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## Pearson, Iqbal, and Procedural Judicial Activism

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# PEARSON, IQBAL, AND PROCEDURAL JUDICIAL ACTIVISM

GOUTAM U. JOIS\*

## ABSTRACT

*In its most recent term, the Supreme Court of the United States decided Pearson v. Callahan and Ashcroft v. Iqbal, two cases that, even at this early date, can safely be called “game changers.” What is fairly well known is that Iqbal and Pearson, on their own terms, will hurt civil rights plaintiffs. A point that has not been explored is how the interaction between Iqbal and Pearson will also hurt civil rights plaintiffs. First, the cases threaten to catch plaintiffs on the horns of a dilemma. Iqbal says, in effect, that greater detail is required to get allegations past the motion to dismiss stage. But a plaintiff who says too much at the pleading stage risks getting kicked out by Pearson; if the allegations are very specific, a court (deciding qualified immunity) will conclude that the constitutional right, if any, is so specific as not to be clearly established. If the litigant pleads at a level of generality to avoid the “clearly established” problem, he will get tripped up by Iqbal because the allegations will be deemed “conclusory” or too general to be “plausible.”*

*Iqbal and Pearson also take divergent tacks with regard to the role of lower courts. In Pearson, lower courts are entrusted to decide which step of qualified immunity to decide first. Iqbal also expands courts’ authority by empowering them to determine “plausibility” based on their “common sense.” But at the same time, Iqbal takes away the district court’s ability to manage litigation (by using procedures explicitly provided in the Federal Rules and previously approved by the U.S. Supreme Court) in order to shield public officials, relying instead on the rather blunt instrument of dismissing the case entirely. The cases expand and restrict lower courts’ discretion, but only do so in a way that makes it easier to dismiss civil rights lawsuits. Pearson and Iqbal exemplify what I call “procedural judicial activism”: the invention of procedural rules to significantly curtail the availability of remedies in civil litigation, especially in the context of civil rights claims.*

*In short, although Pearson and Iqbal are thought of as affecting different, and distinct, areas of law, they interact in ways that are detrimental to civil rights plaintiffs and, ultimately, all of us. This interaction was not addressed by the Court in either case, nor has it been recognized in the academic literature thus far.*

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## I. Introduction

On the first day of Civil Procedure, Professor Arthur Miller tells his students that they probably will not like the class at first because it seems alien:

When you come to law school, your prior experience tells you something about torts, for example. You know what a tort is. You know what an accident is. . . . You know what contracts are; you've signed contracts and sometimes, maybe you've even broken contracts.

But the truth is, nothing in your prior experience prepares you for civil procedure. . . . [Y]ou don't know what a motion to dismiss is. You don't know what *res judicata* is. You don't know what judgment notwithstanding the verdict means. So it's strange. The concepts are strange. They don't seem to have any value judgment to them, the way torts and criminal law are all about value judgments.<sup>1</sup>

That value-neutrality, of course, is an illusion; “as the year progresses, you begin to discover that there are value judgments that lie beneath the surface of each and every aspect of civil procedure. But it simply takes you a long time to understand that.”<sup>2</sup>

\* \* \*

Procedural rules never exist in a vacuum. At every stage of litigation, rules dictate who may bring suit, for what reasons, and under what circumstances. They tell us when the suit must be brought in which jurisdiction, and they tell us the reasons it can be dismissed. Procedural rules govern whether your case will be heard by a judge or a jury, whether it will go to trial or be decided on the papers, and whether you have the right to an immediate appeal. Procedural rules tell us who can be sued and who is immune from suit. They tell us whether immunity is absolute or qualified, and in what circumstances immunity may be overcome.

It is probably obvious that the Federal Rules of Civil Procedure contain (no surprise here) the procedural rules that govern civil litigation. What might not be obvious is that thousands of pages of judge-made law dramatically affect who can bring a lawsuit, against whom, in what substantive areas, when, in which jurisdiction, and for what reason. These judge-made rules, though they have no basis in an authoritative text, get cloaked with the mantle of “neutrality”—precisely because the rules are “strange[; t]he concepts are strange[, and t]hey don't seem to have any value judgment to them.”<sup>3</sup> Yet these rules (which, if we are being uncharitable, we might say are simply made up by judges) are no less binding than those rooted in authoritative texts.

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1. Arthur R. Miller, *Civil Procedure: Sum and Substance Audio CD Series* (1996).  
 2. *Id.*  
 3. *Id.*

In 2009, the U.S. Supreme Court decided two cases that elaborate upon judge-made doctrines in the procedural areas of qualified immunity and pleading standards. In January, the Court ruled unanimously in *Pearson v. Callahan*<sup>4</sup> that the two-step sequential analysis for qualified immunity, as outlined in *Saucier v. Katz*,<sup>5</sup> was no longer mandatory. In *Ashcroft v. Iqbal*,<sup>6</sup> decided a few months later, the Court held district courts could dismiss cases if the nonconclusory allegations in the complaint did not make out an entitlement to relief that was “plausible” (which the Court helpfully told us, is more than “possible” but less than “probable”).<sup>7</sup> Lower courts are to make this determination on the basis of “common sense.”<sup>8</sup> These cases seem obscure, and they turn on rather dry questions of procedural law. But just like procedural rules in general, these cases embody very important value judgments. Unless revisited, they will work a disservice to our nation’s promise of permitting victims of civil rights violations to achieve redress through civil litigation.

*Pearson* and *Iqbal* are problematic for three reasons. First, there is the obvious: *Pearson* makes it easier for lower courts to dismiss lawsuits against government officials, which makes it commensurately harder for a civil rights plaintiff to prevail. Similarly, *Iqbal* makes it easier for courts to dismiss lawsuits at the outset, once again making it harder for plaintiffs to get past a defendant’s motion to dismiss.

However, there are at least two other, more subtle reasons why *Pearson* and *Iqbal* are problematic. First, the interaction between the two cases threatens to catch civil rights plaintiffs on the horns of a dilemma. The problem runs something like this: under *Pearson*, lower courts are permitted to skip to “step two” of the qualified immunity inquiry; courts may conclude that the officer-defendant is entitled to immunity, even if a constitutional right was violated, if such right was not “clearly established” at the time of the alleged violation. This formulation will deter plaintiffs from saying “too much” in their pleadings: if the right is seen as very narrowly described (say, the right to be free from a hostile racial educational environment caused by student-on-student racial harassment in a public school),<sup>9</sup> courts will reason that, even if such a right existed, it is so specific as not to be “clearly established.” To avoid this problem, plaintiffs might try pleading at a level of generality (say, the right to be free from racial discrimination).

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4. 129 S. Ct. 808 (2009).

5. 533 U.S. 194 (2001).

6. 129 S. Ct. 1937 (2009).

7. *Id.* at 1949 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

8. *Id.* at 1950.

9. *See, e.g., DiStiso v. Town of Wolcott*, 539 F. Supp. 2d 562, 567-68 (D. Conn. 2008), *vacated*, *Disito v. Town of Wolcott*, No. 08-1865-CV, 2009 WL 3652096 (2d Cir. Nov. 5, 2009).

But this runs the risk of having the complaint dismissed by *Iqbal*. Allegations pled at a level of generality could be deemed “conclusory” or not “plausible” and insufficiently specific to put the defendant on notice of the claim against him. Thence arises the dilemma: say too much, and you’ll lose based on *Pearson*; say too little, and you’ll lose based on *Iqbal*. I illustrate this problem with reference to recent district and appeals court cases, including a case study.

The second problem is that the *Pearson-Iqbal* interaction simultaneously enlarges and restricts lower courts’ discretion—but does so in a way that hurts civil rights plaintiffs in either case. *Pearson* holds that a court may skip the constitutional violation question and hold against the plaintiff if the right is not clearly established. In this way, courts have greater discretion to find a basis for holding the officer immune. Relatedly, *Iqbal* gives district courts wide latitude to rely on their “common sense” and conclude that allegations in a complaint are not “plausible.” This increases the chances that a plaintiff’s complaint will be dismissed. But at the same time, *Iqbal* also cuts back lower courts’ discretion: for decades, it has been assumed that courts could use various mechanisms to control the process of litigation to shield government officials from undue pretrial burdens. *Iqbal* has effectively cut away this discretion, holding instead that in situations where a discretionary shaping of discovery or requiring further pleading from the plaintiff might have been appropriate,<sup>10</sup> the com-

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10. See, e.g., *Crawford-El v. Britton*, 523 U.S. 574, 597-601 (1998) (noting that, in qualified immunity cases, a court has at its disposal mechanisms provided by Federal Rules of Civil Procedure 7, 11, 12, and 26, as well as its broad discretion to manage discovery, to ensure that defendants are not unduly burdened). In this Article, I take it as a given that the Court’s current framework—that qualified immunity must protect the defendant from “unnecessary and burdensome discovery or trial proceedings,” *id.* at 598—must still inform any development in the doctrine.

I leave aside the antecedent normative question of whether this is a worthwhile goal at all. I note, however, that even sovereign immunity, perhaps the broadest immunity of them all, is only an immunity against money damages and not a wholesale immunity from the “burdens” of litigation. And the idea that the possibility of liability would be “peculiarly disruptive of effective government,” *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982), seems to have been more armchair philosophizing than an empirical conclusion. The only citation *Harlow* provided was to a concurring opinion by Judge Gerhard A. Gessell of the D.C. District Court, from when he was sitting by designation on the D.C. Circuit. See *id.* at 817 n.29 (citing *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (1979) (Gessell, J., concurring), *aff’d in pertinent part by an equally divided Court*, 452 U.S. 713 (1981)). And Judge Gessell’s opinion contains no citation whatsoever. At bottom, it is simply a call to raise the bar on civil rights plaintiffs: “In short, I urge a more exacting standard be placed on the showing a plaintiff must make before proceeding to trial in the face of a properly presented qualified immunity claim.” *Halperin v. Kissinger*, 606 F.2d at 1215 (Gessell, J., concurring). If the rationale behind the current qualified immunity doctrine is simply one district judge’s belief, thirty years ago, that “a more exacting standard [should] be placed on” civil rights plaintiffs, *id.*, perhaps it is time to revisit the rationale.

Some might argue that it was an “activist” decision that revived § 1983 claims in the first place and that this activism required subsequent judicial action to properly define the boundaries of such claims. This may be true in the context of *Bivens* claims against

plaint should instead be dismissed. In sum, whether by expanding or restricting district courts' discretion, the Supreme Court has narrowed the universe of civil rights complaints that will proceed to the merits and ultimately succeed.

Recent years have brought much talk of "judicial activism." Political commentators, generally on the right, have successfully framed activism as the province of liberals—those who disregard the meaning of the Constitution and tradition to limit capital punishment, grant "special status" to homosexuals, prohibit display of the Ten Commandments at school, and so on.<sup>11</sup> But one thing that *Iqbal* and *Pearson* make clear is that "activism," at least as that term is popularly conceived, is not solely the province of liberals. *Iqbal* presented a departure from over seventy years' understanding of the meaning of Federal Rule of Civil Procedure 8(a)(2) and arguably conflicts with the plain language of the Federal Rules and long-standing case law. *Pearson* deviates from two decades of precedent and is part of a line of cases shielding government officials from liability, a notion that appears nowhere in the Constitution and that has never been described in congressional statutes.<sup>12</sup> Shrinking access to civil rights

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federal officers. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). But it is clear that the plain language § 1983 contemplates personal liability:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable to the party injured* in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (emphasis added).

Thus, it is clear that § 1983: (1) contemplates personal liability; (2) provides a certain limitation on liability with regard to judicial officers; and (3) contains no other similar limitation or immunity. Judicially created immunity doctrines might have some purchase in the *Bivens* context, but they are less persuasive in the § 1983 context. Nonetheless, the two have typically been treated identically. See *Butz v. Economou*, 438 U.S. 478, 500-01 (1978). *Butz* is still good law. See *Bunting v. Mellen*, 541 U.S. 1019, 1022 (2004) (Scalia, J., dissenting) (describing the same two-step qualified immunity analysis in connection with § 1983 claims and *Bivens* claims).

11. See, e.g., *Judicial Activism: the Biggest 2002 Election Issue*, 36 THE PHYLLIS SCHLAFLY REPORT (Oct. 2002), <http://www.eagleforum.org/psr/2002/oct02/psroct02.shtml>.

12. The phrase "qualified immunity" appears twice in the United States Code. Of these, only one even indirectly addresses the qualified immunity doctrine as explicated by the Supreme Court. First, 6 U.S.C. § 1104(a) (2006) provides, in essence, that an individual who voluntarily reports suspected terrorist activity will not be liable for making such report unless he made the report knowing it to be false or with a reckless disregard from the truth. The statute goes on to specify that government officials who respond to such reports "shall have qualified immunity from civil liability for such action, consistent with applicable law in the relevant jurisdiction." *Id.* § 1104(b)(1). However, the legislative history makes clear that the law was not intended "to amend, limit, or reduce existing qualified

remedies is no less “activist” merely because it happens under the guise of ostensibly neutral procedural rules.

*Iqbal* is typically thought of as a case about pleading standards,<sup>13</sup> and *Pearson* is typically thought of as a case about qualified immunity.<sup>14</sup> Although these formulations are correct, my goal in this Article is to highlight the intersection of, and interaction between, these two cases. In so doing, I will demonstrate that *Iqbal* and *Pearson* are not only harmful to civil rights plaintiffs separately but also when taken together.<sup>15</sup> This Article is the first (in print or online) to explain this dilemma, awareness of which is of the utmost importance to attorneys litigating civil rights claims against government defendants.

These insights are important from an academic perspective as well. The law of qualified immunity has been a muddle—and now, so is the law regarding pleading standards. Courts are inconsistent, both between circuits and among different panels of the same circuit,

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immunity or other defenses pursuant to Federal, State, or local law that may otherwise be available to authorized officials as defined by this section.” CONFERENCE REPORT ON H.R. 1, IMPLEMENTING RECOMMENDATIONS OF THE 9/11 COMMISSION ACT OF 2007, 153 Cong. Rec. H8496-01, H8583 (Jul. 25, 2007). Thus, although § 1104 recognizes the defense of qualified immunity, it does not define it in the statute, or even explicitly state that the doctrine should be applied as explicated by the courts. If Congress wanted to adopt the federal common law of qualified immunity, it could have done so explicitly. In several other contexts, Congress specifically leaves rules up to common law decisionmaking. *See, e.g.*, 12 U.S.C.A. § 2279aa-14(2) (“All civil actions to which the [Federal Agricultural Mortgage] Corporation is a party shall be deemed to arise under the laws of the United States and, to the extent applicable, shall be deemed to be governed by Federal common law.”); 42 U.S.C. § 1988(a) (providing that, in instances where the district courts do not have the power to fully vindicate civil rights claims, “the common law [subject to certain limitations] shall be extended to and govern the said courts in the trial and disposition of the cause . . .”); FED. R. EVID. 501 (“Except as otherwise required . . . , the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”).

The phrase also appears in 42 U.S.C. § 1320a-7c(a)(3)(B)(iii) (2006), which references the limitation on personal liability of government officials in a particular context. However, this statutory immunity, though described as “qualified immunity,” does not use the term in the sense that it is employed by the Supreme Court.

13. *See, e.g.*, Posting of Howard Wasserman to PrawfsBlawg, *Iqbal and the Death of Notice Pleading: Part I*, at <http://prawfsblawg.blogspot.com/2009/05/iqbal-and-the-death-of-notice-pleading-part-i.html> (May 18, 2009).

14. *See, e.g.*, Jack Ryan, *United States Supreme Court Changes Qualified Immunity Rules for Civil Rights Lawsuits Brought Against Law Enforcement Officers*, PUBLIC AGENCY TRAINING COUNCIL, January 21, 2009, [http://www.patc.com/weeklyarticles/qualified\\_immunity\\_pearson\\_v\\_callahan.shtml](http://www.patc.com/weeklyarticles/qualified_immunity_pearson_v_callahan.shtml).

15. It is true that *Iqbal* applies to all civil actions, not just civil rights claims. But *Iqbal* itself noted that the concerns that motivated moving to a higher, plausibility standard in civil litigation were especially acute in the civil rights context. *See* 129 S. Ct. at 1953. Indeed, Judge Posner believes that *Iqbal* may even be limited to that context. *See infra*, note 19 and accompanying text. Thus, whatever the scope of *Iqbal*, it is clear that it has its greatest force in the civil rights context.



as to the precise test for qualified immunity.<sup>16</sup> The lower courts cited *Iqbal* more than 500 times in the two months after the decision was handed down,<sup>17</sup> but there is disagreement as to the meaning of the new case. Justice Ruth Bader Ginsburg believes the *Iqbal* “majority messed up the federal rules’ governing civil litigation.”<sup>18</sup> Judge Richard A. Posner of the Seventh Circuit, however, believes *Iqbal* is “special in its own way” and perhaps limited to the context of civil rights claims against high government officials or in complex cases.<sup>19</sup> The same divide—between those who think *Iqbal* is far-reaching and those who believe it is limited in application—exists in the commentary about the case.<sup>20</sup>

Thus, in addition to explaining the problem posed by the *Pearson-Iqbal* interaction, this Article will contribute to the still-evolving discourse on the precise contours and meaning of these areas of law.

## II. PEARSON AND IQBAL

In this Part, I provide a brief overview of the relevant aspects of *Pearson* and *Iqbal*. In these sections, I will also discuss the development of the law of qualified immunity and pleading standards, respectively. This discussion is not intended to be exhaustive. Rather, my goal is to provide sufficient background to illuminate the discussion in this Part and the thesis I advance in Part III.

### A. Pearson v. Callahan

In *Saucier v. Katz*,<sup>21</sup> the Supreme Court directed lower courts to conduct a two-step, ordinal inquiry with regard to qualified immunity. First, courts were to determine whether the facts pled, shown,

16. Compare *Higazy v. Templeton*, 505 F.3d 161, 169 n.8 (2d Cir. 2007) (“To rule on the issue of qualified immunity, this Court generally proceeds in two steps.”) with *Harhay v. Town of Ellington Bd. of Educ.*, 323 F.3d 206, 211 (2d Cir. 2003) (“Our analysis of a qualified immunity claim consists of a three step inquiry.”). This inconsistency—two steps versus three steps—is or has been present in cases in at least the First, Second, Third, Sixth, Ninth, Tenth and Eleventh Circuits. I address this problem in a forthcoming article, “*An Additional Hurdle: How the Circuit Courts Messed Up Qualified Immunity* (on file with author).

17. Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, Jul. 21, 2009, available at [http://www.nytimes.com/2009/07/21/us/21bar.html?\\_r=1](http://www.nytimes.com/2009/07/21/us/21bar.html?_r=1).

18. *Id.*

19. See *Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009).

20. Compare Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (“The headline need no longer equivocate. . . . [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Iqbal*] have destabilized the entire system of civil litigation.”) with Maxwell S. Kennerly, *Ashcroft v. Iqbal: Not Nearly As Important As You Think*, <http://www.litigationandtrial.com/2009/06/articles/the-law/for-lawyers/ashcroft-v-iqbal-not-nearly-as-important-as-you-think/> (last visited Aug. 27, 2010) (suggesting that *Iqbal* should be limited to *Bivens* claims against high-ranking government officials).

21. 533 U.S. 194 (2001).

or found (depending on the stage of litigation) made out a constitutional violation.

In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry.<sup>22</sup>

If, and only if, a court answers this question in the affirmative, it is to proceed to the second step of the analysis: "if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established."<sup>23</sup> Fully understanding how we got to *Saucier*, however, requires a bit of background on the nature of qualified immunity in general.

When a state official's conduct causes the deprivation of an individual's constitutional rights, 42 U.S.C. § 1983 enables the victim to bring a damages claim against the official in the officer's personal capacity, i.e., in a suit against the official himself, not the state government or agency. Although § 1983 had formally been on the books since 1871, its potential was not fully exploited until after the Supreme Court's decision in *Monroe v. Pape*.<sup>24</sup> Ten years later, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, held that individuals have an analogous cause of action against federal government officials.<sup>25</sup> In circumstances where constitutional rights have been violated, damages claims are one of the primary vehicles for the individual's enforcement of his or her civil rights as enumerated in the Constitution.<sup>26</sup>

Very shortly after *Bivens*, the Supreme Court began cutting back the scope of this remedy. The Court became concerned about the risk of unsubstantiated legal claims against government actors, which, it has claimed, pose a threat to the operation of government by deterring the zealotry and enthusiasm with which public officials might execute their office and by deterring able citizens away from public service out of an aversion to the expenses of litigation.<sup>27</sup> The Supreme Court has recognized a policy interest in allowing govern-

22. *Id.* at 201 (2001).

23. *Id.*

24. 365 U.S. 167 (1961) (holding actions are taken "under color" of state law when the "wrongdoer is clothed with the authority of the state" as opposed to actions taken by officials pursuant to state law) (quoting *United States v. Classic*, 313 U.S. 325, 326 (1941)).

25. 403 U.S. 388 (1971).

26. *See, e.g.*, *Wilson v. Garcia*, 471 U.S. 261, 276 (1985) *superseded by statute on other grounds*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat 5089, *as recognized in* *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377-81 (2004).

27. *See, e.g.*, *Wood v. Strickland*, 420 U.S. 308, 319-20 (1975).

ment officials facing frivolous or meritless lawsuits to enjoy immunity from “the costs of trial or . . . the burdens of broad-reaching discovery,” which would divert their energy away from the fulfillment of their official responsibilities.<sup>28</sup>

Qualified immunity, the Court tells us, is “the best attainable accommodation of competing values.”<sup>29</sup> This affirmative defense is designed to achieve the dual aims of permitting the prosecution of civil rights torts while ensuring that “[i]nsubstantial lawsuits can be quickly terminated by federal courts . . . .”<sup>30</sup> The Court has determined that where “clearly established rights are not implicated, the public interest may be better served by action taken ‘with independence and without fear of consequences.’”<sup>31</sup> Therefore, the defendant in a § 1983 action may, prior to discovery, move that the trial court dismiss the claim, contingent on a showing that the conduct alleged by the plaintiff does not appear to have violated the plaintiff’s clearly established constitutional rights. In particular, qualified immunity is granted when the facts alleged show that the officer was acting reasonably “as measured by reference to clearly established law.”<sup>32</sup> Government officials are granted immunity from suit “as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated”;<sup>33</sup> and this protects “all but the plainly incompetent or those who knowingly violate the law.”<sup>34</sup>

The important thing to note here is that the qualified immunity doctrine is not just an immunity from having to pay money damages (as is state sovereign immunity, for example) but an immunity from having to endure any litigation at all in the first instance.

Though § 1983 does not enumerate any immunities from litigation, the Court in *Wood v. Strickland* held Congress could not have intended to abolish the traditional common law immunities for legislators, judges, police and administrators.<sup>35</sup> *Wood* framed the test as a subjective one: the officer would not be liable if he acted in “good faith” and with the absence of malice.<sup>36</sup> Thus, the officer would be liable if he should have known he was violating a right or was acting maliciously.<sup>37</sup> *Wood*’s subjective test was soon replaced. But its core

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28. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982).

29. *Id.* at 814.

30. *Butz v. Economou*, 438 U.S. 478, 507 (1978).

31. *Harlow*, 457 U.S. at 819 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

32. *Id.* at 818.

33. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

34. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

35. 420 U.S. 308, 316-18 (1975) (“Common-law tradition, recognized in our prior decisions, and strong public-policy reasons also lead to a construction of § 1983 extending a qualified good-faith immunity . . .”).

36. *Id.* at 322.

37. *See id.*

motivation—the policy that officials should be protected from suit, even though no such immunity appears in § 1983—lives on.

Seven years later, *Harlow v. Fitzgerald* replaced the subjective test (whether the officer knew he was violating rights) with an objective one (whether a reasonable officer could have known that the actions violated rights).<sup>38</sup> Again, the Court was concerned with the policy goal of terminating civil rights litigation as quickly as possible: some courts had held the officer's state of mind (under the *Wood* standard) was a matter of fact and could not be decided on summary judgment, whereas the objective standard could be.<sup>39</sup>

The basic formulation in *Harlow* persists: government officials will be immune when “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known . . . [o]n summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.”<sup>40</sup> This is a test of the state of the relevant law, not the officer's state of mind.<sup>41</sup> The Court elaborated on the relevant standard in *Anderson v. Creighton*, holding that to be clearly established, “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”<sup>42</sup> The exact conduct alleged need not previously have been held unlawful, but in the light of pre-existing law its unlawfulness must be “apparent.”<sup>43</sup> *Anderson* emphasized the question was not merely whether the right had been clearly established in some general sense, but whether *on these facts* the right was established.<sup>44</sup>

The Court began to distill the *Harlow* standard into a more workable analytic framework a few years later. Frederick Siegert had filed a *Bivens* claim against his former employer, a federal hospital administrator, who had released an unfavorable employment evaluation to his current employer, with allegedly “bad faith motivation,” which re-

38. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

39. *See, e.g., Halperin v. Kissinger*, 606 F.2d 1192, 1209 (D.C. Cir. 1979) (“On the subjective criterion [of the *Wood* test] which ‘turns on officials’ knowledge and good faith belief summary action may be more difficult. Questions of intent and subjective attitude frequently cannot be resolved without direct testimony of those involved.”); *see also Wood*, 420 U.S. 308; FED. R. CIV. P. 56.

40. *Harlow*, 457 U.S. at 818 (citing *Procunier v. Navarette*, 434 U.S. 555, 556 (1978) and *Wood*, 420 U.S. at 322).

41. *Id.*

42. 483 U.S. 635, 640 (1987).

43. *Id.*

44. *See id.* This period also included an important case regarding the procedure of qualified immunity. In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court underscored the fact that qualified immunity is an immunity from litigation itself, and held that interlocutory appeals could be taken from a denial of qualified immunity.

sulted in his termination.<sup>45</sup> The District Court had held the officials were not entitled to qualified immunity because the plaintiff had made sufficient allegations of malice. However, the Supreme Court disagreed. The first, threshold inquiry, the Court said, had to be whether Siegert had, on the facts alleged, made out a constitutional violation *at all*. Chief Justice Rehnquist explained that the task of identifying the particular right which is alleged to have been violated had to be undertaken at an “analytically earlier stage of the inquiry” when handling a qualified immunity claim.<sup>46</sup> The Court said it was incorrect to “examine the sufficiency of the allegations of malice” without first resolving the “*threshold* immunity question” of whether or not, in claiming malicious defamation by a federal employer, a constitutional rights violation had even been alleged.<sup>47</sup> Chief Justice Rehnquist again focused on the motivating policy concern behind this line of cases, reasoning that the merits-first sequence would “permit[] courts expeditiously to weed out suits which fail the test” when the allegations did not make out a constitutional violation.<sup>48</sup> The Court applied this two-step sequence, found that Siegert’s claim failed at the first step, and ruled in favor of the defendants.<sup>49</sup>

*Siegert* was the first case to explain qualified immunity in terms of a sequential analysis. Chief Justice Rehnquist reasoned that a claim that had not even made out a constitutional violation should get kicked out, regardless of the officer’s malice (or lack thereof) in his treatment of the plaintiff.<sup>50</sup> However, this sequencing was not explicitly made mandatory.<sup>51</sup> Seven years later, in *County of Sacramento v. Lewis*,<sup>52</sup> Justice Souter described sequencing as the “better approach.”<sup>53</sup> He explained that sequencing was necessary to guard against constitutional stagnation:

What is more significant is that if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity de-

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45. *Siegert v. Gilley*, 895 F. 2d 797, 803 (D.C. Cir. 1990).

46. *Siegert v. Gilley*, 500 U.S. 226, 227 (1991).

47. *Id.* at 232.

48. *Id.*

49. *Id.* at 233-34.

50. *Id.*

51. Paul Hughes points out that many circuits did make the two-step approach mandatory, despite the fact that the Supreme Court had not required it at the time. See Paul W. Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 410 (2009) (“Many courts adopted such an analysis[,] holding sequencing as mandatory, including panels in the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits.”) (citations omitted).

52. 523 U.S. 833 (1998).

53. *Id.* at 841 n.5.

termination, with nothing more, provides no clear standard, constitutional or nonconstitutional. In practical terms, escape from uncertainty would require the issue to arise in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding; in none of these instances would qualified immunity be available to block a determination of law. But these avenues would not necessarily be open, and therefore the *better approach* is to determine the right before determining whether it was previously established with clarity.<sup>54</sup>

The judiciary, however, was not vigilant about observing the two-step sequence. In *Conn v. Gabbert*,<sup>55</sup> the Court made the two-step sequence mandatory: “a court must *first* determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all,” only *then* can a court “proceed to determine whether that right was clearly established at the time of the alleged violation.”<sup>56</sup> Just as in *Siegert*, Chief Justice Rehnquist explained that an officer is denied immunity if “the official [is] shown to have violated ‘clearly established statutory or constitutional rights of which a reasonable person would have known,’ ” and that the determination as to the actual presence or not of an alleged constitutional rights violation is *logically prior* to any considerations as to the degree to which such a right is established in the law.<sup>57</sup> A similar problem arose in *Wilson v. Layne*.<sup>58</sup> There, the Fourth Circuit granted the defendant-officers immunity but “declined to decide whether the actions of the police violated the Fourth Amendment.”<sup>59</sup> The Supreme Court disagreed, reasoning that determining the constitutional question first “promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public.”<sup>60</sup>

Two terms later, *Saucier v. Katz*<sup>61</sup> firmly established the two-step sequence. The Court wrote:

A court required to rule upon the qualified immunity issue must consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? This must be the initial inquiry. . . . If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other

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54. *Id.* (emphasis added, internal citations omitted).

55. 526 U.S. 286 (1999).

56. *Id.* at 290.

57. *Gabbert*, 526 U.S. at 290.

58. 526 U.S. 603 (1999).

59. *Id.* at 608.

60. *Id.* at 609. The Court held police officers bringing media representatives along during the execution of an arrest warrant violated the Fourth Amendment but found qualified immunity on the ground that the law was not clearly established. *Id.* at 605-06.

61. 533 U.S. 194 (2001).

hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.<sup>62</sup>

Like Chief Justice Rehnquist in *Wilson* and Justice Souter in *Lewis*, Justice Kennedy in *Saucier* was concerned about the elaboration of constitutional rights. Sequencing, he wrote, is important to ensure "the law's elaboration from case to case."<sup>63</sup> The role of the courts was to explain the scope and nature of constitutional rights; "[t]he law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."<sup>64</sup>

To recap: the Court in the 1960s and 70s held § 1983 and *Bivens* actions could be used to vindicate constitutional rights. But the scope of liability was almost immediately curtailed: substantively by *Wood* and *Harlow* (which established the defense of qualified immunity) and procedurally by *Mitchell* (which permitted interlocutory appeals). As to the substantive analysis, the Court was insistent that the constitutional question be decided first: to weed out insubstantial claims, to put defendant-officers on notice of the law, and to ensure that the constitutional law did not stagnate. The failure of lower courts to follow this process post-*Siegert* was what forced the Court to press, with increasing insistence, the mandatory two-step sequence.

That all changed in January 2009 with *Pearson v. Callahan*.<sup>65</sup> That case concerned a warrantless search and application of the Fourth Amendment's "consent-once-removed" doctrine.<sup>66</sup> If you don't know what this doctrine is, don't worry: the Court bypassed this issue entirely. *Sua sponte*, it ordered briefing as to whether *Saucier*'s mandatory two-step should be overruled.<sup>67</sup> A few months later, the Court unanimously overruled *Saucier*.<sup>68</sup>

It is important, however, to note what the Court did *not* do. Many critiques of *Saucier* had argued that the mandatory merits-first sequence was unconstitutional or otherwise legally infirm.<sup>69</sup> But the Court did not overrule *Saucier* on constitutional grounds, or really anything that might be described as "legal reasoning." In fact, it left the two steps of the *Saucier* analysis entirely undisturbed. Instead,

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62. *Id.* at 201.

63. *Id.*

64. *Id.*

65. 129 S. Ct. 808 (2009).

66. *Id.*

67. *Pearson v. Callahan*, 128 S. Ct. 1702, 1702-03 (2008) (order granting certiorari).

68. *Pearson*, 129 S. Ct. 808.

69. See, e.g., Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275-81 (2006); Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 920 (2005).

the Court found that the mandatory process was *inefficient*.<sup>70</sup> *Saucier* was thus overruled on entirely prudential grounds:

On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.<sup>71</sup>

In the very next paragraph, the Court again reiterated that *Saucier* sequencing is “often beneficial.”<sup>72</sup> But the mandatory two-step was no more.

Of course, the Court was then left with the task of justifying its departure from *Saucier*, *Anderson*, *Siegert*, *Gabbert* and *Harlow*. Justice Alito wrote there was no *stare decisis* problem because those considerations applied primarily to contract or property cases, not those involving judge-made rules.<sup>73</sup> And the Court focused on the practical effects: lower courts found the mandatory sequencing problematic, and that weighed in favor of abandoning the standard.<sup>74</sup>

What about constitutional elaboration? With a little hand waving, that problem was made to go away, too:

Most of the constitutional issues that are presented in § 1983 damages actions and *Bivens* cases also arise in cases in which that defense is not available, such as criminal cases and § 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages.<sup>75</sup>

Moreover, the Court asserted that decisions on constitutional questions may in some cases “have scant value,” for example, when the issue is pending in a higher court, or hinges on the interpretation of an ambiguous state statute.<sup>76</sup> The Court recognized the protocol often contributes to the goal of efficiently weeding out unsubstantial claims when a complaint can be targeted as not making out a constitutional violation but held the lower courts are better able to determine those cases in which this benefit is available.<sup>77</sup>

The obvious reply, of course, is that courts had come up with ready solutions to these “problems.” For example, a federal court faced with a question of state law could certify the state law issue to the state’s

70. *Pearson*, 129 S. Ct. at 818-19.

71. *Id.* at 818.

72. *Id.*

73. *Id.* at 816.

74. *Id.* at 818.

75. *Id.* at 822.

76. *Id.* at 819.

77. *Id.* at 821.



highest court, retain jurisdiction, and decide the immunity issue accordingly.<sup>78</sup> Indeed, *Pearson's* citation for the proposition that constitutional rights may be elaborated through other avenues was *Lewis*. But *Lewis* itself had reasoned that “these avenues would not necessarily be open, and therefore the *better approach* is to determine the right before determining whether it was previously established with clarity.”<sup>79</sup> It is curious that the argument in favor of the “better approach” is used, a decade later, to justify *abandoning* that same approach.

And so this is the legacy of *Pearson*: throughout the 1990s, even after *Siegert*, courts were not adhering to the strongly suggested two-step analysis. The Ninth Circuit had even developed its own two-step procedure that bypassed *Siegert's* first step entirely.<sup>80</sup> From 1999 to 2001, from *Wilson* to *Saucier*, the Court tightened the screws and made the two-step mandatory. And then, about a decade later, just as the lower courts finally came into line, the Court abandoned its efforts.

### B. Ashcroft v. Iqbal

Before discussing *Iqbal*, some background is in order. In 2007, the United States Supreme Court decided *Bell Atlantic Corp. v. Twombly*,<sup>81</sup> a telecommunications antitrust case. The plaintiffs alleged, *inter alia*, that the defendants had engaged in an illegal, anticompetitive conspiracy; the defendants countered by arguing that their actions, while parallel, were independent. Although the complaint contained detailed allegations regarding the actions taken by each company, the allegations regarding the existence of a conspiracy were much thinner.<sup>82</sup>

Justice Souter, writing for the Court, found the complaint lacking. Pleading the existence of the conspiracy merely upon information and belief, or in conclusory terms, was held insufficient. For example, he noted, parallel conduct was also consistent with the companies acting in their own profit-maximizing self interest in the marketplace. Although the competitors' conduct was “consistent” with a conspiracy, it was not “plausible” that a conspiracy had taken place;<sup>83</sup> the plaintiffs “mentioned no specific time, place, or person involved in

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78. The Sixth Circuit followed a similar procedure in *Waeschle v. Dragovic*, 576 F.3d 539 (6th Cir. 2009). The court concluded that any right was not clearly established and (because it was post-*Pearson*) held that the defendants were entitled to immunity. *Id.* at 550. However, in order to determine the claims against the municipal defendant, it certified the question of whether a property interest existed to the Michigan Supreme Court. *Id.* at 551.

79. County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) (emphasis added).

80. See *Saucier v. Katz*, 533 U.S. 194, 199-201 (2001).

81. 550 U.S. 544 (2007).

82. See generally *id.* at 550-52.

83. See *id.* at 564-65.

the alleged conspiracies.”<sup>84</sup> Therefore, they “ha[d] not nudged their claims across the line from conceivable to plausible.”<sup>85</sup>

*Twombly* sent shock waves through the civil procedure field. Although it was an antitrust case, it was not clear its holding was so limited: the Supreme Court was interpreting Federal Rule of Civil Procedure 8(a)(2),<sup>86</sup> and the Rules apply equally to all civil actions.<sup>87</sup> The destabilizing effect of *Twombly* was due in part to the fact that the current pleading regime had been in place for at least fifty years (since 1957, when the Supreme Court decided *Conley v. Gibson*<sup>88</sup>) and probably more like seventy (since 1938, when the Rules were adopted). In *Conley*, the Court instructed that a complaint was not to be dismissed unless there was “no set of facts” that would entitle the plaintiff to relief.<sup>89</sup> And since 1938, Rule 8(a)(2) required only “a short and plain statement of the claim” showing an entitlement to relief,<sup>90</sup> *Twombly*, for the first time, invited a federal judge to decide how likely it was that the allegations in the complaint were true. Only if they were “plausible” was the case to go forward.

Justice Stevens dissented in *Twombly*. In so doing, he noted, “[w]hether the Court’s actions will benefit only defendants in anti-trust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer.”<sup>91</sup>

*Iqbal* provided that answer. Javid Iqbal was a Pakistani Muslim who was detained by the federal government after the September 11, 2001, terrorist attacks. Iqbal claimed he was subjected to harsh interrogation and abuse because of his race. Iqbal therefore sued the “street-level” officials who were responsible for his alleged abuse. But he did not stop there. Iqbal also claimed that John D. Ashcroft, the United States Attorney General on September 11, 2001, and Robert Mueller, the Director of the Federal Bureau of Investigation at the time, directed and implemented a conspiracy to deprive him of his rights because of his race.<sup>92</sup> Serious allegations, maybe even *true* al-

84. *Id.* at 565 n.10.

85. *Id.* at 570.

86. *See Twombly*, 550 U.S. at 554-55.

87. FED. R. CIV. P. 1. The Supreme Court has consistently rejected the notion of heightened pleading standards in particular contexts. *See, e.g.*, *Swierkiewicz v. Sorema*, 534 U.S. 506, 512-513 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

88. 355 U.S. 41 (1957).

89. 355 U.S. at 45-46.

90. FED. R. CIV. P. 8(a)(2).

91. *Twombly*, 550 U.S. at 596 (Stevens, J., dissenting).

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

legations, but—in the view of the Supreme Court’s 5-4 majority—not *plausible* allegations.<sup>93</sup>

The Supreme Court followed a two-step process in dismissing Iqbal’s claims against Ashcroft and Mueller. First, it disregarded the allegations that were deemed “conclusory.”<sup>94</sup> Then, it determined that the remaining (nonconclusory) allegations, standing alone, were insufficient to form an entitlement to relief:

On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that “obvious alternative explanation” for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, *discrimination is not a plausible conclusion*.<sup>95</sup>

Thus, Iqbal’s claim—and all others—were to be judged by the new standard, which the Court explained as follows:

[A] court considering a motion to dismiss can choose to begin by [1] identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. [2] When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.<sup>96</sup>

This is the two-step framework by which courts are to judge complaints at the motion to dismiss; first, disregard all conclusory allegations; second, determine whether the remaining allegations make out a “plausible” entitlement to relief.

That, at least, is how most people have taken *Iqbal*.<sup>97</sup> It is also the conception I work with in this Article. But before going forward, I want to pause to highlight two aspects of the Supreme Court’s formulation that render it problematic even on its own terms (i.e., apart from the problems I highlight in this Article as regarding civil rights plaintiffs). First, *Iqbal* does not say that lower courts *must* use this formulation. Rather, it says that a court “can *choose to*” apply the two-step approach.<sup>98</sup> Although courts seem to have taken *Iqbal* to be mandatory, ra-

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93. *Id.* at 1952.

94. *Id.* at 1951.

95. *Id.* at 1951-52 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007) (emphasis added and citation omitted)).

96. *Id.* at 1950.

97. See, e.g., Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1316 (2010).

98. *Iqbal*, 129 S. Ct. at 1950 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007) (emphasis added)).

ther than discretionary,<sup>99</sup> this somewhat curious phrase is worth noting. *Iqbal*, unlike *Pearson*, does not explicitly give courts the choice between different frameworks for analyzing the legal question.

Second, *Iqbal* says that conclusory allegations are not entitled to the presumption of truth. But in so doing, the Court conflates two types of “conclusions.” The relevant passage in *Iqbal* reads,

[t]hreadbare recitals of the elements of a cause of action, supported by mere *conclusory statements*, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we “are not bound to accept as true a *legal conclusion* couched as a factual allegation . . .”).<sup>100</sup>

But this paragraph is sloppy. It equates “conclusory statements” with “legal conclusion[s],” even though these terms are used to mean two different things.

Take this example: “X was negligent” is an allegation not entitled to the presumption of truth because the allegation is pleading nothing more than a legal conclusion (negligence). However, the allegation, “X was walking down Fifth Avenue” is an allegation that *is* entitled to the presumption of truth—even though it is “conclusory.”<sup>101</sup> The allegation provides no facts that would establish that X actually *was* walking down the street. It “mention[s] no specific time, place, or person involved in the alleged” walking down the street.<sup>102</sup> Yet this statement *is* entitled to the presumption of truth. The distinction is not that one is “conclusory” while the other is not. The distinction is that one is a *legal* conclusion while the other is a *factual* conclusion. *Iqbal* conflates the two, and in so doing, opens a can of worms. Justice Souter suggested in his *Iqbal* dissent that the only *factual* conclusions disentitled to the presumption of truth are those “that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.”<sup>103</sup> But the majority did not limit the plausibility standard in this way. Instead, a court is to rely on its “judicial experience

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99. See, e.g., *Torn Ranch, Inc. v. Sunrise Commodities, Inc.*, No. C 09-02674, 2009 WL 2834787, at \*2 (N.D. Cal. Sept. 3, 2009) (“A court *must* ‘begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.’”) (quoting *Iqbal*) (emphasis added); *Mohammad v. N.Y. State Higher Educ. Servs. Corp.*, No. 08-CV-4943, 2009 WL 1514635, at \*4 (E.D.N.Y. June 1, 2009) (“I *must* begin by ‘identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.’”) (quoting *Iqbal*) (emphasis added).

100. *Iqbal*, 129 S. Ct. at 1949-50 (emphasis added and citation omitted).

101. Black’s Law Dictionary defines “conclusory” as “[e]xpressing a factual inference without stating the underlying facts on which the inference is based.” BLACK’S LAW DICTIONARY 308 (8th ed. 2004).

102. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007).

103. *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting).

and common sense” in determining whether a claim is plausible, after disregarding “conclusory” allegations.<sup>104</sup>

To be sure, *Iqbal* attempts to frame the discussion as one of legal, not factual, conclusions.<sup>105</sup> But the Court went on to disregard various allegations because they were *factually* conclusory, writing, “[i]t is the conclusory nature of respondent’s allegations, *rather than their extravagantly fanciful nature*, that disentitles them to the presumption of truth.”<sup>106</sup> Of course, a legal conclusion, standing alone, is neither fanciful nor plausible; it simply *is*. What would make a claim fanciful are the *facts* supporting that legal conclusion. “The doctor negligently harmed me by operating on me while drunk” is not fanciful; “the doctor negligently harmed me by operating on me after his brain had been removed from his skull by aliens who were using him in an inter-galactic biological study” is fanciful. The difference has nothing to do with the legal conclusion (negligence in both cases) and turns entirely on the facts. By directing courts to disregard “conclusory” factual allegations (as opposed to legal statements), the Court does grave violence to the long-standing proposition that a plaintiff’s factual allegations are entitled to be taken as true.

The passage also conflates what are ostensibly the two prongs of the *Iqbal* analysis. Recall that a court is first to disregard conclusory allegations, and *second*, determine whether the remaining allegations entitle the pleader to relief. Yet the decision as to whether an allegation is conclusory cannot be made in a vacuum. It is necessarily affected by the cause of action pled, the type of relief sought, and the court’s ability (or lack thereof) to award such relief, among other things. An allegation along the lines of “X singled me out because of my race” apparently does not pass muster under *Iqbal*.<sup>107</sup> This seems to be because the allegation embodies a “legal conclusion,” “because of my race.” But *Iqbal* also disregarded allegations that Ashcroft was the “principal architect” of an illegal policy.<sup>108</sup> This statement embodies no legal conclusion and is simply a fact that either is or is not true. Once again, the Court blurs the line between legal allegations and factual allegations, improperly disregarding the latter.

Finally, the discussion indicates how the Court is elevating form over substance. Though “X singled me out because of my race” does not pass muster, “X singled me out; I am an Arab Muslim; non-Arab, non-Muslims were not singled out” probably would. This is so, ostensibly, because the allegations do not contain a legal conclusion (“because of my race”), even though the new allegations could be based on

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104. *Id.* at 1950 (Opinion of the Court).

105. *See id.*

106. *Id.* at 1951 (emphasis added).

107. *Cf. id.* at 1950-51.

108. *Id.* at 1951.

identical facts and, as a substantive matter, add nothing. A court can only conclude that the first formulation is “conclusory” by (1) making reference to something beyond the allegations themselves, suggesting that the factual allegation/legal conclusion dichotomy further breaks down, or (2) elevating form over substance. Both are bad options.

In just a few short months, *Iqbal* has spawned a substantial corpus of commentary. Commentators have argued the Court made important policy judgments in *Twombly* and *Iqbal* that it should not have made<sup>109</sup> or that *Iqbal* is part of the desirable evolution of federal pleading standards.<sup>110</sup> Though the standard view appears to be that *Iqbal* raised the bar on plaintiffs,<sup>111</sup> others have argued that *Iqbal* can be fully reconciled with pre-*Twombly* precedent.<sup>112</sup> There are also questions as to whether the sample forms contained in the Federal Rules are valid anymore, since the statements in those forms might be deemed “conclusory.”<sup>113</sup> My intention is not to explain or even fully engage these critiques, which I note merely for the sake of completeness. Instead, I provide a doctrinally and conceptually distinct criticism of *Iqbal*: that the interaction between *Iqbal* and *Pearson* works to the detriment of civil rights plaintiffs. This is the project of the next part.

### III. HOW THE CASES HURT CIVIL RIGHTS PLAINTIFFS

Having described the two cases that are the focus of this Article, I now describe the ways in which they harm civil rights plaintiffs.<sup>114</sup> First, there is the obvious way: *Pearson* makes it easier to grant government

109. Clermont & Yeazell, *supra* note 20, at 831-32.

110. Douglas G. Smith, *The Evolution of a New Pleading Standard: Ashcroft v. Iqbal*, at <http://ssrn.com/papers=1463844>, at 4-5 (*Iqbal* “presents a welcome evolution of pleading standards that is likely to have beneficial effects in terms of the efficiency of civil litigation”).

111. See, e.g., *Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 629 (6th Cir. 2009) (noting *Iqbal* “raised the bar for pleading requirements”); Smith, *supra* note 110, at 2 (“*Iqbal* thus represents a further raising of the bar plaintiffs must meet before they are allowed to proceed with discovery”); Robert L. Rothman, *Twombly and Iqbal: A License to Dismiss*, 35 No. 3 LITIG. 1, 2 (2009) (“*Iqbal* drastically changed the landscape for Rule 12(b)(6) motions”).

112. See Steinman, *supra* note 97, at 1299-1300 (arguing that defining conclusory in “transactional terms” could reconcile *Iqbal* with pre-*Twombly* precedent).

113. Federal Civil Form 11, for example, which ostensibly would be sufficient in a negligence action, reads simply, “On [date], at [place], the defendant negligently drove a motor vehicle against the plaintiff. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of \$[amount].” Allen Ides has suggested that Form 11 may not pass muster under the new standard. See Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 633 (2008).

114. *Iqbal*, of course, is not limited to civil rights cases. However, it arose in that context and will probably have its greatest effect in that field. Even those who argue that *Iqbal* is of limited effect, see Clermont & Yeazell, *supra* note 20, acknowledge that it must, at a minimum, apply to these cases.

officials immunity and, by permitting courts to skip “step one,” inhibits development of constitutional law. *Iqbal*, by raising the bar for pleading, makes it harder for plaintiffs to survive a motion to dismiss.

But my focus in this Article is not only the shortcomings of the cases on their own terms but also on the deleterious effects of the *interaction* of the two cases. The cases interact in three ways that are harmful to civil rights plaintiffs.

First, there is this dilemma: a plaintiff who describes the constitutional right in question in great detail runs the risk of losing on *Saucier* step two, when a court holds that his right is not clearly established. If the plaintiff tries to avoid this possibility by pleading at a level of generality, he or she risks losing on *Iqbal*—either because the allegations are deemed “conclusory” or because they are taken to be “implausible.”

Second, the Court gives short shrift to the fact that the first step of qualified immunity—whether there are allegations or facts that could make out a constitutional violation—is *the same as* the test for whether a plaintiff has stated a cognizable claim. In other words, *Iqbal* not only raises the bar for pleading but also raises the bar for *Saucier* step one.

Third, the cases take divergent tracks with regard to lower courts’ discretion. They expand discretion in some regards (in determining which step of qualified immunity to address first (*Pearson*) and in determining which allegations are “conclusory” or “implausible” (*Iqbal*)). However, discretion is also cut back: the Court in *Iqbal* explicitly rejected the notion of using litigation management to shield government officials, directing courts instead to dismiss cases outright. The combined effect is that discretion is expanded in some regards, limited in others, but always in a way that makes it easier to dismiss civil rights lawsuits.

#### A. *The Obvious*

As others have noted, there are some fairly obvious ways in which *Pearson* and *Iqbal* hurt civil rights plaintiffs. First, *Pearson*, as described above, permits courts to skip to the second step of the qualified immunity inquiry and award the officer immunity because the constitutional right in question was not “clearly established.” But if courts do this regularly, then there is a very real risk that constitutional rights will *never* get clearly established. Second, *Iqbal* is problematic because it makes it easier for courts to dismiss civil rights lawsuits. I discuss each of these in turn.<sup>115</sup>

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115. There are critiques of *Saucier*, and arguments against sequencing, that sound in constitutional law. See, e.g., Thomas Healy, *The Rise of Unnecessary Constitutional Rul-*

This problem has been identified for some time in the academic literature. As far back as 1991, Fallon and Meltzer explained that after the early qualified immunity cases, courts would “deny relief without deciding whether a constitutional violation in fact occurred.”<sup>116</sup> They criticized this process, arguing that it “restrict[s] the opportunity for judges to address novel claims . . . [and] thus tend[s] to freeze the development of constitutional law.”<sup>117</sup> Just before *Saucier*, Greabe wrote the defense of qualified immunity, when “it encourages merits bypasses, is . . . a substantial impediment to the development of new constitutional law in civil rights damages actions.”<sup>118</sup> Shortly after *Saucier*, Kamin wrote, “if the question of the entitlement to qualified immunity is addressed before the substance of a plaintiff’s claim, [then] the contours of the law will never become well-defined, and the entitlement of defendants to qualified immunity will continue in perpetuity.”<sup>119</sup>

These risks—mitigated during the *Siegert* era and reduced to near zero in the *Wilson-Saucier* era—are back to the fore now. And these problems are not merely theoretical. As a recent article demonstrates, there is empirical support for the proposition that *Wilson-Saucier* sequencing furthers the development of the constitutional law.<sup>120</sup> Hughes argues compellingly that courts have been more will-

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*ings*, 83 N.C. L. REV. 847, 930 (2005). I do not focus on these criticisms here for two reasons. First, there are compelling responses to these criticisms. See, e.g., Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of Saucier v. Katz*, 16 GEO. MASON L. REV. 53 (2009) (disposing of the argument that merits-first adjudication violates the Article III ban on advisory opinions). Second, so long as the Supreme Court gave its approval to merits-first decisions, the constitutional problems were, at least as a practical matter, moot. Cf. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) (“We are not final because we are infallible, but we are infallible only because we are final.”). In my view, so long as the constitutional questions were bracketed (because the Supreme Court said so), the only relevant issue was whether merits-first ordering was worthwhile. The Supreme Court’s stated justification for this ordering, from *Siegert* to *Wilson* to *Saucier*, was the need for elaboration of the constitutional law. Therefore, I proceed from the premise that (1) the Court saw constitutional elaboration as a worthwhile goal, and (2) this is the value most likely to be lost when mandatory ordering is abandoned.

116. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1735 (1991).

117. *Id.* at 1735, 1797-98 (1991). Fallon and Meltzer were discussing *Harlow* as juxtaposed against *Teague v. Lane*, 489 U.S. 288 (1989), a case involving post-conviction habeas corpus review. They point out that, per *Teague*, a habeas petition that relied on new law—i.e., law that was not “clearly established”—is to be dismissed without any discussion of the constitutional merits. At least for some time, the civil rights and habeas contexts diverged, as lower courts were instructed, from *Siegert* through *Pearson*, to address the constitutional merits first, even in a claim that would fail under step two, on a claim that would get summarily dismissed under *Teague*.

118. John M.M. Greabe, *Mirabile Dictum!: The Case for “Unnecessary” Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 411 (1999).

119. Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 50 (2002).

120. Hughes, *supra* note 51, at 422-23.



ing to elaborate on the nature of constitutional rights in the post-*Siegert*, and especially the post-*Saucier*, eras much more so than they were doing in the post-*Harlow*, pre-*Siegert* era.<sup>121</sup> Before *Siegert*, courts reached the constitutional merits in only about two-thirds of all cases.<sup>122</sup> After *Saucier*, that figure was up to almost ninety-nine percent.<sup>123</sup> It is true that the rate at which courts *rejected* claims of constitutional violations almost doubled from the 1980s to the post-*Saucier* era.<sup>124</sup> However, the rate at which courts *did* recognize such violations also grew.<sup>125</sup> This is undoubtedly a net positive for civil rights litigants. Moreover, as Hughes points out,<sup>126</sup> even negative articulation can have value because it furthers predictability and may even spur Congress to act.<sup>127</sup> But I would go one step further. Suppose the right X has been clearly established and a litigant is now pressing a claim based on X<sub>1</sub>, a related but novel theory. It would be ideal for the plaintiff if the court finds a constitutional violation. But even if the court finds no violation, the ruling is beneficial to civil rights litigants. The next time a similar case comes up, lawyers are on notice that a claim of X<sub>1</sub> will fail. Therefore, they will shift their energies to now arguing X<sub>2</sub>. Or, they will explain how this case differs from the previous one. But in the absence of mandatory sequencing, subsequent cases would keep relitigating X<sub>1</sub>, leading to a Groundhog Day-esque repetition.

It is already clear is that courts are regularly dismissing cases on the ground that the right in question is not clearly established and not discussing the constitutional merits.<sup>128</sup> And it is clear the contours of these rights *would* be defined with clarity in a pre-*Pearson* world. The effects of this avoidance may be felt beyond the realm of civil rights litigation. If the court decides to pass on a constitutional question regard-

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121. *Id.*

122. *Id.*

123. *Id.* at 424. Another empirical study contends that the constitutional law has only developed in a negative direction after *Saucier*, i.e., has almost always *refused* to recognize new rights. See Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 670 (2009). However, Hughes provides a compelling response to this position in his article. Hughes, *supra* note 51, at 428-29 n.122.

124. Hughes, *supra* note 51, at 422-23.

125. *Id.*

126. *Id.* at 428 n.122.

127. *See id.*

128. *See, e.g.,* Cole v. Buchanan County Sch. Bd., No. 08-1105, 2009 WL 1336720, at \*2 (4th Cir. May 14, 2009) (skipping to step two and declining to decide whether a member of the press has the right not to be excluded from school property that is otherwise open to the public); Dean v. Blumenthal, 577 F.3d 60, 66 (2d Cir. 2009) (declining to decide whether a candidate for office has a First Amendment right to receive campaign contributions); Rodis v. City & County of San Francisco, 558 F.3d 964, 970 (9th Cir. 2009) (declining to decide whether passing a counterfeit note, without more, provides probable cause for arrest); Starling v. Bd. of County Comm'rs, No. 08-80008-CIV, 2009 WL 281051, at \*8 (S.D. Fla. Feb. 2, 2009) (declining to decide if there is a protected liberty interest in an adulterous sexual relationship).

ing criminal law, criminal defendants and prosecutors are denied the benefits of constitutional articulation. And if the court, in skipping the merits inquiry, disposes of the case by way of an unpublished decision, the case has no precedential effect whatsoever.

So this is the obvious way *Pearson* harms civil rights plaintiffs: by permitting courts to skip step one, it makes it more likely that they will elect not to address the merits of constitutional claims. This has the potential to stagnate the constitutional law. And if the recent empirical work is any indication, it will reverse the trend of constitutional elaboration that has been under way for two decades.<sup>129</sup>

There is also a straightforward way in which *Iqbal* hurts civil rights plaintiffs. Simply put, *Iqbal* raises the bar on civil rights plaintiffs and, indeed, all plaintiffs. Regardless of how the Court may have characterized its decision, the fact remains that lower courts nationwide are applying a stricter standard post-*Iqbal* than they were before it.<sup>130</sup>

The academic commentary has recognized these and related problems with *Iqbal*. Kilaru notes in his article<sup>131</sup> that *Iqbal* calls into question the Supreme Court's decisions in *Crawford-El v. Britton*<sup>132</sup> (a point I describe below) as well as *Pullman-Standard v. Swint*.<sup>133</sup> Klein argues that *Iqbal* may be unconstitutional as the "heightened" pleading standard it imposes runs afoul of the Seventh Amendment's jury trial guarantee.<sup>134</sup> I do not focus on these problems here because I am interested in the more subtle—but no less harsh—ways that the *interaction* between the two cases is problematic for civil rights plaintiffs. I turn to these issues next.

129. See, e.g., Hughes, *supra* note 51.

130. See, e.g., *al-Kidd v. Ashcroft*, 580 F.3d 949, 977 (9th Cir. 2009) ("Post-*Twombly*, plaintiffs face a higher burden of pleading facts, and courts face greater uncertainty in evaluating complaints."); *Coles v. Eagle*, No. 09-00167 DAE-BMK, 2009 WL 2700210, at \*4 (D. Haw. Aug. 27, 2009) ("A careful review of [the complaint] reveals that, *under the stricter pleading standard recently set forth* by the Supreme Court in *Ashcroft v. Iqbal* . . . *Coles* fails to state a claim against the [defendants.]") (emphasis added); *Ibrahim v. Dep't of Homeland Sec.*, No. C 06-00545 WHA, 2009 WL 2246194, at \*1 (N.D. Cal. July 27, 2009) ("As to [plaintiff's] damage claims for *past* violations, a different problem arises, namely *the stricter pleading standard* in *Ashcroft v. Iqbal* . . .") (second emphasis added); *In re Bishop*, No. 08-11156-MWV, 2009 WL 2231197, at \*2 n.4 (Bankr. D.N.H. July 24, 2009) (noting "the higher pleading requirements established in the *Ashcroft* decision"); *In re Careme-rica*, 409 B.R.737, 754 (Bankr. E.D.N.C. 2009) ("[T]he court admits that claims for relief are more difficult to plead sufficiently following *Twombly* and *Iqbal*.").

131. See Rakesh N. Kilaru, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. (forthcoming 2010) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1434254](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434254), at 104.

132. 523 U.S. 574 (1998).

133. 456 U.S. 273 (1982).

134. Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261 (2009).

### B. *The Less Obvious*

There are at least two (and probably three) other, more indirect, ways in which these cases harm civil rights plaintiffs.

#### 1. *The Horns of a Dilemma*

First, the *Pearson-Iqbal* interaction threatens to catch a civil rights plaintiff on the horns of a dilemma. Put crudely, the problem is this: a plaintiff who says enough to satisfy *Iqbal* will find that he has said too much and loses because his purported right is not clearly established, per *Pearson*. If he says less to survive the qualified immunity analysis, he will find that he has not said *enough* to survive dismissal because of *Iqbal*.

Consider this hypothetical: an aggrieved civil rights plaintiff (Pete)<sup>135</sup> will file a complaint that alleges the violation of some constitutional right—say, the right to be free from excessive force. Suppose, though, that the incident involved some relatively unusual circumstances: a stop-and-frisk, in a car, parked in the garage of the individual's home. The plaintiff might argue that his constitutional rights were violated, namely, his right to be free from excessive force during a stop-and-frisk that occurs in or adjacent to one's home.

Now, however, the Supreme Court has decided *Pearson*. The right to be free from excessive force during a stop-and-frisk in one's car adjacent to one's house is a rather narrow definition of the right in question. Suppose that Pete lives in a circuit that has not decided whether such a right exists. Pete is concerned, having read *Pearson*, that the district court will simply conclude that the right is not clearly established and he will be left high-and-dry.

But Pete is a bright fellow, as hypothetical individuals tend to be. So Pete decides he will simply claim a violation of his right to be free from excessive force at the hands of a police officer. This right is clearly established, and he does not run into the *Pearson* problem.

Alas, it is not to be for our friend Pete. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice[!]"<sup>136</sup> By reframing his cause of action in more general terms, he has avoided the Scylla of *Pearson* only to get caught on the Charybdis of *Iqbal*: his more general pleading will be seen as conclusory. And if it is not, a court exercising its "common sense" (as *Iqbal* instructs) could well conclude that the claim was not "plausible"—if Pete really had a claim, why would he frame it so

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135. The plaintiff's name in a hypothetical always begins with "P." For the uninitiated, that's how these things work.

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

broadly instead of focusing on the specific facts and cause of action that he is pressing?

And so this is the dilemma: say too much, and you lose because of *Pearson*; say too little, and you lose because of *Iqbal*.

The problem can be more vividly illustrated by the facts of a case recently decided by the federal district court in Connecticut. In *DiStiso v. Wolcott*, Robin DiStiso sued various school officials on behalf of Nicholas, her minor son.<sup>137</sup> Robin alleged, inter alia, that the other students at school harassed, taunted, and assaulted Nicholas because of his race.<sup>138</sup> She further alleged that she complained to Nicholas's first-grade teacher, Tammy Couture, and the principal, John Cook, and they did nothing to respond to the complaints.<sup>139</sup> Robin and her husband testified to this effect at their depositions.<sup>140</sup> For their part, Couture and Cook stated in affidavits that they never observed such conduct and never received such complaints from the parents.<sup>141</sup>

It is clear that these allegations do not make out a claim of intentional discrimination against Nicholas. It is not as if, for example, Couture gave Nicholas a failing grade because of her racial animus toward him. Instead, Robin proceeded on a theory of deliberate indifference. The Second Circuit had at least partially explained how such suits should proceed some years earlier, writing that "deliberate indifference can be found when the defendant's response to known discrimination 'is clearly unreasonable in light of the known circumstances.'" <sup>142</sup> Robin therefore had to demonstrate that there was evidence from which a rational fact-finder could conclude that (1) the students were harassing Nicholas on the basis of his race; (2) Couture and Cook were aware of this harassment; and (3) their response, or lack thereof, was "clearly unreasonable."<sup>143</sup>

What this leaves out is any consideration of the effect of the deliberate indifference on Nicholas himself. The courts had, however, spoken to the question in the context of deliberate indifference to student-on-student *sexual* harassment. The Supreme Court held in *Davis v. Monroe County*<sup>144</sup> that, in the context of Title IX, a school could be liable if it is deliberately indifferent to student-on-student sexual harassment. But *Davis* also held that, in order to prevail, the

137. 539 F. Supp. 2d 562, 563 (D. Conn. 2008), *vacated and remanded*, 352 F. App'x 478 (2d Cir. 2009). The Second Circuit remanded because the District Court's treatment of qualified immunity was "cursory," although this does not really affect my analysis here.

138. *Id.* at 564.

139. *Id.* at 566.

140. *Id.* at 568.

141. *See id.* There were other claims in the complaint, but in my analysis here I only focus on the deliberate indifference discrimination claim.

142. *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 141 (2d Cir. 1999).

143. *DiStiso*, 539 F. Supp. 2d at 567.

144. 526 U.S. 629, 633 (1999).

harassment must have been “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”<sup>145</sup> *Gant*, the Second Circuit case regarding student-on-student racial harassment, had declined to decide whether such a racially-hostile educational environment was necessary in a deliberate indifference race discrimination claim brought under the Equal Protection Clause.<sup>146</sup>

If this case had come about after *Pearson-Iqbal*, Robin and Nicholas would find themselves caught on precisely the dilemma I described above.<sup>147</sup> If they pled a very specific constitutional right—the right to be free from race discrimination, premised on a theory of deliberate indifference—they might find their claim dismissed by *Pearson*; a court could conclude that the right in question is not “clearly established” because no relevant court had decided whether a hostile educational environment was a required part of such a claim. If Robin and Nicholas pled their claim at a level of generality—say, simply the right to be free from racial discrimination—they would almost certainly lose because of *Iqbal*. Any allegations regarding intentional, active discrimination by Cook or Couture would be conclusory because the real nub of the claim against them (on this count) was not that they did discriminatory things to Nicholas; it was that they willfully *ignored* others’ discriminatory treatment. In such a context, any allegation Cook or Couture actively engaged in discriminatory conduct would be seen as “conclusory,” as the allegations discarded by the Supreme Court in *Iqbal*.

And so, in a *Pearson-Iqbal* world, Robin and Nicholas would be stuck. They could plead the violation of a specific constitutional right—indeed, the one that is most directly applicable to the fact pattern—and risk getting tossed by *Pearson*. Or they could plead the violation of a more general constitutional right and risk getting thrown out by *Iqbal*.

There are several important implications here. The first, of course, is the interaction between *Pearson* and *Iqbal* makes life very difficult for civil rights litigants and their lawyers. The second is the interaction between the two cases makes a stand-alone problem even worse. Recall that *Pearson*, by its own terms, would be undesirable because it risks stagnation of constitutional law. This dissuades litigants from pressing novel constitutional theories. However, when operating in tandem, the cases make it difficult even to plead *existing* constitutional theories. The Second Circuit had already held school officials

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145. *Id.* at 650.

146. *See Gant*, 195 F.3d at 140 n.5 (declining to answer the question and noting some of the aspects of *Davis* may have turned on the fact it was a Title IX case).

147. The difference, of course, would be that the real-life plaintiffs’ names do not necessarily start with “P.”

could be liable by virtue of their deliberate indifference.<sup>148</sup> Robin and Nicholas would get tripped up by *Pearson-Iqbal* even if they pled a theory of race discrimination that had been recognized since 1999.

Of course, there is no guarantee this case would get tripped up by the interaction effect. But rather than mitigate the problem, this possibility actually underscores it. *Pearson* gives courts the discretion to decide which step of the qualified immunity analysis to address first, and *Iqbal* tells courts to make “common sense” decisions. But this rather wide-ranging discretion makes it nearly impossible to predict how a court will respond to a particular fact pattern.<sup>149</sup>

In its decision in *Iqbal*, the Second Circuit recognized a version of the problem I describe.<sup>150</sup> The court noted Rule 8 establishes a rather liberal pleading standard. However, this standard, “when applied mechanically without countervailing discovery safeguards, threatens to create a dilemma between adhering to the Federal Rules and abiding by the principle that qualified immunity is an immunity from suit as well as from liability.”<sup>151</sup> The Supreme Court avoided this dilemma by raising the pleading bar in *Iqbal* and permitting courts to more easily dismiss claims on the basis of immunity in *Pearson*. But the pendulum has swung too far; in trying to shield government officials from liability, the Court has thrust civil rights litigants into an untenable, damned-if-you-do-damned-if-you-don’t position.

After making this rather sweeping point I will qualify it in two respects. First, it must be acknowledged that *Iqbal* and *Pearson* do not necessarily interact in every single case. *Iqbal*’s standards apply to the allegations a plaintiff must make regarding the actions that the defendant(s) took toward him. *Pearson* applies to the showing a plaintiff must make regarding the constitutional right that was violated. Although these will often overlap—as in the examples above—they need not overlap in every case. For example, we could modify the facts of Nicholas’s case slightly. Imagine that Nicholas’s teachers regularly made him sit in the corner of the classroom, picked on him, and otherwise singled him out for derogatory treatment on account of his race. The right to be free from intentional racial discrimination by the defendants (as opposed to deliberate indifference discrimination) has long been clearly established. Therefore, the claim would proceed to trial.

Suppose, though, that Nicholas wants to also press a claim that the discrimination he suffered was not just because Couture hated him but

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148. *Gant*, 195 F.3d at 150.

149. I discuss the problem with the cases’ approach to lower court discussion in more detail in Subsection III.B.2 *infra*.

150. *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007).

151. *Id.* at 159.

also because Cook had directed a conspiracy to deprive black students of an education. Nicholas would have to allege facts sufficient to establish that Couture discriminated against him (a straight discrimination claim), but he would also have to allege facts regarding the conspiracy involving Cook (a § 1985 civil rights conspiracy claim). In this scenario, fairly simple allegations would get Nicholas past a motion to dismiss as against Couture. The *Iqbal* problem would come up—just as it did in *Iqbal*—in the context of attempting to plead sufficient allegations to make out a conspiracy claim. But this problem would be one of pleading alone and would not implicate the constitutional right at issue, and therefore would not implicate *Pearson*.

The real question (and one that is unknowable at this early stage) is how many cases will involve the dilemma I identify and how many will be relatively straightforward. What we can say is this: *Iqbal* will be problematic in any case where the very detail a plaintiff has to plead (per *Iqbal*) to make her claim takes her out of the clearly established realm. Pre-*Pearson*, she could at least plead enough “*Iqbal* detail,” so to speak, and be assured that she would get a ruling on the constitutional right at issue (*Saucier* step 1). Now, she is not even assured that much and will likely get kicked out on a motion to dismiss.

Moreover, as Nicholas’s example demonstrates, this can be problematic even in non-cutting-edge cases. For example, in *Saucier*, the issue was one of excessive force. But the Court was clear it was not testing whether the general right to be free from excessive force during an arrest was clearly established; the right has to be defined at a greater level of particularity. So the § 1983 plaintiff’s attorney has to decide: “how specifically am I going to define this right?” Even in the variation on Nicholas’s case I gave above, one could imagine that Cook had promulgated a policy that might be read as being “aggressive” toward certain students (or some such), a policy that might plausibly suggest a “discrimination conspiracy.” But if the right must be defined at a greater level of particularity (per *Anderson*, etc.), then we are back to the interaction problem: more specificity risks the possibility the pleadings are no longer “*Iqbal* compliant” (though they may have been when operating at a level of generality).

There is another issue. At the motion to dismiss stage, a court must determine, as a threshold matter, whether the facts alleged by the plaintiff, viewed most favorably to him, make out a constitutional violation. However, as a group of law professors explained in their *amicus* brief in *Iqbal*:

[W]hat is now described as the first step is, in fact, only a reflection of the plaintiff’s standard obligation to show her entitlement to relief under Rule 8(a)(2). As a matter of trans-substantive procedural law, a failure to make such a showing in any case would trigger a Rule 12(b)(6) motion to dismiss for failure to state a claim. No different

rule applies to constitutional claims, for nothing in this Court's qualified immunity jurisprudence suggests that the first element should be accorded any specialized treatment or scrutiny.<sup>152</sup>

In other words, if the facts viewed most favorably to the plaintiff did not make out a constitutional violation, not only would the defendant be entitled to qualified immunity, the complaint (at least as to that claim) would also be dismissed.

This demonstrates another interaction effect between *Pearson* and *Iqbal*. Because *Iqbal* effectively raises pleading standards, thus requiring more for a plaintiff to defeat a Rule 12(b)(6) motion to dismiss, it correspondingly has the effect of raising the bar for plaintiffs at the first step of qualified immunity. Again, *Iqbal* makes no mention of this fact.

In sum, there are two ways the interaction between *Pearson* and *Iqbal* is bad for civil rights plaintiffs. First, a plaintiff faces a potentially untenable situation with regard to how narrowly to define the constitutional right at issue. Pleading the claim narrowly might render the claim so novel as not to be "clearly established," and the plaintiff would lose straight away because of *Pearson* and not even get a ruling on the constitutional merits. But pleading the claim broadly might require allegations at a level of generality and therefore get discarded because they are "conclusory" or otherwise not "plausible." Second, by raising the pleading standard, *Iqbal* has effectively raised the bar for "*Saucier* step one."<sup>153</sup> Neither the subsequent case law nor the academic commentary—let alone *Pearson* and *Iqbal* themselves—recognizes this problem.

## 2. Discretion That Only Cuts One Way

The second way in which *Pearson* and *Iqbal* are problematic relates to their treatment of the discretion a lower court has. The cases simultaneously expand and contract the permissible bounds of a district court's discretion—but only do so in a way that makes it easier to dismiss civil rights lawsuits.

*Pearson* gives district courts the discretion to skip directly to step two of the qualified immunity analysis. "The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circum-

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152. Brief of Professors of Civil Procedure and Federal Practice as Amici Curiae in Support of Respondents at 29-30, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015).

153. This will be most problematic for plaintiffs who have already prevailed on a motion to dismiss (pre-*Iqbal*) but who now face a motion to dismiss on the basis of qualified immunity (post-*Iqbal*). Such a plaintiff would have made the requisite showing under the old standard but will now lose if those allegations are deemed insufficient under the new standard.



tances in the particular case at hand.”<sup>154</sup> To be sure, this does not mean that courts will *never* use *Saucier* sequencing. The Supreme Court has noted the sequence is “often beneficial,”<sup>155</sup> and courts have heeded this advice and continued to adhere to the sequence in certain cases. For example, in *Kelsey v. County of Schoharie*,<sup>156</sup> the Second Circuit noted the sequential analysis “is said to be appropriate in” certain types of cases, and “[t]his is such a case.”<sup>157</sup> The court explained that:

[D]evelopment of constitutional precedent is especially important here, where (1) this Court has not spoken on the issue of the constitutionality of [the procedure *sub judice*] although the issue has been presented in district courts in this circuit . . . ; and (2) the constitutionality of [the procedure] may never be developed if this Court were to dispose of all challenges relating to the procedures simply because the procedure is not “clearly established.”<sup>158</sup>

In so holding, the Second Circuit recognized (and avoided) the problem I identified above, namely, that courts’ regularly moving to “step two” would restrict the development of constitutional law.<sup>159</sup> However, far more courts—dozens, in just a few months after *Pearson*—have skipped directly to the second step of the analysis.<sup>160</sup>

As Hughes’s empirical study makes clear, when sequencing is mandatory—or at least strongly suggested—courts will engage in it more often. My early survey of post-*Pearson* cases indicates courts are indeed engaging in sequencing less frequently.

Although this point is related to the one made earlier (that *Pearson* harms civil rights plaintiffs because it limits the development of constitutional law), it is distinct. My point in this section is not just that it is easier to dismiss civil rights claims against personal-

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154. *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009).

155. *Id.*

156. 567 F.3d 54 (2d Cir. 2009).

157. *Id.* at 61.

158. *Id.* at 61-62 (citations omitted).

159. *See supra* Part 0.

160. *See, e.g.*, *Swanson v. Town of Mountain View*, 577 F.3d 1196, 1199, (10th Cir. 2009) (“The officers contend that even assuming a constitutional violation . . . it was not clearly established . . . We agree.”); *Waesche v. Dragovic*, 576 F.3d 539, 544 (6th Cir. 2009) (resolving the constitutional merits “is unnecessary because . . . [the] purported constitutional right is not clearly established”); *Dean v. Blumenthal*, 577 F.3d 60, 66 (2d Cir. 2009) (“[W]e conclude that, regardless of whether a right to receive campaign contributions exists, it was not clearly established . . . and Blumenthal is therefore entitled to qualified immunity.”); *Lewis v. City of West Palm Beach, Fla.*, 561 F.3d 1288, 1291 (11th Cir. 2009) (“Even if the officers’ actions violated Lewis’s Fourth Amendment rights, the appellant did not demonstrate that the officers’ conduct was an intrusion on a clearly established right.”); *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1278 (10th Cir. 2009) (“Police officers are not constitutional lawyers, and they should not have to fear personal damages liability when they enforce the plain terms of an ordinance that has not been challenged in court, let alone overturned, unless its unconstitutionality is patent.”).

capacity defendants. It is that the Supreme Court has given lower courts the *discretion* to do so, even though it has given them no corresponding discretion to preserve such constitutional claims.

Consider, for example, this illustration: a prisoner, who holds certain religious beliefs, sues prison officials for failing to provide him a diet that comports with his religious beliefs (say, vegan). Suppose a prisoner-plaintiff makes all of the necessary showings at the summary judgment stage regarding the constitutional violation. However, the district court concludes that, at the time of the alleged violation, the right was not clearly established. Per *Pearson*, the court will be free to grant the defendant(s) immunity.

Now suppose the prisoner has demonstrated at the summary judgment stage that prison officials knew he was a vegan, denied him vegan meals, and knew he adhered to a particular religion. Suppose further that this alleged violation took place at such a time that the right *was* clearly established within the relevant jurisdiction. However, it was not clear whether there was evidence from which a jury could conclude that the prisoner's veganism derived from a sincerely held religious belief, the threshold belief in any such case.<sup>161</sup> Under the prevailing law, the court would be within its rights to dismiss the claim because the plaintiff had not put forth evidence from which a fact-finder could conclude his rights had been violated. But nothing in *Pearson*—or any other case—explicitly directs courts to exercise their discretion to require further elaboration of threshold questions. And although district courts are routinely said to possess various inherent powers,<sup>162</sup> a court that went out of its way to exercise discretion on behalf of a civil rights plaintiff in this context would probably be held to have *exceeded* its discretion. This is because, as the Supreme Court has repeatedly instructed, qualified immunity is not just an immunity from having to pay damages, but immunity from having to participate in litigation at all.<sup>163</sup> A defendant who makes a poor showing on *Saucier* step one can still appeal to the district court's discretion to decide step two first. But a plaintiff who makes a poor showing on *either* step very likely cannot appeal to such discretion because the court's discretion is limited, if it exists at all.<sup>164</sup>

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161. See, e.g., *DeHart v. Horn*, 227 F.3d 47, 51 (3d Cir. 2000).

162. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (“Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”); *United States v. \$40,955.00 in U.S. Currency*, 554 F.3d 752, 758 (9th Cir. 2009) (noting a district court’s “inherent power to control litigation”).

163. See, e.g., *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).

164. As described earlier, see *supra* Part 0, the Court’s jurisprudence over the last three decades has been in the direction of *limiting* the scope of civil rights litigation, both substantively (by establishing the qualified immunity doctrine, see *Harlow v. Fitzgerald*,

One of the justifications for this one-way discretion is that it will be more efficient. Yet this justification does not hold water on closer inspection. This is because an attorney—wanting to cover all bases—would presumably argue (1) there was no constitutional violation, and (2) even if there was, the purported right was not clearly established.

This is precisely what the defendant-appellants did in *Green v. Post*, to take an example that came about shortly after *Pearson*.<sup>165</sup> The Tenth Circuit concluded the officer's conduct did not violate a constitutional right.<sup>166</sup> However, the court continued, “[a]lternatively, even were we to conclude that the Greens can establish a constitutional violation . . . we would conclude that Deputy Post is entitled to qualified immunity because the law was not clearly established at the time of the incident.”<sup>167</sup> This discussion is plainly unnecessary to the result in the case: having concluded that no constitutional violation had occurred, the court could end the qualified immunity inquiry under any standard, including *Saucier*.<sup>168</sup> *Pearson* permits, and as a practical matter, probably requires, litigants to argue in the alternative. And as *Green* demonstrates, this presents the risk of courts speaking to unnecessary legal questions—one of the very charges leveled at *Saucier*.

*Iqbal* also expands and contracts district courts' discretion in a way that is problematic for civil rights litigants. The Second Circuit, in its decision, was acutely aware of the tension between Rule 8's liberal pleading rules and the policy underlying qualified immunity, *viz.*, the need to protect government officials not only from liability but also from litigation itself. Therefore, though the court concluded that *Iqbal*'s complaint had stated a viable claim, it cautioned the district court to keep a close eye on the litigation. The discussion focused principally on the discretion that district courts possess. For example, “mindful of the need to vindicate the purpose of the qualified immunity defense by dismissing non-meritorious claims against public officials at an early stage of litigation,” a district court could “consider exercising its discretion to permit some limited and tightly con-

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457 U.S. 800 (1982)) and procedurally (by authorizing interlocutory appeals, see *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985)).

165. See Appellants' Opening Brief, *Green v. Post*, 574 F.3d 1294 (10th Cir. 2009) (No. 08-1122). *Post* presumably raised the alternative arguments because *Saucier* still controlled at the time. But the problem persists to this day. See, e.g., Appellee's Opening Brief, *Olseth v. Larson*, No. 10-4015, 2010 WL 2397296, at \*23 (June 4, 2010) (“Even if this Court [concludes that there was a constitutional violation], *Larson* is still entitled to qualified immunity because *Olseth* cannot demonstrate that *Larson*'s decision to shoot her was contrary to clearly established law at the time of the violation.”).

166. See *Green*, 574 F.3d at 1304.

167. *Id.*

168. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (“If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.”).

trolled reciprocal discovery so that a defendant may probe for amplification of a plaintiff's claims and a plaintiff may probe such matters as a defendant's knowledge of relevant facts and personal involvement in challenged conduct."<sup>169</sup>

The court was particularly concerned about the prospect of "current or former senior officials of the Government, against whom broad-ranging allegations of knowledge and personal involvement are easily made."<sup>170</sup> Therefore, it suggested,

a district court [could] structure such limited discovery by examining written responses to interrogatories and requests to admit before authorizing depositions, and by deferring discovery directed to high-level officials until discovery of front-line officials has been completed and has demonstrated the need for discovery higher up the ranks. If discovery directed to current or former senior officials becomes warranted, a district court might also consider making all such discovery subject to prior court approval.<sup>171</sup>

The Second Circuit explained that the liberal standard of Rule 8, "when applied mechanically without countervailing discovery safeguards, threatens to create a dilemma between adhering to the Federal Rules and abiding by the principle that qualified immunity is an immunity from suit as well as from liability."<sup>172</sup> Therefore, it explained that in cases such as *Iqbal*, a lower court "not only may, but 'must exercise its discretion in a way that protects the substance of the qualified immunity defense.'"<sup>173</sup> The district court was also required to provide an opportunity for defendants to move for summary judgment as soon as it was apparent "that certain of the Defendants were not sufficiently involved in the alleged violations to support a finding of personal liability, or that no constitutional violation took place."<sup>174</sup>

The Second Circuit's focus on district courts' discretion was not isolated or unusual. For years, the Supreme Court had instructed courts to exercise their discretion in precisely the way the Second Circuit suggested, managing the course of litigation in such a way that gave plaintiffs the opportunity to determine facts not within their power to ascertain at the complaint stage while simultaneously preserving the essence of the immunity defense for defendants.

More than a decade ago, in *Crawford-El v. Britton*,<sup>175</sup> the Supreme Court explained this process. The court has the power to order a reply

169. *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007).

170. *Id.*

171. *Id.*

172. *Id.* at 159.

173. *Id.* (quoting *Crawford-El v. Britton*, 523 U.S. 574, 597-98 (1998) (emphasis in *Iqbal*)).

174. *Id.* at 159 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 821 (1982) (Brennan, J. concurring)).

175. 523 U.S. 574 (1998).

to the defendant's answer per Rule 7 or require a more definite statement of the plaintiff's claims per Rule 12. "Thus, *the [district] court may insist that the plaintiff put forward specific, nonconclusory factual allegations* that establish improper motive causing cognizable injury in order to survive a pre-discovery motion for dismissal or summary judgment."<sup>176</sup> This passage is important. In *Iqbal*, the Court instructed that conclusory allegations must be disregarded altogether. Yet in *Crawford-El*, the Court explained that judges had the discretion to order fuller explication of claims pertaining to a defendant's state of mind. *Iqbal* makes no mention of *Crawford-El* (in either the majority or dissent), and therefore litigants and commentators must assume it is still good law.<sup>177</sup> Yet it is difficult, if not impossible, to square the two. *Crawford-El* devotes an entire section to "the existing procedures available to federal trial judges in handling claims that involve examination of an official's state of mind."<sup>178</sup> *Iqbal* flatly states, without any acknowledgement of *Crawford-El*, "We have held . . . that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process."<sup>179</sup> The only citation for this proposition is *Twombly*, though *Twombly* did not implicate "claims that involve examination of an official's state of mind,"<sup>180</sup> and thus it is unclear why *Twombly* has more relevance to the case than *Crawford-El*.

Courts have regularly permitted narrow or otherwise carefully managed discovery as a method to test the viability of a plaintiff's claims while shielding a defendant from the burdens of full-blown discovery. For example, district courts routinely permit or deny limited discovery to determine whether personal jurisdiction exists in a given district, based on the facts of the particular cases.<sup>181</sup> Although the precise standard regarding jurisdictional discovery varies by cir-

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176. *Id.* at 598 (emphasis added and internal quotation marks omitted).

177. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 238 (1997) ("[I]f a precedent of [the Supreme] Court has direct application in a case, *yet appears to rest on reasons rejected in some other line of decisions*, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." ) (emphasis added) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

178. *Crawford-El*, 523 U.S. at 597.

179. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

180. *Crawford-El*, 523 U.S. at 597.

181. *See, e.g.*, *Mother Doe I v. Al Maktoum*, 632 F. Supp. 2d 1130, 1144 (S.D. Fla. 2007) ("It is well-accepted that a qualified right to jurisdictional discovery exists."); *Pettengill v. Curtis*, 584 F. Supp. 2d 348, 361 (D. Mass. 2008) (denying plaintiff's motion for jurisdictional discovery because he failed to provide "specific allegations that might give rise to personal jurisdiction," but noting that if discovery "develops evidence demonstrating personal jurisdiction" over the dismissed defendants, plaintiff "may move to have them added as parties again"); 7240 *Shawnee Mission Holding, LLC v. Memon*, No. 08-2207-JWL, 2008 WL 4001159, \*4 (D. Kan., Aug. 26, 2008) ("The court finds that based on these exhibits and the showing of controverted facts related to jurisdiction, Plaintiffs should be allowed limited discovery regarding personal jurisdiction.").

cuit,<sup>182</sup> these and similar decisions are described as being within the discretion of the district court.<sup>183</sup> The Supreme Court has even recently held that a district court has the discretion to decide a defendant's motion to dismiss on the basis of *forum non conveniens*, even before deciding whether it has subject matter jurisdiction.<sup>184</sup> The viability of such procedures is in some doubt after *Iqbal*, since a borderline complaint is now to be dismissed outright.<sup>185</sup>

Consider, in this same vein, Rule 9(b)'s requirement that fraud must be pled with particularity. The Supreme Court explained in *Iqbal* that "particularity" is a relative term; it simply indicates that *more* is required for a fraud claim, not that state of mind and the like (which may be alleged "generally") can pass muster with *less* than the Rule 8 minimum.<sup>186</sup> Yet the circuits were in agreement, pre-*Iqbal*, that Rule 9(b)'s requirements were relaxed when the facts material to a fraud claim were in the defendant's exclusive possession and could be obtained only through discovery.<sup>187</sup> These cases, too, are apparently still good law; at least one district court has recently applied this standard, even after *Iqbal*.<sup>188</sup> But again, the case law is hard to square. *Iqbal* did not permit a case to go forward when there were general allegations against government officials. It is hard to imagine that the common practice of permitting cases that were subject to a *heightened* standard to go forward can be maintained after

182. *GTE New Media Services, Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1351 (D.C. Cir. 2000) (permitting jurisdictional discovery even when plaintiff's complaint did not make out a *prima facie* case); *Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181, 185-86 (2d Cir. 1998) (holding that the district court acted within its discretion to deny jurisdictional discovery when plaintiffs did not establish a *prima facie* showing of jurisdiction); *Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946-47 (7th Cir. 2000) (same).

183. *See, e.g., Af-Cap, Inc. v. Chevron Overseas (Congo), Ltd.*, 475 F.3d 1080, 1096 (9th Cir. 2007) ("The district court did not abuse this broad discretion when it limited discovery related to whether there was personal jurisdiction . . ."); *Sunview Condo. Ass'n v. Flexel Int'l, Ltd.*, 116 F.3d 962, 964 (1st Cir. 1997) (permitting jurisdictional discovery subject to the discretion of the district court).

184. *Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007).

185. This may overstate the issue somewhat, but only somewhat. Even pre-*Iqbal*, courts had long held that bare assertions of contact with the forum were insufficient to trigger jurisdictional discovery. *See, e.g., McLaughlin v. McPhail*, 707 F.2d 800, 806-07 (4th Cir. 1983). However, *Iqbal* still changes this landscape because a marginal complaint is *never* to proceed to discovery, limited, carefully managed, or otherwise. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

186. *Iqbal*, 129 S. Ct. at 1954.

187. *See, e.g., Emery v. Am. Gen. Fin., Inc.*, 134 F.3d 1321, 1323 (7th Cir. 1998); *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1418 (3d Cir. 1997); *Kowal v. MCI Comm. Corp.*, 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994) (noting that pleading on information and belief is permitted when the evidence at issue is within the defendant's control); *Devaney v. Chester*, 813 F.2d 566, 569 (2d Cir. 1987) (noting "the degree of particularity required [by Rule 9(b)] should be determined in light of such circumstances as whether the plaintiff has had an opportunity to take discovery of those who may possess knowledge of the pertinent facts.").

188. *Morrison v. YTB Int'l, Inc.*, 641 F. Supp. 2d 768, 774-75 (S.D. Ill. 2009).

*Iqbal*. But if that line of cases must be considered abrogated, then it is clear *Iqbal*'s analysis, ostensibly in the context of Rule 8, has disrupted the standards applicable to Rule 9(b) cases as well.

So *Iqbal* effectively ratchets back district courts' discretion, instructing them to dismiss a complaint outright when a complaint's well-pleaded factual allegations are deemed implausible. But it also expands district courts' discretion in another, important direction: it instructs courts to make this decision based on their "judicial experience and common sense."<sup>189</sup> The problem, of course, is that this kind of a determination is so open-ended as to be almost unreviewable.<sup>190</sup> And of course there is the question of how a case should proceed when the appellate court's "common sense" deviates from that of the district court (or when there is a split within an appellate panel). Common sense should be, well, *common*—shared by diverse individuals. Courts will now have the task of formulating a workable standard for "common sense" (The court's? Which court? The litigants? A reasonable third-party observer's?), and then determining the proper standard of review for such a determination.<sup>191</sup>

### C. So What? The Case Against Procedural Activism

On one level, this might seem like much ado about nothing. District courts are vested with wide discretion in many areas of law, including some of the most important decisions that are made in criminal sentencing.<sup>192</sup> And different doctrinal areas of law intersect—and interact—all the time. To cite one relevant example, Rule 9(b)'s requirement of particularized allegations of fraud is at least arguably in tension with the "broad and liberal"<sup>193</sup> interpretation that is to apply to the discovery rules. What's the big deal here?

The big deal, at least in my view, is the interactions between *Pearson* and *Iqbal* all cut in the same direction. For example, in the context of fraud claims, Rule 9's particularity requirement cuts

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

190. See Joan Steinman, *Irregulars: The Appellate Rights of Persons Who Are Not Full-Fledged Parties*, 39 GA. L. REV. 411, 441 (2005) (noting appellate courts "rarely" conclude that a district court's course of action was in excess of its allowable discretion).

191. As of this writing, no Circuit Court of Appeals has formulated a standard of review for a district court's "common sense" determination. So as not to render a "common sense" finding unreviewable, I suggest the analysis must have two elements: first, it must not be framed in conclusory terms. Second, the nonconclusory facts that support the determination must lead to a plausible (not merely possible) conclusion that the plaintiff's claims do not meet the "common sense" standard. This formulation, one might notice, has much in common with the *Twombly-Iqbal* pleading regime. I offer it only slightly tongue-in-cheek; I do submit that such a standard would offer a reviewing court a better record to review than a statement by the trial court that was, well . . . conclusory.

192. See *United States v. Booker*, 543 U.S. 220 (2005); *Kimbrough v. United States*, 552 U.S. 85 (2007).

193. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

against plaintiffs (who must plead more to get past a motion to dismiss) while the liberal discovery rules cut against defendants (who must subject themselves to greater scrutiny from plaintiffs and their attorneys). Motions to dismiss under Rule 12 or for summary judgment under Rule 56 benefit defendants (who can terminate litigation before trial), but the facts at each stage are, at least in theory, viewed most favorably to the plaintiff (who may ultimately prove disputed facts if the case does go to trial). Indeed, even the most important issue of a civil trial—liability—reflects this balance: a finding of liability cuts against the defendant (who must pay up), but getting to that point is harder for the plaintiff (who bears the burden of proof).

This kind of one-hand, other-hand balancing is conspicuously absent from *Pearson-Iqbal*. As I describe above, *Pearson* (in some cases) requires a plaintiff to say less, while *Iqbal* requires a plaintiff to say more. Neither of these cases so much as recognizes this dilemma, let alone provides a way out. And a way out is not impossible to conceive: for example, a plaintiff might be permitted to plead “*Pearson* generality” at the motion to dismiss stage but be required to adduce some evidence of “*Iqbal* detail” at the summary judgment stage. This would not even be much of a departure from pre-*Iqbal* case law: a plaintiff at the motion to dismiss stage was always entitled to rely on his pleadings and allegations, while he was generally required to show more at the summary judgment stage. *Pearson-Iqbal*, however, forecloses this kind of sliding scale.

So too with the discretion that all cuts one way. *Pearson*’s rule that sequencing is now voluntary increases a court’s discretion to dismiss civil rights claims; *Iqbal*’s rule that discovery management is an inadequate tool decreases a court’s ability to preserve civil rights claims; *Iqbal*’s directive to rely on common sense increases a court’s ability to dismiss such claims. Once again, it is possible to devise a rule that balances the interests of civil rights plaintiffs and defendants. For example, the Supreme Court could have (and I submit should have) announced the following rule, consistent with *Twombly* and pre-*Twombly* authority: (1) civil rights claims require no heightened pleading standard; (2) if the allegations regarding a particular defendant’s actions are “conclusory,” a court is to determine whether the claims against him are consistent with liability and, if so, whether the facts necessary to support such a claim are likely to be in the defendant’s possession. If so, the court could order limited discovery or use other procedural tools—as described in *Crawford-El*—to permit the plaintiff an opportunity to determine if he can make out a claim against the defendant. If he did, the case would proceed in the normal course; if not, the case would be dismissed. Again, such a formulation preserves the defendant’s interest in avoiding discovery intended only to harass, while permitting the district court to operate with a scalpel rather than a



mallet (and a rather one-dimensional mallet at that, since a court's only option in such a context is dismissal).<sup>194</sup>

That is my answer to the “so what?” question. The point is not that there are new rules (the merits of which we can debate) or even that various rules interact. It is that these rules interact in a way that harms civil rights plaintiffs and that there has been inadequate recognition of this fact. As a result, the Supreme Court has sharply constricted the universe of potentially successful civil rights claims.

And this is my argument against “procedural judicial activism.” As Professor Miller points out, value judgments underlie every aspect of civil procedure.<sup>195</sup> By cloaking important value judgments in the seemingly-neutral terms of procedure, the Supreme Court has dramatically altered the landscape for civil rights plaintiffs but managed to do so largely under the radar. Yet these decisions are no less “activist” because they involve procedural rules rather than substantive rights. So I use the term “procedural judicial activism” to refer to a course of action taken by a court that significantly expands, abridges, alters, or modifies substantive rights by way of the operation of procedural rules. A court enlarging or restricting the statute of limitations, for example, would be an example of procedural judicial activism. Similarly, a court altering rules regarding standing, justiciability, or similar topics qualifies as activist under this definition because modifications to these rules have a trans-substantive effect. Although a case could be made that the very creation of such rules was activist, I use a narrower conception of the phrase, in which a decision is categorized as activist if it significantly departs from prior precedent (even if the prior precedent might be categorized as activist). Thus, *Harlow* itself might be characterized as activist for creating the modern qualified immunity doctrine. However, I bracket that question, and label a decision activist if it departs from the post-*Harlow* understanding of the law of qualified immunity.

There are others who have written about this kind of judicial activism, or something like it,<sup>196</sup> and an exhaustive analysis of the case

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194. It is a relevant, but not wholly satisfactory, response to say that dismissal might be without prejudice. *Cf. Iqbal v. Ashcroft*, 574 F.3d 820 (2d Cir. 2009) (remanding to the district court to determine, in the first instance, whether plaintiffs should be given leave to amend their complaint). First, it is likely that only cases “on the bubble,” i.e., pending at the time *Iqbal* was decided, will get this benefit; future cases will likely be dismissed outright for failure to state a claim. Second, leave to replead, while softening the blow, does not change the fact that the process is time-consuming and expensive, particularly in civil rights cases that may be litigated pro bono with the hope of attorneys’ fees on the other end. *See* 42 U.S.C. § 1988 (permitting attorneys’ fees for a prevailing plaintiff in a civil rights action).

195. Miller, *supra* note 1.

196. Soree, for example, writes, “Procedural activism . . . may be suspected when a court chooses to reach the merits of an issue despite justiciability rules that would (or should) otherwise restrain the court from so doing, or when a court decides more than is

law and academic literature is beyond the scope of this Article. However, I bring up the issue to highlight an important feature of both *Pearson* and *Iqbal*: these decisions were not compelled, either by precedent or by the questions presented in the cases themselves.

Consider, for example, that overruling *Saucier* was not even on the radar when *Pearson* petitioned the Court for certiorari. It was the Court, *sua sponte*, that raised the issue. In its order granting certiorari, the Court wrote,

Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit granted. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: “Whether the Court’s decision in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L.Ed.2d 272 (2001) should be overruled?”<sup>197</sup>

In so doing, the Court reached out to decide an issue that was neither raised by the parties nor the court below. Such a course of action is “activist” by virtually any definition.<sup>198</sup>

A similar problem afflicts *Iqbal*. As the dissent points out, the parties assumed that actual knowledge of unconstitutional conduct by subordinate officers would subject petitioners Ashcroft and Mueller to liability. The question was not whether they *could* be liable; it was whether, *assuming* they could be liable, the allegations in the complaint were sufficient.<sup>199</sup> Thus, the Court’s majority put *Iqbal* in a rather unfortunate position: he did not brief or argue the issue of liability, relying on petitioners’ concession, and this issue turned out to be

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necessary to dispose of the case before it.” Nadia B. Soree, *The Demise Of Fourth Amendment Standing: From Standing Room To Center Orchestra*, 8 NEV. L.J. 570, 572 (2008). Susan Hauser uses the term “passive judicial activism,” to refer “to a court’s uncompelled use of procedural doctrines to preclude future litigation or legislative action.” Susan E. Hauser, *Predatory Lending, Passive Judicial Activism, and the Duty to Decide*, 86 N.C. L. REV. 1501, 1507 n.31 (2008); *see also id.* at 1551 (“The uncompelled use of procedural doctrines to preclude future litigation . . . does not square with Bickel’s passive virtues or Sunstein’s decisional minimalism; instead, it is a form of disguised judicial activism.”). This is similar to the concept described recently in Laurin’s article, “remedial rationing.” Laurin explains that criminal procedural rights can be vindicated either in a criminal case or in a civil case (in a damages action under § 1983). But when civil and criminal law both offer means to vindicate a particular right, the Court “is likely to channel enforcement into one regime or the other,” not permit both to flourish. Jennifer E. Laurin, *Melendez-Diaz v. Massachusetts, Rodriguez v. City Of Houston, and Remedial Rationing*, 109 COLUM. L. REV. SIDEBAR 82, 85 (2009). What Laurin calls remedial rationing would also qualify as procedural activism in my framework because it involves imposing judge-made rules to curtail the remedies available for the vindication of one’s constitutional rights.

197. *Pearson v. Callahan*, 128 S. Ct. 1702, 1702-03 (2008) (order granting certiorari).

198. *See, e.g., Ernest A. Young, Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1152 (2002) (“When we call the Court ‘activist’ because it ‘reaches out’ to decide an issue not strictly before it . . . we are complaining about judicial maximalism. This form of activism shares with the other types . . . a refusal to defer to other actors in the system.”).

199. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1955-57 (2009) (Souter, J., dissenting).

dispositive.<sup>200</sup> The majority thus decided an issue of liability “that . . . has no bearing on its resolution of the case.”<sup>201</sup>

After deciding the (unnecessary) question of *Bivens* liability, the court turned to the sufficiency of the pleadings. But as Justice Souter pointed out in his dissent, it was not clear what separated the “conclusory” allegations from the ones that were “nonconclusory.”<sup>202</sup> And where there is no “principled basis” for treating different allegations differently,<sup>203</sup> an observer is left to wonder if the majority’s conclusion in *Iqbal* stemmed from results-driven reasoning simply based on a policy belief that a government official’s right to be free from a vexatious lawsuit trumps an aggrieved civil rights plaintiff’s entitlement to relief.

In fact one does not have to look far to see if that was the case. In response to the argument that discovery could be managed to shield government officials from expense, the Court writes:

Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including “avoidance of disruptive discovery.” There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, “a national and international security emergency unprecedented in the history of the American Republic.”<sup>204</sup>

The policy motivation is clear: civil rights litigation “exact[s] heavy costs” and “it is counterproductive” to require government officials to litigate claims that may turn out to be meritless. Of course, one might draw just the opposite conclusion: that unconstitutional conduct by government officials extracts heavy costs and it is counterproductive to shield such individuals from civil rights claims that may turn out to be meritorious. The issue is not one of law. It is a pol-

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200. *See id.* at 1958.

201. *Id.*

202. *Id.* at 1961.

203. *Id.*

204. *Id.* at 1953 (citations omitted).

icy preference and nothing more. Yet, rather than defer to the judgment of the elected branches, or follow the procedure for amendment of the Federal Rules as described in the Rules Enabling Act,<sup>205</sup> the Court took it upon itself to make these judgments on its own.

My point is not really that the Court got the policy judgment wrong (although, if it was not clear, I do believe that it got it wrong). My point, like the one made by Clermont and Yeazell, is that there were policy judgments to be made, and that they should not have been made by the Court.<sup>206</sup> In other words, if the Rules Enabling Act process had resulted in a higher pleading standard, or a curtailment of district courts' ability to manage litigation, or any similar change, such a modification would be presumptively legitimate in a way that the Court's recent action is not.

In the criminal context, where all of the procedural chips fall in the same direction—presumption of innocence, automatic access to material exculpatory evidence, exclusionary rule, *Miranda* rights, rule of lenity, and so on—they do so because we as a society have made an explicit choice that defendants are presumed innocent and that they are entitled to all of the “breaks” in this regard. We have made no such decision, implicitly or explicitly, regarding civil rights plaintiffs. The only congressional authority on the subject is § 1983, which speaks of liability in almost unqualified terms. Section 1983's criminal analogue, 18 U.S.C. § 242, is even broader, prescribing a criminal punishment for those who violate another's rights under the color of *any* law (i.e., state or federal law, as opposed to § 1983, which only covers those acting under color of state law). Section 1983 was part of the Civil Rights Act of 1871 and, though the civil rights laws have been amended in the century-plus since, it exists today unaltered from the original. In short, to the extent that there is a political consensus in any direction, it is in *favor* of avenues to vindicate civil rights. The *Pearson-Iqbal* interaction reverses (or at least sharply curtails) this consensus, but does it *sub silentio*. Such a course of action should be problematic both for liberals who favor expanded access to civil rights remedies and for conservatives who oppose courts deciding cases more broadly than they should.

#### IV. CONCLUSION

Much has been written about *Pearson* and *Iqbal* in the past year. Some of that commentary has even noted that the cases could be harmful to civil rights plaintiffs.

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205. 28 U.S.C. §§ 2071-77.

206. Clermont & Yeazell, *supra* note 20.

However, no article (online or in print) explores the *interaction* between these two cases. When viewed in this light, it is clear that the cases bode poorly for those pressing civil rights claims. First, a plaintiff risks getting caught between a rock (*Iqbal*) and a hard place (*Pearson*). If he pleads his claim in great detail, a court deciding qualified immunity will simply conclude his right is not clearly established and not even give him a ruling on the constitutional merits. If he pleads generally to avoid this problem, he will get dismissed per *Iqbal*, as his broad allegations could be seen as conclusory or otherwise not plausible because of the lack of detail.<sup>207</sup> Moreover, the cases do not recognize, at least explicitly, that at the motion to dismiss stage the first step of the qualified immunity analysis is the same as the analysis under Rule 12(b)(6). By changing the standard for motions to dismiss, the Court has also implicitly changed the standard for “*Saucier* step one.”

The cases also interact with regard to lower courts’ discretion, but only in a way that hurts civil rights claimants. *Pearson* gives courts the discretion to decide which step of the immunity analysis to take up first, but this discretion only makes it easier to dismiss claims on the basis of immunity. *Iqbal* expands courts’ discretion by instructing them to rely on common sense—a standard that, unless Courts of Appeals cabin it, could turn out to be effectively unreviewable. At the same time, *Iqbal* restricts courts’ discretion to carefully manage litigation, thus forcing them to dismiss claims outright when in the past some targeted or limited discovery might have preserved the claims.

In other contexts, the interaction between rules either “cancels out” (because, for example, Rule 9’s particularity requirement is offset by liberal discovery rules) or the procedural rules favor one side because of an explicit policy choice (as in the case of criminal defendant). Neither is the case here. Instead, the Supreme Court has set up a regime where these cases, individually and jointly, work to the detriment of civil rights plaintiffs and, ultimately, all of us. It has done so by endorsing certain policy preferences and rejecting others, thus making political choices that should have been resolved through other mechanisms. The mere fact that the rules are procedural is of no moment; the decisions are just as far-reaching, and curtail civil rights litigation just as much, as if they had come up in an area of “substantive” law.

Though they may be hidden, “there are value judgments that lie beneath the surface of each and every aspect of civil procedure. . . . [I]t

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207. Cf. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009) (“Rule 8 does not empower [a plaintiff] to . . . plead the bare elements of his cause of action, affix the label ‘general allegation,’ and expect his complaint to survive a motion to dismiss.”).

simply takes you a long time to understand that.”<sup>208</sup> We can only hope that countless meritorious civil rights claims do not fall by the wayside before academics, litigants, and judges come to this realization.

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208. Miller, *supra* note 1.