2010

Iqbal, Procedural Mismatches, and Civil Rights Litigation

Howard M. Wasserman

FIU College of Law, howard.wasserman@fiu.edu

Follow this and additional works at: http://ecollections.law.fiu.edu/faculty_publications

Part of the Civil Procedure Commons, Civil Rights and Discrimination Commons, Constitutional Law Commons, Legislation Commons, and the Other Law Commons

Recommended Citation

Available at: http://ecollections.law.fiu.edu/faculty_publications/60

This Article is brought to you for free and open access by the Faculty Scholarship at eCollections @ FIU Law Library. It has been accepted for inclusion in Faculty Publications by an authorized administrator of eCollections @ FIU Law Library. For more information, please contact lisdavis@fiu.edu.
IQBAL, PROCEDURAL MISMATCHES, AND CIVIL RIGHTS LITIGATION

by

Howard M. Wasserman

Understanding the twin pleading cases of Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal from the vantage point of only a few months (or even years) requires as much prediction as explanation. Early confusion is a product of the long-heralded link between substance and procedure. What we are seeing now may be less about Court-imposed changes to procedure as about changes to substantive law and a "mismatch" between new substance and the old procedure of the Federal Rules. Much of the current business of federal courts involves constitutional litigation under 42 U.S.C. § 1983 and Bivens, a species of civil action unheard of when the Federal Rules and the system of notice pleading and broad, wide-ranging discovery were created in 1938. That pleading system arguably does not work with such "modern" litigation and Iqbal reflects the Court's effort to make federal pleading and discovery rules more consistent and more functional with this particularly vulnerable area of new federal substance. Unfortunately, the greater detail demanded by the new pleading rules may be impossible in many civil rights cases, where plaintiffs cannot know or plead essential information with particularity at the outset without the benefit of discovery—discovery that Iqbal stands to deny to plaintiffs who fail to plead with the necessary detail. The predictable result, illustrated by one Ninth Circuit decision just two months after Iqbal, will be a significant decrease in enforcement and vindication of federal constitutional and civil rights.

I. INTRODUCTION ....................................................... 158
II. SUBSTANTIVE EVOLUTION AND SUBSTANCE-PROCEDURE MISMATCHES ....................................................... 161
   A. Procedural Mismatches .................................................. 161
   B. Civil Rights Litigation and Procedural Mismatches .......... 165
III. WHAT IQBAL HATH WROUGHT ................................... 175
   A. Pleading After Iqbal.................................................. 175
IV. CONCLUSION ........................................................................ 183

* Associate Professor of Law, FIU College of Law. Thanks to John Parry and the editors of Lewis & Clark Law Review for inviting me to participate in this symposium. © 2010 Howard M. Wasserman.
I. INTRODUCTION

Understanding the twin pleading cases of Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal from the vantage point of only a few months (or even years) requires as much prediction as explanation. We just do not know much right now. Most commentators are not encouraged. At least some members of Congress seem eager to become involved. Assuming no legislative intervention, early developments under the new regime offer some hints as to where pleading doctrine is and where it is going.

By its terms, Iqbal creates a two-step analysis for evaluating the sufficiency of a complaint in deciding a motion to dismiss under Rule 12(b)(6). First, the court may disregard all conclusory or bald allegations, declining to afford such allegations a presumption of truth. This is so even for allegations for which the plaintiff could not know or add further detail at the outset and without a chance for discovery. Second, the court examines the remaining allegations, according them a presumption of truth, to determine whether the allegations are plausible and whether they plausibly suggest a violation of the application of substantive rights. In determining plausibility, courts seem free to impose their own views of what facts are plausible and what conclusions are plausible (or most
plausible) from the facts pled. At bottom, *Iqbal* is about increased judicial discretion to inquire into and parse the details of complaints, almost certainly producing more 12(b)(6) dismissals, as well as wide variance from case to case, even within the same court. And *Iqbal* and *Twombly* together inextricably link pleading and discovery—the motivation for the apparent move to strengthen pleading as a threshold hurdle was the perceived need to protect defendants from wide-ranging, expensive, burdensome, and distracting discovery.

The uncertain state of pleading demonstrates anew the long-heralded link between substance and procedure. What we are seeing now may be less about changes to procedure than about changes to substantive law and what Thomas Main describes as a "mismatch" between substance and procedure. In the face of a mismatch, either substance or procedure must evolve to keep them from undermining one another. *Iqbal* reflects an effort by the Court to make federal pleading and discovery rules function in one particularly vulnerable area of federal substance—constitutional litigation against federal officials. Arguably, however, that effort will have the opposite substantive effect.

The paradigm of federal litigation when the Federal Rules of Civil Procedure took effect in 1938 was diversity-jurisdiction tort, contract, debt, and other business disputes, as well as patent claims. The litigation regime established by the Rules and *Conley v. Gibson*—skeletal, limited-detail "notice" pleading and broad wide-ranging, party-controlled, cooperative factual discovery viewed as systemic benefits—made sense in these relatively straightforward, single-occurrence, few-party cases.

---

10 *Iqbal*, 129 S. Ct. at 1953–54; Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965–67 (2007); Bone, supra note 3 (manuscript at 11); Burbank, supra note 8, at 117; Hoffman, supra note 6, at 1231.
12 Id. (manuscript at 27–28); see also Epstein, supra note 3, at 66–67.
14 355 U.S. 41, 47 (1957).
Modern civil rights litigation (along with modern antitrust, securities, and other complex litigation) was unheard of in 1938; this is substantive law created and developed—in Congress, the courts, or both—only in the past fifty years and well after introduction of the Federal Rules. But these cases now form a substantial portion of federal civil litigation. It is no accident that the Supreme Court formally (if not forthrightly) changed direction first in a complex antitrust class action and followed quickly in a Bivens action against high-level policymaking federal officers (the former Attorney General of the United States, John Ashcroft, and former Director of the FBI, William Mueller) asserting a defense of qualified immunity. This is the new paradigmatic federal substance, mismatched with old procedure; the new judicially imposed stricter pleading was designed to correct this precise mismatch.

Civil rights claims possess five important traits distinguishing them from the original federal-litigation paradigm. These differences arguably support Richard Epstein’s argument that the 1938 litigation model is “not well suited to the complexities of modern litigation.” Discovery becomes a defect in the system in these cases—too broad, too costly, too burdensome, and too distracting, especially for high-ranking government defendants expected to carry out the business of governing and protecting the public well-being. Discovery thus should be reserved only for those cases that appear, at first glance, to have some merit. Pleading provides that initial measure of merit—it performs a meaningful weeding-out point, in which only claims appearing from the outset to have merit should pass into discovery and the chance to really learn what happened. Epstein praises Twombly for bringing procedure into line with new substantive realities.

Civil rights is one substantive area in which Iqbal will empower courts to increase scrutiny over pleadings, a prediction already bearing out in the early days of the new pleading regime. And we can expect a
continued willingness among courts in civil rights and constitutional
cases to wield their new discretion to dig into the details of complaints, to
parse the complaint as a whole and particular allegations within it, to
disregard insufficiently detailed allegations, and to decide what
allegations and conclusions are most plausible; all of which makes
pleading a significant veto-gate through which all claims must pass before
the opportunity for discovery, with its attendant costs, burdens, and
distractions, opens.26

The predictable result will be a significant decrease in enforcement
and vindication of federal constitutional and civil rights, and of the
values and principles underlying those rights. But that decrease comes
not from changes to substantive constitutional law and not necessarily
from evidence of events on the ground demonstrating that no violation
occurred. Rather, it comes from altering procedure, imposing on
plaintiffs an obligation to present substantial factual detail at the outset
of litigation, even detail they do not and cannot know without discovery,
and empowering courts to form their own conclusions based on their
interpretations of factual allegations.

This Essay considers the evolution of substantive federal law (of
which the rise of civil rights litigation is a significant part) and how that
evolution produces (or is perceived as producing) substance-procedure
mismatches, requiring the current shift in procedural rules. This
evolution, more than any conscious consideration of an overall
procedural framework, explains the new (or affirmed) pleading-and-
discovery regime of Twombly and Iqbal. This Essay then examines Moss v.
U.S. Secret Service,27 decided in the Ninth Circuit just two months after
Iqbal, as illustrating how lower courts may wield this new pleading regime
in civil rights cases and as predicting the future of civil rights pleading.

II. SUBSTANTIVE EVOLUTION AND SUBSTANCE-
PROCEDURE MISMATCHES

A. Procedural Mismatches

The substance-procedure link cuts in two directions. On one hand,
procedure is inherently substantive. Procedure and substance are
inseparable—procedural rules affect litigation behavior, create winners
and losers, and affect substantive outcomes and the overall enforcement
of substantive rights and policies.28 Changes to procedural rules, such as
heightened pleading, become problematic precisely because they

a "pronounced change" in the rate of dismissals of civil rights claims under Twombly).
26 Infra Part II.B.
27 572 F.3d 962 (9th Cir. 2009).
28 Main, supra note 11 (manuscript at 17–18, 21).
undermine plaintiffs’ ability to vindicate substantive rights. Civil rights claims uniquely demonstrate this link, being the consistent substantive target of procedural law; past procedural reform efforts have been criticized for their disparate negative impact on this “disfavored” class of federal litigation. Many commentators expect civil rights claims to be a particular target of the new pleading regime.

On the other hand, Thomas Main recently demonstrated that the converse of the substance-procedure link also is true: “the construction of substantive law necessarily entails making assumptions about how that law ultimately will be enforced” in the existing procedural regime. Procedure is not only necessary to effectuate substantive law; procedure is an underlying assumption for which substantive rule-makers account (or should account) in creating substantive law. Whether procedure undermines or reinforces substance depends on the procedural assumptions made in enacting that substance. As Main argues: “a heightened pleading standard for civil rights cases does not undermine substantive law that was drafted in anticipation of a heightened pleading standard. Indeed, to apply a liberal pleading standard to that law instead could lead to over-enforcement of the substantive mandate.” The risk is what Main calls a “mismatch scenario” between substance and procedure, in which failure to account for procedure in creating substance yields the costly consequence of either over- or under-enforcement of substantive rights.

Putting Main’s insight into operation turns on several underlying concerns. First, much depends on the source of the applicable substantive and procedural rules—whether legislatively enacted, judicially interpreted and construed, or judicially created in the first instance. The risk of a mismatch arguably decreases where the same rulemaker defines both substance and procedure, it increases as different

29 Bone, supra note 13, at 913; see also Main, supra note 11 (manuscript at 20) (“[P]rocedural reforms can have the effect of denying substantive rights without the transparency, safeguards and accountability that attend public and legislative decision-making.”); id. (manuscript at 18–19) (identifying procedural devices whose substantive effects have been analyzed).


31 See supra note 25.

32 Main, supra note 11 (manuscript at 2).

33 Id. (manuscript at 20–21).

34 Id. (manuscript at 28).

35 Id. (manuscript at 27–29); see Bone, supra note 13, at 876; Bone, supra note 3 (manuscript at 33); Epstein, supra note 3, at 98 (“Some calibration of the scales of error is needed . . .”).

rule-makers create and modify different rules at different points, via different methods, and over time. Of course, the Court has disclaimed any power to rewrite procedural rules under the guise of interpreting them.  

Second, we must view this at a macro level. Substantively, this means thinking of "federal law" as a whole, rather than on the level of individual substantive legal rules. It also means considering the procedural regime as a whole, as by considering the link between strict or liberal pleading and broad or narrow discovery as part of one coherent, integrated procedural regime. A procedural scheme might match predominant substantive law in the jurisdiction at one point in time, but as new substantive law is created (legislatively, judicially, or both), the predominant substance changes, producing a mismatch with existing procedure.

Third, Main focuses primarily on mismatches created by applying new procedures to older or preexisting substantive laws. But current controversies over pleading rules involve the opposite—mismatches caused by new substantive law (for our purposes, civil- and constitutional-rights claims) litigated under old or preexisting procedural rules.

Fourth, neither substance nor procedure is static; both evolve over time, especially as different rule-makers place their imprint on the body of legal rules. Thus, we cannot think only of mismatches between new substance and existing procedure or vice versa. We also must consider mismatches that develop as each evolves. Procedure may be created with one category of predominant existing substance in mind, but new and different substance is created in light of existing procedure. And judicial interpretation and construction of substance and procedure, new and old, is ongoing. Matches and mismatches erupt from this dynamic process.

Fifth, mismatches often arise at the level of underlying values and policies. Changes to procedural rules—especially through judicial construction and interpretation—become necessary precisely to prevent mismatches and diminution of the values underlying substance. This perhaps explains the Supreme Court's sudden switch from unanimous insistence that changes to pleading rules for civil rights cases must go through the rulemaking process of the Rules Enabling Act (REA) to explicitly policy-based, case-based ratcheting of pleading standards.

---

38 Main, supra note 11 (manuscript at 27).
Finally, whether a substance-procedure mismatch exists is not value-neutral; whether there is a mismatch, and the steps necessary to avoid or remedy a mismatch, depends on the values the court or rule-maker adopts and emphasizes. Conscious efforts to avoid a mismatch may, in fact, produce one—it depends on the values we emphasize. In trying to keep substance and procedure in step on one view of the legal rules and their underlying values and purposes, rule-makers create a mismatch under different views of those legal rules and their underlying values and purposes. *Iqbal* was driven by the majority’s focus on particular values at issue in civil rights law—freeing government officials to vigorously pursue the public interest without fear of the cost, burden, and distraction of civil litigation—that, in its view, were mismatched to the 1938 Rules regime of liberal pleading and broad discovery. In doing so, however, it created a mismatch with competing substantive policies, similarly central to civil rights law—court access, victim compensation, deterring official misconduct and vindication of constitutional liberties.

The link between underlying policy values and substance-procedure mismatches supports arguments by several commentators that case-by-case adjudication in the Supreme Court—the process used to create the new regime in *Twombly* and *Iqbal*—is not the optimal forum for designing a stricter pleading rule. Strict pleading can be justified only by cost-benefit balancing of the cost of meritless litigation, the difficulties for plaintiffs in accessing essential pre-filing information, the impact of litigation expenses on government actors, and considerations of the moral component of the rights to be litigated—empirical analysis that the Court is not institutionally competent to conduct. If we must resolve underlying policy issues to determine the substance-procedure match, those policy decisions should be made in a formal process for creating prospective policy—either through Congress or the REA rulemaking process (in which Congress plays a role).

---

876–77; (arguing that case-by-case imposition of a pleading scheme is inappropriate); Bone, *supra* note 3 (manuscript at 37–38) (same).

41 *Iqbal*, 129 S. Ct. at 1953–54; Bone, *supra* note 13, at 914; Bone, *supra* note 3 (manuscript at 34).

42 Bone, *supra* note 13, at 875–76; Bone, *supra* note 3 (manuscript at 33); Burbank, *supra* note 8, at 113; Hillel Y. Levin, *Iqbal*, *Twombly*, and the Lessons of the Celotex Trilogy, 14 LEWIS & CLARK L. REV. 143, 145 (2010); see also Bone, *supra* note 13, at 914 (emphasizing that the moral weight of constitutional rights creates a right to litigate a meritorious claim).


45 Bone, *supra* note 3 (manuscript at 38); but see Moore, *supra* note 36, at 1108–09 (arguing for the Court to adopt a more activist approach to interpreting the Rules, given its role in creating the Rules and underlying policies); *cf.* Limited Court Access, *supra* note 4.
B. Civil Rights Litigation and Procedural Mismatches

Main provides a helpful explanatory model for the pleading confusion in which we find ourselves—for Twombly, Iqbal, and the ratcheting of pleading; for the evolution of the business of federal courts under the Federal Rules, particularly as to civil rights claims; and for the interaction of both phenomena.

When the Federal Rules of Civil Procedure took effect in 1938, federal courts mostly were occupied with tort, contract, debt, and other two-party business disputes, as well as federal patent claims.46 This paradigm is reflected in the Forms appended to the Rules—short sample complaints, deemed sufficient under the Rules, demonstrating how pleadings should look in the paradigmatic federal-court cases.47 These cases tended to be relatively straightforward procedurally and substantively. They were dyadic disputes between just two or a small number of parties, involving retrospective application of legal rules and principles and retrospective remedies, usually damages.48 Parties often were similarly situated individuals or business entities, just on opposite sides of a legal and factual dispute. Parties were interchangeable and their positions might change from case to case; an individual might as easily be a tort plaintiff as a defendant, and a corporate entity might as easily sue for breach of contract or patent infringement as be sued.49

The liberal pleading regime of Rule 8(a)(2), given life in Conley, as well as the system of broad factual discovery that went with it, made sense in this substantive regime.50 Plaintiffs possessed the information necessary to plead the basic elements required for these claims under the illustrative Forms; the plaintiff knew (or could know) at the outset what happened at the intersection, whether her allegedly infringed-upon patent was valid, or whether the debt had been paid. The visible consequences of the conduct—a collision between a car and a pedestrian and injuries to the latter—raise the inference of actionable misconduct. A plaintiff could more easily plead a few pieces of information, known or knowable first-hand, in skeletal fashion, and give the defendant “fair notice of what the plaintiff's claim is and the grounds upon which it rests” and the court a sense of the claim's basic validity.51 Moreover, it was unlikely that discovery would be particularly wide-ranging, extensive, time-consuming, or expensive in these cases because they usually focused

46 Epstein, supra note 3, at 62; Resnik, supra note 13, at 508; Wasserman, supra note 13, at 802; see also Bone, supra note 13, at 896.
48 Bone, supra note 13, at 896; Jay Tidmarsh, Pound's Century, and Ours, 81 Notre Dame L. Rev. 513, 531 (2006); Wasserman, supra note 13, at 802.
51 Conley, 355 U.S. at 47.
on discreet one-time deals or actions and few factual details likely were in dispute. There was no need to make true merit determinations too early in the process; waiting until discovery and later pre-trial processes, primarily summary judgment, did not produce unreasonable delay, cost, or burden. Nor was there uniform opposition to liberal pleading and discovery from one group of litigants; because one might be plaintiff in one case and defendant in the next, there were no repeat players always on one side of litigation pushing for rules that systematically benefit that side.

Federal social legislation and public-law litigation beginning in the 1960s and '70s changed the substantive paradigm of federal litigation, and we have been struggling since with the degree to which federal procedure must change to avoid a mismatch with its new substance.

The substantive change has been a joint venture of Congress and the courts. Congress took the lead with legislation prohibiting discrimination because of race, sex, national origin, disability, age, and other characteristics in employment, public accommodations, housing, and institutions receiving federal funds. Congress and the courts together have made such statutes privately enforceable, recognizing the public benefit of private litigation. The Court itself ushered in the era of serious constitutional litigation when it resuscitated 42 U.S.C. § 1983, a long-moribund provision of the Reconstruction Era, and turned it into a meaningful and powerful vehicle for enforcing federal constitutional rights. The Court expansively interpreted the statutory requirement of action "under color" of state law so the Constitution would reach misconduct by all public officials acting randomly and individually even if in violation of state law—officials who misuse power through conduct made possible only because the official was "clothed with the authority" of state law. The Court also recognized that otherwise private entities may be subject to constitutional liability for engaging in forms of joint

59 Bone, supra note 13, at 896; see also Epstein, supra note 3, at 70.
60 Marcus, supra note 30, at 484.
action with government. And the Court alone created constitutional damages litigation against federal officers when it recognized an implied right of action in the Bill of Rights itself.

Civil rights litigation was virtually unheard of in 1938, but (together with complex antitrust, securities, and environmental cases) now forms the new “predominant” federal substantive law and the new paradigm of federal civil litigation. Much of this substance was created in the shadow of the 1938 Federal Rules, Conley, and the regime of liberal pleading and broad discovery. Thus, on Main’s model, Iqbal’s creation of more rigid pleading (and concomitant limits on discovery) actually produces a procedure-substance mismatch with § 1983 and constitutional litigation.

But rule-makers — particularly courts — have identified a mismatch in the opposite direction — significant differences between the 1938 private-litigation paradigm and the new public-law, civil rights litigation paradigm demonstrate the dissonance between the existing liberal pleading regime and the new substance. Old procedure is “not well suited” to the new substantive constitutional litigation. The values and principles underlying the new, evolved substance are undermined by the preexisting procedural regime, even if the new substance was created against the backdrop of that regime. Procedure had to change to prevent a mismatch that would diminish and defeat substantive values — and it had to change through the immediate act of judicial interpretation and construction, rather than via the longer route of prospective rulemaking. On this view, Iqbal’s ratcheting pleading and limiting discovery was necessary to prevent a dangerous mismatch between seventy-year-old procedure and newer substance.

Five features of civil rights (particularly constitutional) litigation render it a mismatch with the procedural regime of Conley and the 1938 Rules. And these features perhaps explain Iqbal and Twombly, as well as the political and ideological controversy that now surrounds pleading.

First, public-law litigation is often less about discrete individual unlawful acts on the ground (although such acts certainly must have occurred), than about the content and enforcement of government policy and violations of rights caused by that policy through individual

60 Cf. Epstein, supra note 3, at 66 (suggesting that the 1938 Federal Rules of Civil Procedure are not well suited to modern litigation, especially antitrust suits); and supra note 16.
61 Epstein, supra note 3, at 70–71.
62 Id. at 66.
acts of enforcement. Policy causes harm over a longer period of time and to a potentially larger number of people. Constitutional litigation targets not only actors on the ground, but also supervisory officers and government entities who enact policy and guide officers in their enforcement. This is of a piece with the general evolution of substantive law away from precise rules into more complex general standards and principles, which has reduced the overall utility of pleading.65

Discovery in these actions is presumed to be broader, more burdensome, and costlier than in the earlier world of contracts, debts, and traffic accidents.64 Discovery now must inquire into written and unwritten policies and customs of executive departments and agencies or into high-level meetings and conversations about such policies, not to mention into the minds of government officials. Such wide-ranging discovery threatens to hinder the business of government and socially beneficial conduct by tying up officials in litigation over claims that will and should ultimately fail, distracting and chilling officials from vigorous exercise of public office.65

Second is the problem of “information asymmetry” at the pleading stage. This is a common structural feature of modern federal litigation, particularly civil rights, where key relevant information is uniquely in defendants’ hands, unknown to the plaintiff at the time of pleading and unknowable without opportunity for discovery.66 In fact, post-Twombly and Iqbal, courts have incentive to deny all discovery until the complaint survives a 12(b)(6) motion testing the sufficiency of the pleading.67 And if the complaint cannot survive—a more likely result under a stricter pleading regime—the plaintiff never will have an opportunity to truly test the merits of the claim.68

The two most notable pieces of information that are beyond plaintiff’s reach at the outset are evidence of defendants’ subjective state of mind and evidence of defendants’ private, behind-closed-doors conduct.69 As to the former, defendants’ intent is an element for individual liability, supervisory liability, and governmental liability as to a range of constitutional rights; what officials intended or what high-ranking officials knew about the conduct of underlings is essential for establishing liability and obtaining a remedy.70 Indeed some

---

65 Marcus, supra note 30, at 459–60.
64 Bone, supra note 13, at 896–97.
66 Iqbal, 129 S. Ct. at 1953–54; Bone, supra note 13, at 914; Bone, supra note 3 (manuscript at 34).
68 Steinman, supra note 3 (manuscript at 22–29).
69 Bone, supra note 3 (manuscript at 33).
70 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948–49 (2009) (supervisory liability for racial, ethnic, and religious discrimination under the First and Fifth Amendments);
governmental conduct is entirely lawful unless committed for an improper purpose. Facts about state of mind obviously rests with defendant officers and are discoverable only if there is an opportunity to depose the officers in discovery. This is why, even under true heightened pleading for allegations of fraud and mistake under Rule 9(b), state of mind still can be alleged "generally," that is, without factual detail. Alternatively, to the extent a challenge is to formal or informal governmental or agency policies and practices, information about the process and purpose in making those policies is necessary and only gained through some court-supervised discovery. Plaintiffs must be able to learn about particular meetings and conversations, which individuals were involved, when and where meetings occurred, what was discussed, and, ultimately, who knew what, when, and why.

We thus confront the paradox of civil rights pleading. Discovery cannot be had until the plaintiff drafts, files, and serves a sufficient complaint. But because wide-ranging discovery poses a greater risk of hindering socially beneficial conduct, pleading must serve as a meaningful hurdle in civil rights actions and Rule 12 must provide meaningful review to ensure that government defendants are not subjected to the burdens except in seemingly meritorious cases. From plaintiff's standpoint, however, skeletal and conclusory pleading is even more necessary in these cases precisely because the information needed to sufficiently plead essential factual details demanded by Iqbal as a condition of getting to discovery is impossible without discovery. And there are no mechanisms within the Federal Rules for formal pre-filing investigative discovery.

Fair pleading rules should eliminate the paradox; Iqbal just draws us further into it.

One response is that plaintiffs can engage in informal pre-filing discovery outside the Rules to gather information enabling them to produce a more-than-conclusory complaint. Complaints can be drafted based on publicly available materials—statements by executive-branch

---


71 FED. R. CIV. P. 9(b).

72 Lonny Sheinkopf Hoffman, Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery, 40 U. MICH. J.L. REFORM 217, 225 (2007); but see Hartnett, supra note 67 (manuscript at 44).

73 Bone, supra note 13, at 897; Epstein, supra note 3, at 71–72.

74 Bone, supra note 3 (manuscript at 33); Hoffman, supra note 6, at 1262–63; Spencer, Civil Rights, supra note 3, at 160; Steinman, supra note 3 (manuscript at 21–22, 64).

75 Hoffman, supra note 72, at 226–28.
officials to Congress, media reports of public statements and conduct, and governmental investigations and reporting of underlying events, policies, and activities. In fact, pleadings in several constitutional damages challenges to War on Terror policies have relied, in whole or in part, on material already in the public record. But for many plaintiffs and plaintiffs' attorneys, that process may be prohibitively expensive. More problematic, the public record will not reveal information about non-public internal workings, thoughts, and actions of government agencies and officials, information that Iqbal nevertheless demands plaintiffs plead at the outset.

Plaintiffs also might use the Freedom of Information Act (FOIA) (federal or state counterparts) as a discovery tool as to policies, policy discussions, and memoranda of public agencies, although delays inherent in those procedures may prevent plaintiffs from obtaining needed information within the necessary limitations window for filing a claim. And, of course, FOIA does nothing to enable plaintiffs to uncover or allege discriminatory intent of individual officials (other than, perhaps, by inferences that the court may feel free to reject).

Iqbal demonstrates how the absence of discovery undermines plaintiffs at the first step. By denying a presumption of truth to bald, conclusory allegations, courts can disregard allegations going to state of mind and other facts about which the plaintiff cannot know enough to plead in detail or other than through a general allegation. For example, the Iqbal majority ignored the following allegations: 1) that Ashcroft and Muller "knew of, condoned, and willfully and maliciously agreed to subject [plaintiff] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin;'' 2) that Ashcroft was the "principal architect" of the discriminatory detention policy; and 3) that Mueller was "instrumental" in adopting and executing that policy." The court found these allegations deficient because they did not identify, even in most general terms, the content of the policy or agreement to which the officers were party; they identified the consequences of that alleged policy (the plaintiff was detained and suffered abuse at the hands of on-the-ground officers), but not the necessary intent in anything more than a "formulaic recitation."

---

76 See, e.g., al-Kidd v. Ashcroft, 580 F.3d 949, 975–76 (9th Cir. 2009); Padilla v. Yoo, 633 F. Supp. 2d 1005, 1019–20 (N.D. Cal. 2009); see also Epstein, supra note 3, at 81 (proposing standard for evaluating complaints in which plaintiffs rely exclusively on public sources).

77 5 U.S.C. § 552 (2006); Hoffman, supra note 72, at 246.


There is an argument that these allegations are not, in fact, bald and conclusory. More troubling, it is not clear what else plaintiff could have said at the point of drafting the complaint—what other language could he use to allege that two high government officials had designed and implemented a policy with discriminatory intent other than a statement saying so? Plaintiffs cannot identify the content of an agreement or conversation to which they were not party or privy until they gain access to documents and information about relevant conversations. Plaintiffs cannot know "what Ashcroft and Mueller actually did vis-à-vis Iqbal" until they can inquire into past events (meetings, conversations, etc.) at which plaintiffs were not present. Plaintiffs cannot know what defendants intended by some conduct until they can ask them, in the formal setting of a deposition taken under oath. Knowledge of these past events and individual thoughts only can be gained through the discovery process. Prior to that point, the plaintiff only can plead what he sees—the consequences of the policy.

Third, discovery plays a unique role in civil rights litigation, even functioning as an end in itself. This is somewhat inherent in the U.S. civil justice system as a whole. Absent the vigorous regulatory and compensatory mechanisms existing elsewhere, the United States relies on civil litigation to expose, remedy, and deter wrongdoing, and to enforce (and, where necessary, reform) legal and social norms. Fact investigation is essential to that process, which is why discovery is necessarily broader in the United States than in other legal systems. Civil rights plaintiffs (and their lawyers) operate as private attorneys general, complementing government investigation and enforcement of federal law and ensuring accountability for official misconduct, thereby furthering the public good. Although compensation certainly is a significant goal for damages plaintiffs, available damages are often quite limited for constitutional claims, especially those not involving physical injuries, loss of property, or the consequences of arrest or incarceration. It is logical that these private attorneys general litigate in furtherance of

---

81 Or at least no more so than other allegations that the majority accepted and accorded a presumption of truth. Iqbal, 129 S. Ct. at 1961 (Souter, J., dissenting).
82 Steinman, supra note 3 (manuscript at 46).
84 Subrin, supra note 83, at 311.
an equally important goal—deterring future government misconduct by exposing it.\footnote{City of Riverside, 477 U.S. at 575; Karlan, supra note 85, at 187; William B. Rubinstein, On What a "Private Attorney General" Is—And Why it Matters, 57 VAND. L. REV. 2129, 2171–72 (2004).}

Court-supervised discovery is essential to exposing and deterring official misconduct.\footnote{Marcus, supra note 15, at 323–24.} Private attorneys general lack the free-standing investigative and subpoena authority that the real attorney general possesses. A private attorney general cannot enforce federal rights and deter wrongdoing absent a genuine opportunity to investigate and uncover unconstitutional behavior. That investigation demands the judicial hammer to enforce government defendants’ discovery obligations and third-party subpoenas. Those obligations (and court supervision of those obligations) are triggered only after successful initiation of litigation.

Clearly this is a different model of discovery than what Justice Murphy sanguinely praised in Hickman v. Taylor.\footnote{329 U.S. 495, 507 (1947) ("[T]he deposition-discovery rules are to be accorded a broad and liberal treatment... Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.").} And it is a model that the Iqbal Court clearly rejected while setting pleading standards so that fewer cases reach judicially enforced discovery. This reveals widespread distaste for discovery and support for according increased protection for government officials (i.e., defendants in constitutional actions) against the distraction of having to litigate and submit to discovery at the cost of being able to focus on their public offices.\footnote{Transcript of Oral Argument at 35–36, Iqbal, 129 S. Ct. 1937 (2009) (comment of Justice Scalia); but see id. at 60 (comment of Justice Stevens) (stating, to laughter, that he did not believe there was a rule that government officials need not testify at proceedings when he wrote the opinion for the unanimous Court in Clinton v. Jones, allowing civil litigation to go forward against a sitting President).} As Justice Scalia inimitably put it during Iqbal arguments: “Well, I mean, that’s lovely, that—that the— the ability of the Attorney General and Director of the FBI to—to do their jobs without having to litigate personal liability is dependent upon the discretionary decision of a single district judge.”\footnote{Van de Kamp v. Goldstein, 129 S. Ct. 855, 859–60 (2009) (absolute prosecutorial immunity); Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998) (absolute legislative immunity); Mireles v. Waco, 502 U.S. 9, 11 (1991) (absolute judicial immunity).}

Fourth, and related, government defendants are entitled to official defenses, notably absolute legislative, prosecutorial, and judicial immunities\footnote{Iqbal, 129 S. Ct. at 1945–46; Pearson v. Callahan, 129 S. Ct. 808, 815–16 (2009); Mitchell v. Forsyth, 472 U.S. 511, 525–26 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982).} and (more commonly) the default executive qualified immunity at issue in Iqbal.\footnote{Iqbal, 129 S. Ct. 1937, 1953 (2009).} All are defined as granting protection not only from liability, but from litigation itself and from having to incur the
cost, burden, and distraction of being parties. Immunity enables government officials to act vigorously on behalf of the public, without fear of personal liability chilling the exercise of their best judgment or dissuading them from seeking public service in the first place. This means getting the defendant out of the action as early as possible and protecting him from broad-ranging discovery, particularly having to sit for a deposition or other inquiries into private conduct and state of mind. Liberal pleading and broad discovery thus are seen as uniquely inconsistent with constitutional litigation under *Bivens* and § 1983, given the potential burden on government-officer defendants.

On the other hand, the relevant facts in these cases make detailed pleading impossible and discovery inevitable. Defendants' subjective state of mind, the quintessential fact known and knowable only to the defendant at the outset of litigation, is an element of many constitutional violations. Supervising officers are not liable on a respondeat superior liability theory, but only for their actual misconduct, which requires allegations and proof of some state of mind. *Iqbal* adds the further twist that the claims were not only against supervisory officers, but against two officials at the very top of the Department of Justice (Attorney General and Director of the FBI) with responsibility for creating all manner of federal law-enforcement policy and entitled to even greater judicial respect and greater judicial caution before imposing on them litigation and discovery. Moreover, the case involved policies aimed at combating terrorism and protecting national security in the wake of September 11th, a "national and international security emergency unprecedented in the history of the American Republic," prompting an ever-more heightened degree of judicial deference for executive decision-making and for officials' immunity from the burden and expense of discovery. Indeed, one arguable limit on *Iqbal* might have been that it was so linked to the underlying policies of qualified immunity and protecting the highest-level cabinet officials that its heightened pleading ought not be applicable in cases where those policy concerns are not in play—such as non-civil rights claims or civil rights claims against ground-level, non-policymaking, non-cabinet-level officials.

---

95 *Mitchell*, 472 U.S. at 525 (citing *Harlow*, 457 U.S. at 819); *Bone*, *supra* note 13, at 914.
96 *Pearson*, 129 S. Ct. at 815.
97 See *supra* note 70 and accompanying text.
98 *Iqbal* has thrown the precise state of mind standard into flux. Compare *Iqbal*, 129 S. Ct. at 1948–49, with *id.* at 1958 (Souter, J., dissenting) (citing range of lower-court standards for supervisory liability, most of which require less than intent).
99 Id. at 1953 (quoting *Iqbal* v. Hasty, 490 F.3d 145, 179 (2d Cir. 2007)); *Bone*, *supra* note 3 (manuscript at 36).
100 See, e.g., *Smith* v. *Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (Posner, J.) (emphasizing context of qualified immunity in suggesting *Iqbal* might not be applicable in basic fraud case).
Alternatively, procedural rules should be more forgiving of civil rights claims, to ensure that substantive policies in enforcing constitutional rights against government officials are vindicated. There is, Robert Bone suggests, a moral component to civil rights claims; pleading rules that screen out valid constitutional claims and thus prevent vindication of those rights must be measured in moral terms to strike the appropriate rule-pleading balance. More generally, procedural rules should support, rather than undermine, plaintiffs who act as private attorneys general and seek to enforce the Constitution, ensure government accountability, and benefit the public at large.

We return to the non-neutral nature of mismatches. On one view, *Iqbal* created a substance-procedure mismatch by establishing a pleading regime inconsistent with a substantial category of substantive federal law. But on a different view, the Court avoided a substance-procedure mismatch—between subjecting government defendants to litigation and discovery that comes with liberal pleading, the substantive policies of official immunity, and limited supervisory liability that demands a quick and easy exit for constitutional defendants. The divide over *Iqbal*, then, is which policies—vindication of constitutional rights by private attorneys general, or protecting government-officer defendants from discovery in (potentially) weak or non-meritorious litigation at the earliest possible moment—should be emphasized and which should define and yield to the procedural mismatch.

The further divide is whether the value and policy choices and empirical analysis inherent in creating and avoiding substance-procedure mismatches should be left to a prospective rulemaking process (whether the REA or Congress), rather than to case-based adjudication before the Court. At least some in Congress want policy choice left to them—and vocal forces prefer to return to a pre-*Twombly/Iqbal* regime, better matched to substantive civil rights law. This suggests that substantive civil rights law had previously been sufficiently in sync (not mismatched) with *Conley*’s looser pleading regime, and the Court and *Iqbal* created the procedural mismatch. At a minimum, Stephen Burbank argues, we should return to the *status quo* prior to *Twombly* until Congress or the REA process can make those value judgments and identify and enact the best pleading regime.

---

1. Bone, supra note 13, at 914, 932; Bone, supra note 3 (manuscript at 33).
3. See supra notes 41–45 and accompanying text.
4. Bone, supra note 13, at 876–77; Bone, supra note 3 (manuscript at 38); Burbank, supra note 8, at 116.
III. WHAT IQLBAL HATH WROUGHT

A. Pleading After Iqbal

At this early stage, there are as many predictions as to Iqbal's future effect (assuming it is not abrogated by legislation or an amended rule) as there are predictors.

Perhaps Iqbal will be (or should be) confined to civil rights claims, given the centrality of qualified immunity and the particular (perceived) inconsistency between relaxed pleading/broad discovery and a defense to even having to participate in litigation. Perhaps Iqbal is unique even among Bivens actions, since the target there was cabinet-level policymaking officials promulgating and enforcing national-security policy in the wake of the trauma of September 11th. Of course, nothing in Iqbal so limits the holding.

Alternatively, perhaps Iqbal did not change much, even as to constitutional litigation. Civil rights claims long have been dismissed as “disfavored claims” of which procedural rules should be less solicitous. In fact, Iqbal is merely the latest volley in an ongoing back-and-forth among the Supreme Court, lower courts, and commentators about the proper pleading standard for civil rights claims. The Supreme Court twice sought to pull back the reins on lower courts, insisting emphatically, explicitly, and unanimously that Conley and notice pleading remained good law and barred lower courts from heightening the pleading rules in municipal liability and employment discrimination cases. Lower courts responded to these decisions in a variety of ways—some following the command, others limiting the precedents to their contexts, others seeming to ignore the Court entirely. And when the Supreme Court initially opened the door to heightened pleading by introducing the plausibility requirement in Twombly, lower courts pounced most readily in civil rights cases. Iqbal and Twombly may act as little more than an invitation or confirmation to lower courts to do precisely what they had been doing all along.

---

107 See Iqbal, 129 S. Ct. at 1953; Bone, supra note 3 (manuscript at 36); and supra notes 98–100 and accompanying text.

108 Bone, supra note 3 (manuscript at 34) ("[T]he Iqbal Court does not confine its holding to qualified immunity cases.").


112 See Spencer, Civil Rights, supra note 3, at 126, 158–59.

113 See id. at 158; supra note 25 and accompanying text.
Adam Steinman has a uniquely sanguine view of \textit{Iqbal}. He argues that, because \textit{Iqbal} did not purport to overturn either \textit{Swierkiewicz} or \textit{Leatherman}, all three cases remain good law and lower courts must reconcile them.\footnote{Steinman, \textit{supra} note 3 (manuscript at 29–32).} Steinman proposes a two-step approach to doing so that maps onto \textit{Iqbal}'s two-step. First, Steinman argues for a narrow, transaction-based definition of conclusory, thus limiting the sorts of allegations that can be disregarded or denied a presumption of truth at the 12(b)(6) stage. An allegation is not conclusory merely because it lacks detail or supporting information and evidence, because \textit{Swierkiewicz} makes clear that detail is not required.\footnote{Id. (manuscript at 52–53); see also \textit{Swierkiewicz}, 534 U.S. at 511; but see \textit{Spencer}, \textit{Understanding Pleading}, \textit{supra} note 3, at 16 (arguing that additional allegations suggesting a wrongful termination are necessary, contra \textit{Swierkiewicz}).} Instead, an allegation is not conclusory so long as it identifies an "adequate transactional narrative," a tangible act or event that has occurred, or some real-world transaction or occurrence that took place.\footnote{Steinman, \textit{supra} note 3 (manuscript at 50).} The complaint must identify the "core content" of a particular transaction, what the defendants actually did, even without detail or explanation of how or why an event is characterized some way.\footnote{Id. (manuscript at 46, 52–53).} And all such non-conclusory allegations must be accepted as true.\footnote{Ashcroft v. \textit{Iqbal}, 129 S. Ct. 1937, 1949–50 (2009); Steinman, \textit{supra} note 3 (manuscript at 54, 61).}

Second, having provided only (or mostly) non-conclusory allegations as to each element, the complaint necessarily survives the second-step plausibility inquiry. Steinman insists "a complaint that \textit{does} provide non-conclusory allegations on every element of a claim, by definition, exceeds the threshold of \textit{plausibly} suggesting an entitlement to relief for purposes of \textit{Iqbal} step two."\footnote{Steinman, \textit{supra} note 3 (manuscript at 26).} There is much to recommend Steinman’s approach to pleading as a normative matter, particularly in civil rights actions, given information asymmetries and plaintiffs’ general inability to know or plead necessary details at the outset.\footnote{Id. (manuscript at 21–22, 63–64); see \textit{supra} Part II.B.} But it is descriptively out of step with \textit{Iqbal} and with what lower courts have done in quickly embracing \textit{Iqbal} (and \textit{Twombly}) and exercising an enhanced power to review and reject complaints.

In particular, Steinman pays insufficient weight to judicial power at step two to closely examine the conduct alleged in non-conclusory fashion and to impose its own best subjective explanation for what happened based on her "judicial experience and common sense."\footnote{\textit{Iqbal}, 129 S. Ct. at 1950; see also \textit{Bell Atl. Corp. v. Twombly}, 127 S. Ct. 1955, 1970 (2007) (considering “common economic experience” in evaluating antitrust allegations).} Of course, even pre-\textit{Twombly} courts recognized that a pleading must do more than blandly assert that "Defendant violated Plaintiff’s rights" and
courts would disregard truly outlandish or fanciful allegations (such as allegations about alien abduction). *Iqbal* cedes even more authority. The point is that judges no longer are obligated, in accepting non-conclusory facts as true, to read those facts together and as a coherent whole in the light most favorable to the plaintiff; they instead enjoy broad discretion to parse the complaint and individual allegations and to screen aggressively for a story that resonates with them. Judges may accord less deference to the plaintiff’s pled version of events in favor of a different (not unlawful) explanation that (in the court’s view) makes more sense. That judicial explanation may be based on baseline assumptions about the world that each different judge brings to bear based on her own underlying experiences; this in turn affects the result of her wielding experience and common sense in evaluating what is the “plausible” explanation for some events and actions.

*Twombly* and *Iqbal* together suggest that courts may look not for a conclusion of liability that is plausible, but for whether that conclusion is the more (or most) plausible one. The *Twombly* Court insisted that a complaint is not plausible, and thus not sufficient, if there is a lawful explanation consistent with the facts alleged; neutral allegations do not state a plausible entitlement to relief. Thus, where the nub of the antitrust complaint was parallel conduct that does not (without more) violate substantive antitrust law, the complaint did not plausibly suggest a violation of federal law. *Iqbal* went one step further. Faced with two explanations for a policy of seizing and detaining Arab and Muslim illegal immigrants after September 11th—“the purposeful, invidious discrimination respondent asks us to infer,” or a merely logical (if disparate) result of seeking to protect the United States from those who had potential connections to those who committed the September 11th terrorist attacks—the Court accepted the latter inference, even though it was not the one pled (and even though it is hardly an irrational conclusion) and held that discrimination was not a plausible explanation for the conduct and policies described in the complaint. And this

177
conclusion as to plausibility perhaps flowed from the shared common sense and executive-branch experience of the majority justices.\footnote{Hartnett, supra note 67 (manuscript at 34).}

Finally, lower courts have not limited use of this new power only to the \textit{Iqbal} paradigm. Rather, they have increased demand for greater facts in all manner of complaints, beyond civil rights\footnote{See, e.g., Branham v. Dolgencorp, Inc., No. 6:09-CV-00037, 2009 WL 2604447, at *2 (W.D. Va. Aug. 24, 2009) (applying \textit{Iqbal} and \textit{Twombly} to dismiss complaint in slip-and-fall for failing to allege how liquid came to be on floor).} and certainly as to run-of-the-mill civil rights actions.\footnote{\textit{Infra} Part III.B.} The unfortunate result will be a higher, often-insurmountable pleading burden for plaintiffs, increased use of Rule 12(b)(6) as a costly litigation tool,\footnote{Posting of Jonathan Siegel to Concurring Opinions, \textit{Iqbal Empirics}, http://www.concurringopinions.com/archives/2009/09/iqbal-empirics.html (Sept. 9, 2009, 6:50 AM).} and increased defendant success in using that tool to defeat claims that can be properly evaluated only after discovery.

The substantive consequence will be a significant decrease in vindication of federal constitutional and civil rights, and of the values and principles underlying those rights. We can predict less private attorney general activity, less exposure of governmental wrongdoing, less enforcement of constitutional and civil rights, and less opportunity to even make a serious inquiry into the underlying facts and events for failure to clear the pleading hurdle.

Importantly, this decrease in substantive enforcement stems from procedure—from imposing burdens on plaintiffs to present substantial factual detail at the outset of litigation, even detail they do not and cannot know, and from empowering courts to form their own conclusions about alleged misconduct based on factual allegations. It stems, in other words, from a judicially created mismatch between current pleading procedure and this category of substantive federal law.

\textbf{B. \textit{Iqbal} in Action: Moss v. U.S. Secret Service}

A good illustration of the consequences of this new regime—and what lower courts can, and perhaps often will, do with their newly found (or newly reenergized) discretion—comes from the Ninth Circuit in \textit{Moss v. U.S. Secret Service,}\footnote{572 F.3d 962 (9th Cir. 2009).} decided just two months after \textit{Iqbal}. The case is more of a typical \textit{Bivens} action, lacking the unique elements that warranted increased scrutiny of pleadings in \textit{Iqbal} itself—no cabinet-level policymaking officers, no challenge to War on Terror policies (although national security was an underlying issue), and the primary targets were directly responsible, on-the-scene officers. It also was a First Amendment case, for which courts often show greater solicitude.
But in dismissing the complaint as insufficient, the court applied an analysis and reached an outcome that demonstrates the difficulties civil rights plaintiffs likely will face in a broad range of cases under this new, mismatched pleading paradigm. The court explicitly recognized the significant change wrought by *Iqbal* and its far-reaching implications. And the court put those changes into action—going to great lengths to find some allegations too conclusory and to ignore the pled explanations for events, to find lawful explanations for non-conclusively alleged conduct, and to reject the alleged First Amendment violation as implausible on the facts.

The plaintiffs were part of a group who in 2004 sought to protest across the street from an inn in Oregon where President George W. Bush was eating. The Secret Service agents on the scene ordered local police to move the protesters away from the inn and one block to the east; local police actually pushed them more than two blocks away. A group of counter-protesters, supportive of the President, had set up a block west of the inn (interactions between the groups were cordial), but were not moved, screened, or otherwise inconvenienced. Plaintiffs brought First Amendment claims against the two Secret Service agents on the scene, the former director of the Service, and the Service itself. The basic claims were that plaintiffs were moved because they were speaking against the President and that this was in keeping with a *sub rosa* viewpoint-discriminatory Secret Service policy of suppressing speech critical of the President. The district court stayed discovery pending resolution of the Rule 12(b)(6) motion, meaning the plaintiffs never had an opportunity to uncover facts and evidence.

The Ninth Circuit followed the two-step approach mandated by *Iqbal*. The court first disregarded as bald, conclusory, and not entitled to a presumption of truth allegations that 1) the on-the-scene agents acted with an impermissible viewpoint-discriminatory motive, and 2) the Service had a *sub rosa* policy of discriminating against anti-Bush protesters based on their anti-Bush viewpoints. The court’s analysis demonstrates the problem with increased scrutiny of conclusory allegations. There is nothing more plaintiffs could have said at this point to allege viewpoint-discriminatory intent by the agents, other than a direct allegation that the agents acted with that impermissible intent. They could not point to and describe any “tangible act or event” giving rise to the inference of intent, any real-world transaction or occurrence revealing intent, because they were not present when the act—the order to move them—took place. They lacked first-hand knowledge of that intent, since state of

133 *Id.* at 972.
135 *Id.* at 965.
134 *Id.*
136 *Id.* at 965–66; see also *id.* at 975 app. (providing map of area).
137 *Id.* at 966.
138 *Id.* at 966–67.
139 *Id.* at 970.
mind obviously rests with the defendant and is unknowable without
discovery. The plaintiffs formed a belief based on a consequence—the
known fact that they were ordered to move—that the reason was
viewpoint discrimination, and they alleged that in the only way possible.
They can prove that conclusion only after an opportunity to depose the
defendants.

Similarly, prior to an opportunity to inquire into the policies and
workings of the agency, plaintiffs lacked any way to allege the existence of
Service policy in greater detail; they could not know what events,
meetings, or conversations occurred among which actors in the agency to
put this unofficial policy into place. Perhaps they could have pled other
examples of similar Service handling of protesters, if other examples
were publicly known. But pleading (and proving) a policy still requires
that supervisory officials knew about those other incidents and intended
to allow such viewpoint discrimination as a matter of custom and policy;
this again requires facts as to defendants' subjective state of mind, which
are impossible to allege in a non-conclusory manner pre-discovery.
Finally, while FOJA might be useful as a pre-filing discovery tool for
uncovering formal and official agency policies and memoranda, the
allegation here was of a sub rosa policy—a widely accepted custom not
reduced to writing or formal rule—not likely to be uncovered other than
through depositions and close review of agency files, which do not occur
through FOJA.

This brought the court to Iqbal's second step and whether the
remaining, non-conclusory allegations, accorded a presumption of truth,
plausibly gave rise to an entitlement to relief. We then see a court
willing to aggressively screen, to find a pleading not plausible based on
judicially identified alternative explanations for the conduct alleged,
explanations that are, on the court's subjective "experience and common
sense," more plausible. Indeed, Moss illustrates the lengths that courts
may go to avoid plaintiff-favorable inferences.

One non-conclusory allegation in Moss was that only anti-Bush
protesters were moved from in front of the inn but not the supporting
counter-protesters on the west side, which plaintiffs alleged raised the
inference of viewpoint discrimination. But the court said the agents' order
was to move the protesters to a point of comparable distance from
the inn as the counter-protesters were standing—one block away, on
opposite sides of the building. The result was viewpoint neutral—all

---

139 Id. at 970-71.
140 Steinman, supra note 3 (manuscript at 20) (quoting Ashcroft v. Iqbal, 129 S.
Ct. 1937, 1950 (2009)); id. (manuscript at 22 & n.19).
141 Moss, 572 F.3d at 971.
142 Id. That the anti-Bush protesters ended up much farther than one block away
was due not to the agents' orders, but the actions of local police who carried out the
move-along order and apparently went beyond it. Local police were not named in the
original complaint, although they were named in an amended complaint. Id.; see
points of view an equal distance away from the President—which the court insisted did not plausibly show a First Amendment violation.

The problem is that the complaint still alleged that anti-Bush protesters occupied a spot on a public sidewalk lawfully because they got there first and that they were moved. Absent some explanation for the move, it is plausible to conclude that the (or a) reason for moving them was the protesters' speech. By ordering only the anti-Bush speakers to move, the agents took action against only one group. Even if the Secret Service's goal was to place pro- and anti-Bush demonstrators equidistant from the inn (a seemingly viewpoint neutral goal), balancing the relative location of competing speakers is not, as a matter of law, an appropriate government purpose when achieved by moving one point of view from a lawfully occupied spot. This is not the only plausible conclusion, of course, but Iqbal and Twombly do not require the plaintiffs allege the only conclusion—only a plausible one, based on the allegations read as a whole in the light most favorable to the plaintiff.

Second, the court insisted that the allegation that the protesters were ordered one block away did not support the conclusion that the agents' motivation was suppressing the anti-Bush message. The protesters still could be heard; if the goal had been to silence the protest, agents would have removed them from the scene entirely, or at least to a location from which they could not be heard at all. But even if they still could be heard, they were farther away, probably less audible, and certainly less visible to their target audience and to anyone coming in and out of the building. The free speech question is not only whether they could be heard, but whether their speaking position (and theirs alone) was disadvantaged or diminished—and it clearly was.

Third, plaintiffs alleged that diners and guests inside the inn were permitted to remain in close proximity to the President without security screening. The court said this allowed no inference about the agents' motive in moving the plaintiffs; the question of whether the order was viewpoint discriminatory only could be given meaning by reference to the pro-Bush counter-protesters, not to non-protesting inn guests.

But according to the non-conclusory allegations in the pleading, the stated reason for moving the protesters away from the sidewalk in front of the inn was to keep them out of "handgun or explosive" range of the President. That concern is belied by the pled (and accepted as true for Rule 12(b)(6) purposes) fact that people inside the inn would have


Moss, 572 F.3d at 971.

[Moss, 572 F.3d at 971.](#)

TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 71-72 (2009) (emphasizing speakers' need to be within visual and listening distance of the target audience).

Moss, 572 F.3d at 971.

Id.

Id. at 965.
remained within range of the President, but were not screened. In other words, the Secret Service’s stated reason was pretext, suggesting the motivation behind the move order was something else. Combining this with the fact that only anti-Bush protesters were moved and it certainly seems plausible that the real, non-pretextual reason for the move was the protesters’ speech—that is, if the court properly looks at the complaint as a coherent whole in the light most favorable to the plaintiff. That the court ignored this inference reveals much about how courts view the task of determining plausibility at step two—it looked for what it saw as the more (or most) plausible explanation, not simply whether the plaintiffs’ pleaded explanation was, in fact, plausible.

Finally, it is notable that the court granted the plaintiffs leave to replead. The court did this in part because the action was filed in 2006, prior to Twombly and Iqbal changing the law of pleading under the Federal Rules. Granting opportunity to replead is a common remedy for factual-insufficiency dismissals, one suggested as appropriate in Iqbal itself and one that we can expect to see with greater frequency. In fact, the argument that Iqbal will impose costs at the pleading stage rests on this likelihood. We can predict multiple rounds of complaint/motion to dismiss/amended complaint/motion to dismiss until the plaintiff finally crosses the plausibility threshold or the court finds further amendment futile. Of course, futility may come sooner than we expect. It is difficult to imagine what more the Moss plaintiffs could say in an amended pleading that will satisfy the court. It is not clear that the two conclusory allegations, given their substance, could be redrafted in a non-conclusory fashion; how else can a plaintiff say that the defendants acted with an impermissible motive other than by saying so? Nor is it clear what else the plaintiffs could say about the move-along order, given the court’s willingness to ignore plaintiff-friendly inferences and rely on its own conclusions as to the better (and lawful) explanation for the events described.

The result, in the end, is that a potentially significant (if monetarily less significant) violation of First Amendment liberties goes unremedied. But it goes unremedied not because consideration of the

---

148 Id. at 972.
149 Id.
150 Ashcroft v. Iqbal, 129 S. Ct. 1987, 1954 (2009) (leaving to the Court of Appeals the question of whether to remand to the District Court for plaintiff to seek an opportunity to replead).
151 See Posting of Jonathan Siegel, supra note 130.
152 Plaintiffs also sought an injunction against the alleged Secret Service policy of suppressing anti-President speech, although it is not clear these plaintiffs would be able to establish standing to obtain prospective relief based on past violations of their First Amendment liberty during a protest against a former President. See Second Amended Complaint, supra note 142, at ¶ 3; Cf. City of L.A. v. Lyons, 461 U.S. 95, 102 (1983) (“[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief.” (quoting O’Shea v. Littleton, 414 U.S. 488, 495 (1974))).
facts on the ground as described by witnesses and documents showed no violation. And it goes unremedied not because of judicial consideration of the law of the First Amendment and the substantive liberty to protest in the most advantageous position on public sidewalks. Rather, the result is ordained by the limited information plaintiffs have or can have at the outset of this type of case, and without an opportunity for discovery, about the inner workings of government agencies and the inner minds of government officials. And it is ordained by courts' new willingness to rethink the plausibility of the plaintiffs' allegations, rather than adopting a favorable view of the complaint taken as a coherent whole.

IV. CONCLUSION

At this stage, we only can predict where Iqbal will take federal pleading, although commentators are not optimistic. But if past is prologue, Moss suggests that courts will be quite willing to exercise their newfound discretion in determining plausibility and quite stingy in what satisfies Rule 8(a)(2). The result is a disconnect between Iqbal's rigid pleading regime and substantive constitutional and civil rights laws that depend on looser pleading and broader discovery for proper vindication of underlying substantive policies of exposing and deterring governmental misconduct and of holding public officials accountable for constitutional violations.

The result, in other words, is a judicially created mismatch between the procedural scheme and predominant federal substantive law. The question going forward is how lower courts, the Supreme Court, Congress, and litigators handle and undo the mismatch.

155 See supra note 4.