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**“PLAUSIBLE CAUSE”?: HOW CRIMINAL PROCEDURE  
CAN ILLUMINATE THE U.S. SUPREME COURT’S NEW  
GENERAL PLEADING STANDARD IN CIVIL SUITS**

*Jesse Jenike-Godshalk\**

I. INTRODUCTION

In 2007, the United States Supreme Court decided *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,<sup>1</sup> a case concerning the heightened pleading standard for civil actions brought under the Private Securities Litigation Reform Act of 1995 (PSLRA).<sup>2</sup> In this case, Justice Stevens wrote a brief dissent in which he argued that the Court should have interpreted the heightened pleading standard as equivalent to probable cause.<sup>3</sup> He analogized the privacy interests of a citizen, who is suspected of criminal activity, and the interests of a civil defendant in resisting discovery.<sup>4</sup> Justice Stevens also thought that the familiar standard of probable cause would be easier for judges to apply than the new standard that the majority had crafted.<sup>5</sup>

Following *Tellabs*, scholars paid little attention to Justice Stevens’s dissent.<sup>6</sup> His opinion was overshadowed by two subsequent Supreme

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\* Associate Member, 2009–2010 *University of Cincinnati Law Review*. The author would like to thank the following professors for reading this Comment and for providing valuable feedback: Michael E. Solimine, Darrell A.H. Miller, and Mark A. Godsey. The author would also like to thank his family, including his in-laws. Particularly, he would like to thank his wife, Katie Thoman-Godshalk, for her love and support, and his sisters-in-law, Lizzie and Chelle, for helping him take his mind off of law school.

1. 551 U.S. 308 (2007).

2. The PSLRA imposes, by statute, a pleading standard that is higher than the general civil pleading standard embodied in Federal Rule of Civil Procedure 8 and different than the heightened civil pleading standard embodied in Federal Rule of Civil Procedure 9(b). *In re 2007 Novastar Fin. Inc., Sec. Litig.*, 579 F.3d 878, 882 (8th Cir. 2009) (“The PSLRA goes beyond the ordinary pleading requirements described in Rules 8(a)(2) and 9(b) of the Federal Rules of Civil Procedure . . .”). *Compare* 15 U.S.C. § 78u-4(b)(1), (2) (2006), *with* FED. R. CIV. P. 8, *and* FED. R. CIV. P. 9(b). The PSLRA “requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter.” *Tellabs, Inc.*, 551 U.S. at 313. With regard to scienter, “plaintiffs must ‘state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.’” *Id.* at 314 (quoting 15 U.S.C. § 78u-4(b)(2)).

3. *Id.* at 336 (Stevens, J., dissenting).

4. *Id.*

5. *Id.* at 335–36.

6. The author could find only a single casenote that treated Justice Stevens’s dissent at any length: John M. Wunderlich, Note, *Tellabs v. Makor Issues & Rights, Ltd.: The Weighing Game*, 39 LOY. U. CHI. L.J. 613, 679–81 (2008) (arguing, over only four short paragraphs, that Justice Stevens was

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Court decisions that revolutionized<sup>7</sup> the general civil pleading standard: *Bell Atlantic Corp. v. Twombly*<sup>8</sup> and *Ashcroft v. Iqbal*.<sup>9</sup> Scholars have written extensively on these cases, approaching the cases in a variety of ways.<sup>10</sup> Despite the breadth of secondary literature, most scholars

right in *Tellabs*).

7. *But see* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298 (2010) (“This article challenges the conventional wisdom that *Iqbal* and *Twombly* run roughshod over a half-century’s worth of accumulated wisdom on pleading standards.”).

8. 550 U.S. 544 (2007).

9. 129 S. Ct. 1937 (2009).

10. Some scholars have criticized these two cases. *See, e.g.*, A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009) (arguing, *inter alia*, that the new civil pleading standard unfairly curtails access to the courts for certain plaintiffs or those with certain claims); Jason Bartlett, Comment, *Into the Wild: The Uneven and Self-Defeating Effects of Bell Atlantic Corp. v. Twombly*, 24 ST. JOHN’S J. LEGAL COMMENT. 73 (2009) (arguing that *Twombly* cannot achieve its purpose of curbing discovery abuse because the Supreme Court’s decision is too confusing); Damon Amyx, Note, *The Toll of Bell Atlantic Corp. v. Twombly: An Argument for Taking the Edge off the Advantage Given Defendants*, 33 VT. L. REV. 323 (2008) (generally criticizing *Twombly* because it favors defendants). Other scholars have examined the constitutional conflicts created by *Twombly* and *Iqbal*. *See, e.g.*, Kenneth S. Klein, *Is Ashcroft v. Iqbal the Death (Finally) of the “Historical Test” for Interpreting the Seventh Amendment?*, 88 NEB. L. REV. 467 (2010) [hereinafter Klein, *Seventh Amendment*] (predicting that, because of *Ashcroft v. Iqbal*, the Supreme Court will have to abandon part of its existing Seventh Amendment jurisprudence); Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261 (2009) [hereinafter Klein, *Rule 8*] (arguing that, after *Iqbal*, Federal Rule of Civil Procedure 8 often violates the Seventh Amendment to the U.S. Constitution); Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008) (arguing that the pleading standard enunciated in *Twombly* violates the Seventh Amendment to the U.S. Constitution). Yet, some have defended these cases on grounds of efficiency or fairness. *See* Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063 (2009) (concluding that *Twombly* is a justifiable, even desirable, limit on discovery).

Scholars have analyzed *Twombly* and *Iqbal* generally. *See, e.g.*, 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 (2009) (analyzing the “plausibility” standard that *Twombly* and *Iqbal* established, and arguing that this standard should be regarded as rather minimal); John P. Sullivan, *Twombly and Iqbal: The Latest Retreat from Notice Pleading*, 43 SUFFOLK U. L. REV. 1 (2009) (discussing generally the effect of *Twombly* and *Iqbal* on notice pleading and on motions to dismiss). Scholars have also analyzed these cases within the context of a variety of discrete substantive fields. *See, e.g.*, Kenneth R. O’Rourke, et al., *Ashcroft v. Iqbal: The Sleeper 2009 Supreme Court Decision for Patent Litigators?*, 21 No. 12 INTELL. PROP. & TECH. L.J. 6 (2009) (arguing that *Iqbal* creates tension with the specific pleading standard that the Federal Circuit has established for patent cases); Erika L. Amarante, *New Pleading Standards in Federal Court: Will They Impact Franchise Cases?*, 29 FRANCHISE L.J. 81 (2009) (analyzing franchise cases); William H. Page, *Twombly and Communication: The Emerging Definition of Concerted Action Under the New Pleading Standards*, 5 J. COMPETITION L. & ECON. 439 (2009) (analyzing antitrust cases); Benjamin W. Cheesbro, Note, *A Pirate’s Treasure?: Heightened Pleading Standards for Copyright Infringement After Bell Atlantic Corp. v. Twombly*, 16 J. INTELL. PROP. L. 241 (2009) (analyzing copyright infringement cases); Robert A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (examining the effect of *Twombly* on motions to dismiss in employment discrimination cases and suggesting a new pleading framework for such cases). Still others have focused on particular facets of the framework that *Twombly* and *Iqbal* established. *See, e.g.*, Steinman, *supra* note 7 (focusing on the first step of the framework, which asks if any of the allegations in the complaint are conclusory); Darrell A.H. Miller, *Iqbal and Empathy*, 78 U. MO.-KAN. CITY L.

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struggle, to some degree, with the same issues: What do *Twombly* and *Iqbal* mean? What do they require lower courts to do? What pleading standard do they create? What pleading standard should courts adopt for civil cases?

These questions continue to defy simple or certain answers. Moreover, scholars have not exhausted the possible ways to approach these questions. Specifically, no one has looked to Justice Stevens’s *Tellabs* dissent in order to address these issues. No one has looked to criminal procedure to determine what *Twombly* and *Iqbal* might mean or to determine what the general civil pleading standard ought to be.<sup>11</sup> This Comment does just that.

As this Comment shows, in *Twombly* and *Iqbal* the Supreme Court adopted a standard of pleading that shares many similarities with probable cause. In particular, the new civil pleading standard is a form of “comparative plausibility” that appears to be, in practice, tantamount to a standard of more-likely-than-not probability—the same quantum of proof required by probable cause. Since the new civil pleading standard is similar to probable cause, courts may be able to look to probable cause jurisprudence to better understand *Twombly* and *Iqbal*, especially the language in *Iqbal* that calls on courts to use their “experience and common sense.” At the same time, probable cause jurisprudence

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REV. 999 (2010) (focusing on the role of empathy in the framework that *Twombly* and *Iqbal* established).

Some have analyzed how *Twombly* and *Iqbal* affect the federal courts. See, e.g., Anthony Martinez, Note, *Plausibility Among the Circuits: An Empirical Survey of Bell Atlantic Corp. v. Twombly*, 61 ARK. L. REV. 763 (2009). Others have analyzed the effects on state courts. See, e.g., J. Thomas Richie & Anna Manasco Dionne, *Twombly and Iqbal: The Effect of the “Plausibility” Pleading Standard on Alabama Litigators*, 71 ALA. LAW. 75 (2010) (noting that, for now, Alabama state courts have not followed *Twombly* and *Iqbal*, meaning that Alabama has one pleading standard for federal courts and another for state courts); Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431 (2008) (discussing whether the states should adopt the new civil pleading standard enunciated in *Twombly* and *Iqbal*).

Finally, some scholars have sought to better understand *Twombly* and *Iqbal* by examining areas of civil procedure other than pleading. See, e.g., Andrew Blair-Stanek, *Twombly is the Logical Extension of the Mathews v. Eldridge Test to Discovery*, 62 FLA. L. REV. 1 (2010) (arguing that *Twombly* grows out of an application to discovery of the *Mathews v. Eldridge* due process test, which governs what process a person is due under any given circumstances); Lonny S. Hoffman, *Burn up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach us About Judicial Power Over Pleadings*, 88 B.U. L. REV. 1217 (2008) (arguing that the Supreme Court’s interpretation of pleading standards in *Twombly* is inconsistent with the Court’s rulings on summary judgment and removal).

11. Notably, even before *Tellabs*, *Twombly*, or *Iqbal*, some scholars argued that criminal procedure ought to be compared to civil procedure in order to “generate helpful insights and highlight overlooked possibilities.” See David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 687 (2006). This Comment will focus entirely on federal criminal procedure, rather than examining criminal procedure in the state courts.

elucidates ways in which the Supreme Court erred in *Twombly* and *Iqbal*. In these decisions, the Supreme Court created a confusing standard that imposes too great a burden on civil plaintiffs. But one may also find solutions to these problems by further examining the probable cause jurisprudence. This jurisprudence suggests that perhaps the new standard for civil pleading should be an objective inquiry, and plaintiffs should perhaps be able to secure something akin to a search warrant that would allow limited discovery in the early stages of a case.

This Comment begins, in Part II, by laying out the general civil pleading standard in federal court, both before and after *Twombly* and *Iqbal*. Part III explores the Supreme Court's criminal pleading and probable cause jurisprudence. Then, in Part IV, this Comment draws out the similarities between the new general civil pleading standard and probable cause. Part V shows how probable cause jurisprudence may help courts and scholars better understand, critique, and build upon *Twombly* and *Iqbal*. Finally, Part VI concludes by examining the methods for changing the new general civil pleading standard.

## II. THE GENERAL CIVIL PLEADING STANDARD IN FEDERAL COURT

This Part discusses how the general civil pleading standard in federal court has evolved from the earliest days of modern civil pleading until after *Iqbal*. Modern civil pleading may be dated to 1938, the year that the U.S. Supreme Court adopted the Federal Rules of Civil Procedure.<sup>12</sup> Rule 8 is entitled "General Rules of Pleading," and it continues today to govern civil pleadings in federal court.<sup>13</sup> Rule 8 declares that a pleading must contain: "(1) a short and plain statement of the grounds for the court's jurisdiction . . . ; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought."<sup>14</sup> Rule 8 also states that "[e]ach allegation must be simple, concise, and direct."<sup>15</sup> By using this language, the drafters sought to eliminate the formalism and hyper-technicality that marked earlier pleading regimes.<sup>16</sup>

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12. Amber A. Pelot, Note, *Bell Atlantic Corp. v. Twombly: Mere Adjustment or Stringent New Requirement in Pleading?*, 59 MERCER L. REV. 1371, 1374 (2008) ("[T]he era of modern pleading began with the adoption of the Federal Rules of Civil Procedure . . . in 1938 . . .").

13. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009). In *Iqbal*, the Supreme Court declared that *Twombly* was not a departure from Rule 8, but that "the decision was based on our interpretation and application of Rule 8." *Id.* at 1953.

14. FED. R. CIV. P. 8(a).

15. FED. R. CIV. P. 8(d).

16. Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 551 (2002) ("In 1938, reacting to both the hypertechnical categorization of fact pleading under the codes and the sluggish

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The Federal Rules of Civil Procedure also provide a method to dispose of pleadings that do not satisfy Rule 8. Under Rule 12(b)(6), a defendant may move to dismiss pleadings that fail “to state a claim upon which relief can be granted.”<sup>17</sup>

The Supreme Court elucidated these two Rules in a short 1957 decision, *Conley v. Gibson*.<sup>18</sup> The Court declared, in oft-quoted words, that federal courts should not dismiss a complaint under Rule 12(b)(6) “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>19</sup> The Court further specified that the plaintiff could rely upon general allegations because “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”<sup>20</sup> Rule 8 was only intended to ensure that the defendant had adequate notice of the plaintiff’s claim and the general grounds for that claim; the parties could flesh out the details in discovery.<sup>21</sup>

*Conley v. Gibson* stood as the Supreme Court’s definitive statement on Rules 8 and 12(b)(6) for almost fifty years—until the Supreme Court decided *Bell Atlantic Corp. v. Twombly*<sup>22</sup> in 2007. In *Twombly* the plaintiffs sued various telephone companies, called Incumbent Local Exchange Carriers (ILECs), for allegedly violating § 1 of the Sherman Antitrust Act.<sup>23</sup> Specifically, the plaintiffs alleged that: (1) the ILECs engaged in parallel conduct that impeded other companies, called Competitive Local Exchange Carriers (CLECs); and (2) the ILECs agreed not to compete against each other.<sup>24</sup> The district court granted the defendants’ motion to dismiss.<sup>25</sup> Relying upon *Conley*’s “no set of facts” language, the Second Circuit reversed.<sup>26</sup>

The Supreme Court then reversed the Second Circuit and, in the process, adopted the “plausibility” standard for reviewing civil pleadings. The Court began its legal analysis by noting that, in order to prove a violation of the Sherman Antitrust Act, a plaintiff must show a

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formalism of common-law pleading, the drafters forged a new balance” with Rule 8.).

17. FED. R. CIV. P. 12(b)(6).

18. 355 U.S. 41 (1957), *abrogated by* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

19. *Id.* at 45–46.

20. *Id.* at 47.

21. *Id.* at 47–48; *see also* *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (The Federal Rules of Civil Procedure “restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial.”).

22. 550 U.S. 544 (2007).

23. *Id.* at 548–50. The Sherman Antitrust Act can be found in the U.S. Code at 15 U.S.C. §§ 1–7 (2006).

24. *Twombly*, 550 U.S. at 550–51.

25. *Id.* at 552.

26. *Id.* at 553.

conspiracy between companies to restrain trade.<sup>27</sup> To show conspiracy, the plaintiff must demonstrate, not just that companies engaged in parallel conduct, but that they actually entered into an agreement to restrain trade.<sup>28</sup> The Court further declared that, to survive a motion to dismiss, a plaintiff's complaint does not have to provide "detailed factual allegations," but does have to provide more than just "labels," "conclusions," or a statement of the elements in the cause of action.<sup>29</sup> Thus, in the present case, the plaintiffs' complaint had to contain:

enough factual matter . . . to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.<sup>30</sup>

If the plaintiffs could not supply some facts that suggested an agreement, then the plaintiffs could not push the complaint across the line between what is possible and what is plausible.<sup>31</sup> Without a showing of plausibility, the Court was unwilling to allow cases to move forward into discovery, which can be both expensive and time-consuming.<sup>32</sup>

In light of this analysis, the Court reexamined *Conley's* "no set of facts" language. One could construe this language very broadly to mean that "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery."<sup>33</sup> The Court rejected this broad interpretation, finding instead that *Conley's* iconic statement meant only that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."<sup>34</sup> Because *Conley's* "no set of facts" language could be so confusing, the Court declared that the language had "earned its retirement, and it was "best forgotten."<sup>35</sup>

Turning to the case sub judice, the Supreme Court found that the plaintiffs' complaint failed to create "a plausible suggestion of

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27. *Id.*

28. *Id.* at 553–54.

29. *Id.* at 555.

30. *Id.* at 556.

31. *Id.* at 557.

32. *Id.* at 558–59.

33. *Id.* at 561 (internal quotation marks removed). Such an interpretation would obviously conflict with the Court's newfound "plausibility" requirement.

34. *Id.* at 563.

35. *Id.*

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conspiracy.”<sup>36</sup> The complaint did contain some direct allegations of agreement, such as allegations that the ILECs had “engaged in a ‘contract, combination or conspiracy’ and agreed not to compete with one another.”<sup>37</sup> Yet these allegations were mere legal conclusions, not entitled to the Court’s consideration.<sup>38</sup> Discounting these allegations, the complaint then rested entirely on allegations of parallel conduct, and such conduct could occur even in a competitive, free market, in the absence of any agreement.<sup>39</sup> Because the plaintiffs had not “state[d] a claim . . . that [was] plausible on its face [and] [b]ecause the plaintiffs [had] not nudged their claims across the line from conceivable to plausible,” the Court held that the complaint had to be dismissed.<sup>40</sup>

In response to this opinion, Justice Stevens dissented.<sup>41</sup> He was especially perturbed that the majority granted dismissal without even requiring the defendants to file an answer or to submit to limited discovery.<sup>42</sup> Justice Stevens argued that while the Court might be concerned with the costs of discovery, these concerns could be addressed through careful discovery management, rather than through granting a motion to dismiss.<sup>43</sup>

Justice Stevens also examined the history of civil pleading, both in Great Britain and in the United States.<sup>44</sup> Before the Federal Rules of Civil Procedure, various rule systems required a plaintiff to plead “facts” and not mere “conclusions.”<sup>45</sup> This distinction created great confusion, and the Federal Rules of Civil Procedure were intended to abandon this distinction. Thus, Rule 8 contains no reference to either “facts” or “conclusions.”<sup>46</sup> According to Justice Stevens, the Rules were meant to keep litigants in, rather than out of, court.<sup>47</sup>

In light of this history, Justice Stevens argued that *Conley*’s “no set of facts” language should be read broadly to mean that a court will dismiss a plaintiff’s complaint “only when proceeding to discovery or beyond

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36. *Id.* at 566.

37. *Id.* at 564 & n.9 (quoting the plaintiffs’ complaint).

38. *Id.* at 564.

39. *Id.* at 564, 566–68.

40. *Id.* at 570.

41. Justice Ginsburg joined this dissenting opinion, except as to Part IV. No other Justices dissented.

42. *Twombly*, 550 U.S. at 572–73 (Stevens, J., dissenting).

43. *Id.* at 573.

44. *Id.* at 573–76.

45. *Id.* at 574.

46. *Id.* at 575.

47. *Id.*

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would be futile.”<sup>48</sup> On numerous occasions, the Supreme Court, along with other federal and state courts, had championed such a broad reading of *Conley*.<sup>49</sup> By deviating from this reading, the *Twombly* majority had misinterpreted *Conley*.<sup>50</sup>

Turning to the present case, Justice Stevens found that the plaintiffs had three times alleged an agreement or conspiracy between the ILECs.<sup>51</sup> The Court should have considered these allegations and should have regarded them as true.<sup>52</sup> Instead, the Court improperly disposed of these allegations because they were supposedly “conclusory.”<sup>53</sup> According to Justice Stevens, in the present case the allegations were sufficient to show that conspiracy was a “possibility,” and this showing was enough to survive a motion to dismiss.<sup>54</sup> Thus, Justice Stevens would apparently have allowed at least limited discovery.<sup>55</sup>

Courts and scholars immediately recognized *Twombly* as a groundbreaking opinion, but many were uncertain just how much ground the Supreme Court had broken. Specifically, many wondered whether the majority opinion only applied to antitrust litigation<sup>56</sup>—or only applied to complicated litigation, which has high discovery costs.<sup>57</sup> Others speculated that the opinion applied to all civil litigation.<sup>58</sup> Shortly after deciding *Twombly*, the Court revisited the opinion in a short per curiam decision, *Erickson v. Pardus*,<sup>59</sup> but the Court did not resolve whether *Twombly*’s holding applied only to certain types of cases or to all cases.

In 2009, with *Iqbal v. Ashcroft*,<sup>60</sup> the Supreme Court clarified that the

48. *Id.* at 577.

49. *Id.* at 577–78, 583–85.

50. *Id.* at 580 (“This is not and cannot be what the *Conley* Court meant.”).

51. *Id.* at 589. Here, Justice Stevens provided a citation to the plaintiffs’ complaint, but he did not directly quote or paraphrase the three allegations he was referring to. *See id.*

52. *See id.*

53. *Id.* at 589–90.

54. *Id.* at 592–93.

55. *See id.* at 593–94.

56. *See, e.g.,* Keith Bradley, *Pleading Standards Should not Change After Bell Atlantic Corp. v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117 (2007) (arguing that *Twombly* only applies to antitrust litigation).

57. *See, e.g.,* Gunasekera v. Irwin, 551 F.3d 461, 466 (2009) (“Courts in and out of the Sixth Circuit have identified uncertainty regarding the scope of *Twombly* and have indicated that its holding is likely limited to expensive, complicated litigation like that considered in *Twombly*.”).

58. *See, e.g.,* Goldstein v. Pataki, 488 F.Supp.2d 254, 290 (E.D.N.Y. 2007) (“The generality of [the] discussion [in *Twombly*] strongly suggests that *Twombly* applies more broadly to all civil cases rather than only to claims of antitrust conspiracy.”), *aff’d*, 516 F.3d 50 (2d Cir. 2008).

59. 551 U.S. 89 (2007).

60. 129 S. Ct. 1937 (2009).

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latter interpretation was correct.<sup>61</sup> In *Iqbal*, the plaintiff was a Pakistani Muslim arrested by the Federal Bureau of Investigation (FBI) for criminal charges in the months following September 11, 2001. The plaintiff alleged that, while in custody, “he was deprived of various constitutional protections.”<sup>62</sup> He sued numerous officials, including John Ashcroft, former U.S. Attorney General, and Robert Mueller, Director of the FBI, alleging that these officials adopted an unconstitutional policy that caused violations of his constitutional rights.<sup>63</sup> Pursuant to this policy, the plaintiff was classified as “a person of high interest” and was confined under highly restrictive, harsh conditions because of his race, religion, or national origin, which he argued violated his First and Fifth Amendment rights.<sup>64</sup>

This case came before the U.S. District Court for the Eastern District of New York in 2005, prior to the Supreme Court’s *Twombly* decision. The defendants moved to dismiss the claims, but the district court denied the motions, relying upon *Conley*’s “no set of facts” language.<sup>65</sup> From this judgment, the Second Circuit took an interlocutory appeal.<sup>66</sup> In the meantime, the Supreme Court decided *Twombly*. The Second Circuit ultimately affirmed the denial of the motions, finding that, even after *Twombly*, plaintiffs only had to amplify certain types of claims with factual material in order to make the claims plausible.<sup>67</sup>

The Supreme Court reversed, holding that *Twombly*’s framework applied to all claims in all civil cases because this framework was an interpretation of Rule 8, which governs all civil actions.<sup>68</sup> Thus, in *Iqbal*, the Court applied the *Twombly* framework. Looking to *Twombly* for guidance, the Court noted that its first task was to identify what a plaintiff must plead for the particular claim under consideration: unconstitutional discrimination.<sup>69</sup> For unconstitutional discrimination, a plaintiff must plead discriminatory purpose.<sup>70</sup>

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61. *Id.* at 1953.

62. *Id.* at 1942.

63. *Id.*

64. *Id.* at 1944.

65. *Id.*; *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at \*9 (E.D.N.Y. Sept. 27, 2005), *aff’d in part, rev’d in part sub nom.* *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

66. *Iqbal*, 129 S. Ct. at 1944. In most situations, a party cannot secure interlocutory appeal of a denial of a motion to dismiss, but a party is entitled to interlocutory appeal if the lower court, in denying the motion to dismiss, also rejected the defense of qualified immunity based on an issue of law. *Id.* at 1945–46.

67. *Id.* at 1944.

68. *Id.* at 1953 (quoting FED. R. CIV. P. 1).

69. *Id.* at 1947.

70. *Id.* at 1948.

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The Court then distilled *Twombly*'s legal conclusions into two major principles. First, although a court must accept all allegations as true, this requirement does not apply to legal conclusions or to a mere recitation of the elements for a cause of action.<sup>71</sup> Second, a claim must be plausible to survive a motion to dismiss. A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."<sup>72</sup> The Court further stated that "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."<sup>73</sup>

According to the Court, these two principles suggest a two-prong approach to evaluating motions to dismiss—an approach that the Court applied in *Twombly*. First, a court should isolate conclusory statements, which are not entitled to the presumption of truth. Second, a court should determine whether the remaining "well-pleaded factual allegations" make a showing of plausibility.<sup>74</sup>

Applying this approach, the Court found that, in the present case, the complaint was not plausible.<sup>75</sup> First, the Court disposed of conclusory allegations. The plaintiff had alleged that the defendants "'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'"<sup>76</sup> The plaintiff had also alleged that Ashcroft was the "'principal architect'" of this policy, and "Mueller was 'instrumental' in adopting and executing" the policy.<sup>77</sup> Because the Court regarded these statements as conclusory, the Court was not obligated to assume the statements were true.<sup>78</sup>

The Court then applied the second prong. It began this analysis by noting two well-pleaded factual allegations: (1) during investigations following September 11, 2001, Mueller directed the FBI to arrest and detain thousands of Arab Muslims; and (2) shortly after September 11, 2001, Ashcroft and Mueller approved a policy of holding these Muslim detainees "'in highly restrictive conditions of confinement'" until the

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71. *Id.* at 1949–50.

72. *Id.* at 1949.

73. *Id.* at 1950.

74. *Id.*

75. *Id.* at 1950–51.

76. *Id.* at 1951.

77. *Id.*

78. *Id.*

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FBI had cleared the detainees.<sup>79</sup> According to the Court, such conduct might be consistent with an impermissible purpose to discriminate, but the conduct was more likely consistent with a legitimate policy of seeking out those connected with the September 11 attacks, especially because those who were known to be involved in the attacks were Arab Muslims.<sup>80</sup> In light of this alternative explanation, the Court found that the plaintiff failed to show that his explanation was plausible; he failed to show that the defendants’ policies were the result of purposeful discrimination.<sup>81</sup> Under these circumstances, the Court found that allowing limited discovery was an unacceptable way to resolve the motion to dismiss. Instead, the Court was compelled to grant the motion.<sup>82</sup>

In *Iqbal*, Justice Souter wrote a dissent in which Justices Stevens, Ginsburg, and Breyer joined.<sup>83</sup> Justice Souter argued that the Court had misapplied *Twombly* because the Court had inappropriately applied the first prong of its analysis.<sup>84</sup> Justice Souter did not regard as conclusory those statements that the majority had found conclusory.<sup>85</sup> The majority had mistakenly read the individual allegations in isolation.<sup>86</sup> Instead, the Court should have read each allegation in the context of the other allegations, which provide the necessary supporting details and facts.<sup>87</sup> In particular, the plaintiff alleged that after September 11, 2001, “the Chief of the FBI’s International Terrorism Operations Section and the Assistant Special Agent in Charge for the FBI’s New York Field Office implemented a policy that discriminated against Arab Muslim men, including Iqbal, solely on account of their race, religion, or national origin.”<sup>88</sup> This allegation provided the necessary factual detail to support the allegations that Ashcroft and Mueller created, knew about, and implemented this same policy.<sup>89</sup> Justice Souter further averred that the allegations the majority regarded as conclusory could not be distinguished, in any principled way, from the allegations the majority

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79. *Id.*

80. *Id.*

81. *Id.* at 1951–52.

82. *Id.* at 1953–54.

83. Notably, Justice Souter wrote the majority opinion in *Twombly*, and he was joined by Justice Breyer.

84. *See Iqbal*, 129 S. Ct. at 1955, 1960–61 (Souter, J., dissenting).

85. *Id.* at 1961.

86. *Id.* at 1960 (“The fallacy of the majority’s position, however, lies in looking at the relevant assertions in isolation.”).

87. *Id.* at 1960–61.

88. *Id.* at 1960.

89. *Id.* at 1961.

considered well-pleaded factual allegations.<sup>90</sup> In sum, according to Justice Souter, the plaintiff's complaint satisfied the requirements of Rule 8.<sup>91</sup>

Writing by himself, Justice Breyer argued that, if the majority was concerned that discovery could devolve into unwarranted intrusion into the business of high-level officials, the proper solution was not reinterpreting *Twombly* and, thus, granting the defendants' motion to dismiss. Instead, the plaintiff should have been allowed to conduct carefully controlled discovery.<sup>92</sup>

### III. CRIMINAL PLEADINGS AND PROBABLE CAUSE

Focusing specifically on probable cause, this Part describes some basic tenets of criminal procedure in the federal courts, beginning with the investigative stage and ending with the pleading stage.

In federal criminal cases, investigative and pretrial conduct is constrained by constitutional limitations<sup>93</sup> and by the Federal Rules of Criminal Procedure.<sup>94</sup> A single standard resonates, more than any other standard, throughout most of the investigative and pretrial stages; this standard is probable cause.<sup>95</sup> Probable cause strikes a balance between society's interest in crime control and an individual's interest in liberty and privacy.<sup>96</sup> In general, probable cause "exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."<sup>97</sup> The inquiry for probable cause varies somewhat in different circumstances, but the Supreme Court has stated that "[t]he substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.'"<sup>98</sup>

The Supreme Court has often described the various attributes of

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90. *Id.*

91. *Id.* at 1955.

92. *Id.* at 1961–62 (Breyer, J., dissenting).

93. U.S. CONST. amends. IV, V, and VI.

94. These Rules took effect in 1946. George H. Dession, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L.J. 197, 255 (1947).

95. In federal court, probable cause is used to evaluate search warrants, arrest warrants, complaints, and indictments. *See generally infra* notes 106–125 and accompanying text. Still, probable cause is not the only standard in this context. For instance, reasonable suspicion governs investigative "stops." *See generally* WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE 212–23 (4th ed. 2004).

96. *Brinegar v. United States*, 338 U.S. 160, 176 (1949); ROBERT M. BLOOM, SEARCHES, SEIZURES, AND WARRANTS 56 (2003).

97. *Brinegar*, 338 U.S. at 175–76 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

98. *Id.* at 175 (quoting *McCarthy v. De Armit*, 99 Pa. 63, 69 (Pa. 1881)).

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probable cause. First, as the definitions above make clear, probable cause is an objective concept based on facts. Because it is based on particular facts, probable cause is context specific; it applies differently depending on the facts of the situation.<sup>99</sup> Second, probable cause is "flexible," "nontechnical," "practical," and a matter of "commonsense."<sup>100</sup> These qualities ensure that probable cause may be easily applied by law enforcement and by juries.<sup>101</sup> Even though probable cause is objective, when determining probable cause officers may look to their individual experiences to draw inferences from facts,<sup>102</sup> and a court that reviews the officer's conduct should defer to judgments based upon such experience.<sup>103</sup> Third, probable cause is a matter of probabilities.<sup>104</sup> The Supreme Court has refused to state exactly what probability is required by probable cause, though some commentators have found that the Supreme Court's opinions suggest "a more-probable-than-not test."<sup>105</sup>

During the investigative stage, probable cause limits the state's vast investigative powers. The Fourth Amendment ordinarily requires that law enforcement have probable cause before interfering with a citizen's significant privacy or property interests.<sup>106</sup> For a search, probable cause requires a showing not only that an offense has occurred, but also "that evidence bearing on that offense will be found in the place to be searched."<sup>107</sup> Similarly, for an arrest, probable cause requires a showing not only that an offense has occurred, but also that the arrestee committed the offense.<sup>108</sup>

Traditionally, law enforcement had to secure a search warrant, based on probable cause, before conducting a search.<sup>109</sup> Although this warrant

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99. *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

100. *Ornelas v. United States*, 517 U.S. 690, 695 (1996); *Gates*, 462 U.S. at 238–239; *Texas v. Brown*, 460 U.S. 730, 742 (1983); *Brinegar*, 338 U.S. at 176.

101. *See Brown*, 460 U.S. at 742 (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)); *United States v. Ventresca*, 380 U.S. 102, 108 (1965).

102. *Pennsylvania v. Dunlap*, 129 S. Ct. 448, 448 (2008) (quoting *Ornelas*, 517 U.S. at 700); *United States v. Ortiz*, 422 U.S. 891, 897 (1975).

103. *See Ornelas*, 517 U.S. at 699.

104. *Gates*, 462 U.S. at 232.

105. LAFAVE, *supra* note 95, at 144.

106. *United States v. Knights*, 534 U.S. 112, 121 (2001) ("[T]he Fourth Amendment ordinarily requires the degree of probability embodied in the term 'probable cause'" before police conduct a search.).

107. *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009).

108. *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 n.6 (1978) (quoting Wayne R. LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255), *superseded by statute*, Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (1980) (codified as amended at 42 U.S.C. §§ 2000aa-12).

109. *See, e.g., Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the

“requirement” has been eroded with exceptions, the Supreme Court still recognizes that it is preferable for law enforcement to secure a warrant from a magistrate judge before conducting a search.<sup>110</sup> In evaluating warrant applications, the magistrate must be able to determine probable cause. Because probable cause is fact-based, the magistrate cannot find probable cause based on someone else’s conclusory statements.<sup>111</sup> For instance, in *Nathanson v. United States*, a customs agent applied for a search warrant simply by swearing that “he [had] cause to suspect and . . . believe” that contraband would be found at a certain address.<sup>112</sup> A judge issued the warrant, but the Supreme Court found the warrant invalid because the warrant application did not provide the facts that would allow the judge to find probable cause.<sup>113</sup> Even if a warrant application is full of detail, it still may be inadequate if it fails to provide the facts necessary to establish an essential element of probable cause or if it makes only a conclusory assertion regarding any essential element of probable cause.<sup>114</sup>

Once the state has gathered sufficient evidence to arrest a person, this arrest may proceed by a number of different avenues. First, in many cases, if police officers have probable cause, they may simply arrest the person.<sup>115</sup> Second, the government may file a complaint or an

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judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”).

110. *See, e.g.*, *Georgia v. Randolph*, 547 U.S. 103, 117 (2006) (“[T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers . . .” (quoting *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932))); *Texas v. Brown*, 460 U.S. 730, 735 (1983) (“Our cases hold that procedure by way of a warrant is preferred, although in a wide range of diverse situations we have recognized . . . exceptions to this requirement.”); *see also* BLOOM, *supra* note 96, at 101–02 (discussing the increase in the breadth of exceptions to the warrant “requirement”).

111. *See Illinois v. Gates*, 462 U.S. 213, 239 (1983) (“Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.”); *Nathanson v. United States*, 290 U.S. 41, 47 (1933) (declaring that probable cause must be based on “facts or circumstances,” and the magistrate’s evaluation of a search warrant application must be more than a “[m]ere affirmance of [someone else’s] belief or suspicion”).

112. *Nathanson*, 290 U.S. at 44.

113. *Id.* at 47; *see also Gates*, 462 U.S. at 239 (“An officer’s statement that ‘affiants have received reliable information from a credible person and believe’ that heroin is stored in a home, is . . . inadequate.” (quoting *Aguilar v. Texas*, 378 U.S. 108, 109 (1964))).

114. *See, e.g.*, *United States v. Roach*, 582 F.3d 1192 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1160 (2010). In this case, the police submitted a 120-page affidavit as part of their application to a magistrate for a search warrant. *Id.* at 1197. In seeking a search warrant, an essential element is that evidence of a crime will be found at a particular place. In this case, the police officer’s affidavit stated that the police had determined the suspect resided at 1441 N. Minnesota Street. *Id.* at 1197, 1202. But the police provided no facts to support this assertion. *Id.* at 1203. The court found that the magistrate could not have found probable cause for a search warrant based on this document, because the assertion regarding the address was conclusory. *Id.*

115. *See* BLOOM, *supra* note 96, at 96–98 (discussing the situations where a warrant is or is not

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information. A magistrate then evaluates the complaint or information and, if the magistrate finds probable cause, the magistrate issues an arrest warrant for the person.<sup>116</sup> Third, the government may convene a grand jury and seek an indictment. The grand jury must determine whether there is probable cause to believe that an offense has been committed and the suspect committed it. If the grand jury finds probable cause, the grand jury will issue an indictment. When presented with this indictment, a court must issue an arrest warrant.<sup>117</sup>

Once a suspect has been arrested, various documents may constitute the pleading or charging document, depending on the circumstances. For misdemeanors, the trial "may proceed on an indictment, information, or complaint."<sup>118</sup> An indictment is required for more serious crimes, those punishable by death or "by imprisonment for more than one year."<sup>119</sup>

Federal Rule of Criminal Procedure 3 states that a complaint "is a written statement of the essential facts constituting the offense charged."<sup>120</sup> It is "a sworn statement by a law enforcement officer that there is probable cause to believe a stated federal crime was committed by a named defendant."<sup>121</sup>

Federal Rule of Criminal Procedure 7 provides the procedures for an indictment or information. This Rule states that "[t]he indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged."<sup>122</sup> An information is an assertion, by a prosecutor, that there is probable cause to believe a crime was committed and the defendant committed it.<sup>123</sup> Pursuant to the Fifth Amendment, an indictment cannot issue unless the evidence has been put to a grand jury<sup>124</sup> and, in federal court, the grand jury is

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required in order to make a lawful arrest).

116. FED. R. CRIM. P. 4(a); FED. R. CRIM. P. 9(a).

117. FED. R. CRIM. P. 9(a); *Giordenello v. United States*, 357 U.S. 480, 487 (1958) ("[T]he grand jury's determination that probable cause existed for the indictment also establishes that element for the purpose of issuing a warrant for the apprehension of the person so charged."); KATHLEEN M. BRINKMAN & GLEN WEISSEBERGER, *FEDERAL CRIMINAL PROCEDURE LITIGATION MANUAL* 120–21 (2008).

118. FED. R. CRIM. P. 58(b)(1).

119. FED. R. CRIM. P. 7(a)(1).

120. FED. R. CRIM. P. 3.

121. BRINKMAN & WEISSEBERGER, *supra* note 117, at 64.

122. FED. R. CRIM. P. 7(c)(1).

123. BRINKMAN & WEISSEBERGER, *supra* note 117, at 108. *See also* *Gerstein v. Pugh*, 420 U.S. 103, 117–19 (1975) (discussing whether a prosecutor's "determination of probable cause" in an information is "sufficient alone to justify restraint of liberty pending trial").

124. The Fifth Amendment states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." U.S. CONST. amend. V.

required to find probable cause.<sup>125</sup>

Complaints, informations, and indictments are similar documents. Notably, both Rule 3 and Rule 7 explicitly refer to pleading facts, but Rule 3 requires less. Complaints must sometimes be prepared quickly, and thus the rule governing complaints is less stringent.<sup>126</sup>

Some commentators have also noted the similarity in language between Federal Rule of Criminal Procedure 7 and Federal Rule of Civil Procedure 8.<sup>127</sup> The drafters of the original Rules of Criminal Procedure made clear that they considered Civil Rule 8 when drafting Criminal Rule 7.<sup>128</sup> Like Civil Rule 8, Criminal Rule 7 evidences a desire for simplified pleading. Still, Criminal Rule 7 explicitly requires the pleading of facts, something that is notably absent from Civil Rule 8.<sup>129</sup>

A defendant can challenge an indictment or information through a pretrial motion, pursuant to Rule 12(b)(3)(B), alleging a defect in the charging document.<sup>130</sup> The U.S. Supreme Court has declared that an indictment must: (1) plead all the elements of a charge so that the indictment states a federal offense; and (2) notify the defendant of the charges so that the defendant can build his or her defense and can argue double jeopardy, if warranted.<sup>131</sup> The defendant may move at any time to have the court invalidate an indictment or information, because it fails the first requirement, stating an offense.<sup>132</sup>

Still, criminal charging documents are not very susceptible to such challenges.<sup>133</sup> Generally, a federal court cannot invalidate an indictment that is valid on its face simply because the indictment is based on insufficient evidence.<sup>134</sup> If a court invalidated such an indictment, the

125. See *United States v. Calandra*, 414 U.S. 338, 343 (1974) (A grand jury is responsible for determining “whether there is probable cause.”); BRINKMAN & WEISSENBERGER, *supra* note 117, at 108; 2 JOSHUA DRESSLER & ALAN C. MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE* 10 n.33 (4th ed. 2006). Some state courts allow an indictment to issue based on a showing that is different from probable cause. LAFAVE, *supra* note 95, at 751.

126. BRINKMAN & WEISSENBERGER, *supra* note 117, at 58.

127. See LAFAVE, *supra* note 95, at 885.

128. FED. R. CRIM. P. 7(c) advisory committee notes to 1944 adoption. The advisory committee notes twice refer to Federal Rule of Civil Procedure 8.

129. LAFAVE, *supra* note 95, at 885.

130. FED. R. CRIM. P. 12(b)(3)(B).

131. *Hamling v. United States*, 418 U.S. 87, 117 (1974); *Russell v. United States*, 369 U.S. 749, 763–64 (1962).

132. FED. R. CRIM. P. 12(b)(3)(B).

133. BRINKMAN & WEISSENBERGER, *supra* note 117, at 153 (“Attacks on the institution of a prosecution are rarely successful . . . . Defects in an indictment or information usually are harmless and can be cured by correction or redaction . . . . If the defect is substantive, the government may obtain a superseding indictment or file a superseding information . . . .”).

134. *Costello v. United States*, 350 U.S. 359, 363 (1956) (“An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on

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court would be usurping the grand jury’s role.<sup>135</sup> Moreover, an indictment can be valid even if it only tracks the language of a criminal statute, as long as the pleading provides facts that are sufficient to put the defendant on notice.<sup>136</sup> As for factual adornment, the Second Circuit, for instance, only requires a general statement of the time and place of the offense.<sup>137</sup>

#### IV. SIMILARITIES BETWEEN THE NEW GENERAL CIVIL PLEADING STANDARD AND PROBABLE CAUSE

This Part shows that the new general civil pleading standard is, in many regards, surprisingly similar to probable cause. Still, similarities between civil and criminal pleading are not entirely of recent vintage. Even before *Twombly* and *Iqbal*, the civil complaint and the criminal indictment shared similar attributes. As previously noted, Federal Rule of Criminal Procedure 7 was modeled after Federal Rule of Civil Procedure 8. Both rules call for a plain and concise statement, although Criminal Rule 7 explicitly calls for a statement of facts. Both civil complaints and criminal indictments must provide adequate notice and must plead all the elements necessary to make out a claim. Indeed, before *Twombly* and *Iqbal*, these were the core functions of both civil complaints and criminal indictments. Finally, civil and criminal defendants can move to dismiss pleading documents, and, before *Twombly* and *Iqbal*, reviewing courts applied a rather deferential standard to both civil complaints and criminal indictments.

With *Twombly* and *Iqbal*, the Supreme Court somewhat altered these dynamics, and the Court established a new general civil pleading standard that appears similar to probable cause. First, the requisite inquiry is similar. In *Twombly*, the Court stated that the new general civil pleading standard “calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”<sup>138</sup> This inquiry is similar to the inquiry for a search in criminal law. There, the question is whether the facts are such that a reasonable person would be warranted in believing that an offense has been committed and evidence of the offense will be found in a particular place.<sup>139</sup> In *Iqbal*,

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the merits.”); *United States v. Calandra*, 414 U.S. 338, 345 (1974).

135. *See Costello*, 350 U.S. at 362–63 (quoting *United States v. Reed*, 27 F.Cas. 727, 738 (N.Y. Cir. Ct. 1852)).

136. *Hamling v. United States*, 418 U.S. 87, 117–18 (1974).

137. *See United States v. Elliott*, 363 F. Supp. 2d 439, 450 (N.D.N.Y. 2005) (citing *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999)).

138. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

139. *See supra* note 107 and accompanying text.

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the Supreme Court declared that the inquiry for civil pleadings is whether the plaintiff has pleaded “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>140</sup> This inquiry is similar to the inquiry for a criminal arrest. For an arrest, the facts must be such that a reasonable person would be warranted in believing that an offense has occurred and that the defendant committed it.<sup>141</sup> The statement in *Iqbal* is also consistent with the Supreme Court’s statement that the substance of probable cause is a reasonable ground for believing that a defendant is guilty.<sup>142</sup> Notably, the Supreme Court has not stated that “plausibility” analysis is an objective inquiry like probable cause; it is not necessarily based on what a “reasonable person” would do. Yet, in general, the “plausibility” inquiry is strikingly similar to probable cause because: (1) it must be based on facts; (2) it must be guided by or based upon reason; and (3) the ultimate question is whether misconduct has been committed, whether the defendant committed it, and whether evidence of the misconduct might be discovered.

Second, the Supreme Court has also made clear that “plausibility” is a context-specific inquiry that should be guided by experience and common sense.<sup>143</sup> The Court has made the same statements about probable cause.<sup>144</sup> Yet, the Court has typically only invited *law enforcement officers*, and not judges, to rely upon their experience when figuring probable cause.<sup>145</sup> With *Twombly* and *Iqbal*, the Court invited judges to rely upon their experience.<sup>146</sup>

Third, the Supreme Court has stated that conclusory statements are not entitled to an assumption of truth in applying the “plausibility” standard.<sup>147</sup> Likewise, when magistrate judges consider probable cause applications, they cannot rely upon purely conclusory assertions.<sup>148</sup>

Finally, “plausibility” analysis seems to be a matter of probabilities, much like probable cause. True, the Supreme Court has stated that the “plausibility” standard “does not impose a probability requirement.”<sup>149</sup>

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

141. *See supra* note 108 and accompanying text.

142. *See supra* note 98 and accompanying text.

143. *Iqbal*, 129 S. Ct. at 1950.

144. *See supra* notes 99–100, 102–103 and accompanying text.

145. *See supra* notes 102–103 and accompanying text.

146. *See Iqbal*, 129 S. Ct. at 1950 (“[T]he reviewing court [should] draw on its judicial experience . . .”).

147. *Id.* (“[P]leadings that . . . are no more than conclusions, are not entitled to the assumption of truth.”).

148. *See supra* notes 111–114 and accompanying text.

149. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). But, as Professor Darrell Miller

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This statement, however, does not make sense without understanding what “plausibility” and “probability” mean.<sup>150</sup> “Plausibility” means that something is “seemingly true,” but the term also often implies disbelief.<sup>151</sup> “Probable” means that something is reasonably likely.<sup>152</sup> If an incident may be explained in two or more ways, one might suppose that several of the explanations could be plausible, even if the explanations directly conflict, especially if each explanation is viewed in isolation. That is, several explanations could seem to be true. In addition, one explanation could be probable or likely, and another could still be plausible. In other words, if one explanation is probable, this explanation does not necessarily render other explanations implausible.<sup>153</sup>

These arguments can be illustrated through the facts of *Iqbal*. In *Iqbal*, the Court declared that it had found the “likely” (i.e. probable) explanation for why the federal government arrested so many Arab Muslims following the terrorist attacks of September 11, 2001: The terrorists were mostly Arab Muslims.<sup>154</sup> Even if this is true, alternative explanations may still be plausible. For instance, discrimination may still be plausible. It may still seem to be a true, valid explanation in this case: Following September 11, 2001, Ashcroft and Mueller may have developed a fear and hatred towards Arab Muslims, because in attacking the Pentagon and planning an attack on the White House, Arab Muslims sought to bring down the very government in which Ashcroft and Mueller were leading officials. Thus, Ashcroft and Mueller decided to arrest and detain Arab Muslims for two interrelated reasons: (1) Arab Muslims had committed the terrorist attacks of September 11, 2001; and (2) Ashcroft and Mueller hated and feared Arab Muslims.

Yet, in both *Twombly* and *Iqbal*, the Supreme Court applied a type of “comparative plausibility” that seems to actually impose a probability

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has pointed out, simply “couching the pleading standard as plausibility rather than probability” does not ensure that judges avoid “erroneous judicial decisions” by applying a standard that is similar to or tantamount to probability. Miller, *supra* note 10, at 1006.

150. Here, this Comment analyzes the “plausibility” standard in a somewhat technical fashion. This technical analysis is necessary in order to understand what quantum of proof the “plausibility” standard requires. Nevertheless, this Comment is not suggesting that courts should normally analyze “plausibility” in a technical manner when such courts consider a motion to dismiss. This Comment argues that courts should, instead, evaluate “plausibility” in a non-technical manner. See *infra* Part V.A.

151. WEBSTER’S NEW WORLD DICTIONARY 1091 (2d College ed. 1979).

152. *Id.* at 1132.

153. Take, as an example, a duck-billed platypus. This creature is a mammal with a “duck bill.” Mammals cannot be birds. The two categories are mutually exclusive. If there were a creature very similar to a platypus, one might say the creature is likely a mammal. The same person could rationally conclude, with a hint of disbelief, that it seems to be true that the creature is a bird.

154. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009).

standard. The Court compared two explanations<sup>155</sup> for the conduct at issue and, finding that one explanation was “natural,” “obvious,” or “likely,” the Court determined that the other explanation could not be “plausible.”<sup>156</sup> In practice, the Court’s “plausibility” analysis seems to become a matter of probabilities. For probability, if one explanation is sixty percent likely, then other (mutually exclusive) explanations are only forty percent likely. In other words, if one explanation is probable, then any other (mutually exclusive) explanation is necessarily improbable.

Supposing the Court’s “plausibility” analysis is a matter of probabilities, the next question is what level of probability. In *Iqbal*, the Court found that one explanation was more likely than not (i.e. more than fifty percent), and this finding rendered the alternative explanation implausible. In this case, the Supreme Court seemed to suggest that the facts supported only two explanations, and the Court treated these explanations as mutually exclusive:<sup>157</sup> (1) the defendant’s conduct was motivated by an impermissible discriminatory intent; or (2) the defendant’s conduct was not motivated at all by discriminatory intent, but simply motivated by a desire to catch terrorists who were Arab

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155. In both *Twombly* and *Iqbal*, the Court dealt with only two explanations. The Court has not clarified what would happen if there were more explanations. Perhaps the Supreme Court intends for lower courts to only consider two options. Ostensibly, these two options would always be: (1) the plaintiff’s explanation; and (2) the strongest alternative explanation.

156. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567–68 (2007); *Iqbal*, 129 S. Ct. at 1951–52. In *Twombly*, the Court found “a natural explanation for the noncompetition alleged.” 550 U.S. at 568. This “obvious alternative explanation” was normal competitive behavior. *Id.* at 567. This explanation seemingly rendered the plaintiffs’ explanation implausible. In *Iqbal*, the Court wrote:

[T]hese allegations are consistent with [the defendants’] purposefully designating detainees “of high interest” because of their race, religion, or national origin. *But given more likely explanations, they do not plausibly establish this purpose.* The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts [the plaintiff] alleges[,] the arrests Mueller oversaw were *likely* lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. *As between that ‘obvious alternative explanation’ for the arrests and the purposeful, invidious discrimination [the plaintiff] asks us to infer, discrimination is not a plausible conclusion.*

*Iqbal*, 129 S. Ct. at 1951–52 (emphasis added and citation omitted).

157. Yet, this Comment has already shown that the two explanations are not mutually exclusive.

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Muslims.<sup>158</sup> Because these are the only two options and the Court treated them as mutually exclusive, their probabilities must add up to one hundred percent. According to the Court, the second explanation was “likely” (i.e. more than fifty percent), and this made the first explanation implausible. Simple algebra indicates that, under the Supreme Court’s jurisprudence, an explanation becomes implausible when it is less than fifty percent likely, and seemingly, an explanation becomes plausible when it is at least fifty percent likely—or “more likely than not.” Commentators have attributed this same quantum of proof to probable cause.<sup>159</sup> In sum, although the Supreme Court claims that “plausibility” analysis is not a matter of probabilities, the Supreme Court’s practice in *Twombly* and *Iqbal* suggests that “plausibility” analysis is a matter of probabilities, and “plausibility” analysis imposes the same quantum of proof—more likely than not—that probable cause demands in criminal cases.

#### V. DISCUSSION: VIEWING THE NEW GENERAL CIVIL PLEADING STANDARD THROUGH THE PRISM OF CRIMINAL PROCEDURE

This Part has three subsections: (A) better understanding the new general civil pleading standard; (B) criticizing the new general civil pleading standard; and (C) improving the new general civil pleading standard.

##### A. *Better Understanding the New General Civil Pleading Standard*

If “plausibility” analysis is similar to probable cause, lower courts should be able to easily apply “plausibility” analysis. After all, most judges are familiar with the concept of probable cause, and they feel comfortable applying this concept.<sup>160</sup>

Yet, “plausibility” analysis is not utterly tantamount to probable cause. If “plausibility” analysis were simply probable cause, then the Supreme Court would ostensibly state this fact. Instead, the Supreme Court has denied some of the similarities between “plausibility” analysis and probable cause, declaring for instance that “plausibility” analysis is not a matter of probabilities. This Comment shows that the Supreme Court’s actual practice undercuts this averment. Still, courts cannot simply apply probable cause in the place of “plausibility” analysis.

Courts can, however, better understand the meaning of particular

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

159. See *supra* note 105 and accompanying text.

160. See *supra* note 5 and accompanying text.

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aspects of “plausibility” analysis by looking to similar aspects of probable cause—and to the Supreme Court’s jurisprudence on these aspects of probable cause. One such aspect is experience and common sense. In *Iqbal*, the Supreme Court declared that a reviewing court should “draw on its judicial experience and common sense” when figuring “plausibility.”<sup>161</sup> The Supreme Court has not clarified exactly how lower courts should apply “common sense” and “judicial experience” in “plausibility” analysis. Some commentators have lamented that these terms make “plausibility” analysis highly subjective,<sup>162</sup> or that the terms seem to “permit judges to use their own opinions to assess the sufficiency of facts to decide motions to dismiss.”<sup>163</sup> Yet, the Supreme Court has used similar language in describing probable cause, even though probable cause is an objective concept.<sup>164</sup> Thus, the Supreme Court’s statement in *Iqbal* does not necessarily mean that “plausibility” analysis is utterly subjective or even highly subjective.

In the context of probable cause, “common sense” does not seem to denote a body of substantive knowledge, but rather a method of analysis used by ordinary people. The Supreme Court often lists “common sense” alongside such terms as “practical” and “non-technical.”<sup>165</sup> In like manner, the Court contrasts “common sense” with terms such as “hypertechnical.”<sup>166</sup> The Court is making the point that probable cause should be applied in a non-technical manner, in a manner that is simple, easy, and intuitive. Probable cause is thus not a matter of discrete elements that must be carefully analyzed at great length.<sup>167</sup> Probable cause is neither esoteric nor arcane. By making probable cause a matter of common sense, the Supreme Court intends to make probable cause

161. *Iqbal*, 129 S. Ct. at 1950.

162. See, e.g., Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 624 (2010) (The Court’s language is a “highly subjective directive.”); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 530 (2010) (The Court’s language “necessarily adds a more subjective element to a district court’s assessment of whether a plaintiff’s claim should go forward.”); Blair-Stanek, *supra* note 10, at 39 n.322 (“Experience and common sense inherently invite a subjective analysis.”).

163. Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 31 (2010).

164. LAFAYE, *supra* note 95, at 143 (“The probable cause test . . . is an objective one.”).

165. See *supra* note 100 and accompanying text.

166. See *United States v. Ventresca*, 380 U.S. 102, 109 (1965) (“[W]hen a magistrate has found probable cause [to issue a warrant], the [reviewing] courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner.”).

167. See *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (“In dealing with probable cause, . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”).

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accessible to, and comprehensible to, those lacking formal legal training—particularly police officers and jurors.<sup>168</sup> In this context, when the Court writes about “common sense,” the Court is not calling on judges to use some idiosyncratic brand of common sense. Instead, the Court is calling on judges to apply probable cause in a way that “practical people”<sup>169</sup> or “reasonable and prudent men”<sup>170</sup> would apply the concept—so that everyday people can understand and apply the concept. These dictates are consistent with an objective standard, where “objective standard” means “[a] legal standard that is based on conduct and perceptions external to a particular person.”<sup>171</sup>

“Experience” is another term that the Supreme Court employs in the probable cause context. Law enforcement officers are allowed to use their experience when drawing inferences from facts.<sup>172</sup> If one closely examines Supreme Court jurisprudence, however, one finds that officers are primarily (if not exclusively) supposed to draw on their training and experience as law enforcement officers, rather than drawing on all of their life experiences.<sup>173</sup> Thus, “experience” is less of a call to subjectivity than it might at first seem. Indeed, the Supreme Court has repeatedly stated that, even if probable cause depends on “experience,” probable cause is an objective concept.<sup>174</sup> Probable cause should therefore be understood as asking: given the facts and circumstances in this case, what would a reasonable person *in the position of the police officer* do?<sup>175</sup>

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168. *See Ventresca*, 380 U.S. at 108 (“[A]ffidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area.”).

169. *United States v. Cortez*, 449 U.S. 411, 418 (1981) (“Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence . . . must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.”).

170. *See supra* note 167.

171. BLACK’S LAW DICTIONARY 1441 (8th ed. 2004).

172. *See supra* notes 102–103 and accompanying text.

173. *See Ornelas v. United States*, 517 U.S. 690, 692, 699 (1996) (noting that an officer had “25 years of law enforcement experience” and that officers view “facts through the lens of . . . police experience and expertise”); *Cortez*, 449 U.S. at 418 (“[A] trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.”); *United States v. Ortiz*, 422 U.S. 891, 897 (1975) (Border patrol officers may draw on “their prior experience with aliens and smugglers.”); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975) (same).

174. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 166 n.2 (1992) (stating that probable cause is objective); *United States v. Ross*, 456 U.S. 798, 808 (1982) (“[T]he probable-cause determination must be based on objective facts . . .”); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (Probable cause is “an objective standard.” (internal citation omitted)).

175. A similar objective standard is used in other contexts, such as Federal Rule of Evidence

This probable cause jurisprudence may help one understand “plausibility” analysis. For “plausibility” analysis, the Supreme Court has commanded lower courts to use common sense, but the Court has provided little guidance in describing what this requires.<sup>176</sup> In the probable cause context, “common sense” denotes a practical, non-technical approach that is comprehensible to ordinary people; “common sense” is a rejection of formal legal analysis.

For several reasons, the Supreme Court seems to embrace this definition of common sense in the context of “plausibility” analysis. First, in both *Twombly* and *Iqbal*, the Court stressed that “‘a formulaic recitation of the elements of a cause of action will not’” enable a complaint to survive a motion to dismiss.<sup>177</sup> Thus, the Court made clear that lower courts cannot apply a technical analysis that simply looks for a statement of each element in the cause of action. Instead, courts must apply a common sense approach that goes beyond confirming that each element is stated in the complaint. Second, in *Conley*, the Supreme Court interpreted Federal Rule of Criminal Procedure 8 as a rejection of the formalism that allowed courts to dismiss complaints on overly technical grounds.<sup>178</sup> In *Twombly*, the Court unequivocally abandoned portions of *Conley*.<sup>179</sup> In *Iqbal*, the Court made clear that, although it had abandoned parts of *Conley*, it was not returning to the formalism and technicality of the pre-*Conley* era. The majority explicitly

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804(b)(3), qualified immunity, and the Model Penal Code’s negligence standard. Federal Rule of Evidence 804(b)(3) examines what “a reasonable person in the declarant’s position would” or would not do. FED. R. EVID. 804(b)(3). Likewise, in *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), the Supreme Court cast the qualified immunity inquiry as “the objective (albeit fact-specific) question whether a reasonable officer could have believed [that the defendant’s] warrantless search [was] lawful, in light of clearly established law and the information the searching officers possessed.” For negligence, the Model Penal Code states in part:

The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

MODEL PENAL CODE § 2.02 (2001).

176. The *Twombly* majority only once used the phrase “common sense.” In a footnote, the majority quoted and then rebuffed the dissent, which referred to “the common sense of Adam Smith” in order to argue that the majority should reach a different conclusion. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 n.12 (2007). The *Iqbal* majority also only once used the phrase “common sense”—when the Court stated that reviewing courts should draw on their “judicial experience and common sense.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

177. *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555).

178. See *Conley v. Gibson*, 355 U.S. 41, 48 (1957) (“The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome . . .”), *abrogated by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

179. *Twombly*, 550 U.S. at 563 (*Conley*’s “no set of facts” language “has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard.”).

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reaffirmed that Rule 8 was a "departure from the hyper-technical, code-pleading regime of a prior era," and just two sentences after this statement, the Court stated that lower courts must use common sense when evaluating civil complaints.<sup>180</sup>

In the context of "plausibility" analysis, the Supreme Court has also called on reviewing courts to use their "judicial experience." Some writers have suggested that "judicial experience" is tantamount to "legal experience," "personal experience," or "life experience."<sup>181</sup> These interpretations are incorrect. Courts should construe "judicial experience" so that its meaning is similar to "law enforcement experience" in the context of probable cause. In other words, the Supreme Court is not asking judges to draw upon all their life experiences, but just to draw on their experiences as judges.<sup>182</sup> This

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180. *Iqbal*, 129 S. Ct. at 1950. Some courts have indeed adopted an academic or technical approach to reviewing motions to dismiss. See *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. 1993) (en banc) (A motion to dismiss "is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action."). The U.S. Supreme Court seemingly rejected this approach in *Iqbal* when the Court called for "common sense."

181. See, e.g., Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 516 (2010) (seemingly treating "judicial experience" as "life experience" and exploring the idea that "[d]ifferent judges with different life experiences will . . . reach different conclusions about plausibility"); Jay S. Goodman, *Two, New, U.S. Supreme Court Cases Raise the Question: Is Notice Pleading Dead?*, R.I. B.J., Jan.-Feb. 2010, at 5, 9 ("The 'context' based 'plausibility' standard, in which judges apply their experience and common sense would seem to lead to different outcomes based upon the differences among District Court judges in [legal] experiences (tort lawyers versus corporate lawyers) . . ."); Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 282 (2009) (discussing "personal experience" in the context of "judicial experience" and stating that "[t]he risk of applying [judicial experience and common sense] in employment discrimination litigation is that it will bring to the fore the experiences and assumptions . . . of the reviewing judge about whether discrimination is a continuing problem in the workplace as a general matter").

182. The Supreme Court implicitly illustrated the distinction between these two types of experience in a death penalty case. See *Furman v. Georgia*, 408 U.S. 238 (1972). In this case, Justice White drew upon what might be called his judicial experience, and he concurred in the judgment of the Court. He stated that his conclusion in this case was:

based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty. That conclusion . . . is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.

*Id.* at 313 (White, J., concurring in judgment); see also *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in judgment) ("[J]ust as Justice White ultimately based his conclusion in *Furman* on his extensive exposure to countless cases for which death is the authorized penalty, I have relied on my own experience in reaching the conclusion that the imposition of the death penalty" violates the Eighth Amendment).

In *Furman*, Justice Marshall also concurred in the judgment, but he seemed to draw upon a wider array of experiences in order to arrive at this conclusion. Marshall asked himself whether capital punishment "is morally acceptable to the American public," and he answered this question by examining

interpretation is most consistent with the plain language of the term “judicial experience.” Thus, in a discrimination case, judges are not necessarily supposed to ask themselves: have I ever been the subject of the type of discrimination alleged in this complaint? But they may ask: in my judicial experience, when a plaintiff pleads facts such as the facts being pleaded in this case, is the plaintiff *ever* able to ultimately prove discrimination?<sup>183</sup> In other words, judges are only supposed to draw on a limited scope of life experiences.

Still, in *Twombly*, the Court suggested at one point that, when courts evaluate motions to dismiss, they are permitted to draw on a broader array of experiences. The Court stated it was drawing on “common economic experience” in order to decide *Twombly*.<sup>184</sup> Yet, one must remember that *Iqbal* clarified *Twombly* and, arguably, it reinterpreted *Twombly*.<sup>185</sup> Thus, the Court displaced its earlier dicta concerning “common economic experience” with its more recent statement concerning “judicial experience.” And this latter statement ought, rightly, to be given its plain and obvious meaning.

In sum, when the Supreme Court wrote of “judicial experience and common sense” in *Iqbal*, the Court was not necessarily calling for utter subjectivity in “plausibility” analysis. Instead, by employing the term “common sense,” the Court may simply have been directing lower courts to apply “plausibility” in a non-technical way that makes the analysis accessible and comprehensible to ordinary people. In addition,

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his own life experiences:

[J]udges have not lived lives isolated from a broad range of human experience. They have come into contact with many people, many ways of life, and many philosophies. They have learned to share with their fellow human beings common views of morality. If . . . judges conclude that these people would not knowingly tolerate a specific penalty in light of its costs, then this conclusion is entitled to weight.

*Furman*, 408 U.S. at 369 n.163 (Marshall, J., concurring in judgment).

183. See Blair-Stanek, *supra* note 10, at 34 (“Judicial experience” is the experience “of seeing the dispositions of similar cases.”). This inquiry is quite similar to the inquiry sometimes employed when a defendant moves for summary judgment: viewing the facts in the light most favorable to the plaintiff, could a reasonable jury find for the plaintiff at trial? See Thomas, *supra* note 163, at 20 (discussing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). Thus, as other scholars have noted, *Twombly* and *Iqbal* have made motions to dismiss more like motions for summary judgment. See *id.* at 29–31; Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61 (2007); see also Thomas, *supra* note 10, at 1857 (“In *Twombly* and *Tellabs*, the Court established standards for dismissal at the motion to dismiss stage that are similar to the standard for summary judgment.”).

184. *Twombly*, 550 U.S. at 565 (The “sufficiency [of the complaint] turns on the suggestions raised by [the ILECs’ parallel behavior] when viewed in light of common economic experience.”).

185. Justice Souter wrote the majority opinion in *Twombly*, and he believed that, in *Iqbal*, the majority misapplied the pleading standard he had enunciated in *Twombly*. *Iqbal*, 129 S. Ct. at 1955 (Souter, J., dissenting). Likewise, Justice Breyer joined the majority in *Twombly*, but joined the dissent in *Iqbal*.

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by employing “judicial experience,” the Court was not giving judges a license to draw upon all of their life experiences, but only upon their experiences as judges. Thus, this may only inject a modicum of subjectivity into the “plausibility” analysis. Moreover, in the context of probable cause, the Supreme Court has allowed consideration of “common sense” and “experience,” and yet probable cause remains an objective concept. Probable cause seems to call for this inquiry: given the facts and circumstances in this case, what would a reasonable person *in the position of the police officer* do? The Supreme Court could adopt a similar objective standard for “plausibility” analysis, though the Court has not yet explicitly done so.

### *B. Criticizing the New General Civil Pleading Standard*

In addition to helping elucidate the new general civil pleading standard, criminal procedure can be compared to civil pleading in order to highlight problems and inconsistencies with the new civil pleading standard. First, when the Federal Rules of Criminal Procedure are read together with the Federal Rules of Civil Procedure, these rules suggest that civil litigants should not be required to adorn their pleadings with facts. When Federal Rule of Criminal Procedure 7 was promulgated, the drafters looked to and considered Federal Rule of Civil Procedure 8.<sup>186</sup> The drafters decided to adopt, for the criminal rules, language requiring the pleading of specific facts.<sup>187</sup> This decision reflects the drafters’ understanding that Civil Rule 8 did not require the pleading of specific facts. This decision also shows how easily and explicitly a requirement of fact-pleading may be made. Simply because the civil rules do not explicitly require fact-pleading, one may assume that Civil Rule 8 was not intended to require fact-pleading.

Logic also confirms that, while the government may be required to plead facts in a criminal case, a private litigant should not be required to do so in a civil case. The government possesses vast resources that may be allocated toward fact-gathering in a criminal case.<sup>188</sup> True, the

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186. See *supra* note 128 and accompanying text.

187. See FED. R. CRIM. P. 7(c).

188. See *Lassiter v. Dep’t of Soc. Servs. of Durham County, N.C.*, 452 U.S. 18, 46 (1981) (Blackmun, J., dissenting) (“[T]he State . . . commands great investigative and prosecutorial resources . . .”); *Wardius v. Oregon*, 412 U.S. 470, 480 (1973) (Douglas, J., concurring in result) (“[T]he Constitution recognized the awesome power of indictment and the virtually limitless resources of government investigators.”); *Adams v. Illinois*, 405 U.S. 278, 291 & n.6 (1972) (Douglas, J., dissenting) (“The State . . . [has] access to superior investigative resources . . .”). See also *Britt v. North Carolina*, 404 U.S. 226, 236 n.7 (1971) (Douglas, J., dissenting) (comparing the State’s vast investigative resources to the relatively meager resources available to the average criminal defendant).

government is restrained by the Fourth Amendment, whereas private individuals are not. Nevertheless, one must view the Fourth Amendment in context—as a restraint on an otherwise incredibly far-reaching power to investigate.<sup>189</sup> Thus, the government should be required, in preparing an indictment, to provide the facts establishing probable cause and to lay out a factually-adorned pleading.

A private litigant simply is not in the same position as the government to investigate and gather facts. A private litigant often does not have the same vast resources or the same amount of investigative power. Thus, by requiring fact-pleading from private litigants, the Supreme Court is placing an unfair burden on these litigants.

A second comparison between civil and criminal pleading comes from the different definitions of probable cause. For a search, probable cause requires a showing that a reasonable person would be justified in believing that a crime was committed and that evidence of that crime may be found at a particular place.<sup>190</sup> For an arrest, probable cause requires a showing that a reasonable person would be justified in believing that a crime was committed and that the defendant committed the crime.<sup>191</sup> Grand juries employ this latter definition when they consider whether to issue an indictment allowing a prosecution to move forward. Thus, in criminal law, at the point where a grand jury is convened, the central question is whether an offense has occurred and whether the defendant committed it.<sup>192</sup>

In *Twombly* and *Iqbal*, the Supreme Court presented two inquiries for “plausibility” analysis. As this Comment shows above, one inquiry is similar to a search inquiry, and the other is similar to an arrest inquiry. In *Twombly*, the Court stated that the issue was whether the plaintiff had provided sufficient facts to make it plausible that discovery would reveal evidence of illegal agreement.<sup>193</sup> This inquiry is similar to a search inquiry, and it seems like the wrong question to ask when considering whether a case is viable at the pleading stage. Instead, the focus should be on whether misconduct has been committed and whether the defendant committed it.

The Supreme Court has created potential problems by adopting a search inquiry at the pleading stage of civil actions. Ostensibly, a court

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189. As Justice Douglas famously noted, the Fourth Amendment places a necessary restraint on the government’s otherwise “untrammelled power to invade one’s home and to seize one’s person.” See *Mapp v. Ohio*, 367 U.S. 643, 671 (1961) (Douglas, J., concurring).

190. See *supra* note 107 and accompanying text.

191. See *supra* note 108 and accompanying text.

192. *United States v. Dionisio*, 410 U.S. 1, 15 (1973) (“A grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it.”).

193. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

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could find that a plaintiff’s claim, as presented in the civil complaint, is not plausible—but the court could find plausible that, if the case goes forward to discovery, evidence of misconduct will be found. Take, for example, a case where the plaintiff has been injured by the employee of a company, and the identify of the employee is unknown.<sup>194</sup> The company is not cooperative with the plaintiff, and the company denies any wrongdoing. The plaintiff sues the company under the theory of *respondeat superior*,<sup>195</sup> even though he does not plead facts that would make plausible the assumption that the company is liable under this theory. For instance, the plaintiff might not plead facts showing that the alleged misconduct occurred within the scope of employment, which is a necessary prerequisite for *respondeat superior* liability.<sup>196</sup> Still, the plaintiff might also plead facts strongly suggesting that the company possesses the documents that could determine who is liable. In other words, it is plausible that, if this case continues to discovery, evidence of liability will be found. The Court does not make utterly clear in *Twombly* or *Iqbal* whether such a case could survive a motion to dismiss, but presumably it would not.

A final comparison arises from the quantum of proof required by “plausibility” analysis. As this Comment demonstrates, this quantum of proof seems to become, when the Supreme Court actually applies “plausibility” analysis, tantamount to more-likely-than-not, the same quantum of proof that is required for probable cause. This quantum of proof makes sense at the pleading stage in the criminal context because the stakes are high for a criminal defendant. The defendant faces the potential of losing his or her liberty. Moreover, the quantum of proof at the pleading stage is less than the quantum ultimately required for conviction, where the standard for conviction is “beyond a reasonable doubt.”<sup>197</sup>

These considerations do not apply in civil actions. Civil defendants do not face the potential loss of liberty, but only the potential loss of time, money, and reputation. Moreover, the quantum of proof at trial is,

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194. This hypothetical is based, in part, on *Smith v. Troyer Potato Prods.*, No. 74522, 1999 WL 561552 (Ohio Ct. App. July 29, 1999) (plaintiff was riding a motorcycle and was hit by a truck that allegedly bore the defendant company’s name, even though the company denied having a truck in the area at that time, and the plaintiff could not establish the identity of the driver).

195. Under the doctrine of *respondeat superior*, “an employer is subject to liability for torts committed by employees while acting within the scope of their employment.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1958 (2009) (Souter, J., dissenting) (quoting RESTATEMENT (THIRD) OF AGENCY § 2.04 (2005)).

196. *Id.*

197. *In re Winship*, 397 U.S. 358, 364 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

in most civil actions, by a preponderance of the evidence.<sup>198</sup> Thus, it seems foolish, or at least unfair, to weigh the evidence according to this same quantum of proof (more-likely-than-not) at both the pleading stage and at the end of trial.<sup>199</sup>

### *C. Improving the New General Civil Pleading Standard*

This Comment has shown that one may use criminal pleading jurisprudence in order to elucidate the faults with civil “plausibility” analysis. This same jurisprudence also suggests at least three ways to improve “plausibility” analysis. First, the Supreme Court has not expressly made “plausibility” analysis an objective inquiry, but this Comment shows that the Court could adopt an objective (“reasonable person”) inquiry and could still require that courts apply common sense and judicial experience. This objective inquiry would ask the following question: taking all the non-conclusory allegations of this complaint as true, would a reasonable person with the judicial experience of this reviewing court find it plausible that misconduct occurred and that the defendant is liable for that misconduct? Courts would also apply this inquiry in a common sense manner. If the Supreme Court adopted this standard, the Court could ostensibly quiet many critics of “plausibility” analysis, who feel that the current standard is too subjective.<sup>200</sup> Moreover, commentators often consider objectivity, alongside fairness and consistency, as a fundamental value of courts and legal systems.<sup>201</sup> Thus, the Court could increase judicial legitimacy if it adopted this objective inquiry.

Still, this inquiry does present some potential problems. By adding the objective component, the inquiry begins to closely resemble the inquiry for summary judgment: viewing all the facts in the light most favorable to the non-moving party, could a reasonable jury find for the non-moving party?<sup>202</sup> Other authors have suggested that, if the motion

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198. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983) (“In a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence.”).

199. Still, this Comment is not arguing that the procedures for evaluating a motion to dismiss a civil complaint are tantamount to the procedures used to weigh the evidence at trial. As the Supreme Court has noted in the criminal context, probable cause is not a “finely tuned,” technical standard, “comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence.” *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983)).

200. See *supra* notes 162–163 and accompanying text.

201. See, e.g., Robert A. Creo, *Mediation 2004: The Art and the Artist*, 108 PENN ST. L. REV. 1017, 1032 (2004) (Objectivity is among “[t]he core values of courts.”).

202. See *supra* note 183.

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to dismiss takes the form of the motion for summary judgment, then the motion to dismiss may violate the Seventh Amendment right to trial by jury.<sup>203</sup> However, authors have also argued that *Twombly* and *Iqbal* inevitably create these clashes with the Seventh Amendment.<sup>204</sup> In other words, the proposals in this Comment do not produce a new conflict with the Seventh Amendment; they simply suffer from the inevitable Seventh Amendment conflicts that follow from *Twombly* and *Iqbal*. This Comment does not attempt to directly address or resolve these conflicts because they are beyond the Comment’s scope.<sup>205</sup>

Besides constitutional concerns, additional problems are created when the motion to dismiss becomes similar to the motion for summary judgment. As one scholar has argued, “[i]t may not be appropriate to treat summary judgment and the motion to dismiss similarly because of the difference in the availability of discovery under the motions, the difference in cost surrounding the motions, and the difference in the role of the courts under the motions.”<sup>206</sup>

This Comment addresses some of these additional concerns by proposing a second improvement to “plausibility” analysis: discovery should be more readily available before a court rules on a motion to dismiss. If civil plaintiffs must now plead facts, they should be able to conduct some form of discovery in order to uncover those facts. They should be able to secure something like a search warrant or a warrant to conduct limited discovery before a court rules on a 12(b)(6) motion to dismiss,<sup>207</sup> and perhaps even before suit is filed.<sup>208</sup> Litigants would

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203. See Thomas, *supra* note 10, at 1857, 1871–1872 (arguing that the motion to dismiss has become similar to the motion for summary judgment and that the motion to dismiss now violates the Seventh Amendment). See also Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007). If summary judgment is unconstitutional, as Thomas argues, then a motion to dismiss, in the form of a motion for summary judgment, would also be unconstitutional.

204. Klein, *Seventh Amendment*, *supra* note 10, at 481 (“*Iqbal* inevitably clashes with the Seventh Amendment.”); Klein, *Rule 8*, *supra* note 10, at 287 (“*Twombly* took [Federal] Rule [of Civil Procedure] 8 on a path that could not be squared with the Seventh Amendment, as interpreted under the historical test.”).

205. The curious reader may refer to existing scholarship on this topic. See Klein, *Seventh Amendment*, *supra* note 10; Klein, *Rule 8*, *supra* note 10; Thomas, *supra* note 10.

206. Thomas, *supra* note 163, at 41–42. For an argument that motions to dismiss *should* sometimes be treated like motions for summary judgment, see Epstein, *supra* note 183.

207. Cf. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1961 (2009) (Breyer, J., dissenting) (suggesting that, where a civil complaint is weak, the solution in some cases is to allow limited discovery). Notably, courts do sometimes allow discovery before ruling on other 12(b) motions such as a 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction, a 12(b)(4) motion to dismiss for insufficient process, a 12(b)(5) motion to dismiss for insufficient service of process, and a 12(b)(7) motion to dismiss for failure to join a party under Rule 19. See 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1350, 1353 (3d ed. 2004); 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1359 (3d ed. 2004).

208. See Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit*

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petition a court for such a warrant, and the court would employ an objective inquiry to determine if the warrant should issue.<sup>209</sup> This inquiry could have the following form: taking all the non-conclusory allegations of this complaint as true, would a reasonably prudent person with the judicial experience of this reviewing court find it plausible that limited discovery of this defendant would yield evidence of liability for the acts alleged in the complaint?

Finally, this Comment shows that “plausibility” analysis, as applied by the Supreme Court, becomes a matter of more-likely-than-not probability. This standard is too high. The error does not lie in the way that the Supreme Court has described “plausibility” analysis, but rather in the way that the Supreme Court has applied this analysis. In particular, the Supreme Court has adopted a comparative analysis, wherein it: (1) distills two explanations for the same conduct; (2) treats these explanations as mutually exclusive; and (3) determines which explanation is likely. This comparative analysis might make sense when evaluating probabilities, but it does not make sense when evaluating plausibility. Thus, the Court should abandon its comparative analysis in favor of an analysis that simply asks: Is the plaintiff’s explanation plausible? Does the plaintiff’s explanation seem to be true?

## VI. CONCLUSION

With *Twombly* and *Iqbal*, the Supreme Court adopted a new general civil pleading standard that is shockingly similar to the probable cause standard that pervades criminal law. Perhaps most disturbing is that, in *Twombly* and *Iqbal*, the Court adopted a quantum of proof that appears to be more-likely-than-not, the same quantum of proof that is typically associated with probable cause. This Comment has attempted to explore how the Supreme Court’s probable cause jurisprudence can shed light on the new general civil pleading standard. Specifically, the Supreme Court’s probable cause jurisprudence suggests that the new general civil pleading standard may not be as subjective as many commentators have assumed. Moreover, the Court may make this standard even more objective without abandoning the standard’s core framework. Still, this observation does not mean that the new standard is error-free. The

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*Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217 (2007) (discussing *presuit* investigatory discovery, which is available in some states but is generally unavailable in the federal courts, and arguing that such discovery affects litigants’ access to justice because it gives them access to information that may be essential to initiating a suit).

209. *See id.* at 273–74 (“[I]f a broader grant of investigatory discovery is given to private parties . . . judges should maintain an active oversight role to ensure that the tools are not misused.”).

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standard seems to require fact-pleading, even though numerous reasons militate against such a requirement, and the standard establishes a quantum of proof that is all too high.

These problems may be fixed in a variety of ways. Congress may take action to change the new standard. Indeed, both the Senate and the House of Representatives are considering bills to return civil pleading to pre-*Conley* “notice pleading.”<sup>210</sup> Nevertheless, these bills have only just been referred to committee, and they have few cosponsors.<sup>211</sup> These bills may languish in committee for quite some time, and they may never even become law.

In the meantime, the Supreme Court seems unlikely to utterly abandon the new general civil pleading standard. Justices Souter and Breyer did move from the *Twombly* majority to the *Iqbal* dissent, but they ostensibly only disagreed with the way that the majority construed *Twombly*.<sup>212</sup> They were not ready to return to the pre-*Twombly* standard. True, Justice Souter has now been replaced by Justice Sotomayor, but even if Justice Sotomayor were inclined to overturn *Twombly*, she would join, at most, two other Justices—Ginsburg and Kagan—in taking such a position. In addition, the Supreme Court has arguably lost its sharpest critic of *Twombly* and *Iqbal*, Justice Stevens, who recently retired.

Thus, for now, the federal courts are stuck with the new general civil pleading standard, and the question is how this standard should be interpreted. This Comment has suggested how the lower courts may interpret the standard, and it has suggested how the Supreme Court should further refine the standard. Specifically, the Court should make the new standard more objective, and it should allow limited discovery based on a showing that is similar to that used for the issuance of a search warrant. Finally, the Court should move from “comparative plausibility” to simple or direct plausibility. These changes should quiet critics, increase judicial legitimacy, and keep courtroom doors open.

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210. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong., available at <http://www.govtrack.us/congress/bill.xpd?bill=s111-1504> (last visited Dec. 6, 2010); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong., available at <http://www.govtrack.us/congress/bill.xpd?bill=h111-4115> (last visited Dec. 6, 2010).

211. *Id.*

212. *Iqbal*, 129 S. Ct. at 1955, 1960–61 (Souter, J., dissenting) (arguing that the majority misapplied *Twombly* by isolating individual allegations in the plaintiff’s complaint); *id.* at 1961 (Breyer, J., dissenting) (averring that the majority had provided inadequate justification for its interpretation of *Twombly*).