

# THE EPISTEMOLOGY OF *TWOMBLY* AND *IQBAL*

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## INTRODUCTION

Plausibility pleading—inaugurated in *Twombly*,<sup>1</sup> extended by *Iqbal*<sup>2</sup>—has incited a revolution in pretrial practice. The idea is simple enough: Instead of letting a claim survive dismissal simply because its theory is sound and illegal behavior *might* have occurred,<sup>3</sup> judges should

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<sup>1</sup> Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007).

<sup>2</sup> Ashcroft v. Iqbal, 129 S. Ct. 1937, 1940 (2009).

<sup>3</sup> This was the pleading standard that reigned—formally, at least—until *Twombly* came down in 2007. See Conley v. Gibson, 355 U.S. 41, 47 (1957). In the words of the Conley Court,

The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is “a short and plain statement of the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.

*Id.* (citing Fed. R. Civ. P. 8(a)(2)). How federal judges actually implemented the *Conley* standard is a separate matter, *infra* note 6–7 and accompanying text, but its formal contours remain as described. For an exemplary genealogy of notice pleading to plausibility pleading, see Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1624–34 (2011). See also Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal*, 94 MINN. L. REV. 505, 530–39 (2009). The theory behind *Conley* is simple: At the pleading stage, a plaintiff should only have to theorize a claim for relief. To actually prove that claim is a factual endeavor, which may—and should—wait until both parties are given an opportunity to investigate, take part in discovery, and dispute the evidence. See *Conley*, 355 U.S. at 47–48. This, indeed, is exactly what commentators have celebrated about “possibility” pleading. See, e.g., Andrew I. Gavil, *Civil Rights and Civil Procedure: The Legacy of Conley v. Gibson*, 52 HOW. L.J. 1, 4 (2008). The *Conley* Court

embraced the “no set of facts” standard, which had already been developed in the lower courts and by commentators, at a moment in time when . . . those without power sought access to justice through the courts. For the disenfranchised, judicial intervention was the best strategy for advancement and the Court understood that permissive pleading standards facilitated access to equal justice.

*Id.*

have latitude, up front, to interrogate a complaint's factual allegations.<sup>4</sup> If (1) those allegations lead as naturally to an inference of legal behavior as they do an inference of illegal behavior or (2) the inference of legal behavior is more natural, then the claim should be dismissed.<sup>5</sup>

*Twombly* and *Iqbal* have inspired a maelstrom of commentary, the bulk of which spans three questions. First: Does plausibility pleading genuinely part ways from *Conley*'s "no set of facts" standard,<sup>6</sup> or does it simply explicate a longstanding de facto practice within the federal courts?<sup>7</sup> Second: What is the normative valence of plausibility—does it overhaul a system rife with frivolous claims, or does it unduly bar deserving plaintiffs from redress?<sup>8</sup> And third: What has been the empirical impact of plausibility pleading?<sup>9</sup>

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<sup>4</sup> "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." 630 F.3d 622, 629 (7th Cir. 2010).

<sup>5</sup> See, e.g., Stephen R. Brown, *Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265, 1274–78 (2010) [hereinafter Brown, *Reconstructing Pleading*]; A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 13–18 (2009).

<sup>6</sup> *Conley*, 355 U.S. at 45, 47. For an example of the view that *Twombly* and *Iqbal* represent a break from previous understandings of Rule 8, see William Kolasky & David Olsky, *Bell Atlantic Corp. v. Twombly: Laying Conley v. Gibson to Rest*, 22 ANTITRUST 27, 27 (2007). See also John P. Sullivan, *Twombly and Iqbal: The Latest Retreat from Notice Pleading*, 43 SUFFOLK U. L. REV. 1, 56–61 (2009) (arguing that the principles in *Iqbal* will not reach uniform and consistent results); cf. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (arguing that even before the *Twombly* ruling, "[f]rom antitrust to environmental litigation, conspiracy to copyright, substance specific [sic] areas of law are riddled with requirements of particularized fact-based pleading").

<sup>7</sup> For the view that *Twombly* is contiguous with previous understandings of Rule 8, see Andrew Blair-Stanek, *Twombly is the Logical Extension of the Mathews v. Eldridge Test to Discovery*, 62 FLA. L. REV. 1, 4 (2010); Daniel R. Karon, "*Twombly* and *Iqbal*—the Unremarkable Effect of the U.S. Supreme Court's Re-Expressed Pleading Standard in *Bell Atlantic Corp. v. Twombly*", 44 U.S.F. L. REV. 571, 572 (2010); Karen Petroski, *Iqbal and Interpretation*, 39 FLA. ST. U. L. REV. 417, 434 (2012); Brook Detterman, Note, *Rumors of Conley's Demise Have Been Greatly Exaggerated: The Impact of Bell Atlantic Corporation v. Twombly on Pleading Standards in Environmental Litigation*, 40 ENVTL. L. 295, 296 (2010); Daniel W. Robertson, Note, *In Defense of Plausibility: Ashcroft v. Iqbal and What the Plausibility Standard Really Means*, 38 PEPP. L. REV. 111, 132 (2010) (arguing that plausibility analysis is no more than an "explicat[ion]" of Rule 8 practice).

<sup>8</sup> The large bulk of commentary on *Iqbal* and *Twombly* has been critical. See, e.g., Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 474 (2010) [hereinafter *Taming Twombly*]; Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261, 262 (2009) (arguing, with not too fine a point, that *Iqbal* runs afoul of the Seventh Amendment guarantee of a jury trial); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 15–16 (2010); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 433 (2008) ("[T]he *Twombly* decision

has dealt what may be a death blow to the liberal, open-access model of the federal courts espoused by the early twentieth century law reformers.”); Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 571 (2012) (calling *Iqbal* an “embarrassment”); cf. Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 54, 65–66 (2010) (making the larger point that factual sufficiency or insufficiency, whether under the guise of “plausibility,” is conceptually misaligned with the question of merit, casting doubt on any pleading, as opposed to notice, standard).

Some commentators, however, take a more positive view. See, e.g., Michelle Kallen, *Plausible Screening: A Defense of Twombly and Iqbal’s Plausibility Pleading*, 14 RICH. J.L. & PUB. INT. 257, 258 (2010) (arguing that plausibility pleading is responsive to the reality of how litigation has changed since the Federal Rules were first adopted); Mark Moller, *Procedure’s Ambiguity*, 86 IND. L.J. 645, 646–48 (2011) (arguing that plausibility pleading, by allowing lower courts to leave their decisions opaque, can be said to facilitate political and ideological pluralism across the federal judicial system); Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POLY 1107, 1109–10 (2010) (arguing that heightened pleading serves an important purpose in the age of massive, costly litigation); Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 216–18 (2011) (arguing, *inter alia*, that the tradeoffs of plausibility pleading are justified in the antitrust setting, but they are not necessarily justified in the setting of discrimination law); see also Brian T. Fitzpatrick, *Twombly and Iqbal Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1622 (2012) (arguing, *inter alia*, that the Court’s motives in *Twombly* and *Iqbal* “were pure, even if its methods were not”).

Recently, there has been a surge of “*Iqbal* redemption” scholarship as well: Articles that respond to the enduring reality of plausibility pleading by crafting concrete proposals to optimize its function—or, depending on how one sees it, to minimize its damage. See, e.g., Edward A. Hartnett, *Taming Twombly: An Update After Matrixx*, 75 LAW & CONTEMP. PROBS. 37, 37–39 (2012) [hereinafter *An Update After Matrixx*] (arguing that *Iqbal* is very unlikely to be overturned and exploring “accommodationist” strategies); Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 180–81 (2010) (formulating proposals for dealing with Title VII discriminatory intent claims within *Iqbal*’s confines).

<sup>9</sup> On this front, the empirical literature corroborates what many of the theoretical articles predicted: Rule 12(b)(6) dismissals have increased since *Iqbal* came down. The extent of the increase is a matter of some dispute, but virtually everyone agrees that a general surge has transpired. See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 624 (2010) (finding that “after *Iqbal*, [district courts] appear to be granting 12(b)(6) motions at a significantly higher rate than they did under *Conley*”); Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 604–05 (2012) (reiterating the results of her previous study—namely, that *Iqbal* has inspired a surge in 12(b)(6) motions—and finding, in light of new evidence, that this effect is also apparent with respect to dismissals without leave to amend); Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1835–36 (2008) (finding that 12(b)(6) motions increased from 36.8% granted under *Conley* to 39.4% granted under *Twombly*). The empirical effects cannot be contained, moreover, to the impact on 12(b)(6) grants alone. Data suggests that the specter of *Iqbal* has also had a chilling effect before the 12(b)(6) stage. See 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, 2275–76 (2012) (exploring the effects of plausibility on “plaintiff selection effects,” and arguing that empirical findings about

Lost in the shuffle—astonishingly, given the sheer volume of commentary<sup>10</sup>—is the antecedent question of how plausibility analysis actually works. Most scholars have simply let this question pass by.<sup>11</sup> And among those who have taken it up, the results largely amount to exercises in renaming,<sup>12</sup> or conceptual somersaults that beg the core

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increased 12(b)(6) grants substantially underrepresent the impact of *Twombly* and *Iqbal*. Nor have the effects been uniform across all legal sub-fields. The impact in civil rights litigation, particularly (but certainly not only) with respect to disability issues, has been comparatively severe. See Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 260–61, 268 (2012) (finding that 12(b)(6) grants in cases alleging employment and housing discrimination have increased by 18% since the pre-*Twombly* period); Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 117–18 (2010) (finding that district courts granted 12(b)(6) motions on ADA claims rose by 10.4% after *Twombly*); cf. Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and The Paradox of Pleading*, 62 STAN. L. REV. 905, 920 (2010) (arguing, for conceptual reasons, that plausibility has posed particular issues for civil rights suits). Furthermore, commentators that have taken a more “soft empirical” approach to the question, examining a wide swath of opinions to see how *Twombly* and *Iqbal* are invoked, have also concluded that plausibility provides cover for greater dismissal rates. See Colleen McNamara, Note, *Iqbal as Judicial Rorschach Test: An Empirical Study of District Court Interpretations of Ashcroft v. Iqbal*, 105 NW. U. L. REV. 401, 403 (2011) (calling plausibility a “judicial Rorschach test” that allows “individual judge[s] [to use] the Court’s dicta to craft the pleading standard that the judge feels to be most appropriate”); Ryan Mize, Note, *From Plausibility to Clarity: An Analysis of the Implications of Ashcroft v. Iqbal and Possible Remedies*, 58 U. KAN. L. REV. 1245, 1257 (2010) (“Some courts interpret current pleading doctrine as plainly mandating heightened pleadings, while others note a tension between the latter and notice pleading, and still others continue to endorse the traditional liberal standard.”); Michael O’Neil, Note, *Twombly and Iqbal: Effects on Hostile Work Environment Claims*, 32 B.C. J.L. & SOC. JUST. 151, 153–55 (2012) (delineating two strands of reception among lower courts, and arguing that the more stringent strand will result in greater dismissal rates in hostile work environment claims).

<sup>10</sup> As of this writing, a Westlaw search for law review publications that have “*Iqbal*” in the title yields 182 results. Cf. Jeffrey J. Rachlinski, *Why Heightened Pleading—Why Now?*, 114 PENN. ST. L. REV. 1247, 1247 (2010) (referring to *Iqbal* as the “case that launched a thousand law review articles”). Make no mistake, my purpose in emphasizing the volume of commentary is not pejorative. It seems only fitting that the two cases being cited most frequently by federal courts—*Iqbal* and *Twombly*—would also be the subject of the most copious scholarly attention. See Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179, 1181–83 (2013) (showing the discussions that came about in reaction to the two cases); Rosalie B. Levinson, *The Many Faces of Iqbal*, 43 URB. LAW. 529, 529 (2011) (showing that within a matter of months thousands of federal courts had cited to *Iqbal*); Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 852 (2008) (showing that *Twombly* had “massive implications for civil litigation”).

<sup>11</sup> The normative vein of analysis, for example, has all but sidestepped this question. See *supra* note 8. And the empirical literature, of course, has no need to answer this question. See *supra* note 9.

<sup>12</sup> Numerous articles—many quite prominent—have sought to reconstruct the standards set forth in *Twombly* and *Iqbal*. For the most part, these efforts have failed to

question rather than resolving it.<sup>13</sup> Against this inauspicious backdrop, however, two contending accounts of plausibility have emerged: (1) the “conclusoriness” account, articulated by a handful of scholars, and elaborated most carefully in Alex Steinman’s well-known article, *The Pleading Problem*;<sup>14</sup> and (2) the “factual specificity” account, theorized

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move beyond the hollowness of the Court’s own formulations. For example, Robert Bone has argued that plausibility involves reference to “baseline[s] of conduct.” See Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 884–85 (2009). An allegation is plausible, on this view, if it deviates from baseline assumptions about legal conduct in the world. *Id.* at 885–86. Similarly, Benjamin Spencer construes plausibility as a “presumption” of non-wrongdoing. Spencer, *supra* note 5, at 14–15. On this account, plausibility determinations stem from a judge’s decision about whether the alleged facts convey “some sense of specific wrongdoing in the eyes of the law,” the presumption being that they do not. *Id.* Both accounts fall prey to the same trap. They simply restate the benchmarks of plausibility—or state them more elaborately—without unpacking what those benchmarks actually require. For an excellent statement of this critique, see Stephen R. Brown, *Correlation Plausibility: A Framework for Fairness and Predictability in Pleading Practice After Twombly and Iqbal*, 44 CREIGHTON L. REV. 141, 163 (2010) [hereinafter Brown, *Correlation Plausibility*] (summarizing Bone’s and Spencer’s frameworks as variations on the theme of “I-know-it-when-I-see-it,” an approach that may describe plausibility analysis accurately, but that certainly fails to unpack what plausibility determinations mean). Perhaps the most startling example of the “restatement” genre is Charles Campbell’s argument—spanning fifty pages—that plausibility pleading requires plaintiffs to adduce facts that lead to “direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory.” Charles B. Campbell, *A “Plausible” Showing After Bell Atlantic Corp. v. Twombly*, 9 NEV. L.J. 1, 22 (2008) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). Too true—for that is the definition of “pleading.” At the twilight of elegance, the delight of redundancy holds fast.

<sup>13</sup> See, e.g., Brown, *Correlation Plausibility*, *supra* note 12. Brown’s theory—“correlation plausibility”—sees plausibility as a matter of drawing “correlations” between “the sensory-perceptible allegations in the complaint” and “the unalleged element.” See *id.* at 165–71. Brown is right: Plausibility *does* involve such correlation-drawing. But this formulation does not resolve the indeterminacy of the plausibility standard. It exactly recapitulates it. One of the main purposes of the *Twombly* opinion was precisely to distinguish among three *different* modes of “correlation-drawing” between factual scenarios and legal harms: possibility, plausibility, and probability. *Infra* Part I. Brown’s account, by emphasizing the importance of “correlation-drawing” as such, ends up leaving the crucial second-order question untouched: What *kinds* of correlations need to be drawn? To simply point out that plausibility analysis rests on perceived correlations between factual scenarios and legal harms does not resolve the question of what plausibility requires. It precisely *begs* that question. Put otherwise, the obstinate mystery of plausibility analysis is not *whether* it requires “correlation-drawing” in Brown’s sense; the Court has spelled that out plainly enough. The mystery is, what *kind* of “correlation-drawing” it requires. To answer that question, we need an account of what sets plausibility apart from its conceptual siblings, namely, possibility and probability. (To be clear, I deeply respect Brown’s account. It is *nearly* correct. But, the devil resides, as ever, in the minutiae.)

<sup>14</sup> Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298 (2010). It bears note, up front, that others have shared Steinman’s insight regarding the role of “conclusoriness” inquiry under the *Iqbal* Court’s construction of plausibility. See *infra* Part II.A. Stephen Brown, for example, has delineated a virtually identical theory of

most systematically in Luke Meier's more recent contribution, *Why Twombly is Good Law (but Poorly Drafted) and Iqbal Will Be Overturned*.<sup>15</sup>

Although both of these accounts get a lot right—and I strive to pay them credit where due<sup>16</sup>—neither offers a fully persuasive account of plausibility's analytic shape. The problem is simple: Scholars have not attended to the specific cognitive operation that plausibility analysis requires. That operation, in the jargon of epistemology, is “abduction,” the process of selecting which among multiple hypotheses most perspicuously predicts the limited universe of known facts.<sup>17</sup> In this respect, plausibility analysis requires judges to evaluate “what . . . is ‘natural’ [and what] is not,”<sup>18</sup> an inquiry veering “outside the formal rule

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plausibility. Where Steinman discerns two steps, Brown discerns three, but the conceptual thrust—distinguishing conclusoriness inquiry from plausibility inquiry, and casting the former as primary with respect to the latter—is the same. Brown, *Reconstructing Pleading*, *supra* note 5, at 1283–84; *see also* Charles B. Campbell, *Elementary Pleading*, 73 LA. L. REV. 325, 359–60 (2013) (outlining a “three-step process” for analyzing the “sufficiency of a claim for relief”). Edward Hartnett has also traced similar grooves, writing that

What emerges from *Twombly* and *Iqbal*, then, is a two-step process for adjudicating a 12(b)(6) motion. First, identify allegations that are not subject to the presumption of truth, typically because they simply allege the conclusion that the pleader wishes the court to make regarding an element of the claim. Second, determine whether the allegations that are assumed to be true plausibly suggest an entitlement to relief.

*Taming Twombly*, *supra* note 8, at 494. In what follows, I opt to focus on Steinman's formulation of the “two-step” view because it provides the most systematic account and because it has received the most attention.

<sup>15</sup> Luke Meier, *Why Twombly is Good Law (but Poorly Drafted) and Iqbal Will Be Overturned*, 87 IND. L.J. 709, 711–12 (2012).

<sup>16</sup> *Infra* Part II.

<sup>17</sup> *See infra* note 52 and accompanying text. This account is indebted, in certain ways, to Stephen Brown's theory of “correlation plausibility.” *See* Brown, *Correlation Plausibility*, *supra* note 12, at 170. His is the only piece on *Twombly* and *Iqbal*, of which I am aware, that picks up on the hypothesis-selection aspect of plausibility analysis. He does not name it as such, nor does he analyze it in architectonic detail. But the basic intuition is certainly present in his analysis. *See id.* at 167–70.

Nonetheless, two important variables (in addition to its analytical under-determination, *see supra* note 13) set Brown's account apart from mine. The first is that he slips into the language of probability, and thus fails to keep focus on the distinction between what is likely and what is plausible. *See id.* at 170 (arguing that *Twombly* was probably dismissed because the correlation between parallel behavior and collusion is low, a conclusion derived from the proposition that firms only “rarely” collude). The second is that his work vacillates between positive and normative poles. At times, the project seems to be expounding on the Court's words; at others, Brown describes the purpose of his intervention as “reducing subjectivity” in pleading analysis. *Id.* at 180. It is not clear, throughout, how these poles relate.

<sup>18</sup> *Taming Twombly*, *supra* note 8, at 500.

making process,”<sup>19</sup> and one that necessarily “involves . . . normative judgment.”<sup>20</sup> Abduction differs subtly, but importantly, from “induction,” the process of assessing the truth or falsity of an already-selected hypothesis.<sup>21</sup> The distinction between these two operations—a matter of essence, not degree—is important for grasping the architecture of plausibility analysis because it is crucial for evaluating what it means for a proposition to be *plausible* as opposed to “probable.” The abduction-induction distinction also helps to explain why commentary on *Twombly* and *Iqbal* has been so disappointing. Bereft of a descriptive anchor, normative projects have tripped out of the gate.<sup>22</sup>

Once the centrality of “abduction” comes to the surface—and plausibility is distinguished from its conceptual sibling, probability—it becomes clear that *Twombly* and *Iqbal* are far from the bedfellow pair that most scholars have assumed.<sup>23</sup> In *Twombly*, plausibility analysis

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<sup>19</sup> Bone, *supra* note 12, at 894.

<sup>20</sup> *Id.* at 887; *see also* David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 138–41 (2010) (noting that *Iqbal* has introduced an indeterminacy at the heart of pleading law by allowing judges to look to extra-legal content). No lesser authority than Justice John Paul Stevens picked up on this theme in his dissent from *Twombly*, which expressed concern that plausibility pleading would have the effect of “invi[ing] lawyers’ debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 595 (2007) (Stevens, J., dissenting); *cf.* Karen Petroski, *Iqbal and Interpretation*, 39 FLA. ST. U. L. REV. 417, 434 (2012) (arguing that plausibility analysis is actually derivative of a deeper structure of interpretation, and that it is therefore impossible to eliminate).

<sup>21</sup> This distinction is familiar, for example, at the level of trial practice. Both abduction and induction are required to shape a persuasive factual narrative, but they play very different roles. Abduction allows lawyers and judges to formulate “theories of the case,” that is, suppositions about what legal hypothesis best encompasses the posited facts. One theory of the case can be rebutted by another. For example, opposing counsel at trial might attempt to reinterpret the adduced facts in support of alternate theory (“The prosecution would have you believe that the defendant killed his brother in cold blood; but in fact, the defendant was nowhere near the scene of the crime.”), or a judge at oral argument might push the advocate to explain why her view of the case makes the most sense (“But counselor, why is this a case about the fighting words doctrine, as opposed to time, place, and manner restrictions?”). If that is abduction, then induction is what lawyers and judges engage in to test the veracity of a given theory of the case. With a hypothesis in tow of what we suspect took place, now the facts must be adduced. Pleading can be broken down into equivalent stages: formulating a theory of the case, and testing its preliminary veracity.

<sup>22</sup> *Supra* note 12 and accompanying text.

<sup>23</sup> If anything, “most” is an understatement. In truth, it is only Luke Meier’s article—analyzed at length below—that makes a serious effort to distinguish *Twombly* and *Iqbal*. Meier, *supra* note 15, at 710–11 (stating that the cases “have dissimilar analytical foundations”). The assumption of continuity between the two cases has been a defining feature of both the empirical and conceptual work. That being said, some have claimed that *Iqbal* was wrongly decided on plausibility grounds—most notably, Justice Souter in his dissenting opinion in *Iqbal*. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1958 (2009) (Souter, J.,

inspired the Court to draw on economic-theoretical insights about how firms behave in certain business environments.<sup>24</sup> In *Iqbal*, by contrast, the same mode of analysis provided the Court with cover to make ideologically charged judgments about the way that high-ranking officials wield power.<sup>25</sup> At a high echelon of abstraction, these operations are identical: Both use extra-legal knowledge to parse legal allegations. But on a more granular level, in terms of the type of extra-legal knowledge they employ, the identity between the cases vanishes. In fact, all similarity between them vanishes. They become diametrical.

Where the *Twombly* Court bridged disciplines, infusing its antitrust analysis with well-established, and falsifiable, scholarly findings,<sup>26</sup> the *Iqbal* Court drew from the bottomless and more obscure well of “common sense.”<sup>27</sup> Evaluating the allegation that John Ashcroft and Eric Mueller architected an intentionally discriminatory detention program immediately after September 11th, Justice Kennedy pronounced—without citation and virtually without explanation—that the fact that Arab Muslims were disproportionately detained was merely consistent with the hypothesis of intentional discrimination; it did not “plausibly establish” that hypothesis.<sup>28</sup> Indeed, to Justice Kennedy’s mind, it came “as no surprise” that the detention program “produce[d] a disparate, incidental impact on Arab Muslims,” since “Arab Muslim[s]” comprised the “large part of” Osama Bin Laden’s “disciples.”<sup>29</sup> One need not roam too far to the political Left to feel a jolt of alarm at this sanguine vision of executive power.<sup>30</sup> Putting ideological disputes to one side, the more important point is that this vision is underwritten by nothing. What

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dissenting). But this critique leaves the basic premise of continuity unscathed; it goes only to the case’s outcome, not to its conceptual underpinnings.

<sup>24</sup> *Twombly*, 550 U.S. at 567–69.

<sup>25</sup> Justice Kennedy has famously referred to this process as “common sense.” *Iqbal*, 129 S. Ct. at 1950–51; see also Henry S. Noyes, *The Rise of the Common Law of Federal Pleading: Iqbal, Twombly, and the Application of Judicial Experience*, 56 VILL. L. REV. 857, 858–59 (2012) (analyzing the implications of the *Iqbal* Court’s invocation of “common sense” and “judicial experience,” and arguing that they open up into a “common law of federal pleading,” which will evolve over time).

<sup>26</sup> *Twombly* originated in antitrust law, a legal field that grafts economic theory into its basic doctrinal structure, so it only stands to reason that economic theory would inform the pretrial stage of antitrust claims as well. I develop this point in more detail below. See *infra* note 129 and accompanying text; see also ROBERT H. BORK, *THE ANTITRUST PARADOX* 91 (1978); RICHARD A. POSNER, *ANTITRUST LAW* 1–2 (2d ed. 2001).

<sup>27</sup> *Iqbal*, 129 S. Ct. at 1950.

<sup>28</sup> *Id.* at 1951.

<sup>29</sup> *Id.*

<sup>30</sup> See THE FEDERALIST NO. 51, at 257 (James Madison) (Lawrence Goldman ed., 2008).

began in *Twombly* as deference to extra-legal expertise in *Iqbal* transubstantiated into naked reliance on intuition.

This snapshot, in a sense, embeds the whole of my claim. Instead of grouping *Twombly* and *Iqbal* together, I aim precisely to put distance between the cases. In spite of the abstract form this effort takes, my ambition is highly pragmatic. Instead of offering an ideal theory of how pleading *should* operate, I hope to improve the way pleading, in the wake of *Iqbal*, actually *does* operate.<sup>31</sup> In this respect, my analysis departs in the same “accommodationist” spirit as Professor Edward Hartnett: I, too, believe that for better or worse, the best strategy for dealing with *Twombly* and *Iqbal* is appeasement “rather than battle.”<sup>32</sup> And I, like Hartnett, also take a tepidly “optimistic” view of the situation.<sup>33</sup> Plausibility analysis may be here to stay, but its more conspicuous externalities can certainly be mitigated.

A few years ago, Hartnett kicked off the mitigation effort by outlining a host of strategies, aimed at both litigators and trial judges, to maximize opportunities for discovery within the bounds set out by *Iqbal* and *Twombly*.<sup>34</sup> My proposal is distinct and complementary: We should demarcate more carefully what factual materials “count,” or ought to count, toward plausibility determinations in specific doctrinal settings. This question, however, cannot be properly addressed until we resolve some first-order questions about the architecture of plausibility analysis—the purpose of my work here. I seek to theorize how extra-

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<sup>31</sup> Many commentators have come up with creative and thought-provoking frameworks to displace plausibility. See, e.g., Brown, *Correlation Plausibility*, *supra* note 12, at 165–67 (proposing a “correlation plausibility” regime that would make the operative question whether the alleged facts “correlate,” in practice, with the legal harm being pled); Spencer, *supra* note 8, at 489–90 (proposing a “functional pleading” regime that would require plaintiffs, first, to give notice of the allegation to defendants and, second, to “frame” the issue for the court); Steinman, *supra* note 14, at 1334 (proposing a “plain pleading” regime that would require plaintiffs to adduce a sufficiently robust “transactional narrative,” that is, to “identify *what* is alleged to have happened,” as opposed to providing direct evidentiary support for the claims). Other commentators have simply called for a restoration of the old order. See, e.g., Miller, *supra* note 8, at 96 (arguing for the resurrection of *Conley*). These efforts, one and all, inflect prayers toward an imaginary idol, for the Court has shown no intention of embarking on a reform effort any time soon. In fact, the Court has recently demonstrated a desire to entrench the core holding of *Iqbal*. See *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323–25 (2011) (holding that plaintiffs alleged a plausible claim that disclosures were material in a securities fraud lawsuit); *Skinner v. Switzer*, 131 S. Ct. 1289, 1293, 1296 (2011) (rehearsing the language of plausibility in the context of a Section 1983 claim). More notably still: These decisions were authored by liberal members of the Court. See *An Update After Matrixx*, *supra* note 8, at 38 n.8 (2012).

<sup>32</sup> See *An Update After Matrixx*, *supra* note 8, at 37.

<sup>33</sup> *Id.*

<sup>34</sup> *Taming Twombly*, *supra* note 8, at 503–16.

legal knowledge underpins plausibility analysis, so that litigators and judges can get a better sense of what extra-legal knowledge should be incorporated into pretrial practice.

This approach, even if adopted wholeheartedly, would not eliminate interpretive latitude outright—pleading necessarily involves practical judgment, and it is fated to remain more art than science. But my approach would suffuse plausibility analysis with a manner of consistency, and ex ante predictability, which it has not previously enjoyed. That alone would be a sizeable improvement from the status quo. In addition, and perhaps more importantly, it would give a coherent direction to scholars who want to improve upon the mechanics of plausibility analysis as it actually plays out in our federal courts.<sup>35</sup>

#### I. INDUCTION AND ABDUCTION, PROBABILITY AND PLAUSIBILITY

Let us begin with an example from everyday life. Suppose that I suspect my spouse of infidelity. In an effort to either confirm or refute my suspicion, I look for evidence, such as inconsistencies in our bank records or oddities in the itineraries of her business trips. With each new piece of evidence, I will “build my case.” The universe of facts will expand, just as it would over the course of evidence introduction and witness examination during a trial. Once all the facts—or the most important facts—are known, I can make my final determination. This is classic induction. With a hypothesis in tow, I examine the facts to decide if it is correct. And “correct” is defined, as it must be under the epistemic constraints in which we live, as some very high degree of probability.<sup>36</sup>

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<sup>35</sup> For an excellent scholarly contribution written in this spirit, see Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still Out for Civil Rights and Employment Cases Post-Iqbal*, 57 N.Y.L. SCH. L. REV. 719, 722 (2013). Departing from the observation that “the impact of *Twombly* and *Iqbal* remains elusive,” Malveaux argues that “empirical data alone cannot answer [the] question[s]” raised by plausibility pleading, as they depend on the concrete “experiences and practices of judges and lawyers” in particular legal settings. *Id.*

<sup>36</sup> The standard way that analytic philosophers describe the epistemic conditions of “knowledge” is true and justified belief. See RODERICK M. CHISHOLM, *Knowledge as Justified True Belief*, in THE FOUNDATIONS OF KNOWING 43, 43 (1982). Edmund Gettier, however, has offered an important critique of this commonplace position. See Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121 (1963). In fact, one suspects that if Professor Gettier were to catch wind of the dynamics of hypothesis-formation that beset plausibility analysis, he would be interested in the problem—potent in theory, if not in practice—that could result from judicial confusion about *which* facts render a given complaint plausible. Suppose, for example, that a judge confronts a complaint consisting of Fact A, Fact B, Fact C and Legal Conclusion X. Fact A is ambiguous between legal conduct and illegal conduct (like the fact of parallel behavior in *Twombly*)—meaning that for Legal Conclusion X to be plausible, the judge must have some reason to believe that Fact A more naturally leads to an inference of illegal conduct than an inference of legal conduct. Now suppose that the judge construes Legal Conclusion X as plausible because he believes that

Fair enough, but this narrative raises an important question. At some point in time, before I started investigating the hypothesis of infidelity, I must have *formed* that hypothesis. I did not suspect my spouse of infidelity from day one. Something made me suspicious; something made me decide that the hypothesis of infidelity was plausible. How did this happen? The answer, obviously, is that I observed a fact in the world that led to the thought, “Perhaps my spouse is cheating on me.” In practice, the suspicious fact might have been virtually anything. Perhaps I accidentally stumbled on a series of flirtatious emails with her co-worker, or perhaps I found a receipt for a hotel room while taking out the trash. Whatever the exact catalyst, the important question is this: What was the epistemic process that turned (1) a suspicious fact into (2) a hypothesis worthy of exploration? For this is just the process—or a distilled version of it—that courts go through when determining the quality of pleadings.

The process is as follows. After observing the suspicious fact or facts, I will ask myself: What state of the world gave rise to this? Is it reasonable to hypothesize that my spouse is cheating on me, and that *that* is the reason these emails exist (or that this receipt exists)? Or is there another hypothesis that explains the suspicious facts more perspicuously? As I address this question, my knowledge of reality will be constrained: Having observed the suspicious fact, I know almost nothing about the (inductive) question of what happened. Instead, I must ask: What *might* have happened? That question will generate multiple possibilities. For example, perhaps it is part of her office culture to write emails in a tone that sounds flirtatious to me, or perhaps she has a harmless crush on a co-worker, or perhaps she is cheating, and so forth.<sup>37</sup> With these possibilities generated, I will have to decide which among them I should entertain as my operating hypothesis.

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Fact *B* makes it more likely that Fact *A* signifies illegal conduct rather than legal conduct. And in fact, this *is* more likely, but it is not more likely in virtue of Fact *B*; it is more likely in virtue of Fact *C*. Under these conditions, the judge’s plausibility determination would be correct in the sense that it accurately describes the status of the complaint for the purposes of Rule 8, and the determination would be justified in the sense that the judge will have adduced an internally supportive reason for arriving at the determination—but something nevertheless “feels wrong.” Intuitively, it seems a strain to say that the judge has properly executed plausibility analysis, at least within the parameters outlined in *Twombly* and *Iqbal*. The analysis, simply put, seems predicated on a mistake. Although I leave its full contours for another day, the Gettierian parallel is certainly striking.

<sup>37</sup> There are also, of course, countless possibilities that will not even occur to me because they are so wildly implausible as to be filtered out automatically, unconsciously. This, too, is a natural part of “plausibility analysis,” in both its everyday form, and its technical guise. See, e.g., *Hayden v. Paterson*, 594 F.3d 150, 162 (2d Cir. 2010) (dismissing as implausible, due to the obviousness of a countervailing explanation, the allegation that

Notice that if I decide that infidelity is a plausible hypothesis, it does not follow that I believe it *likely* that my spouse has cheated on me. I may (and hopefully do!) find the possibility quite unlikely. The following dialogue, for example, is easy to imagine:

Me: I am worried that my spouse is cheating on me.

Friend: Really? Wow. Do you think she would actually do that?

Me: No, I don't *think* so. She's not that kind of person. But still, I found this inexplicable receipt for a hotel room, and it has me worried.

That I can maintain both positions at once in this hypothetical conversation—finding infidelity plausible enough to entertain as a hypothesis, even as I simultaneously find it quite unlikely—speaks to the epistemic peculiarity of “plausibility.” My suspicion of infidelity signifies two belief-states simultaneously: First, that if my suspicion is accurate, it would explain the suspicious fact that I observed; and second, that in comparison to other possible hypotheses, the hypothesis of infidelity is sufficiently reasonable to merit further exploration. My suspicion, however, signifies nothing about how likely, as an absolute matter, I believe my spouse's infidelity to be.

This thought experiment achieves two things at once. First, it shores up the distinction between abduction and induction. It was by abduction that I formulated the hypothesis, and by induction that I tested it. Second, the thought experiment provides a precise analogy for plausibility analysis as the *Twombly* Court delineated it. Assessing plausibility is an exercise in abduction, while assessing probability is an exercise in induction. Although scholars and lower court judges have tripped over this issue,<sup>38</sup> the *Twombly* Court, for its part, rendered the

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felon disenfranchisement laws were passed with the purpose of discriminating against Black and Latino voters).

<sup>38</sup> The main error has been to construe plausibility as a more lenient version of probability. See, e.g., *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) (calling plausibility a “nonnegligible probability” inquiry); Edward D. Cavanagh, *Making Sense of Twombly*, 63 S.C. L. REV. 97, 112 (2011) (calling the *Twombly* Court's approach to plausibility a “goldilocks approach,” with probability being “too much,” possibility being “too little,” and plausibility being “just right”); Seiner, *supra* note 8, at 180–81 (describing plausibility as falling in the “gray area between *possible* and *probable*”); Tymoczko, *supra* note 3, at 529 (outlining various spectrum-based approaches regarding the relationship between plausibility and probability). In one sense, this is true: In practice, plaintiffs operating under a plausibility regime will have to adduce fewer facts than they would have to adduce under a more stringent “probability pleading” regime. The more salient distinction, however, is not quantitative but qualitative. It pertains not to the number of facts that plausibility pleading requires, but to the type of facts. Conceptually, probability and plausibility work in opposite directions. Probability—an exercise in induction—asks whether the established facts lead to an inference that legal harm occurred. Plausibility—an exercise in abduction—formulates theories that, if true, would lead to an inference that the established facts occurred. In the first case, the alleged facts comprise a logical antecedent (“If the alleged facts are true, then it is likely that harm

distinction quite crisply. *Twombly* originated from a claim under § 1 of the Sherman Act, in which plaintiffs alleged that multiple telecom companies had conspired to keep prices high by dividing up the market and agreeing not to compete with each other.<sup>39</sup> The key fact—the fact that gave rise to the whole controversy about plausibility—was parallel behavior.<sup>40</sup> The defendant companies all raised their prices at similar points in time.<sup>41</sup> From this observation, the plaintiffs hypothesized that collusion had occurred. The question was whether the Court should entertain that hypothesis as “plausible,” thus allowing the case to proceed to discovery.<sup>42</sup>

Writing for the majority, Justice Souter deemed the fact of parallel behavior insufficient, on its own, to make out a claim under § 1 of the Sherman Act.<sup>43</sup> To justify this conclusion, he argued that parallel conduct is “ambigu[ous],” in the sense that it is “consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market;”<sup>44</sup> which means that the “allegations of parallel conduct . . . must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as

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occurred.”); whereas in the second, they comprise a logical consequent (“If the world has characteristics  $(X, Y, Z)$ , then the alleged facts are sensible.”). The animating insight of plausibility analysis is that multiple sets of worldly characteristics— $(X, Y, Z)$ , but also  $(A, B, C)$ ,  $(D, E, F)$ , and so on—render the alleged facts sensible. The question thus becomes, what set of worldly characteristics best predicts the facts. What it means to “best predict the facts” is certainly not self-evident—hence my motivation to unpack it—but it is just as certainly distinct, in basic form, from probability analysis. Whereas the latter asks judges to evaluate the likely veracity of a specific hypothesis, plausibility asks judges to select among multiple hypotheses. See *infra* Part II.B (fleshing out this point in relation to Meier’s “factual specificity” theory).

<sup>39</sup> Bell Atl. Corp. v. Twombly, 550 U.S. 544, 550–51 (2007).

<sup>40</sup> *Id.* at 550.

<sup>41</sup> See *id.*

<sup>42</sup> *Id.* at 558. The complaint stated the ultimate allegations as follows:

In the absence of any meaningful competition between the [ILECs] in one another’s markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.

*Id.* at 551 (alteration in original).

<sup>43</sup> *Id.* at 553.

<sup>44</sup> *Id.* at 554.

well be independent action.”<sup>45</sup> To reach this conclusion, Justice Souter cited three academic studies,<sup>46</sup> as well as numerous court cases reaching the same conclusion with respect to “ambiguity” of parallel conduct.<sup>47</sup> In this light, what he wanted to see from the plaintiffs—but what their complaint, so drafted, was unable to show—was an additional fact to wrench the Court from its equipoise, giving it reason to hypothesize illegal behavior over the “obvious alternative explanation” of independent business decisions.<sup>48</sup>

In other words, on its own, the fact of parallel conduct gives rise to two competing hypotheses about reality. One is that the defendants colluded, just as the plaintiffs claim. The other is that each firm made an independent business decision, and in the aggregate, those independent decisions led to synchronous conduct. The *Twombly* Court dismissed the complaint, ultimately, not because the hypothesis of collusion was impossible—it was precisely possible—but because the plaintiffs offered no free-standing reason to believe that it was more likely than the countervailing hypothesis of legal behavior.<sup>49</sup> Justice Souter was careful to distinguish this standard, however, from a full-blown probability requirement.<sup>50</sup> Within a plausibility regime, Justice Souter made clear that “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and ‘that a recovery is very remote and unlikely.’”<sup>51</sup>

Here, the distinction between plausibility and probability, abduction and induction, comes through pristinely, just as it did in the infidelity thought experiment. An allegation can be plausible—which turns on the qualitative question of whether there is a reason to entertain it—without it necessarily being probable—which turns on the quantitative question of how likely it is to hold true. That the same fact can bear on both issues simultaneously does not make the difference between them any less

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<sup>45</sup> *Id.* at 557.

<sup>46</sup> *Id.* at 554, 556 n.4.

<sup>47</sup> *See, e.g., id.* at 553–54 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)).

<sup>48</sup> *Id.* at 567. It bears note, as an aside, that disagreement exists about whether independent business decisions that amount to parallel conduct in practice *ought* to be grounds for an antitrust claim. *See* POSNER, *supra* note 26, at 51–100. Judge Posner advocates an “*economic*” approach to punishing collusion, both explicit and tacit, in contrast to the traditional legal approach, which is based [solely] on proof of a conspiracy.” *Id.* at 69; *see also* Michael D. Blechman, *Conscious Parallelism, Signaling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y.L. SCH. L. REV. 881, 888–90 (1979) (outlining a procedure for dealing with anticompetitive behavior by oligopists).

<sup>49</sup> *Twombly*, 550 U.S. at 566, 570.

<sup>50</sup> *Id.* at 556.

<sup>51</sup> *Id.* (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

formal or absolute.<sup>52</sup> In my view, it is precisely confusion about this point that has led existing scholarly accounts of plausibility astray. Without an explanation of the difference between plausibility and probability ready-at-hand, commentators have encountered enormous—and understandable—difficulty keeping precise track of the former.<sup>53</sup> Pursuing an elusive monster, even a hero resorts to lunging in the dark.

## II. PLAUSIBILITY IN CONCEPT

Burn away the underbrush, and two viable accounts of plausibility emerge. The first, set forth by Alex Steinman, is that plausibility analysis primarily turns on the question of what allegations are “conclusory.”<sup>54</sup> The second account, championed by Luke Meier explicitly as an alternative to the “conclusoriness” view, is that plausibility analysis effectively establishes a heightened threshold of factual

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<sup>52</sup> To bring the difference between probability and plausibility into sharper focus, we could distinguish among three epistemic categories: factual allegations, factual hypotheses, and legal conclusions. See Meier, *supra* note 15, at 745–48 (distinguishing between two senses of conclusoriness—“legal conclusions,” and “conclusory factual allegations”—to make the same point). A factual allegation is an already-known fact that the complaint puts forth; in *Twombly*, the allegation of parallel behavior was a factual allegation. A factual hypothesis is a fact that the complaint suggests is true, but that is not already known; in *Twombly*, the allegation of collusion was a factual hypothesis. And a legal conclusion is a syllogistic claim about the relationship between the facts—both factual allegations and factual hypotheses—and legal harm (*if* allegation X true, *then* liability Y obtains); in *Twombly*, the legal conclusion was that collusion constituted an unreasonable restraint of trade under § 1 of the Sherman Act.

In many cases, factual hypotheses will be irrelevant because every fact necessary to form the antecedent of the legal conclusion will already appear in the complaint. Such cases are, quite simply, well pled. In a case like *Twombly*, however, factual hypotheses become paramount, since the complaint does not support the key fact—collusion—with direct evidence. Rather, the complaint posited collusion as a factual *hypothesis*, and it asked the Court to stipulate to that hypothesis provisionally, for the sake of letting the litigation go forward. What the *Twombly* Court had to grapple with, therefore, was whether the hypothesis of collusion was worth stipulating in virtue of the factual allegation of parallel conduct. Probability, on the other hand, would have concerned the relationship between the facts—both the factual allegations and the factual hypotheses—and the legal conclusion: whether the former were predictive of the latter in an absolute sense.

<sup>53</sup> Characterizing the existing scholarship this way, I am not trying to suggest that it has been entirely misaimed. Far from it: Many articles have, for example, provided helpful blueprints for working within the confines of plausibility analysis to maximize court access for plaintiffs. See *An Update After Matrixx*, *supra* note 8, at 39–40; *Taming Twombly*, *supra* note 8, at 494–98; Seiner, *supra* note 8, at 211–13 (outlining strategies for getting discrimination claims off the ground in the shadow of *Iqbal*). And many others have made great strides in outlining the empirical contours of plausibility’s impact. See *supra* note 9 and accompanying text.

<sup>54</sup> *Supra* note 14. As noted above, scholars other than Steinman have also articulated this view. See *supra* note 14.

specificity.<sup>55</sup> For reasons explored below, I find neither account fully satisfactory.

In broad strokes, Steinman's argument is that although *Twombly* and *Iqbal* adopt the same analytic framework, it is not a single-prong "plausibility" test.<sup>56</sup> Rather, the framework is a *two*-prong test, with "plausibility," despite its namesake, in the subordinate role.<sup>57</sup> The first prong is a so-called "conclusoriness" test, calling on the court to determine what factual allegations are "conclusory," and pruning those allegations away as invalid.<sup>58</sup> Once the conclusory allegations are pruned away, the second prong is to determine whether the complaint's remaining factual allegations give rise to a plausible inference of harm.<sup>59</sup> For Steinman, therefore, plausibility analysis is a secondary inquiry: It only becomes relevant if a complaint fails the court's threshold "conclusoriness" review.<sup>60</sup>

Meier's argument, like Steinman's, subordinates "plausibility" to a more primary form of threshold review. For Meier, however, the latter has to do not with conclusoriness but with factual specificity.<sup>61</sup> He argues that the *Twombly* complaint failed because it did not describe the legally salient "transaction"—the meeting that gave rise to collusion—in sufficient detail.<sup>62</sup> Had the complaint offered a fuller description of the collusive meeting, the case would have gone forward without any need for plausibility analysis, from which Meier infers, following Steinman, that it was not plausibility *per se* that motivated the *Twombly* holding.<sup>63</sup> From there, however, Meier and Steinman sharply part ways. In Meier's view, the *Iqbal* Court's adoption of a "conclusoriness" test was based on a fundamental misreading of *Twombly*.<sup>64</sup> Had the *Iqbal* Court embraced *Twombly's* actual standard—factual specificity—the complaint in *Iqbal* would have survived dismissal, since it described the key "transaction"—Ashcroft and Mueller's discriminatory program—in adequate detail to move forward.<sup>65</sup> In other words, Meier thinks that the *Iqbal* Court's analysis—and Steinman's incorporation of the *Iqbal* Court's analysis—

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<sup>55</sup> Meier, *supra* note 15, at 732–33, 739.

<sup>56</sup> Steinman, *supra* note 14, at 1314–16, 1318.

<sup>57</sup> *Id.* at 1298, 1314.

<sup>58</sup> *Id.* at 1314–15.

<sup>59</sup> *Id.* at 1316.

<sup>60</sup> *Id.* at 1314, 1316, 1318–19.

<sup>61</sup> Meier, *supra* note 15, at 738–39.

<sup>62</sup> *Id.* at 735, 741.

<sup>63</sup> *Id.* at 736–38.

<sup>64</sup> *Id.* at 738, 743.

<sup>65</sup> *Id.* at 759, 763–64.

rests on a basic interpretive error.<sup>66</sup> Meier thus advocates restoring *Twombly* back to its roots in factual specificity and, as the title of his article implies, overturning *Iqbal*.<sup>67</sup>

On the whole, while Steinman suggests that *Twombly* and *Iqbal* are both formally and functionally continuous,<sup>68</sup> Meier suggests that the two cases are formally discontinuous and so does not reach the question of functional continuity.<sup>69</sup> My claim, in contrast to both of these accounts, is that *Twombly* and *Iqbal* are formally continuous (thus cutting anchor with Meier) but *functionally* discontinuous (thus cutting anchor with Steinman) in virtue of the extra-legal knowledge they incorporate into the pleading process.<sup>70</sup> To fill out my own position, I work through their accounts in turn.

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<sup>66</sup> *Id.* at 762, 764–65.

<sup>67</sup> *Id.* at 759–60, 765.

<sup>68</sup> See Steinman, *supra* note 14, at 1314–16 (stating that *Twombly* and *Iqbal* are formally continuous because both implement the “same analytical structure,” and they are functionally continuous because in both cases the “key allegations . . . were disregarded because they were conclusory”).

<sup>69</sup> See Meier, *supra* note 15, at 710–11.

<sup>70</sup> I also have a methodological quibble with Steinman and Meier, orthogonal to the merits, which bears remarking on. Steinman and Meier strike the same basic orientation: They rope off complaints that require plausibility analysis as statistically uncommon, and from there, they offer substitute accounts of what is really at stake in *Twombly* and *Iqbal*. In other words, both articles suggest that in an important bulk of cases, judges will never reach the issue of “plausibility,” making its salience marginal—or, at least, more marginal than others have suggested—to pretrial practice. See Meier, *supra* note 15, at 738–39 (referring to plausibility as a “second (and possibly unnecessary)” inquiry that is “triggered by a lack of factual specificity”); Steinman, *supra* note 14, at 1314–16. A duly taken point, but once plausibility is relegated to the margins, Steinman and Meier spend precious little time unpacking its content. See, e.g., Meier, *supra* note 15, at 740 (arguing that emphasis on plausibility analysis has “obscured” the “true import of [*Twombly*]” and defending the decision to sidestep it on that basis). This elision is not necessarily blameworthy: They plainly had other ambitions. Yet the maneuver also comes at a cost. When all is said and done, it is unclear if Steinman’s and Meier’s accounts of plausibility—certainly not the entirety of their articles, but their view of plausibility analysis specifically—go beyond the basic proposition that plausibility analysis is not necessary to deal with robustly pled complaints. This proposition is true, of course. But it verges on tautological, and it marshals no response to the central question posed by plausibility analysis, at least in the *Twombly* Court’s formulation, which was precisely how to deal with sparsely pled complaints. The risk, in other words, is that Steinman’s and Meier’s common orientation ends up—perhaps unwittingly—imagining the core problem out of existence. While Steinman’s and Meier’s articles, taken on their own terms, obviously shed important light on when plausibility analysis is triggered, the reader does not necessarily come away with a richer understanding of what it means for the Court to carry out that analysis. Truth be told, it is not clear that the question of *when*, as distinct from the question of *how*, was a matter of controversy at all.

### A. The “Conclusoriness” View

Steinman’s article has much to recommend. For one thing, his prescription of “plain pleading” seems to me an exemplary blueprint of how the Supreme Court, should it decide to overturn *Iqbal*, might go about doing so.<sup>71</sup> Nothing in my remarks here intends to undermine that contribution. For another thing, a review of the case law suggests that Steinman’s two-prong theory of plausibility—in which judges are called on, first, to trim away conclusory factual allegations, and second, to determine a claim’s plausibility in light of the non-conclusory allegations that remain<sup>72</sup>—maps neatly on to the language from Justice Kennedy’s opinion in *Iqbal*, as well as the construction of *Iqbal* (and *Twombly*) throughout the federal courts.<sup>73</sup>

But Steinman’s “conclusoriness” theory suffers two shortcomings. The first is that on its face, Steinman’s account casts plausibility as a more lenient pleading standard than its precursor, making it difficult to harmonize with the empirical reality that *Iqbal* has become, in practice,

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<sup>71</sup> To reduce Steinman’s intricate proposal down to one sentence, it would be that plaintiffs would have to sufficiently “identify the real-world events that give rise to liability.” Steinman, *supra* note 14, at 1343. This standard is not far off from Meier’s “event or transaction” understanding of the plausibility’s factual specificity requirement. Meier, *supra* note 15, at 741–43. In fact, Steinman even uses the term “transactional” in his articulation of plain pleading. Steinman, *supra* note 14, at 1339. What, then, divides the two accounts? In Meier’s words,

I believe that Professor Steinman . . . errs in explaining *Iqbal* as a case that fails the “transactional” trigger for plausibility. According to Professor Steinman: “The problem [in *Iqbal*] is not the cursory allegation of discriminatory animus. The problem is the murkiness surrounding what Ashcroft and Mueller actually did *vis-à-vis* *Iqbal*.” This reading of *Iqbal* is incorrect.

Meier, *supra* note 15, at 762 (alteration in original) (citing Steinman, *supra* note 14, at 1336). But the reason that Meier finds this reading of *Iqbal* “incorrect” has nothing to do with its analytical architecture. It is that Meier believes that the *Iqbal* complaint adequately described the relevant transaction—that is, that the *Iqbal* complaint was sufficiently factually specific—whereas Steinman does not. Their disagreement falls exclusively to application, not theory. I leave it to the reader to decide whether this disagreement, and the broader difference between Steinman’s and Meier’s views on how pleading should work, more resemble mole hills or mountains.

<sup>72</sup> Steinman, *supra* note 14, at 1314.

<sup>73</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009) (explicitly outlining the view that *Twombly* stood for “two working principles,” that resolve practically into two prongs: conclusoriness and plausibility); see also *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (deploying *Iqbal* as a two-prong standard); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009) (delineating the relationship between *Twombly* and *Iqbal* and concluding that plausibility analysis consists of two steps).

a mechanism of more stringent review.<sup>74</sup> Second, even if his account can overcome this obstacle, it faces a deeper problem: Conclusoriness cannot be kept analytically separate from plausibility. Despite the *Iqbal* Court's distinction between conclusoriness review and plausibility analysis,<sup>75</sup> there is a strong case to be made that deeming an allegation conclusory just is to say that it is implausible; or, put the other way around, that if someone finds an allegation implausible, it means that he takes the alleged content to be conclusory.

As for the first problem, the key observation is that even under *Conley*'s "no set of facts" regime,<sup>76</sup> conclusory allegations were insufficient to establish a claim under Rule 8.<sup>77</sup> If a complaint simply rehearsed a legal conclusion, in lieu of providing factual evidence to ground that conclusion, the complaint could be dismissed as a matter of law.<sup>78</sup> Conclusoriness review, in short, has always existed. If Steinman's description of plausibility pleading is right—that the standard maintains conclusoriness review intact, while appending a second prong of analysis in the event of conclusoriness review failing—the effect of plausibility analysis is effectively to offer plaintiffs "another shot" at passing complaints through the dismissal stage. In other words, Steinman's view of *Iqbal* predicts that some complaints that fail conclusoriness review will be "revivable," so to speak, by plausibility analysis.<sup>79</sup> Therefore, a judge faithful to Steinman's view should be inclined, on the margins, to

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<sup>74</sup> Compare Steinman, *supra* note 14, at 1319 (arguing that "the plausibility aspect of *Twombly* and *Iqbal* makes the pleading standard *more* forgiving, not less"), with *supra* note 9 (describing the empirical reality that 12(b)(6) dismissals have increased since *Iqbal*).

<sup>75</sup> *Iqbal*, 129 S. Ct. at 1949–50.

<sup>76</sup> *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

<sup>77</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

<sup>78</sup> Steinman, *supra* note 14, at 1319 ("Imagine if the Court had just said: Mere legal conclusions need not be accepted at the pleadings phase; if that eliminates a crucial element of the claim, then the complaint must be dismissed—even if other allegations plausibly suggest an entitlement to relief. This would not have been unprecedented. Lower federal appellate courts had long embraced the idea that mere legal conclusions need not be accepted as true. By definition, this approach would be a stricter one than *Iqbal*, because it would remove entirely the possibility that the plausibility inquiry could *salvage* complaints that *otherwise* rested on mere legal conclusions.") (footnote omitted).

<sup>79</sup> To Steinman's credit, he is well aware of this issue. He deems it the "irony" of plausibility pleading, and it is partly in light of such irony that he advocates replacing plausibility with a "plain pleading" standard. Steinman, *supra* note 14, at 1319, 1339. Fair enough. It is one thing to remark on "irony" instrumentally like this, as a foil for normative critique. But what does it say about the descriptive veracity of Steinman's account? His conception of plausibility-as-leniency is out of sync with the reality of federal practice. This means either that Steinman's account is wrong, or, so to speak, that federal practice is wrong. With all respect due Steinman, the former conclusion seems inescapable—not only by reason of critical mass, but also because it is the behavior of federal judges, ultimately, that determines the meaning of *Iqbal*.

dismiss fewer claims. Yet, the empirical reality clearly belies this prediction.<sup>80</sup>

This critique meets with a natural response. Namely, because the plausibility prong offers complaints “another shot,” even if they fail conclusoriness review, it stands to reason that it would also embolden judges to more readily diagnose allegations as “conclusory.” Put differently, if one step in the two-step inquiry—plausibility—liberalizes pleading, it makes sense that the other prong—conclusoriness—would operate hydraulically to constrain it, resulting in fewer overall claims surviving the 12(b)(6) stage. Not only does this view synchronize with the empirical record, but it also makes a good deal of conceptual sense. Reasonable people will disagree, in any given case, about what counts as a “conclusory” allegation. A judge with preexisting sympathies for a claim will undoubtedly tend to construe threadbare assertions as non-conclusory, while an unsympathetic judge will tend to do just the opposite. It makes sense, therefore, that a standard that makes it easier to rationalize determinations of conclusoriness—by lessening their analytical weight—would encourage unsympathetic judges to cast more allegations aside.

In resolving the first problem, however, this solution leads Steinman’s view headlong into a larger trap. Once it is acknowledged that conclusoriness and plausibility operate interdependently, it becomes far more difficult to maintain a “two-step” view of plausibility pleading. The purpose of describing something as consisting of two steps is to suggest that each step operates independently of the other. If that is not true, if instead, the two steps “interact” and define one another’s content, then they are not proper steps. Rather, they fuse into a single, unified standard. Concretely, if the imminence of plausibility review makes judges more prone to find specific allegations “conclusory,” it suggests that neither “plausibility” nor “conclusoriness” is an intrinsic property of an allegation—since, as intrinsic properties, they would run orthogonal to one another. It suggests, rather, that they are overlapping properties, which provokes the natural question: Are they simply the same property?

I think so. Consider *Twombly*: If the Court were to deem plaintiff’s allegation of market-sharing “conclusory,” it would mean that the Court is not persuaded that parallel behavior, on its own, suggests market-sharing.<sup>81</sup> This, however, is exactly the same formulation the Court would use to deem the allegation of “market-sharing” implausible. To call an allegation conclusory is to say that it is not plausibly supported

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<sup>80</sup> See *supra* note 9.

<sup>81</sup> See Meier, *supra* note 15, at 753.

by the complaint's non-conclusory allegations; it is to call the allegation implausible by another name.<sup>82</sup> Or, to borrow an analogy from Meier, "[t]o state that a conclusory allegation triggers the plausibility analysis . . . is akin to saying that the defendant's negligent behavior triggers an analysis of whether the defendant acted reasonably."<sup>83</sup> The logic is "circular."<sup>84</sup>

On the whole, then, Steinman's view runs into trouble whichever route he takes. If conclusoriness and plausibility are conceptually distinct prongs of analysis, then Steinman must account for the fact that his theory would predict greater leniency in pleading, despite the empirical record suggesting just the opposite. Thus, if conclusoriness and plausibility are conceptually intertwined, then it is unclear what Steinman's account achieves beyond redefining plausibility in terms of conclusoriness. Meanwhile, the core problem persists.<sup>85</sup>

### B. The "Factual Specificity" View

What, then, of Meier's view? In an effort to resurrect plausibility from the ashes of conclusoriness, he returns to its source, the *Twombly* opinion. Meier argues that the true core of *Twombly*—what the *Iqbal* Court failed to grasp—is that the complaint did not offer a sufficiently

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<sup>82</sup> Meier develops this argument more extensively. *See id.*

<sup>83</sup> *Id.* at 754.

<sup>84</sup> *Id.* Meier, better Samaritan than I, offers Steinman a readymade way out of this snare. I recommend consulting Meier's own formulation, *id.* at 748, but distilled to its essence, I understand his argument to be as follows. Whereas "conclusory" typically refers to propositions that (a) require an inferential leap, and (b) leave the listener skeptical about the soundness of the inferential leap, "conclusory" could be redefined to refer to any proposition that requires an inferential leap, irrespective of the leap's perceived soundness. On that definition of "conclusory," it is possible to formally distinguish conclusoriness review from plausibility analysis. The problem—for Steinman, I mean—is that this "massaged" definition of "conclusory" sweeps much too broadly. Under its plain terms, any allegation that requires an inferential leap—even of the most everyday and obvious variety—would count as a "conclusory" allegation. First, this seems fatuous—it does not capture what we typically have in mind when using the term "conclusory." Second, even if true, its practical effect would be to read the "conclusoriness" prong out of plausibility analysis entirely, since virtually every complaint would involve copious allegations of a "conclusory" nature. This effect would be to subvert the deeper purpose of Steinman's account, which is precisely to emphasize the gate-keeping role that conclusoriness analysis plays. *See supra* note 70; *cf.* 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, 304–05, 307 (2011) (outlining the tremendous confusion that "conclusory," an ostensible term of art, has engendered in the federal courts).

<sup>85</sup> To reiterate, I am only talking about Steinman's descriptive account of plausibility. His proposed solution, "plain pleading," seems to me a sound contender of how pleading ought to work. *See supra* note 71 and accompanying text.

detailed account of the “transaction” that gave rise to the § 1 claim.<sup>86</sup> Had the complaint alleged more details about the collusion, it would have survived dismissal.<sup>87</sup> Therefore, Meier argues, when a judge dismisses a complaint as implausible, it must mean that the complaint did not provide a sufficiently detailed account of the alleged violation.<sup>88</sup>

Meier provides a hypothetical to gloss this view. In the original complaint, Mr. Twombly offered the following pleading in support of his allegation of market-sharing:

Plaintiffs allege upon information and belief that [the defendants] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.<sup>89</sup>

On its own, this pleading was held insufficient to establish a claim under Rule 8.<sup>90</sup> In response, Meier invites us to imagine a slightly modified pleading, which, holding everything else constant, incorporates three further allegations:

1. On February 6, 1996, all of the defendants named in this lawsuit met at the Marriot Hotel in Waco, Texas.
2. During this meeting, defendants entered into an agreement to engage in parallel business behavior.
3. The agreement was memorialized in a document that was drafted on the evening of February 16, although no formal contract was ever drafted.<sup>91</sup>

Meier takes it as “beyond assailment” that a complaint including these allegations would have survived the 12(b)(6) stage.<sup>92</sup> If that is true, he believes it follows that the real problem in *Twombly* is not plausibility but factual specificity.<sup>93</sup> To boil his logic down to its essence: Because greater factual specificity would have cured the complaint in *Twombly*, we can conclude that factual specificity is the fulcrum of plausibility pleading.

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<sup>86</sup> Meier, *supra* note 15, at 728–30, 741.

<sup>87</sup> *Id.* at 729–30.

<sup>88</sup> *Id.* at 734; *see also* Bradley Scott Shannon, *I Have Federal Pleading All Figured Out*, 61 CASE W. RES. L. REV. 453, 455 (2010) (“The word ‘plausible’ as used by the Supreme Court in connection with a plaintiff’s allegations cannot be construed as meaning ‘believable.’ Rather, it must refer only to the factual sufficiency of a complaint.”).

<sup>89</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 551 (2007).

<sup>90</sup> *Id.* at 556–57.

<sup>91</sup> Meier, *supra* note 15, at 729.

<sup>92</sup> *Id.* at 729.

<sup>93</sup> *Id.* at 730.

Herein lies the rub: Granting Meier that his premise stands beyond reproach—his hypothetical complaint indeed would have survived dismissal—his inference does not necessarily follow. The “factual specificity” theory of plausibility is one possible inference from Meier’s premise.<sup>94</sup> But it is not the only one. Another possible inference would be that Meier’s imaginary allegations are curative because they would allow the Court to differentiate between two competing hypotheses about the observation of parallel behavior: First, the hypothesis that collusion, not independent business decisions, best explain the parallel behavior; and second, just the inverse.

If we draw the latter inference from Meier’s hypothetical, then the theory of plausibility changes considerably. Now, the important effect of Meier’s additions is not, as he maintains, that they specify the claim of harm by elucidating the transaction on which a § 1 claim rests.<sup>95</sup> It is, rather, that they address the “ambiguity” inherent in the fact of parallel conduct, as Justice Souter refers to it, by giving the Court grounds for believing that the parallel conduct is better explained by the presence of illegal behavior than it is by the absence of legal behavior.<sup>96</sup> In other words, Meier’s imaginary add-on facts disrupt the Court’s equipoise, providing an independent rationale for believing that the parallel conduct is more readily ascribed to collusion than to rational market behavior.<sup>97</sup>

There are two reasons to favor my inference from Meier’s hypothetical over Meier’s own. The first is that Meier’s theory of plausibility is unresponsive to the deeper purpose of plausibility pleading, which is not to make plaintiffs “prove their case,” or even to approximate proving their case, but rather, to make plaintiffs shoulder the burden of persuading the court that the case is worth *trying* to prove.<sup>98</sup> In this respect, Meier understands the burden of plausibility in far too strict of terms. It comes as little surprise, or ought to, that a complaint containing the facts that Meier imagines—nearly all the facts necessary to prove a § 1 claim in advance of discovery—can comfortably

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<sup>94</sup> *Id.* at 711, 728.

<sup>95</sup> *Id.* at 729–30.

<sup>96</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–57 (2007).

<sup>97</sup> To be clear, Meier’s hypothetical additions do further specify the allegation in question; I am not saying otherwise. What I am contesting is whether that is the most important aspect of what they do. I am asking—in a rather poetic twist—about the most plausible way to understand the corrective force of Meier’s imaginary facts.

<sup>98</sup> Professor Hartnett has articulated a helpful distinction along these lines: the plausibility of *winning* on the merits versus the plausibility of discovery leading to evidence that will be *helpful* at the merits stage. *Taming Twombly*, *supra* note 8, at 506–07.

survive dismissal. In the fantasy-world where plaintiffs have access to such facts before discovery, Meier is, of course, right: There is no pleading issue. I daresay, however, that commentators who worry about the constrictive effects of plausibility analysis will find cold comfort in this assurance, since the normative danger of plausibility is precisely that it will force plaintiffs to “make their case” without the benefit of the legal tool—discovery—designed to facilitate that process.<sup>99</sup> Meier’s hypothetical, far from *alleviating* anxiety about plaintiffs’ inability to obtain relevant factual material without discovery, actively provokes it. What Meier imagines are exactly the sort of facts—details about closed-door transactions likely to be in the exclusive possession of the opposing party—that require discovery most urgently.<sup>100</sup>

Beyond this, there is a second, deeper reason to favor my inference from Meier’s hypothetical over his own: the plain language of Justice Souter’s *Twombly* opinion. Eyebrow-raising caveats preface Meier’s discussion. He claims (1) that Justice Souter’s analysis of factual specificity was, in no uncertain terms, “hidden in the opinion”; (2) that because of this, the Court’s identification of “factual specificity as the underlying problem” was “not as explicit as it could have been”; and (3) that even after factual specificity emerges as the important metric, the whole business remains “somewhat muddled” by the Court’s inability to decide, as a starting proposition, whether the complaint had met the notice requirement of Rule 8.<sup>101</sup> Somewhat muddled, indeed.<sup>102</sup> In fact, apart from a lone footnote discussing the notice requirements of Form 9, the *Twombly* Court gave absolutely no indication that factual specificity was the issue on the table.<sup>103</sup>

In fact, it seems to me that Justice Souter was quite clear about the shortcoming of the complaint in *Twombly*—and clear, as well, about the goal of plausibility analysis.<sup>104</sup> The *Twombly* opinion might be accused of a certain artlessness—it definitely could have been clearer about how plausibility analysis is supposed to *implement* its goal. Meier’s error,

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<sup>99</sup> See, e.g., Spencer, *supra* note 8, at 479, 481–82; see also Miller, *supra* note 8, at 14, 20–22, 47.

<sup>100</sup> Meier’s hypothetical (qua hypothetical) could be reformulated, of course, but the problem will persist. For the point cuts deep: It is precisely concern over the Court’s use of specificity that has worried commentators to date, because it is precisely the more granular facts—that is, the facts that one would actually need to press forward with litigation—that are unlikely to be known. The problem is woven into the very fabric of his theory.

<sup>101</sup> Meier, *supra* note 15, at 730–31.

<sup>102</sup> This framing is rather convenient for Meier’s position, since it makes the near-invisibility of the Court’s remarks on factual specificity an evidentiary *strength* of his claim rather than a weakness, as it would customarily be.

<sup>103</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007).

<sup>104</sup> *Id.* at 556–57, 559, 564–66.

however, reaches something more fundamental; he misconstrues the goal of plausibility analysis entirely. That goal, as Justice Souter articulated it, is to help courts negotiate between competing factual hypotheses, which plausibility analysis accomplishes by setting the following default rule: A complaint should only be allowed to go forward if its hypothesis of illegal behavior is more plausible than a readily imaginable hypothesis of legal behavior, and “ties”—cases in which the hypothesis of illegal behavior and the hypothesis of legal behavior are equally likely—favor the defendant.<sup>105</sup>

Here, the descriptive problem with Meier’s account becomes achingly clear: Notwithstanding Meier’s effort to reconstruct plausibility in terms of factual specificity, there is no necessary connection between (a) the materials that plaintiffs might adduce to help the court negotiate between factual hypotheses, and (b) the “event or transaction” that gives rise to competing hypotheses in the first place. In context, there *might* be a connection between them—a possibility exemplified by Meier’s hypothetical—but there does not *have* to be one. It is easy, for example, to imagine additional material that is completely unrelated to the underlying “event or transaction,” and so performs no “specification” function, but that nevertheless persuades the court that it is reasonable to hypothesize illegal behavior—for example, an alternative economic theory debunking the proposition that independent business decisions tend to converge in an oligopolistic market; a statement from the CEO of one of the companies that he “does not believe in antitrust law”; or documentation about a spate of collusion schemes that had been recently discovered in similar industries. These additional materials, despite providing no further gloss on the alleged transaction, would nonetheless jostle the court in favor of one hypothesis over the other—that of illegal behavior—and thereby satisfy the burden of plausibility as Justice Souter articulated it.

Importantly, the converse claim also holds: There are facts that would further specify the alleged transaction—*pace* Meier’s theory—but that would nevertheless fail to resolve the ambiguity of parallel conduct. Suppose the complaint had outlined the terms of the alleged collusion in granular detail. For example, suppose the plaintiffs had alleged: “Defendant Bell Atlantic was given exclusive right to the northeast corridor, while AT&T was given an equivalent right to the southwestern United States.” That this would make the alleged transaction more specific is surely beyond dispute. But would it resolve Justice Souter’s central question? I think not, since more information about the specific contours of the hypothetical market-sharing scheme does nothing to

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<sup>105</sup> See *id.* at 554–57.

convince the reader that the scheme is *more than hypothetical*. By specifying the terms of the alleged market-sharing agreement, all the plaintiffs would be showing is that the hypothesis of collusion is a refined hypothesis; they would not be showing that the hypothesis of collusion is more likely than the countervailing hypothesis of rational market behavior.<sup>106</sup> Ultimately, as much functional overlap as might exist between (a) the domain of additional facts that provide further detail about an alleged transaction, and (b) the domain of additional materials that can help the court to “disambiguate” factual hypotheses,

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<sup>106</sup> In fact, Meier’s reading of *Iqbal* puts this exact ambiguity on display. Meier argues that *Iqbal* should be overturned because the underlying complaint “was much more specific about Ashcroft and Mueller’s involvement in the restrictive confinement policy than was *Twombly*’s allegation of conspiracy, which did not detail how the alleged agreement was reached, where it was done, by whom, and when.” Meier, *supra* note 15, at 764. To support his view, Meier points to the fact that in the plaintiff’s complaint, (a) the detention program was explained at length, and (b) it was alleged that Ashcroft and Mueller engaged in “discussions in the weeks after September 11, 2001.” *Id.* at 763 (quoting First Amended Complaint and Jury Demand at 13–14, *Elmaghraby v. Ashcroft*, No. 04 CV 1809 (JG)(JA), 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), *aff’d in part, rev’d in part, and remanded sub nom.* *Iqbal v. Hasty*, 490 F.3d 143, 147 (2d Cir. 2007)). But can this really be the distinguishing factor? The description of the detention program simply does not go to the issue of Ashcroft and Mueller’s supervisory liability; it is, ironically enough, a perfect example of the kind of fact that further specifies the allegation, but that is irrelevant to the abductive question of whether that allegation is plausible.

Zooming out, this points to a larger possible pitfall of Meier’s argument: I am skeptical of this claim that the *Iqbal* complaint would have satisfied “factual specificity” review. Putting the allegations regarding the details of the detention program to one side, the remaining allegation—that Ashcroft and Mueller engaged in “discussions”—hardly seems to specify what role Ashcroft and Mueller played in designing and implementing the detention policy, much less why they are liable under the *Iqbal* Court’s heightened theory of supervisory liability in this setting. For an excellent summary and critique of how *Iqbal* reshaped supervisory liability in the context of *Bivens* claims, see Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-Iqbal/Connick World*, 47 HARV. C.R.-C.L. L. REV. 273, 285–89, 291–92 (2012). Is the allegation of “discussions” during “the weeks after September 11, 2001,” really more specific than alleging, say, that “Ashcroft and Mueller designed the policy during the relevant time period?” Not self-evidently—and the latter would plainly fail Meier’s specificity test, since it nakedly rehearses an element of the supervisory liability claim without glossing its factual basis. Thus, might the discerning reader wonder: How else besides by having “discussions” could Ashcroft and Mueller have formulated the disputed policy, and when else would it have taken place except for “the weeks after September 11, 2001”? The analogy back to *Twombly* is clear: If the plaintiffs had simply rewritten the complaint to “specify” that the alleged collusion resulted from “discussions” among the defendants during a general time frame, that would not have sufficed, even on Meier’s own theory. To my ear, then, Meier’s construction of *Iqbal* sounds like a *reductio* argument against his position, not an affirmative argument in its favor.

the domains are formally distinct. And it is on the latter, not the former, that plausibility determinations rest.<sup>107</sup>

### C. The Missing Keystone: Abduction

Ultimately, what is absent in Meier's account—and in Steinman's, though less glaringly—is the epistemic distinction between induction and abduction. Induction, we saw above, is the process of adducing factual content to prove a theory.<sup>108</sup> Its goal is to demonstrate truth-value as exhaustively as the relevant evidentiary constraints allow.<sup>109</sup> Meier's factual specificity theory imagines plausibility as a kind of “induction-lite” standard.<sup>110</sup> On his view, the burden that *Twombly* imposes on plaintiffs is inductive in nature, requiring them, if not to *prove* their case at the pretrial stage, at least partially to build it.<sup>111</sup>

The problem with this account is that plausibility, as outlined in *Twombly*, is not geared toward induction but abduction, the process of formulating an operating hypothesis.<sup>112</sup> The goal of abduction, by contrast to induction, is not to demonstrate (or even to suggest) the actual truth-value of a given claim. It is, rather, to ask what claims, in the first place, have possible truth-values worth considering.<sup>113</sup> Meier's factual specificity theory would take the posited facts as a premise and ask about the conclusion to which they lead; and if they do not lead to a (probabilistic) conclusion of legal harm, the corrective action is to provide

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<sup>107</sup> Professor Hartnett makes a similar point about the relationship between specificity and plausibility:

It is not simply that specific allegations can make an inference less plausible, but that specificity has no necessary connection to plausibility of inference. When assessing the plausibility of an inference, we are asking, “What reason is there to draw that conclusion?” Giving more specifics about the conclusion may be completely unresponsive, while a responsive answer may be no more specific.

*Taming Twombly*, *supra* note 8, at 496.

<sup>108</sup> See *supra* note 21.

<sup>109</sup> See Dan Hunter, *No Wilderness of Single Instances: Inductive Inference in Law*, 48 J. LEGAL EDUC. 365, 369 (1998) (explaining the way in which induction works).

<sup>110</sup> See Meier, *supra* note 15, at 739. Specifically, under Meier's theory, “the inference as to whether the event occurred is based on other allegations contained in the complaint. Thus: Y, Z → X?” *Id.*

<sup>111</sup> See *id.* at 741.

<sup>112</sup> “Abduction is a retroactive attempt to account for a past observation. It is post hoc explanation.” Jeanne L. Schroeder, *Just So Stories: Posnerian Methodology*, 22 CARDOZO L. REV. 351, 404 (2001).

<sup>113</sup> *Id.* at 404–05 (describing the difference between induction, “show[ing] that something *actually* is operative [i.e., actuality],” and abduction, “suggest[ing] that something *may be* [i.e., possibility]”) (second and fourth alterations in original).

more facts.<sup>114</sup> Justice Souter's model, by contrast, takes the posited facts as a conclusion and asks what hypothesis would *lead to them*; and if multiple hypotheses stand in contention, the corrective action is to shed light on the surrounding context in a way that pushes the court to embrace one hypothesis over another.<sup>115</sup> Conceptually, then, the two models are not simply distinct. They pull in opposite directions.<sup>116</sup>

Justice Souter's language of "ambiguity" helps to crystallize the point.<sup>117</sup> His unease at allowing the complaint in *Twombly* to go forward, as written, was that parallel conduct is "ambiguous" in the sense of being "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."<sup>118</sup> If "ambiguity" is Justice Souter's diagnosis of the complaint's weakness, the corresponding aim of plausibility must be to "disambiguate" the fact of parallel conduct—a formulation that already betrays the underpinnings of abduction. Notice what Justice Souter's formulation does not suggest. His point is not that plaintiff's claim is ambiguous in the sense that its legal merit is unclear. Of course, its legal merit is unclear—as with any case, the allegation in *Twombly* may or may not describe an event that actually happened—but the more perspicuous word for that condition would be "indeterminate." Adopting the language of ambiguity, Justice Souter was making a different point: The fact of parallel conduct is ambiguous in the sense that it opens up onto two different hypothetical worlds, one in which defendants colluded and *that* is why they acted in parallel, and the other in which defendants pursued independent business decisions and *that* is why they manifested parallel action.<sup>119</sup>

These hypothesized worlds are neither true nor false; they have no truth-value whatsoever. They are projections based on an initial premise, and deciding which among them to entertain as the most plausible does not commit one to taking any view of their factual merits. It simply allows the process of exploring that content to move forward. That is the central question of plausibility analysis. It involves selecting from among a set of competing hypotheses—abduction—based on what one thinks is true of the world in an everyday sense. It is to the practical implications of this process that we now turn.

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<sup>114</sup> See Meier, *supra* note 15, at 739.

<sup>115</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

<sup>116</sup> For a more analytically involved discussion of this point, see *Taming Twombly*, *supra* note 8, at 483.

<sup>117</sup> *Twombly*, 550 U.S. at 554.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

## III. PLAUSIBILITY IN PRACTICE

The *Twombly* Court, as I have now reiterated multiple times, rested its plausibility determination on lessons drawn from economic scholarship.<sup>120</sup> If this use of inter-disciplinary expert knowledge was normatively sound, as I believe it was,<sup>121</sup> it is important to be clear about why this is so. The reason is not that expert knowledge is infallible. To the contrary, expertise is unruly. New paradigms continually supplant the old,<sup>122</sup> and at any given moment, different experts in the same field may hold multiple, competing views—an observation no less true of economics than any other discipline.

Consider *California Dental Association v. FTC*, which predated *Twombly* by eight years but directly adumbrated its logic.<sup>123</sup> In *California Dental*, the Court reversed the FTC's determination that a

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<sup>120</sup> This is not unique to *Twombly*. Just as one might expect, it is clearly discernible in antitrust case law post-*Twombly*—but it is even apparent in cases that predate *Twombly*. For example, in *Jefferson Parish Hospital District No. 2 v. Hyde*, the Court abandoned the longstanding *per se* prohibition against “tying” arrangements—the bundling together of two distinct products—in favor of a more lenient “market power” test; the rationale being that although tying arrangements often have an anticompetitive effect, they can also sometimes have a pro-competitive effect. 466 U.S. 2, 14–15 (1984); see Erik Hovenkamp & Herbert Hovenkamp, *Tying Arrangements and Antitrust Harm*, 52 ARIZ. L. REV. 925, 941, 944 (2010) (arguing that when tying allows a producer to sell primary goods at a lower rate, consumer welfare can increase rather than decrease). In this sense, the Court found that the mere fact of tying is ambiguous in the same sense as the mere fact of parallel conduct in *Twombly*; thus, it was insufficient to make out a § 1 claim on its own. See *Hyde*, 466 U.S. at 31. This conclusion was a blend of economic theory about firms and distinct economic theory about consumers, the latter of which was rather off the cuff. See *id.* at 30 (“[No] patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would provide him with the anesthesiologist of his choice.”).

Another example is *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, in which the Court held that the fact of synchronized price decreases among a group of television companies was insufficient, on its own, to make out a predatory pricing claim under § 1. 475 U.S. 574, 583 (1986). The *Matsushita* Court's logic directly adumbrated that of *Twombly*: It found plaintiffs' claim of collusion unjustified absent a specific showing of agreement, and it construed plaintiffs' contention that defendants intended to recuperate lost profits via future price-hikes as too “speculative” to stipulate. *Id.* at 588–89, 595–97 (citing Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981)). Indeed, somewhat amusingly, the record in *Matsushita* brought to light that even after the alleged “predation” scheme subsided, the largest market share of American television sales still belonged to plaintiff firms, not to any of the defendants. *Id.* at 591.

<sup>121</sup> More than that, even: I take it as a model of well-executed plausibility analysis. *Infra* Part IV.

<sup>122</sup> See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 12 (3d ed. 1996).

<sup>123</sup> See *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 780–81 (1999).

dental group was prohibited from dictating the parameters of advertising among its member dentists.<sup>124</sup> The FTC had reasoned that such parameters had an anti-competitive effect.<sup>125</sup> In response, the Court held that the FTC “fail[ed] to present a situation in which the likelihood of anticompetitive effects is comparably obvious,” which meant that although it was *possible* that the advertising parameters were like general “restrictions on advertis[ing] . . . price and quality[,]” in violation of § 1, economic theory rendered it more plausible that the parameters would either have a “procompetitive effect, or . . . no effect at all on competition.”<sup>126</sup>

Writing for the dissent in *California Dental*, Justice Breyer argued that the Court ought to defer to the FTC’s finding of violation.<sup>127</sup> In his words, “The problem with . . . argument[s] [about possible pro-competitive effects] is an empirical one. Notwithstanding its theoretical plausibility, the record does not bear out” the claim that the California Dental Association “had to prevent dentists from engaging in the kind of truthful, nondeceptive advertising that it banned in order [to] effectively . . . stop dentists from making [misleading] claims.”<sup>128</sup> The question, in Justice Breyer’s view, was one of economic reality, not economic theory; and as for the latter, the Court was not in the best position to judge.<sup>129</sup>

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<sup>124</sup> *Id.* at 762–65.

<sup>125</sup> *Id.* at 762.

<sup>126</sup> *Id.* at 771. Justice Souter, writing for the Court, offered a few possibilities of what these pro-competitive effects might be. For example, if it is assumed that the average consumer knows very little about the intricacies of dental service, uniform disclosure might help to mitigate this information asymmetry. *See id.* at 771–72 (citing George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 495 (1970)). Or, if it is assumed that patients derive value from the relational aspect of dentistry services, for example, maintaining the same dentist over time, it is conceivable that limiting predatory advertising among dentists actually carries a consumer benefit. *Id.* at 772–73 (citing Robert G. Evans, *Professionals and the Production Function: Can Competition Policy Improve Efficiency in the Licensed Professions?*, in OCCUPATIONAL LICENSURE AND REGULATION 225, 235–36 (Simon Rottenberg ed., 1980) (describing why professional service sectors, with their relational quality, are out of sync with traditional conceptions of competition)).

<sup>127</sup> *See id.* at 786 (Breyer, J., dissenting).

<sup>128</sup> *Id.* at 787.

<sup>129</sup> *Id.* at 786–87, 791. For a similar, if analytically more intricate, example of economic theory and empirical economic analysis coming into collision, see *Eastman Kodak Co. v. Image Technical Services, Inc.*, which dealt with a tying claim against *Eastman*, alleging that their policy of forcing consumers to use Kodak parts and services on Kodak cameras violated § 1 of the Sherman Act. 504 U.S. 451, 459 (1992). The *Eastman* majority took the view that the central question was a factual one fit for trial. It concluded this on the basis of empirical evidence that consumers do not always understand how secondary markets work when they purchase goods in primary markets; on this basis, the Court

In a case like *California Dental*, the status of expert knowledge was highly indeterminate. Does it illuminate or obscure? The majority and dissent fiercely disagreed, offering no reason to think that exploring other expert materials would clarify the question. Yet acknowledging the indeterminacy of expert knowledge should not cast a pall over plausibility analysis. The variegation of expert knowledge, far from rendering the process hopeless, is precisely what propels and mediates abduction. In its best form, plausibility analysis unfolds as a debate about the background conditions of the world, accountable to neutral and objective sources of knowledge. That reasonable people disagree about those sources, or about what those sources imply, no more undermines plausibility analysis than competing theories about monopolistic behavior undermine economics, or competing theories about the nature of space-time undermine physics. In all these examples, what ensures the coherence and rigor of the inquiry is not consensus about truth-claims. It is, rather, good faith on the part of all parties involved as they work toward such consensus. In the meantime, disagreements are sure to be persistent, as they have always been, as to matters both lofty and mundane.<sup>130</sup>

If *Twombly* is a paradigm case of plausibility analysis hinged on expert knowledge, what is *Iqbal*? Scholarship to date has grouped the two together.<sup>131</sup> But the epistemic account of plausibility advanced in the last two Parts makes clear the two cases are better understood diametrically. The core factual allegation in *Iqbal* is that, directly after 9/11, the FBI, in tandem with a host of other agencies, “arrested and detained thousands of Arab Muslim men as part of its investigation,” and that such detainees were held in “highly restrictive conditions of confinement until they were ‘cleared’ by the FBI.”<sup>132</sup> From this allegation, the complaint goes on to hypothesize that the detention program was designed to be intentionally discriminatory against Arab

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inferred that even absent a showing of market power in the primary goods market—the gold standard of tying claims under *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 18 (1984)—it was still possible, as a matter of fact, that consumers were being de facto coerced. *Eastman*, 504 U.S. at 473, 477–78. In dissent, Justice Scalia disagreed vociferously with this view, because he found it unreasonable, as a matter of theory, that coercion was taking place in the absence of market power in the primary goods market. *Id.* at 498–99 (Scalia, J., dissenting). In Justice Scalia’s view, it was necessarily true, as a matter of economic theory, that the cost of goods in a secondary market will be incorporated into the costs of goods in the primary market. *Id.* at 495–96.

<sup>130</sup> That disagreement exists is surely no reason, however, to become pessimistic about plausibility. It is a feature of interpretation in general. See generally Petroski, *supra* note 7, at 417–18.

<sup>131</sup> See, e.g., Miller, *supra* note 8, at 17 (discussing *Twombly* and *Iqbal* as a unit).

<sup>132</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1944 (2009).

Muslims,<sup>133</sup> which, if true, would mean that the detainees' constitutional rights had been violated. Such was the basis of their *Bivens* action.<sup>134</sup>

Writing for the Court, Justice Kennedy viewed this situation as analogous to the situation in *Twombly*: The plaintiff was relying on a factual hypothesis, rather than a direct allegation, to sustain his legal theory, and the question was whether his factual hypothesis was more plausible than the countervailing hypothesis of legal behavior.<sup>135</sup> What Justice Kennedy understood the case's resolution to turn on, in other words, is exactly the same process of abductive hypothesis-selection on which *Twombly* turned.<sup>136</sup> And just as in *Twombly*, there were two relevant hypotheses in *Iqbal*. The first was Mr. Iqbal's hypothesis that various high-ranking officials in the U.S. government, including Robert Mueller and John Ashcroft, designed a post-9/11 law enforcement program that consciously sought to detain Arab Muslims.<sup>137</sup> The second, countervailing hypothesis was that Mueller, Ashcroft, et al. had simply enacted a legitimate law enforcement program, designed to arrest individuals who might be linked to 9/11, and that this program had "produce[d] a disparate, incidental impact on Arab Muslims."<sup>138</sup>

Justice Kennedy found the latter hypothesis more plausible.<sup>139</sup> Nothing in the complaint sufficed to persuade him (or to persuade the other conservative Justices) that it was more likely that race-based detentions, as opposed to race-neutral detentions with a disparate impact on Arab Muslims, had given rise to Mr. Iqbal's factual allegations.<sup>140</sup> In Justice Kennedy's words, "All [Iqbal's complaint] plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared."<sup>141</sup> And this, of course, is no foundation for liability.

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1943 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

<sup>135</sup> *Id.* at 1950–51.

<sup>136</sup> *See id.*

<sup>137</sup> *Id.* at 1951.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1951–52.

<sup>140</sup> *Id.* at 1952.

<sup>141</sup> *Id.* Because he had authored the *Twombly* opinion just two years prior, Justice Souter's dissent from this holding displayed an added layer of chagrin. He distinguished the cases as follows: Whereas in *Twombly*, "[t]he difficulty was that the conduct alleged was 'consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy[.]'" *id.* at 1959 (Souter, J., dissenting) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007)), in *Iqbal*, "the allegations in the complaint are . . . [not] consistent with legal conduct. The complaint alleges that FBI officials discriminated

Fair enough. But the puzzle is this: What did Justice Kennedy rely on to come to this conclusion? What data did he use to carry out the hypothesis-selection required by plausibility analysis? In *Twombly*, we know that Justice Souter relied on economic theory derived from expert assessments—indeed, expert consensus—about the behavior of firms within an oligopolistic marketplace.<sup>142</sup> In *Iqbal*, by contrast, Justice Kennedy does not cite a *single source* to justify his impression that it is comparatively more likely that high-ranking government officials pursued a race-neutral detention program than that the same officials decided to systematically lock up Arab Muslims on account of their ethnicity.<sup>143</sup>

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against *Iqbal* solely on account of his race, religion, and national origin.” *Id.* at 1960. This is not quite right, and the subtlety of its wrongness has likely contributed to the conceptual confusion about the relationship between *Twombly* and *Iqbal*. Justice Souter is correct, of course, that discrimination alleged in the *Iqbal* complaint is illegal on its face. But that is true, too, of the market sharing alleged in the *Twombly* complaint. The whole point of plausibility analysis is that when a factual hypothesis interpolates between a factual allegation and a legal conclusion, the legal conclusion cannot be stipulated to automatically; instead, the factual hypothesis must be interrogated for its likelihood. So, Justice Souter is wrong, in my view, when he writes,

In *Twombly*, . . . [t]he difficulty was that the conduct alleged was “consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strateg[ies] . . .” [In *Iqbal*], by contrast, the allegations in the complaint are neither confined to naked legal conclusions nor consistent with legal conduct . . . *Iqbal*’s complaint therefore contains “enough facts to state a claim to relief that is plausible on its face.”

*Id.* at 1959–60. The same basic condition—competing factual hypotheses—obtained in *Iqbal* as obtained in *Twombly*. The actual source of Justice Souter’s disagreement is that he draws a different abductive conclusion than the majority about the comparative likelihood of race-based detention vis-à-vis race-neutral detention. But this is a grievance on the merits, entirely different from saying that the *Iqbal* Court has misapplied *Twombly*’s analytic framework.

<sup>142</sup> See *Twombly*, 550 U.S. at 555–59. Justice Souter cites mostly to previous judicial opinions, but those opinions, too, contain citations—many of which are empirical and theoretical economic studies of firm behavior in oligopolistic markets.

<sup>143</sup> See *Iqbal*, 129 S. Ct. at 1950–52. In some sense, the reality is even grimmer than this lets on. Although the Court fails to furnish any evidence for its understanding of the relevant context (the way high-ranking officials tend to behave)—perhaps an inherent red flag—it is not necessarily the case that the absence of evidence renders a plausibility determination unlikely to be sound. Everyday examples of plausibility make it clear, I think, that lack of rigor and improbability do not always stem from the same bud. For example, when it comes to a question like whether my spouse is cheating on me, my intuitive sense is probably worth more—much more—than any source of “objective” corroborating evidence. *Infra* Part 206. In the context of *Iqbal*, the trouble is that beyond the sheer absence of evidence—even assuming we can construe that fact as neutral—there is reason to believe that decisions implicating national security are among the most prone toward cognitive biases in favor of deference to the political branches. See Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 197–98 (2010) (profiling the ways in which judgment goes awry

This is not to say that Justice Kennedy's determination is wrong—only that it is unjustified.<sup>144</sup> I mean this adjective literally, not pejoratively, for it is not clear, even in theory, that Justice Kennedy *could* justify his hypothesis-selection. What would it mean to do so? What source material would he draw on? Unlike the question of how firms behave in an oligopolistic environment, there are no rigorous studies about the question of how high-ranking government officials behave in the face of national disaster. Did they flout the law or conform to its letter? Did they react the way many ordinary Americans did, blaming a large swath of people, based on race and religion, for a heinous act carried out by a small minority? Or, did they remain steadfast, remembering the oath of constitutional fidelity that they took when they entered office, not letting race guide their decisions, no matter how pressing the temptation to do otherwise?<sup>145</sup>

Two things are clear. First, these are precisely the type of questions that the Justices had to engage with—if only tacitly—to decide which hypothesis, conscious discrimination or incidental disparity, was more plausible. Second, these questions are not empirical or falsifiable in the manner as *Twombly's* core question of market dynamics. The question of how John Ashcroft and Eric Mueller likely behaved intersects many disciplines at once. It certainly involves political philosophy and what it means for people with power to wield it legitimately. It also involves psychology, in exploring whether power is corrupting and, if so, in what sense. It may also involve personal character; it would not be surprising if some members of the Supreme Court knew John Ashcroft or Eric

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in the context of national security disputes); cf. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 854 (2009) (discussing the role of cognitive heuristics in interpretation in general). At an epistemic level, this line of thought is far more damning to the *Iqbal* Court's position than the mere absence of affirmative evidence.

<sup>144</sup> See *Iqbal*, 129 S. Ct. at 1951–52. It is amusing—darkly amusing—that Justice Kennedy draws on an entirely conclusory premise to dismiss what he takes to be plaintiff's conclusory claim. Of course, even if Justice Kennedy is correct that high-ranking government officials tend to enact constitutional policies of their own accord, this behavior must be due, at least partially, to the ever-present possibility of judicial review. By relying on a presumed default of governmental responsibility, Justice Kennedy is trying to justify a circumscription of constitutional suits by recourse to a state of affairs brought about at least partially *by* such suits. This is a bit analytically tasteless, if not distasteful in a deeper sense.

<sup>145</sup> I am trying to present this as neutrally and humanely as possible. No matter how repulsive we find the prospect of high-ranking officials reverting to racism and discrimination in response to 9/11, it is quite understandable. It is a normal human response. And the crown looms heavy. Of course, that it is understandable does not vindicate the decision at a constitutional level. But we do a disservice to the situation—a clear *ex post* fallacy—to treat the decision as any species of easy.

Mueller personally, a fact that would surely color one's viewpoint. Whatever the question of high-ranking officialdom precisely involves, the point is that it can hardly be isolated and addressed in the way the *Twombly* Court was able to isolate and address the question of how businesses behave in oligopolistic markets.<sup>146</sup>

This dynamic, moreover, is not unique to *Iqbal*. Nor is it unique to *Bivens* actions against high-ranking government officials, although there has certainly been no shortage of such actions since *Iqbal* came down, many of a politically disturbing character.<sup>147</sup> No, the implications reach more broadly, to every instance when the court confronts vexing questions about how government officials tend to behave. In *Haley v. City of Boston*, for example, the First Circuit had to decide whether

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<sup>146</sup> A colloquy from the *Iqbal* oral argument exemplified this point. Counsel for Mr. Iqbal tried to distinguish *Iqbal* from *Twombly* on the basis that in the latter, there were “two possibilities,” leaving the court in “equipoise,” whereas in *Iqbal*, there was no hypothesis of legal behavior that could accommodate the underlying allegation. To this Justice Scalia responds as follows:

Well, there are two possibilities here. Number one is the possibility that there was a general policy adopted by the high-level officials which was perfectly valid and that whatever distortions you are complaining about was in the implementation by lower level officials. That's one possibility.

The other possibility, which seems to me much less plausible, is that the—the high-level officials themselves directed these—these unconstitutional and unlawful acts.

Transcript of Oral Argument at 33, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 07-1015). Justice Scalia offers no evidence for this ad hoc plausibility determination, and in the context of oral argument, we would hardly expect him to. But the point goes deeper: Even if Justice Scalia were pressed to offer evidence for his view, it is unclear what form that evidence would possibly take. The ad hoc nature of the determination could be said, in other words, to reflect a deeper truth.

<sup>147</sup> For example, in *Vance v. Rumsfeld*, the Seventh Circuit construed as plausible plaintiff's allegation that Donald Rumsfeld personally oversaw the torture of U.S. contractors in Iraq, in response to suspicion that they had been flipped as enemy spies. 653 F.3d 591, 603–04 (7th Cir. 2011), *rev'd en banc*, 701 F.3d 193, 199 (7th Cir. 2012) (finding that “special factors” precluded the *Bivens* action from going forward); *see also* *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 961 (N.D. Ill. 2010) (“When a plaintiff presents well-pleaded factual allegations sufficient to raise a right to relief above a speculative level, that plaintiff is entitled to have his claim survive a motion to dismiss even if one of the defendants is a high-ranking government official.”). Similarly, in *Doe v. Rumsfeld*, the D.C. District Court held that the allegation that Donald Rumsfeld was personally responsible for the plaintiff's unlawful detention in Iraq was plausible. 800 F. Supp. 2d 94, 114 (D.D.C. 2011), *rev'd*, 683 F.3d 390, 397 (D.C. Cir. 2012). In *Hamad v. Gates*, however, the Western District of Washington dismissed as implausible the allegation that Robert Gates, in his official capacity as Secretary of Defense, violated the plaintiff's rights by ordering his detention in Guantanamo Bay. No. C10-591, 2012 WL 1253167, at \*7 (W.D. Wash. Apr. 13, 2012). This was so, moreover, even after plaintiff had an opportunity to file an amended complaint—the court found none of the plaintiff's new material, including the allegations that Secretary Gates had been personally apprised of the situation in Guantanamo by his advisors, sufficient to ground a plausible claim. *Id.* at \*5.

plaintiff had plausibly alleged a *Brady* violation as a basis for his § 1983 action.<sup>148</sup> Plaintiff claimed that police officers failed to disclose inconsistent statements made by key witnesses on the day of the crime, an error that resulted in the plaintiff spending thirty-four years unduly behind bars.<sup>149</sup> In finding plaintiff's allegations sufficient to make out a plausible § 1983 claim, the court drew explicit reference to the "volume of cases involving nondisclosure of exculpatory information," on account of which plaintiff's claim "step[s] past the line of possibility into the realm of plausibility."<sup>150</sup> No legal or factual authority was offered for the proposition that *Brady* violations are rampant; nor was it clear what type of evidence could be offered.<sup>151</sup> The diagnosis of nondisclosure as a persistent problem simply reflected what the appellate judges believed to be true about the operation of police departments, for reasons that have nothing to do with facts alleged in the complaint.<sup>152</sup>

Another illustrative example is *Arnett v. Webster*, in which the Seventh Circuit had to determine whether a prisoner sufficiently alleged a constitutional violation by claiming that medical staff acted with deliberate indifference when they failed to administer alternative remedy for Rheumatoid Arthritis ("RA") during a ten-month window, in which Embrel, the typical treatment, was unavailable.<sup>153</sup> This failure, plaintiff alleged, unreasonably caused him severe, prolonged pain, in contravention of the Eighth Amendment.<sup>154</sup> The court found the allegations sufficient to state a plausible claim, relying, in large part, on what it took to be the incompetence of the medical staff.<sup>155</sup> It would be no

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<sup>148</sup> *Haley v. City of Boston*, 657 F.3d 39, 47 (1st Cir. 2011).

<sup>149</sup> *Id.* at 45.

<sup>150</sup> *Id.* at 53.

<sup>151</sup> The court does cite authority for the proposition that "[d]isclosure abuses are a recurring problem in criminal cases." *Id.* (citing *United States v. Osorio*, 929 F.2d 753, 755 (1st Cir. 1991)). But this citation can hardly sustain the analytical work for which it sets out. First, the citation is from a case nearly twenty years old; it requires an overarching theory of how police departments tend to work—just the sort of extra-legal knowledge we might expect from plausibility analysis—to connect claims from twenty years ago to claims from today. Second, the citation itself is *ipse dixit*. See *Osorio*, 929 F.2d at 755 ("This appeal from a criminal conviction presents, *inter alia*, the recurring problem of belated government compliance with its duty to provide timely disclosure of exculpatory evidence.").

<sup>152</sup> For a similar example of appellate judges offering ad hoc determinations about how specific institutions tend to operate, see *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 15–16 (1st Cir. 2011) (deeming allegation of First Amendment retaliation against a governor's office plausible, on the basis of knowledge about how "small workplace[s]" tend to operate).

<sup>153</sup> *Arnett v. Webster*, 658 F.3d 742, 748–49 (7th Cir. 2011).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 754–55.

exaggeration, in fact, to say that the court momentarily stepped into the role of medical expert to deliver its conclusion.<sup>156</sup> To wit: “[Plaintiff] has an inflammatory condition, yet he was never provided anti-inflammatory medication, not even aspirin, a well-known and readily available NSAID. [Plaintiff] wasn’t seeking an unconventional treatment; he sought medication that would reduce his pain and swelling and slow the progression of his RA.”<sup>157</sup> How the court decided what counted as a “conventional” treatment for RA is anyone’s guess; no citation was provided.<sup>158</sup> But on the basis of the intermediate determination, the court saw fit to hold that plaintiff deserved further discovery.<sup>159</sup>

#### IV. CHANGING THE NORMATIVE TACK

The foregoing examples were selected from an innumerable many. Literally every civil case that makes its way through the federal courts has to contend—or at least has to be ready to contend—with the strictures of plausibility analysis. The examples were chosen for their evocative character; I did not mean to shade substantive impressions one way or another. I meant only to underscore the evidentiary puzzle that underpins plausibility analysis, that is, the inescapable need for judges to reach beyond the four corners of the complaint and incorporate extra-legal knowledge in their determinations of what is “plausible.” To do this, judges must rely on what they know about the world to select one among the multiple hypotheses that predict the alleged facts. In this respect, the burden that plausibility analysis imposes on plaintiffs is neither an inherently light one,<sup>160</sup> nor an inherently arduous one.<sup>161</sup>

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<sup>156</sup> See *id.* at 758.

<sup>157</sup> *Id.* at 754.

<sup>158</sup> See *id.*

<sup>159</sup> Similar analysis has emerged in sister circuits. See, e.g., *Bistrrian v. Levi*, 696 F.3d 352, 371 (3d Cir. 2012) (holding that plaintiff’s allegation that prison administrators left him in the recreational yard with known adversaries was sufficient to plead a plausible claim of deliberate indifference); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (holding that plaintiff’s allegation that subordinate officers stood by idly while he screamed for help during a stabbing was sufficient to state a plausible claim of supervisory liability); see also *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam) (finding, in a pre-*Iqbal* era case with remarkably similar logic, that plaintiff’s allegation that prison administrators intentionally denied him treatment for Hepatitis C was sufficient to state a claim for relief under the Eighth Amendment). The opinion explicitly rebukes the Tenth Circuit for construing plaintiff’s allegations of deliberate indifference as too “conclusory” to state a claim. *Erickson*, 127 S. Ct. at 2199–200.

<sup>160</sup> See, e.g., Miller, *supra* note 8, at 35–36; Spencer, *supra* note 5, at 16–18. Perhaps the strangest of these complaints is the pejorative description of plausibility as “constrictive,” Miller, *supra* note 8, at 9–10, or “illiberal,” Spencer, *supra* note 5, at 29–30. Apart from their unwillingness to make any concession to practical issues like skyrocketing litigation costs—which may or may not be a weakness, depending on one’s view—the

Formally, the burden of plausibility is neither light nor arduous. It becomes light or arduous only in practice, by virtue of the doctrinal setting in which it is implemented.<sup>162</sup> This is so because plausibility analysis in law, and as in everyday life, requires one to draw on knowledge about the world, an inquiry that depends on the setting in which it is carried out, and whose rigor is bounded by the richness of the dataset on which one has to draw.

It is precisely on this last dimension that *Twombly* and *Iqbal* differ so markedly. They hail from opposite sides of the “rigor” spectrum in terms of the type of extra-legal knowledge they embed. In antitrust law, the relevant dataset is both uncontroversial and readily accessible: economic theory.<sup>163</sup> In civil rights law, by contrast, the relevant dataset is either controversial, in the sense that reasonable people would disagree categorically about what the relevant data are, or there simply is no dataset.<sup>164</sup> And between these extremes, middle cases are beginning to emerge. For example, the Court recently applied *Twombly* and *Iqbal* in the setting of a § 10(b) securities action; a determination that required speculation about what omissions consumers would “likely” have found material.<sup>165</sup> In addition, a host of employment cases, applying *Iqbal* in

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deeper problem with these accusations is that they do essentially zero conceptual work. The whole *point* of pleading rules is to constrict: to make an institution built on a liberal ideal of access—the judiciary—slightly less liberal. Unto itself, therefore, the observation that *Iqbal* and *Twombly* constrict access to federal courts mounts no normative claim.

<sup>161</sup> See, for example, Steinman, *supra* note 14, at 1339–40, which argues that plausibility is actually more permissive than its predecessor, since it effectively gives plaintiffs another shot, even if their pleadings fail conclusoriness review. Of course, this could be seen as a reduction argument against his position just as easily as an insight his argument produces; I explore this issue at some length above. *Supra* Part II.A.; see also Tymoczko, *supra* note 3, at 530 (describing plausibility as a “low threshold” that should make “courts . . . hesitant . . . to dismiss any but the most tenuous claims”).

<sup>162</sup> See *An Update After Matrixx*, *supra* note 8, at 45–47; Spencer, *supra* note 8, at 459–60 (arguing, in general, that the stringency of plausibility depends on the role that evidence plays in a particular doctrinal setting, and in particular, that plausibility is “more demanding in the context of claims in which direct evidence supporting the wrongdoing is difficult for plaintiffs to identify at the complaint stage”).

<sup>163</sup> See John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617, 619–20 (2005).

<sup>164</sup> For further discussion of this point, see Malveaux, *supra* note 35, at 724–25.

<sup>165</sup> See *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323 (2011). Although the *Matrixx* Court cited no studies or other expert materials—and in that respect differed from the *Twombly* Court—it also relied on propositions about consumer behavior in the securities market that are beholden in principle to objective knowledge; for example, that “[c]onsumers likely would have viewed the risk [of *Matrixx*’s main product] as substantially outweighing [its] benefit . . . in light of the existence of many alternative products on the market.” *Id.* In other words, the *Matrixx* Court lays out reasons for its plausibility determination that could, in theory, be unsettled by empirical study or conceptual critique. In this respect, the *Matrixx* opinion deviates sharply from *Iqbal*.

the Title VII setting, have made their way through the appellate courts—many of which require intermediate determinations about the elements of a facial discrimination claim.<sup>166</sup>

Everyday examples of abduction, too, fall on different points of the rigor spectrum. Recalling the infidelity example, whatever hypothesis I end up abducting from the suspicious receipt, the hypothesis is unlikely to be rigorous. If I tell my friend, “I found this suspicious receipt; I think my spouse may be cheating on me,” he could easily come back and say, “I think you’re overreacting; I don’t draw any suspicious inference from that receipt.” This dialogue would put us in the same position as two judges with divergent assessments of, say, the *Iqbal* complaint. It is difficult to imagine how my friend and I, if we wanted to resolve our dispute, would go about doing so. I look at the receipt and, taking into account everything I know about my spouse and our relationship, something gives me the sense that the receipt is suspicious. When my friend looks at the evidence, he also takes into account what he knows of my spouse and our relationship, but he sees no cause for alarm. We are simply at loggerheads; we have different impressions of the world. “Is it plausible that my spouse is cheating on me?” therefore occupies the same position, conceptually, as the question “Is it plausible that John Ashcroft and Eric Mueller consciously designed a discriminatory detention program?” In both, reasonable minds will surely disagree, and they will disagree for reasons that have very little to do with the facts that have been adduced, and quite a lot to do with competing ideas about how the world is composed.

Just as the infidelity example tracks *Iqbal*, there are everyday analogies to *Twombly* as well. Suppose I injure my ankle while running,

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<sup>166</sup> See, e.g., *EEOC v. Tuscarora Yarns, Inc.*, No. 1:09-cv-217, 2010 WL 785376, at \*3 (M.D.N.C. Mar. 3, 2010) (holding that the plaintiff’s allegations of various forms of sexual harassment provided no plausible foundation for a Title VII claim). This case is illustrative of the whole, and not surprisingly, scholars of discrimination law have mostly lamented the court’s use of plausibility analysis. See, e.g., Ramzi Kassem, *Implausible Realities: Iqbal’s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN. ST. L. REV. 1443, 1446 (2010) (arguing that *Iqbal* facilitates the perpetuation of bias on the part of majority groups); O’Neil, *supra* note 9, at 177; cf. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (holding, in a pre-*Twombly* case, that it was sufficient, to state an employment discrimination claim under Title VII, for plaintiff to allege that his termination had been motivated by age and national origin). There is substantial dispute about whether *Swierkiewicz* remains good law in the shadow of *Iqbal*. See *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (holding, somewhat tentatively, that *Iqbal* overturned at least the analytical predicates of *Swierkiewicz*); Seiner, *supra* note 8, at 184–85 (discussing *Swierkiewicz* in the wake of *Iqbal*). Compare Steinman, *supra* note 14, at 1322–23 (arguing that *Swierkiewicz* remains good law), with Meier, *supra* note 15, at 757 (arguing that there is “no way to reconcile, as a matter of pleading standards, the Court’s approach to the ‘conclusory allegations of discrimination’ in *Swierkiewicz* and *Iqbal*.”).

and there are two possible explanations: The ankle is either broken or sprained. When I get home, I examine my ankle and hypothesize that it is broken. When my friend examines it, however, he hypothesizes that it is sprained. Just as in the infidelity example, my friend and I have different impressions of the world. But unlike the infidelity example, he and I will be able to consult an objective body of knowledge—calling a doctor, or the equivalent—to enrich our understanding of how ankle injuries work, just as the *Twombly* Court was able to draw on economic theory to enrich its understanding of how firms behave.<sup>167</sup> This enriched understanding will help us select between the two hypotheses; it will cast light on the meaning of the known facts, for example, if I am limping, or if my ankle is swollen. It will give us a common, objective foundation from which to work and, by doing so, will make our ultimate determination more rigorous. Rigor is no guarantee of consensus. My friend and I may review countless sources of medical information, for example, without coming to any agreement: I may still hypothesize that the ankle is broken, and he that the ankle is sprained. Again, just as in the discussion of *Twombly*, the point is not that an objective field of knowledge necessarily eliminates the space for interpretive divergence. The point is that it renders such divergence accountable rather than opaque.

Here, then, is my ultimate proposal. First, *Twombly* should become our model of plausibility analysis at its most functional level, not because *Twombly*, in either logic or result, is beyond reproach, but because it exemplifies the tethering of plausibility analysis to objective knowledge about the world. Second, in doctrinal settings unlike antitrust law—without a disciplinary anchor like economic theory to mediate intuitional disagreements about what is plausible—“objective knowledge” should be built from the ground up. Abstract as this might sound, I mean something quite concrete: Scholars and litigators should begin proposing, and judges should begin codifying, guidelines about the proper source materials for performing the hypothesis-selection on which plausibility rests. For the most part, these guidelines should be setting-specific, in respect of the setting-specific nature of plausibility analysis itself. A few generalizations are possible, however. For one thing, it seems plain that courts should welcome the incorporation of expert research into pleadings. Whenever the wisdom of other disciplines can supplant crude intuition and “common sense,” then it should. For another thing, one piece of evidence that would almost certainly make plausibility determinations more rigorous would be empirical data about previous litigations in the same substantive area. If it could be

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<sup>167</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553–54 (2007).

demonstrated, for example, that most plaintiffs—or an important threshold of plaintiffs—alleged parallel conduct at the outset end up prevailing at trial, or settling advantageously, this type of information would surely help judges evaluate the plausibility of legally analogous claims.

Ultimately, without any seismic shift in the law of pleading, it would be possible to improve the status quo dramatically by equipping litigators and judges with a few heuristics to define and delimit the universe of evidence on which plausibility determinations are based. Scholars are well situated to assist in this enterprise. I humbly submit that in lieu of formulating theories of how pleading ought to operate, we should focus our attention on making plausibility analysis, as it operates, more functional. When the conceptual dust settles—and my main ambition was to help settle it—the question that most matters is an intensely practical one. How can our federal courts be made to work better, indeed, to work at all, for the most vulnerable among us?