AN UPDATED QUANTITATIVE STUDY OF *IQBAL*'S IMPACT ON 12(B)(6) MOTIONS

Patricia Hatamyar Moore *

The effect of Ashcroft v. Iqbal *on pleading standards and behavior is a source of significant legal debate. This article serves as a follow-up to Professor Moore's 2010 empirical study on* Iqbal*'s effect on courts' rulings on motions to dismiss complaints for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Professor Moore's previous study found a statistically significant increase in the likelihood that a court grants a 12(b)(6) motion with leave to amend following* Iqbal*. In this article, Professor Moore updates and increases the pool of cases in her database. The updated data reveals several empirical trends. First, the current study finds a statistically significant increase under* Iqbal *in the likelihood that a court will grant a 12(b)(6) motion without leave to amend, as compared to denying the motion. Second, following* Iqbal*, courts are now more likely to entirely dismiss cases through the grant of a 12(b)(6) motion. And third, the study confirms that constitutional civil rights cases are particularly affected under the courts' application of* Iqbal.

I. INTRODUCTION

Judges, lawyers, academics, legislators, and law students have collectively spent thousands of hours over the last two years pars-

* Associate Professor of Law, St. Thomas University School of Law. J.D., 1983, University of Chicago Law School; B.A., 1980, Northwestern University. A research grant from St. Thomas University School of Law supported work on this article.

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ing *Ashcroft v. Iqbal*,[1] debating whether it mandated a radical change in federal pleading standards, and predicting its future influence on rulings on motions to dismiss federal complaints under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.[2] Some have also attempted to quantitatively measure whether federal district court judges were less likely to grant 12(b)(6) motions under the old "no set of facts" standard set forth in dictum in *Conley v. Gibson*[3] than under the new "plausibility" standard introduced in *Bell Atlantic Corp. v. Twombly*[4] and amplified in *Iqbal*.[5]

My prior empirical study of the effect of *Twombly* and *Iqbal* on district court rulings found that district courts following *Iqbal* granted 12(b)(6) motions in full with leave to amend at over three times the rate (19%) of district courts following *Conley* (6%).[6] Further, the relative risk of a 12(b)(6) motion being granted with leave to amend, compared to being denied, was four times greater under *Iqbal* than under *Conley*, holding other potential factors (such as the type of case) constant.[7]

1. *See* 556 U.S. ___, ___, 129 S. Ct. 1937, 1953 (2009).

2. *See* FED. R. CIV. P. 12(b)(6) ("[T]he following defense[] may at the option of the pleader be made by motion: . . . failure to state a claim upon which relief can be granted . . . .").

3. *See* 355 U.S. 41, 45–46 (1957) ("In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

4. *See* 550 U.S. 544, 570 (2007) ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."). As to "plausible," Professor Epstein has stated, "Exactly what that elusive word means is still up for grabs, but it does appear at the very least that this much is true: standards have stiffened." Richard A. Epstein, *Of Pleading and Discovery: Reflections on* Twombly *and* Iqbal *with Special Reference to Antitrust*, 2011 U. ILL. L. REV. 187, 197 (2011).

5. *Iqbal* clarified that *Twombly's* plausibility standard applies to all civil cases, not just antitrust cases. 129 S. Ct. at 1953. *Iqbal* also solidified the "two-pronged" approach to 12(b)(6) motions. *Id.* at 1950. First, a court should identify the "conclusions" in the complaint and refuse to assume that those "conclusions" are true, as opposed to "factual" allegations in the complaint, which the court must assume are true on a 12(b)(6) motion. *Id.* at 1949–50. The Court, however, did not explain how to distinguish a "conclusion" from a "fact." Second, a court should then determine whether the "factual" allegations alone (disregarding the "conclusions") state a claim to relief that is "plausible on its face." *Id.* at 1950. In applying the plausibility standard, the judge should use her "judicial experience and common sense." *Id.*

6. Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 598 tbl.1 (2010).

7. *Id.* at 619.

This prior study used 1039 cases, including only 173 cases decided in the three months after the *Iqbal* decision.[8] The present study includes 460 different cases (not including the original 173) decided in the twelve months after *Iqbal*, for a total of 1326 cases in the database decided under *Conley*, *Twombly*, and *Iqbal*.[9] Part II below outlines the research design of the updated study.

The larger database for this study yielded some interesting results suggesting that the impact of *Iqbal* has intensified since my earlier study. The results of my updated study are presented in Part III below.

For example, my last study found no statistically significant effect of either *Twombly* or *Iqbal* on the granting of 12(b)(6) motions *without* leave to amend.[10] The updated results indicate that the relative risk of a 12(b)(6) motion being granted *without* leave to amend, compared to being denied, was expected to be 1.75 times greater under *Iqbal* than under *Conley*, holding all other variables constant, and this increase is statistically significant.[11] Further, my former study found that neither *Twombly* nor *Iqbal* had a statistically significant effect on whether a case was entirely dismissed upon the granting of a 12(b)(6) motion without leave to amend.[12] In this updated study, the odds of the case being entirely dismissed upon the grant of a 12(b)(6) motion without leave to amend were 1.71 times greater under *Iqbal* than under *Conley*.[13] Finally, the updated study continues to indicate that constitutional civil rights cases in particular were dismissed at a higher rate post-*Iqbal* than pre-*Twombly*.[14]

As explored in Part IV below, the results of the updated study are roughly consistent with other publicly available studies.[15] But

8. *Id*. at 585.
9. *See infra* Table 1.
10. Hatamyar, *supra* note 6, at 618 tbl.4.
11. *See infra* Table 3.
12. Hatamyar, *supra* note 6, at 622–23 tbl.5.
13. *See infra* Table 5.
14. *See infra* Tables 2, 4.
15. *See* EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 11–12 (2010) [hereinafter LEE & WILLGING, ATTORNEY SATISFACTION] (discussing a survey of employment discrimination attorneys, in which 94.2% of plaintiffs' attorneys indicated that they included more factual allegations in their complaints since *Twombly* and *Iqbal*, and 74.6% said they had to respond to motions to dismiss that might not have been filed before *Twombly* and *Iqbal*, but

in March 2011 the Federal Judicial Center ("FJC") released an extensive empirical study ("FJC Study") of the possible effect of *Iqbal* on 12(b)(6) motions.[16] If read quickly and uncritically, the FJC's overall conclusion, unlike mine, appears to be that *Iqbal*'s impact has been negligible, particularly when considering grants of 12(b)(6) motions without leave to amend.[17] Those defending *Iqbal* have been quick to spin the FJC Study as demonstrating that the criticism of *Iqbal* has been premature and overblown.[18] However, a careful analysis of the FJC Study, such as the one recently completed by Professor Lonny Hoffman, reveals that "in every case category examined there were more orders granting dismissal post-*Iqbal* than there were pre-*Twombly*, both with and with-

only 7.2% reported having had a case dismissed for failure to state a claim under *Twombly* and *Iqbal*); William M. Janssen, Iqbal *"Plausibility" in Pharmaceutical and Medical Device Litigation*, 71 LA. L. REV. 541, 598, 644 n.400 (2011) (showing that of 264 federal pharmaceutical and medical device cases, 21.2% were potentially, though not always fatally, impacted by *Iqbal*); Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 116–18 (2009) (finding that in a study of 124 ADA cases in the federal district courts in the years before and after *Twombly*, while 54.2% of motions to dismiss were granted in the year before *Twombly*, 64.6% were granted in the year after *Twombly*); Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1835–38 tbl.2 (2008) (finding that in cases under *Conley* and in the seven months after *Twombly,* the granting of 12(b)(6) motions increased from 36.8% under *Conley* to 39.4% under *Twombly*, but the difference was largely explained by an increase in the granting of 12(b)(6) motions in civil rights cases under *Twombly*). *But see* THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 25 (2010), [hereinafter WILLGING & LEE, IN THEIR WORDS] (discussing telephone interviews with thirty-five attorneys, in which "[m]ost interviewees indicated that they had not seen any impact of [*Twombly* and *Iqbal*] in their practice").

16. JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011) [hereinafter FJC STUDY].

17. *See id*. at vii.

18. *E.g*., *Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 2 (2011) (prepared statement of Andrew Pincus, Partner, Mayer Brown LLP), *available at* http://judiciary.senate.gov/pdf/11-6-29%20Pincus%20Testimony.pdf ("Two years ago, many asserted that the Court's ruling in *Ashcroft* v. *Iqbal* . . . would dramatically restrict plaintiffs' access to court and that Congressional action was needed to overturn that decision. That speculation has been proven wrong: an independent study of the effects of the *Iqbal* ruling commissioned by the Federal Judicial Center—released just three months ago—found 'no increase' in the rate at which motions to dismiss terminate a case and that '[t]here was, in particular, no increase in the rate of grants of motions to dismiss without leave to amend in civil rights cases and employment discrimination cases.'") (alteration in original) (citation omitted). *Cf.* William H.J. Hubbard, *The Problem of Measuring Legal Change, with Application to* Bell Atlantic v. Twombly 1 (Univ. of Chi. Law & Econ., Olin Working Paper No. 575, 2011), *available at* http://papers.ssrn.Com/sol3/papers.cfm?abstract_id=1883831 (finding that "*Twombly* caused no legal change").

out prejudice[,] . . . and it was more likely that a motion to dismiss would be granted."[19]

In Part V below, I explore the FJC Study, and venture that it minimizes *Iqbal's* impact in a variety of ways. First, I outline the differences between the FJC's database and mine. Most critically, the FJC's database omits pro se cases, which are disproportionately civil rights cases,[20] and which my previous study found were more likely to be the subject of a successful 12(b)(6) motion under *Iqbal* than under *Conley*.[21] In addition, the FJC's database omits all cases in which the 12(b)(6) motion was granted on the basis of sovereign or qualified immunity;[22] in other words, the FJC excluded the cases that were most like *Iqbal* itself. Finally, the FJC's database (for studying the rulings on 12(b)(6) motions) is limited to a six-month period pre-*Twombly* (January to June 2006) and a six-month period post-*Iqbal* (January to June 2010), whereas my database contains cases running continuously for a five-year period from May 22, 2005 to May 18, 2010.[23]

Next, I present comparative results, reached after attempting to limit my database to more closely parallel the FJC's. Chiefly, I omitted pro se cases from my database (as did the FJC) and, for some purposes, limited my results to approximate the time periods the FJC used.[24]

With those limitations, my findings are broadly consistent with the FJC's: both the FJC and I found that 34% of 12(b)(6) motions were denied in 2006 (although my figure is for all of calendar year 2006, and the FJC's is only for the first six months of 2006). In the first six months of 2010, the FJC found that the rate of denial of 12(b)(6) motions had fallen to 25%; I found that the rate of denial had fallen to 27%. Concomitantly, of course, that means that

19. Lonny Hoffman, Twombly *and* Iqbal's *Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss* 6 (Univ. of Hous. Law Ctr., Paper No. 1904134, 2011), *available at* http://ssrn.com/abstract=1904134.

20. Hatamyar, *supra* note 6, at 613 (noting that although 28% of all plaintiffs in the database were pro se, 50% of plaintiffs in civil rights cases were pro se).

21. *Id.* at 614 fig.10, 629 tbl.C (noting that 67% and 85% of 12(b)(6) motions in pro se cases were granted under *Conley* and *Iqbal*, respectively, with and without leave to amend combined).

22. FJC STUDY, *supra* note 16, at 41.

23. *Id.* at 5.

24. Actually, my database ends one year after *Iqbal*, May 18, 2010, so it only contains cases from roughly the first five months of 2010. In addition, I included all of the cases in my database from 2006 so as to have a larger sample size.

both studies found that the rate of granting 12(b)(6) motions, at least in part, increased significantly from 2006 to 2010. Both studies also found the increase in grants was primarily attributable to grants with leave to amend.

Setting aside for a moment the substance of the *Iqbal* findings, the comparison of my delimited results with the FJC's tends to weaken the oft-stated hypothesis that orders granting 12(b)(6) motions are more likely to be "published" in computerized databases such as Westlaw than orders denying 12(b)(6) motions. The FJC was able to access district court orders that are not available on computerized databases.[25] At several points, then, the FJC postulates that other researchers' inability to access such orders, forcing them to rely on Westlaw, could have overstated the grant rate found by those researchers (including me).[26] However, when I excluded pro se plaintiffs and limited my database to roughly the same time periods covered by the FJC's database, the two studies found exactly the same denial rate in 2006 and only a two-percentage-point difference in the denial rate in 2010—my denial rate being two percentage points *higher* than the FJC's. This indicates that district court orders ruling on 12(b)(6) motions in Westlaw *are* fairly representative of the universe of all such district court orders.

Returning to the substantive comparison between my results and the FJC's, my results show a much greater impact of *Iqbal* when I include all cases decided under *Conley* and *Iqbal* in my database. The denial rate under *Conley* is still close—the FJC found 34% of 12(b)(6) motions were denied in the first six months of 2006,[27] while I found 33% of motions were denied under *Conley* from May 2005 to May 2007. However, as to orders granting all relief sought by the 12(b)(6) motion, our results diverge. While the FJC found that in the first six months of 2010 46% of the orders granted all relief sought by the 12(b)(6) motion,[28] I found 53% of the orders granted all relief sought by the motion under *Iqbal*

25. FJC Study, *supra* note 16, at 5.

26. *Id.* at 1 n.4 (examining four studies by other researchers); *id.* at 2 (finding that "each study was based on opinions appearing in the Westlaw database, which is likely to overrepresent orders granting motions to dismiss when compared with orders appearing on docket sheets"); *id.* at 21, 22, 36 (differentiating the FJC Study, which relied on cases not appearing in computerized reference systems, from the four other studies).

27. *Id.* at 13.

28. *Id.* at 17 n.32.

from May 2009 to May 2010—and that is still considering only represented, not pro se, plaintiffs. When I add back the pro se plaintiffs to the database, 46% of the 12(b)(6) motions were granted in full under *Conley*, and 61% of the motions were granted in full under *Iqbal*.

To be sure, as noted by several researchers (including the FJC), any study designed to empirically measure the impact of *Iqbal* faces numerous challenges.[29] Some potential litigants, perceiving that the standard is more stringent, will choose not to file a case at all. Other litigants may successfully plead with more particularity to avoid being dismissed. In addition, 12(b)(6) motions are granted for numerous reasons, not just on factual sufficiency grounds, which are arguably the grounds most affected by *Twombly* and *Iqbal*. It is frequently difficult to separate out or characterize the exact reason for a dismissal, and I made no attempt to do so, nor did the FJC.[30] Finally, "a study comparing grant rates pre-*Twombly* and post-*Iqbal* is unable to tell us how many *meritorious* cases have been dismissed under the *Twombly*/*Iqbal* standard."[31]

Still, *Iqbal*'s effect on federal pleading practice is undeniable. Both the FJC's results and mine show that 12(b)(6) motions are granted at a higher rate under *Iqbal* than under *Conley*.

II. STUDY DESIGN AND INCLUSION OF CASES IN UPDATED DATABASE

For a detailed review of the design of the study, an explanation of which cases were included and excluded from the database, and the coding of the variables, please refer to my earlier article on this topic.[32] Precisely the same procedure was followed for this update.

29. FJC STUDY, *supra* note 16, at 22–23; Kevin M. Clermont, *Three Myths About* Twombly-Iqbal, 45 WAKE FOREST L. REV. 1337, 1366 n.140 (2010); Hoffman, *supra* note 19, at 26–28.

30. For an interesting attempt to do exactly that for *Iqbal*'s effect on employment and housing discrimination cases, see Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. (forthcoming), *available at* http://ssrn.com/abstract=1941294.

31. Hoffman, *supra* note 19, at 32 (emphasis added).

32. Hatamyar, *supra* note 6, at 584–96.

Briefly, I chose, as randomly as possible, 1500 federal district court cases involving 12(b)(6) motions for possible inclusion in the database: 500 cases under *Conley* in the two years prior to the *Twombly* decision,[33] 500 cases under *Twombly* in the two years following the *Twombly* decision,[34] and 500 under *Iqbal* in the one year following the *Iqbal* decision.[35] I excluded some of these 1500 cases from the database for various reasons. For example, I excluded those that did not actually involve a 12(b)(6) motion[36] or

33. The Westlaw search in the U.S. District Courts Cases ("DCT") database for *Conley* cases was as follows: ("12(b)(6)" "12(c)") & ("*Conley*" /2 "gibson") & "no set of facts" & da(aft 05/21/2005) & da(bef 05/22/2007). The same cases decided under *Conley* that were used in my last study remained in the database for this study. It has been suggested that the formulation of my Westlaw search for pre-*Twombly* cases (and analogously my search for post-*Twombly* changes) may have had the effect of overstating the impact of *Iqbal*. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 839 n.66 (2010). Because my pre-*Twombly* search included as search terms "Conley" and "no set of facts" (the operative phrase of *Conley v. Gibson* that *Twombly* "retired"), the search only turned up cases that at least cited (if not actually applied) that very lenient standard. The concern is that other cases involving 12(b)(6) motions that did not cite *Conley* and its "no set of facts" standard may have applied a tougher standard to the complaint such that whatever tightening of the standard by *Iqbal* occurred, the net effect would have seemed smaller. The point is logical, but I have several responses to it. First, my choice of search terms was deliberate; whether there was a difference in results based on the key language of the cases is exactly what I set out to study. Second, to my knowledge, no one has actually studied how many pre-*Twombly* rulings on 12(b)(6) motions there were that did not, in fact, cite *Conley v. Gibson*. Because *Conley* was in the pantheon of civil procedure and the federal litigation bar, I suspect such cases are in the minority. Similarly, to my knowledge no one has studied whether there is any difference in results pre-*Twombly* between cases that cited *Conley* and cases that did not. Again, notice pleading and the "no set of facts" standard were so strongly engrained in the collective understanding that I suspect any case that did not cite *Conley* cited something very much like it, such as another leading Supreme Court case. *E.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) ("[A] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (internal quotation marks omitted)). Another possibility is that the case cited a court of appeals case from the district court's circuit. *E.g.*, Stewart v. Jackson & Nash, 976 F.2d 86, 87 (2d Cir. 1992). Finally, we now have a modest basis for comparison of grant rates between orders that cited *Conley* and the "no set of facts" standard in 2006 (mine) and orders that did not use those search terms and were decided in the first six months of 2006 (the FJC's). Both studies found that 34% of the 12(b)(6) motions were denied and 66% of the motions were granted at least in part. *See infra* Table 7.

34. The Westlaw search in the DCT database for *Twombly* cases was as follows: ("12(b)(6)" "12(c)") & ("*Twombly*" /p "plausib!") & da(aft 05/21/2007) & da(bef 05/22/2009). The same cases decided under *Twombly* that were used in my last study remained in the database for this study.

35. I did not use the cases decided under *Iqbal* that were selected for my last study, selecting instead 500 different cases. The new Westlaw search in the DCT database was: ("Ashcroft" /2 "*Iqbal*" & "12(b)(6)" & da(after 5/18/2009) & da(bef 5/19/2010)). This search generated 5958 cases. Using a random number generator, I selected 500 of these cases, of which 460 were ultimately included in the database.

36. *See* Hatamyar, *supra* note 6, at 586.

were decided under an explicitly heightened pleading standard,[37] such as Rule 9(b)[38] or the Private Securities Litigation Reform Act ("PSLRA").[39] Similarly, it is important to note, for purposes of comparison with the FJC Study, that although I included pro se plaintiff cases generally, I excluded pro se cases that were decided in a procedural posture other than a 12(b)(6) motion or under a standard that was not the default Rule 8(a)(2).

The updated database thus includes 1326 cases: 444 decided under *Conley*, 422 decided under *Twombly*, and 460 decided under *Iqbal*.

I coded the cases for these variables:

Authority: The Supreme Court authority under which the 12(b)(6) motion was decided. The categories are *Conley*, *Twombly*, and *Iqbal*.

Circuit: The circuit within which the district court sits.

Judge Type: Whether a district court judge or a magistrate judge wrote the opinion.

Pro Se Status: Whether the plaintiff was represented or pro se.

Class Action: Whether the case was brought as a class action (whether or not it was actually certified as such).

Case Type: The nature of the suit. The thirteen categories of suit are contracts; torts; constitutional civil rights; Title VII of the Civil Rights Act of 1964 ("Title VII"); Americans with Disabilities Act of 1990 ("ADA"); other civil rights (such as Title IX); Employment Retirement Income Security Act of 1974 ("ERISA") and the Fair Labor Standards Act of 1938 ("FLSA"); Labor Management Relations Act of 1947 ("LMRA") and other labor; intellectual property; antitrust; consumer credit; Racketeer Influenced and Corrupt Organization Act ("RICO"); and other federal or state statutes.[40]

37. *Id*. at 587.

38. FED. R. CIV. P. 9(b) (stating that in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake).

39. *E.g.*, 15 U.S.C. § 78u-4(b)(1)(2) (2006) (requiring pleading with particularity in private securities fraud actions); *see* Hatamyar, *supra* note 6, at 587 & nn.210–12.

40. For a detailed description of case types see Hatamyar, *supra* note 6, at 590–95.

Ruling: The ruling on the 12(b)(6) motion. The categories are (1) grant the entire motion without leave to amend, (2) grant the entire motion with leave to amend, (3) grant the motion in part and deny it in part (a "mixed ruling"), and (4) deny the entire motion.

Entire Case Dismissed: Whether the case was entirely dismissed upon the grant of a 12(b)(6) motion without leave to amend, or whether some part of the case nevertheless remained pending.

The last two variables are the outcome, or dependent, variables that are the subject of this study. The first six variables are the independent variables postulated to have some relationship to the dependent variables. All calculations were performed in Stata.[41]

Two major caveats about my database are in order. First, I used only cases available on Westlaw, rather than searching all district court orders on the prohibitively expensive and time-consuming Public Access to Court Electronic Records ("PACER") system. As indicated below, however, it does not appear that this significantly affected the results. Second, the cases decided under *Iqbal* span only one year, while the cases under *Conley* and *Twombly* span two years each.

III. RESULTS OF ANALYSIS OF UPDATED DATABASE

A. *Differences in Overall Rulings on 12(b)(6) Motions*

Figure 1 and Table 1 show the percentage of rulings on 12(b)(6) motions in the updated database under *Conley*, *Twombly*, and *Iqbal*.[42]

41. Stata is a commercially available statistical software package for data analysis, data management, and graphics.

42. For ruling percentages with only represented plaintiffs, see *infra* Tables 2, 8, and 9.

Table 1
Percentage of Rulings in Database on 12(b)(6) Motions under *Conley, Twombly,* and *Iqbal*
(1326 cases between May 22, 2005 and May 18, 2010)
Frequency in database *(Expected frequency)*
Percent in database *(95% confidence interval)*

	Grant, no amend	**Grant, amend**	**Mixed**	**Deny**	**Total**
Conley	**178** *(177)* **40%** *(36–45%)*	**28** *(54)* **6%** *(4–9%)*	**123** *(117)* **28%** *(24–32%)*	**115** *(96)* **26%** *(22–30%)*	**444**
Twombly	**165** *(168)* **39%** *(34–44%)*	**37** *(52)* **9%** *(6–11%)*	**125** *(111)* **30%** *(25–34%)*	**95** *(91)* **23%** *(19–27%)*	**422**
Iqbal	**184** *(183)* **40%** (36–44%)	**97** *(56)* **21%** *(17–25%)*	**102** *(121)* **22%** *(18–26%)*	**77** *(100)* **17%** *(13–20%)*	**460**
Total	**527** **40%**	**162** **12%**	**350** **26%**	**287** **22%**	**1326**

Pearson chi2(6) = 60.5278, $p < 0.001$.

The percentage of 12(b)(6) motions granted in full *with* leave to amend increased from 6% under *Conley* to 9% under *Twombly* to 21% under *Iqbal*. The percentage of motions denied (i.e., plaintiff won the motion) fell from 26% under *Conley* to 23% under *Twombly* to 17% under *Iqbal*. The increase from *Conley* to *Iqbal* in grants with leave to amend is statistically significant ($p < 0.001$), as is the decrease from *Conley* to *Iqbal* in denials ($p < 0.001$).

If we total the motions that were granted in full, both with and without leave to amend, a full 61% of the motions in the database were granted under *Iqbal*, as compared to 46% under *Conley*. The increase, though, is due to the increase in grants of motions *with* leave to amend under *Iqbal*.

This raises two obvious questions: do plaintiffs given leave to amend actually amend, and, if so, do their amended complaints survive any subsequent 12(b)(6) motions? If plaintiffs go on to amend their complaints and survive further motions to dismiss, then the increase in grants with leave to amend under *Iqbal* is not troubling and may enhance litigation efficiency by sharpening the issues in the case at an early stage.

If, on the other hand, most plaintiffs either do not amend or amend only to be dismissed once more, this time with prejudice, then the increase in grants with leave to amend under *Iqbal* may continue to cause concern that *Iqbal* is impeding access to justice. The FJC Study promises, in a future study, to examine the eventual fate of 12(b)(6) motions that have been granted with leave to amend.[43]

B. *Differences in Case Types*

1. Distribution of Case Types in Database under *Conley* and *Iqbal*

Figure 2 shows the percentage of different case types in the database. Appendix A provides the exact frequencies and percentages, broken down by represented and pro se plaintiffs.

43. FJC STUDY, *supra* note 16, at 23.

As shown in Figure 2, constitutional civil rights cases are the most prevalent case type in the database, comprising 30.5% of the overall 12(b)(6) motions (including the cases under *Twombly*, which are not pictured above). There are 141 constitutional civil rights cases under *Conley* (32% of the cases decided under *Conley*), 135 constitutional civil rights cases under *Twombly* (32% of the *Twombly* cases), and 124 such cases under *Iqbal* (27% of the *Iqbal* cases). The next most frequent case type—other federal and state statutes—comprises about 14% of the database, less than half the number of constitutional civil rights cases.

Constitutional civil rights cases are also by far the most likely to be brought by a pro se plaintiff. Figure 3 shows the percentage of cases in the database brought pro se by case type.

As Figure 3 shows, civil rights cases of all types—constitutional civil rights, Title VII, ADA/ADEA, and other civil rights—have a higher proportion of pro se plaintiffs than other case types. The overall average of pro se plaintiffs in the database is 29%.[44] Under *Conley*, 56% of the constitutional civil rights cases in the database were brought by pro se plaintiffs (78 of 140 cases).[45] Under *Iqbal*, 57% of the constitutional civil rights cases in the database were brought by pro se plaintiffs (71 of 124 cases). There was only one antitrust case in the database brought pro se. ERISA/FLSA cases had the next lowest percentage: only 2.9% of such plaintiffs were pro se.

The database includes constitutional civil rights cases filed pro se by prisoners. Note, however, that I excluded pro se complaints

44. This percentage is higher than the overall percentage of pro se litigants in federal district court, which was 26.5% in fiscal year 2008. *See* Hatamyar, *supra* note 6, at 613 n.271 (citing JAMES C. DUFF, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 780 tbl.S-23 (2008)).

45. Throughout this article, slight variations in totals result from an inability to classify some cases in a particular manner—here, pro se status—based solely on the written order in question. The unclassifiable cases are not included in totals relating to the classification.

that were dismissed under a standard different from that of Rule 8(a)(2).[46] Only cases challenged by a 12(b)(6) motion and subject to the default pleading standard under Rule 8(a)(2) were included in the database.[47]

I did not code the cases for prisoner plaintiffs, but I did code the cases for pro se plaintiffs. Since most cases filed by prisoners invoke constitutional civil rights, and since most prisoners file pro se, "constitutional civil rights cases brought pro se" articulates an imperfect proxy for prisoner cases. The database contains 224 constitutional civil rights cases brought pro se and 172 constitutional civil rights cases brought by represented plaintiffs.

2. Differences in Rulings by Case Type

Figure 4 and Table 2 show the percentage of 12(b)(6) motions in the database that were granted in full, both with and without leave to amend, for represented plaintiffs only, by the most prevalent case types.

46. *See* 28 U.S.C. § 1915A(b)(1) (2006) (outlining the dismissal of *sua sponte* reviews of prisoners' complaints under the PLRA); *id.* § 1915(e)(2)(B)(ii) (describing the dismissal of complaints in proceedings *in forma pauperis*); *see also* Hatamyar, *supra* note 6, at 585 (demonstrating that I excluded the same under my prior study).

47. *See* Hatamyar, *supra* note 6, at 588, 594 (demonstrating that to maintain continuity, I only included the same types of cases in both studies).

Even excluding pro se cases, the percentage of motions granted in full (both with and without leave to amend) rose from *Conley* to *Iqbal* in every major type of case. To be sure, some of the rate increases are not statistically significant (at $p \leq 0.05$). The rate increases that are statistically significant—in contracts, constitutional civil rights, ERISA, and consumer credit cases—can attribute much of their increase to grants with leave to amend. Still, whether statistically significant or not, the rate of grants in full without leave to amend in cases with represented plaintiffs increased from *Conley* to *Iqbal* in most major case types (except for consumer credit and "other statutes").

In constitutional civil rights cases, even excluding pro se plaintiffs, courts granted 12(b)(6) motions at a higher-than-average rate under *Iqbal*. Overall, under *Iqbal*, courts granted in full without leave to amend 33% of the 12(b)(6) motions in cases with represented plaintiffs, but in constitutional civil rights cases, courts granted 45% (24 of 53) of the motions without leave to

amend. In addition, under *Iqbal*, courts granted in full with leave to amend 19% (10 of 53) of the motions in constitutional civil rights cases with represented plaintiffs. Combining grants in full with and without leave to amend means courts granted 64% of the 12(b)(6) motions in the database in constitutional civil rights cases under *Iqbal*, even when the plaintiff was represented by counsel. Comparatively, under *Conley*, courts granted in full 41% of the motions in constitutional civil rights cases with represented plaintiffs (35% without and 6% with leave to amend).

C. *Regression of Various Factors on 12(b)(6) Ruling*

The results above were presented in two-way tables or figures.[48] The multinomial logistic regression is a more appropriate statistical tool with which to gauge *Iqbal*'s possible effect on the ruling on a 12(b)(6) motion. A multinomial logistic regression tests the strength of a model's various independent variables in predicting the outcome, or dependent variable, when the dependent variable is categorical rather than linear. This regression model estimates "the probability of different alternatives relative to the probability of a baseline."[49]

In the regression presented in this part, the dependent variable is the ruling on the 12(b)(6) motion. The ruling is a categorical variable: the outcome possibilities are deny in full, mixed ruling (granted in part and denied in part), grant in full with leave to amend, and grant in full without leave to amend. I used "deny" (the best outcome for the plaintiff) as the baseline outcome with which to compare the other outcomes.

The independent variables, or possible predictors, used in this model were Authority (*Conley*, *Twombly*, or *Iqbal*), Circuit, Judge Type, Pro Se Status, Class Action, and Case Type.[50]

48. As I warned earlier, "[M]ultiple factors may affect the ruling on the 12(b)(6) motion, and two-way tables cannot account for any confounding effects of other variables. As presented in two-way tables, any apparent relationships between the independent variables and outcomes can be misleading." *Id.* at 597 (citation omitted).

49. Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J. L. ECON. & ORG. 598, 608 (2007).

50. Dummy (or "design" or "indicator") variables were created for Authority, Circuit, and Case Type. *See* DAVID W. HOSMER & STANLEY LEMESHOW, APPLIED LOGISTIC REGRESSION 62 (2000) ("[D]iscrete nominal scale variables are included properly into the

Table 3 presents the results of this regression for all plaintiffs (both represented and pro se).[51]

Table 3

Multinomial Logistic Regression on Rulings on 12(b)(6) Motions in Database of 1340 Motions Decided Between May 22, 2005 and May 18, 2010
All plaintiffs (represented and pro se)

* Significant at the 95% confidence level or higher.
Notes: Number of observations = 1304. "Deny" is the baseline outcome to which other ruling outcomes are compared. The ruling category "mixed" is not shown. The reference outcome for Authority is *Conley*; for Pro Se Plaintiff, a represented plaintiff; for Class Action, not a class action; for Judge Type, a district court judge; for Circuit, the Eleventh Circuit; and for Case Type, contract. For this model, LR chi2(84) = 334.22; $p < 0.001$; Log likelihood = -1539.99; and Pseudo R2 = 0.10.

[logistic] analysis only when they have been recoded into design variables."). Judge Type, Pro Se Status, and Class Action are already binary variables (variables that have only two outcome categories).

51. The outcome possibility "mixed ruling" as compared to "deny" is not included. These results are available from the author upon request.

My earlier study found no statistically significant difference in the relative risk of a 12(b)(6) motion being granted *without* leave to amend, as compared to being denied, under *Conley*, *Twombly*, or *Iqbal*.[52] In the updated database, though, *Iqbal* has become a statistically significant factor. Under *Iqbal*, the relative risk that a court would grant a 12(b)(6) motion without leave to amend, rather than deny, increased by a factor of 1.75 over *Conley*, holding all other variables constant.[53] At the 95% confidence level, this relative risk ratio could be as low as 1.18 or as high as 2.57.

Further, the updated database continues to show *Iqbal*'s impact on the granting of 12(b)(6) motions *with* leave to amend. Under *Iqbal*, holding all other variables constant, the relative risk that a court would grant a 12(b)(6) motion with leave to amend, rather than deny, increased by a factor of 6.03 over *Conley*—six times more likely. At the 95% confidence level, this could be as low as 3.5 times or as high as 10.38 times more likely under *Iqbal* than *Conley*.

Keep in mind that the regression shown in Table 3 indicates the potential impact of *Iqbal* holding all other independent variables—such as Pro Se Status—constant. Thus, the relative risk of a 12(b)(6) motion being granted, as compared to denied, increased under *Iqbal* regardless of the plaintiff's pro se status.

As in my previous study, variables other than *Iqbal* also have a significant effect on courts granting 12(b)(6) motions without leave to amend, as compared to denying such motions. Holding all other variables constant, the relative risk that a 12(b)(6) motion would be granted without leave to amend, as compared to denied, by district courts sitting in the First, Second, Sixth, Ninth, and Tenth Circuits is over three times that of district courts sitting in the Eleventh Circuit.[54] In the District of Columbia, holding all other variables constant, the relative risk that a court grants a

52. Hatamyar, *supra* note 6, at 620.

53. A value greater than 1.0 for the relative risk ratio for any variable indicates that the presence of that variable (holding all other variables constant) increases the relative risk that the outcome possibility (here, grant without leave to amend) will occur, compared to the baseline outcome (here, deny).

54. In district courts sitting in the First Circuit, the relative risk ratio is 3.30; in the Second Circuit, 3.45; in the Sixth Circuit, 3.76; in the Ninth Circuit, 3.5; and in the Tenth Circuit, 3.43. In district courts sitting in the Fourth Circuit, holding all other variables constant, the relative risk that a 12(b)(6) motion would be granted without leave to amend, as compared to denied, is 2.46 times that of the Eleventh Circuit.

motion without leave to amend, as compared to denying the motion, is 8.21 times that of district courts sitting in the Eleventh Circuit.

Some case types are also significant predictors of the ruling. The relative risk that a 12(b)(6) motion would be granted without leave to amend, as compared to denied, in a case type involving "other federal and state statutes" is expected to be 1.92 times that of a contract case, holding all other variables constant. In a constitutional civil rights case, this relative risk is expected to be 2.16 times that of a contract case; at the 95% confidence level, this could be as low as 1.22 or as high as 3.84.

Finally, holding all other variables constant, the relative risk that a 12(b)(6) motion would be granted without leave to amend, as compared to denied, in a case with a pro se plaintiff is over five times that of a case with a represented plaintiff.

D. *Regression Focusing on Constitutional Civil Rights and* Pro se *Plaintiffs*

Motions to dismiss constitutional civil rights cases, and motions to dismiss pro se plaintiffs' complaints, are disproportionately successful under any authority.[55] Does *Iqbal* make it even more difficult for such cases to survive the pleadings stage?

Table 4 presents another way to examine *Iqbal*'s potential impact on constitutional civil rights cases. It presents the results of a multinomial logistic regression using only the 396 constitutional civil rights cases in the database.[56] The district court's ruling on the 12(b)(6) motion is again the dependent variable. Due to the smaller number of cases in this subset of the database, the only independent variables used in the model were Authority (*Conley*, *Twombly*, or *Iqbal*) and Pro Se Status.

55. *See supra* Part III(B); *see also* Hatamyar, *supra* note 6, at 614, figs.9 & 10. As to pro se plaintiffs generally, see the following: 28 U.S.C. § 1654 (2006); Nina Ingwer Van Wormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro se Phenomenon*, 60 VAND. L. REV. 983 (2007) and Rory K. Schneider, Comment, *Illiberal Construction of Pro se Pleadings*, 159 U. PA. L. REV. 585 (2011).

56. The figure differs slightly from the 405 total constitutional civil rights cases in the database because not all cases indicated whether or not the claim was brought pro se.

Table 4
Multinomial Logistic Regression of Authority and
Pro Se Status on Ruling
(Includes Only Constitutional Civil Rights Cases, Both
Pro Se and Represented)

Ruling	Relative Risk Ratio	Standard Error	z	P>|z|
Mixed				
Twombly	1.71	0.67	1.36	0.175
Iqbal	2.02	1.00	1.43	0.154
Pro se pl	1.05	0.37	0.13	0.898
Grant amend				
Twombly	3.57	2.05	2.23	0.026*
Iqbal	14.06	8.50	4.37	<0.001*
Pro se pl	2.08	0.90	1.69	0.091
Grant no amnd				
Twombly	1.73	0.66	1.43	0.152
Iqbal	3.77	1.76	2.85	0.004*
Pro se pl	2.16	0.73	2.28	0.022*

***** Significant at the 95% confidence level or higher.
Notes: Number of observations = 396. Deny is the baseline outcome category for Ruling. *Conley* is the baseline for Authority. A represented plaintiff is the baseline for Pro se Plaintiff. In this model, LR chi2(9) = 41.72; $p < 0.001$; Log likelihood = -462.44; and Pseudo R2 = 0.04.

Table 4 shows that in constitutional civil rights cases courts were 3.77 times more likely to grant motions to dismiss in full *without* leave to amend, as compared to deny, under *Iqbal* than under *Conley*—regardless of the plaintiff's pro se status. At a 95% confidence level, this could be as low as 1.51 times or as high as 9.39 times more likely under *Iqbal* than under *Conley*.

The strength of *Iqbal's* relationship to grants in full with leave to amend is even higher. In civil rights cases, courts were fourteen times more likely to grant motions to dismiss with leave to amend, as compared to deny, under *Iqbal* than under *Conley*—again, holding the pro se factor constant.

Finally, in a constitutional civil rights case, the relative risk that a court grants a 12(b)(6) motion without leave to amend against a pro se plaintiff's complaint, as compared to deny, was 2.16 times higher than a represented plaintiff's. That increase in

relative risk was regardless of the authority under which the motion was decided.

E. *Whether the Grant of a 12(b)(6) Motion Contributes to the Entire Case's Dismissal*

Even if a 12(b)(6) motion is granted in full *without* leave to amend, part of the case could still remain pending—for example, a different count or a claim against a different defendant. Thus, I coded the cases in the database for whether the grant of a 12(b)(6) motion without leave to amend resulted in a dismissal of the entire case (no part of the case remains pending after the grant of the 12(b)(6) motion).[57] My last study found that the rate of dismissing entire cases upon the grant of a 12(b)(6) motion did not change significantly from *Conley* to *Twombly* to *Iqbal*. The updated database reveals a significantly higher percentage of entire cases being dismissed on the grant of a 12(b)(6) motion under *Iqbal* than was the case under *Conley*.

Using all cases in the database, 120 of 443 cases (27%) under *Conley*, 101 of the 420 cases (24%) under *Twombly*, and 143 of the 460 cases (35%) under *Iqbal* were entirely dismissed upon the grant of a 12(b)(6) motion without leave to amend. Using only the subset of 510 cases in the database in which the court granted a 12(b)(6) motion in full without leave to amend, the percentage of cases that were entirely dismissed rose from 67% (118 of 177) under *Conley* to 76% (139 of 183) under *Iqbal*.[58]

A logistic regression[59] of factors that might be related to whether the entire case was dismissed suggests that *Iqbal*, as compared to *Conley*, is expected to significantly raise the odds that a case will be entirely dismissed on the grant of a 12(b)(6) motion without leave to amend. Table 5 presents the results.

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57. Sometimes the dismissal of the case occurs because of a combination of motions being granted, such as a 12(b)(6) motion as to some counts and a summary judgment motion as to other counts. I counted the order as an entire dismissal if the grant of the 12(b)(6) motion was without leave to amend and contributed to the dismissal.

58. The increase in the rate at which entire cases were dismissed from *Conley* to *Iqbal* is statistically significant at $p = 0.03$.

59. The logistic regression model is similar to the multinomial logistic regression model, except that in logistic regression, the outcome variable is binary (i.e., has only two outcome possibilities). Here, the outcome variable—whether a case is entirely dismissed upon the grant of a 12(b)(6) motion—is binary (entire case dismissed or entire case not dismissed).

Table 5
Logistic Regression of Various Factors on Whether the Entire Case Was Dismissed (Includes 510 Cases in Which Motion Was Granted in Full without Leave to Amend)

	Odds Ratio	Std. Err.	*z*	*p*
Twombly	0.82	0.22	-0.74	0.459
Iqbal	1.71	0.45	2.03	0.043*
Pro se plntff	3.51	0.87	5.07	<0.001*
Class action	3.95	2.16	2.51	0.012*
Judge type	0.83	0.34	-0.46	0.646
First Cir	1.93	1.36	0.94	0.349
Second Cir	3.07	1.71	2.01	0.044*
Third Cir	2.02	1.14	1.25	0.213
Fourth Cir	1.36	0.83	0.51	0.608
Fifth Cir	1.19	0.71	0.29	0.771
Sixth Cir	1.32	0.72	0.52	0.606
Seventh Cir	0.58	0.35	-0.90	0.370
Eighth Cir	1.13	0.74	0.19	0.853
Ninth Cir	2.67	1.49	1.75	0.080
Tenth Cir	0.91	0.56	-0.15	0.882
D.C. Cir	3.18	2.15	1.71	0.088
Tort	0.27	0.13	-2.77	0.006*
Intell prop	0.70	0.52	-0.47	0.635
Const civ rts	0.99	0.40	-0.04	0.972
Title VII	1.12	0.68	0.18	0.857
ADA/ADEA	0.58	0.38	-0.82	0.412
Other civ rts	0.84	0.51	-0.28	0.776
ERISA/FLSA	1.23	0.74	0.35	0.726
LMRA/oth lab	1.49	1.16	0.48	0.634
Antitrust	1.79	2.28	0.46	0.647
Consum credit	0.60	0.33	-0.92	0.356
RICO	0.40	0.37	-0.98	0.329
Othr statutes	0.80	0.35	-0.52	0.603

* Significant at the 95% confidence level or higher.
Notes: Number of observations = 510. The dependent variable is whether the case was entirely dismissed upon the motion's grant (no part of the case remained pending). The independent variables are shown in the left column. For binary variables, represented plaintiffs, non-class actions, and district court judges were the reference categories. For indicator variables, district courts in the Eleventh Circuit were used as the reference category for Circuit and contract cases were used as the reference category for Case Type. For this model, LR chi2(28) = 89.27; $p < 0.001$; Log likelihood = -274.92; and Pseudo R2 = 0.14.

Of 510 rulings of "grant without leave to amend" in the database, all other factors held constant, the odds of a dismissal of the entire case were 1.71 times greater under *Iqbal* than under *Conley*, and this is statistically significant at a 95.7% confidence level.

At the 95% confidence level, the odds ratio could be as low as 1.02 or as high as 2.88. Again, the increase in the odds ratio under *Iqbal* occurred regardless of the plaintiff's pro se status.

Factors other than *Iqbal* were also significant predictors of whether a case would be entirely dismissed upon the grant of a 12(b)(6) motion without leave to amend. First, cases with pro se plaintiffs were 3.5 times more likely to be entirely dismissed upon the grant of a 12(b)(6) motion than cases with represented plaintiffs. At the 95% confidence level, this rate could be as low as 2.2 or as high as 5.8. Second, interestingly, class actions (putative or certified) were almost four times more likely to be entirely dismissed than non–class actions. Third, the district courts in the Second Circuit were over three times more likely to dismiss the entire case upon the grant of a 12(b)(6) motion than the district courts in the Eleventh Circuit. Finally, tort cases were *less* likely (by a factor of 0.27) to be entirely dismissed upon the granting of a 12(b)(6) motion without leave to amend than contract cases.

IV. EARLY STUDIES OF *IQBAL* REQUESTED BY THE ADVISORY COMMITTEE ON CIVIL RULES

Responding to the controversy ignited by *Iqbal*, the Advisory Committee on Civil Rules has requested several studies of *Iqbal*'s possible effect on federal civil practice. Two of the early studies are discussed below.[60]

A. *Qualitative Study of Appellate (and Some District Court) Cases Interpreting* Iqbal

Andrea Kuperman, the Rules Law Clerk to Judge Lee A. Rosenthal of the Southern District of Texas, compiled a summary of approximately 100 federal appellate court cases as of July 26, 2010, applying *Iqbal* to review district court rulings on 12(b)(6) motions ("Kuperman Memorandum").[61] The Kuperman Memo-

60. *See* LEE & WILLGING, ATTORNEY SATISFACTION, *supra* note 15; WILLGING & LEE, IN THEIR WORDS, *supra* note 15.

61. *See* Memorandum from Andrea Kuperman, Rules Law Clerk to Hon. Lee A. Rosenthal, to Civil Rules & Standing Rules Comms. (July 26, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/*Iqbal*_me mo_072610.pdf [hereinafter Kuperman Memorandum]. Judge Rosenthal is the Chair of the Judicial Conference Committee on Rules of Practice and Procedure.

randum reveals that the appellate courts affirm most 12(b)(6) dismissals under *Iqbal*. Of approximately seventy-nine appeals court cases cited in the memorandum in which the district court had granted a 12(b)(6) motion, fifty-eight cases (73%) were affirmed on appeal.[62] Only fifteen of those seventy-nine dismissals (15%) were reversed on appeal.[63] Of the five cases cited in the memorandum in which the district court had *denied* the 12(b)(6) motion, two (40%) were reversed and three (60%) were reversed in part.

In addition, forty-six of the seventy-nine district court dismissals (58%) involved some sort of civil rights case, such as constitutional civil rights, employment discrimination, or housing discrimination. Of those forty-six civil rights dismissals, thirty-four (74%) were affirmed on appeal, six (13%) were affirmed in part and reversed in part, and six (13%) were reversed.

Of the thirty-one district court rulings summarized in the Kuperman Memorandum (most dating from 2009), thirteen motions (42%) were granted without leave to amend, six motions (19%) were granted with leave to amend, five motions (16%) were granted in part and denied in part, and seven motions (23%) were denied. Although Ms. Kuperman does not appear to have selected her cases randomly, and the sample is small, these findings are roughly consistent with mine.[64]

Civil rights cases comprise 74% (23 of 31) of the district court rulings summarized in the Kuperman Memorandum.[65] Of those twenty-three cases in which a 12(b)(6) motion was ruled upon, ten motions (43%) were granted without leave to amend, four motions

62. *See id.* These figures summarize Ms. Kuperman's memorandum as of July 26, 2010. I did not include cases decided under 28 U.S.C. § 1915A, Rule 9(b), or the PSLRA, or motions for leave to amend or motions to quash. All calculations in text are mine and do not appear in Ms. Kuperman's memorandum. Ms. Kuperman's memorandum has been updated to include cases decided after the time period I studied for this article, but the later cases are not included in my calculations. *See* Memorandum from Andrea Kuperman, Rules Law Clerk to Hon. Lee A. Rosenthal, to Civil Rules & Standing Rules Comms. (Dec. 15, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/*Iqbal*_memo_121510.pdf.

63. The remaining nine dismissals (11%) were affirmed in part and reversed in part. *See* Kuperman Memorandum, *supra* note 61.

64. *Compare supra* Table 1 (showing that of 460 motions to dismiss in this database decided under *Iqbal*, 40% were granted without leave to amend, 21% were granted with leave to amend, 22% were granted in part and denied in part, and 17% were denied), *with* Kuperman Memorandum, *supra* note 61.

65. *See* Kuperman Memorandum *supra* note 61.

(17%) were granted with leave to amend, five motions (22%) were granted in part and denied in part, and four motions (17%) were denied. Again, these findings are roughly consistent with mine despite the lack of randomness and small size of Ms. Kuperman's sample.

Of course, no case cited in the Kuperman Memorandum predates 2009, so a comparison of the frequency of 12(b)(6) dismissals before 2009, or affirmances of same, is not possible without additional research.[66]

B. *Administrative Office Statistics on Motions to Dismiss*

In the aftermath of *Twombly* and *Iqbal*, the Administrative Office of the United States Courts ("AO") undertook a statistical study of the frequency of and rulings on all motions to dismiss under Rule 12(b), beginning in January 2007 (four months before *Twombly*) and (as of this writing) ending at September 2010 (eighteen months after *Iqbal*).[67] The AO study provides useful information, but it was an imperfect assessment of the effect of *Twombly* and *Iqbal* for at least three reasons.

First, the AO study did not segregate 12(b)(6) motions; it included motions to dismiss filed under all subsections of Rule 12(b).[68] Although *Twombly* and *Iqbal* are now applied to some 12(b)(1) motions—motions to dismiss for lack of subject matter jurisdiction—it does not appear that the cases are being used in motions to dismiss under Rule 12(b)(2), 12(b)(3), 12(b)(4), 12(b)(5), or 12(b)(7).[69] In particular, motions to dismiss for lack of personal jurisdiction under Rule 12(b)(2) proliferate and are unlikely to be granted as frequently as 12(b)(6) motions.[70] Second, the AO study

66. *See id*. at 1–2.

67. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, MOTIONS TO DISMISS: INFORMATION ON COLLECTION OF DATA http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions%20to%20Dismiss%20Statistics%20-%20October%202010.pdf (last visited Dec. 12, 2011) [hereinafter MOTIONS TO DISMISS]. The AO has now posted a note that because the FJC has published its study, the AO is no longer studying this issue. Notice on Motion to Dismiss Data Provided by the Administrative Office, ADMIN. OFFICE OF THE U.S. COURTS http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Notice_Regarding_Collection_of_Motion_to_Dismiss_Data.pdf (last visited Dec. 12, 2011).

68. MOTIONS TO DISMISS, *supra* note 67.

69. *See generally* Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6):* Twombly, Iqbal, *and the Paradox of Pleading*, 62 STAN L. REV. 905, 908, 910 (2010).

70. *See* Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 26, 29–30 (1998) (discussing a study of motions to dismiss for lack of personal ju-

did not distinguish between grants of motions with leave to amend and grants without leave to amend.[71] Third, and most importantly, the AO data included all filed 12(b) motions to dismiss, but it did not include the dispositions of a large number of these motions.[72] As the AO explained, "[t]he courts do not rule on a significant number of motions to dismiss, often because the case settles without court intervention."[73]

An example will illustrate the extent of the lack-of-disposition problem with the AO data. For the entire time period (January 2007 to September 2010), the AO reported a total of 309,366 filed motions to dismiss.[74] However, in the same time period, the AO reported only 116,041 motions granted; 43,499 denied; 14,504 mooted; and 17,646 granted in part and denied in part, for a total of 191,690 motions on which there was some disposition reported.[75] Even though the motions filed were probably not exactly the same motions that were disposed of, the 117,676 missing cases could not all be due to a time lag.

Despite these problems with the AO data, some general trends may still be discerned. Using the AO's published data, I created some graphs that are somewhat easier to read.

Figure 5 shows that the number of motions to dismiss filed roughly tracks the number of cases filed. Thus, any increase in the filing of motions to dismiss may not mean that defendants are emboldened by *Twombly* and *Iqbal*, just that there were more complaints to challenge. Civil filings in the federal district courts increased by 2% from 2009 to 2010.[76]

risdiction from 1970 to 1994 and finding that such motions were denied in federal court approximately 50–60% of the time).

71. MOTIONS TO DISMISS, *supra* note 67.

72. *Id.*

73. *Id.*

74. *Id.* at tbl.3.

75. *Id.* at tbls.3 & 4.

76. Chief Justice John G. Roberts, Jr., *2010 Year-End Report on the Federal Judiciary*, THIRD BRANCH (Admin. Office of the U.S. Courts), Jan. 2011, at 3.

Figure 6 attempts to present the same information somewhat more meaningfully by graphing, by quarter, the number of motions to dismiss filed as a percentage of the number of cases filed. Here, however, arises the problem, implicit in the AO data, that the motions to dismiss filed in a certain quarter were not necessarily motions arising out of the cases that were filed in that quarter. In other words, the study was likely taking apples as a percentage of oranges.

Be that as it may, the upward-sloping fitted line suggests an increase in the rate of filings of 12(b) motions. This rather vague indication of a possible *Iqbal*-based encouragement of 12(b) motions was confirmed by the far more focused FJC Study, which concluded that there was a statistically significant increase in the rate of filing 12(b)(6) motions from 2006 to 2010.[77]

77. FJC STUDY, *supra* note 16, at 10.

Figure 7 shows a scatterplot of the granted motions to dismiss both with and without leave to amend) as a percentage of all motions to dismiss filed, by quarter, from January 2007 to September 2010. Oddly, the percentage bounces down, then up, from quarter to quarter, but stays within a range of about 34% to about 42%. A fitted line on the data points slopes slightly upward, possibly indicating a gradual increase in grants of 12(b) motions from January 2007 to September 2010.

V. A COMPARATIVE ANALYSIS OF THE FJC STUDY OF 12(B)(6) MOTIONS

At the request of the Civil Rules Committee, the FJC undertook an empirical study of the effect of *Twombly* and *Iqbal* on rulings on 12(b)(6) motions.[78] The FJC Study was designed to remedy some of the deficiencies of the AO study and posed two main research questions.[79] First, the FJC evaluated whether the rate of filing 12(b)(6) motions increased from 2006 to 2010.[80] Second, the FJC studied whether the rate of granting 12(b)(6) motions changed from 2006 to 2010.[81]

I summarize the FJC's main findings below. Next, I highlight important constraints placed on the FJC's database, many of which were not logistically or theoretically necessary and some of which seem likely to have resulted in an understatement of *Iqbal*'s impact. Then, taking the FJC database as it is found, I compare my results with the FJC's by limiting the cases in my database as best I can to parallel the FJC's.

78. *See* Judicial Conference Committee on Rules of Practice and Procedure, Minutes of the Committee on Rules of Practice and Procedure, at 5 (June 14–15, 2010) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2010-min.pdf; *see also* REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 4 (Mar. 2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST03-2011.pdf; Lee H. Rosenthal, *Pleading, for the Future: Conversations After* Iqbal, 114 PENN ST. L. REV. 1537, 1543 (2010).

79. *See* Rosenthal, *supra* note 78, at 1543.

80. FJC STUDY, *supra* note 16, at vii, 5, 8–9.

81. *Id*. at 5, 13–14.

A. *The FJC's Overall Findings*

1. Rate of Filing 12(b)(6) Motions

In the first part of its study, the FJC found that 12(b)(6) motions were filed in 6.2% of all cases in 2009–2010 (after *Iqbal*), up from 4.0% in 2005–2006 (before *Twombly*), and that this increase in the filing rate was statistically significant at less than the 0.05 level.[82] This finding confirms what was roughly apparent from the earlier AO data in Figure 6 above.

The increased motion filing rate means higher costs for litigants and more work for federal judges, without any obvious societal benefit.[83] If it is true, as the FJC asserts, that there has been no significant increase in grants of motions without leave to amend and no significant increase in individual plaintiffs' cases being terminated, this flurry of motion activity is not resulting in less litigation—even assuming that less litigation is a worthy goal.[84]

A recent study by Professor Lonny Hoffman also suggests that the FJC's method of collecting cases for its database may have been underinclusive due to search terminology and other factors.[85] This underinclusiveness would have applied not only to the FJC's conclusions on the rate of motion filings, but also to its conclusions on the rate of grants of motions to dismiss.

2. Rate of Different Rulings on 12(b)(6) Motions

The second part of the FJC Study is more controversial and statistically more difficult to digest than the first part. A summary narrative that relentlessly downplays the FJC's findings on *Iqbal*'s impact intensifies the difficulty.

Overall, the FJC found that the rate of granting 12(b)(6) motions, at least in part, increased from 66% in 2006 to 75% in 2010 (an increase that was statistically significant at the 99% confi-

82. *Id*. at 8, 9 tbl.1.

83. *See* Hoffman, *supra* note 19, at 5 ("[A] higher filing rate means greater costs for those who have to gather additional information either in anticipation of or in response to a dismissal motion.").

84. FJC STUDY, *supra* note 16, at 16.

85. Hoffman, *supra* note 19, at 39.

dence level).[86] It further found that an increase in the grant rate could be seen in every major case type, including a statistically significant increase in grants with leave to amend in contract, civil rights, financial instruments, and "other" cases.[87] Finally, the FJC found an overall increase in the rate at which the grant of a 12(b)(6) motion eliminated all the claims of at least one plaintiff (the "Termination Rate") that was statistically significant, and it found an increase in the Termination Rate in every major case type, even though the increase was only statistically significant in financial instruments cases.[88]

B. *Database Limitations*

Before examining the FJC's results on grant rates more closely, it is important to understand exactly what was included in—and more importantly, excluded from—the FJC's database. Having done empirical work for some time now, I can attest that as careful as any researcher tries to be, there are database-parameter and coding decisions one makes at the start that at the end one wishes had been different. This was certainly true of my study; for example, I now wish I had coded for prisoner plaintiffs, and for whether the "grant in part" of a mixed ruling was with or without leave to amend. I suspect that even the FJC researchers, with their superior resources, would have made some different choices *ex ante* if they knew then what they know now.

Most critically, the FJC excluded all cases brought by pro se plaintiffs (which constitute 29% of my database and 26% of all civil cases in federal district court).[89] The FJC also excluded all cases in which the 12(b)(6) motion was granted on the basis of sovereign or qualified immunity (as in *Iqbal* itself).[90] Further, the

86. FJC STUDY, *supra* note 16, at 13.

87. *Id.* at 14 tbl.4. For a discussion of why the FJC's focus on "statistical significance" is both partially inaccurate and substantively misleading, see Hoffman, *supra* note 19, at 17–21.

88. FJC STUDY, *supra* note 16, at 17 & n.33, 18 tbl.7.

89. *Id.* at 16; *see also* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 78 tbl.S-23 (2010), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/tables/S23Sep10.pdf (detailing that in the twelve-month period ending September 30, 2010, 11% of all nonprisoner cases were pro se and 94% of all prisoner cases were pro se, combining to 72,900 pro se civil cases out of a total 282,895).

90. FJC STUDY, *supra* note 16, at 41.

FJC database is limited to orders entered in two six-month periods from twenty-three of the ninety-four district courts.[91]

Table 6 highlights the differences between my database and the FJC's database:[92]

Table 6

FJC Study and Hatamyar Study Database Parameters and Coding

91. *Id*. at 25.

92. The FJC also used a statistical model that differed from mine. First, the two studies characterized the dependent variable—the ruling on the 12(b)(6) motion—differently. *See id*. at vii. Second, the FJC used as independent variables for a multinomial probit model the years 2006 and 2010, seven major case types as indicated on the Civil Cover Sheet, and the presence of an amended complaint. *See id*. at vii, 5. My independent variables for a multinomial logistic regression included the twelve circuits within which the district courts lie, the authority cited (*Conley*, *Twombly*, or *Iqbal*), and thirteen case types addressed by the 12(b)(6) motion in the actual order. My model also included as independent variables whether the plaintiff was pro se, whether a magistrate judge or a district court judge decided the motion, and whether the case was a class action. Third, the FJC chose to use multinomial probit rather than the multinomial logistic test that I used. *See id*. at 18, 27. One authority posits that "[p]robit analysis will produce results similar to logistic regression. The choice of probit versus logit depends largely on individual preferences." *SAS Data Analysis Examples: Logit Regression*, UCLA ACADEMIC TECHNOLOGY SERVICES, http://www.ats.ucla.edu/stat/stata/dae/logit.htm (last visited Dec. 10, 2011). The FJC explains the choice of probit as justified by its method of classifying the rulings, first as grant or deny, then if grant, by leave to amend or no leave to amend. *See* FJC STUDY, *supra* note 16, at 15 n.28. My four ruling choices are mutually exclusive—deny in full, mixed (grant in part, deny in part), grant the motion in full but with leave to amend, and grant the motion in full with no leave to amend. The Small-Hsiao test of independence of irrelevant alternatives run on these outcomes confirms that the independence of irrelevant alternatives hypothesis is satisfied. *See generally* Kenneth A. Small & Cheng Hsiao, *Multinomial Logit Specification Tests*, 26 INT'L ECON. REV. 619 (1985).

1. Time Period Covered

The FJC database only includes orders deciding 12(b)(6) motions from January through June 2006, and then from January through June 2010.[93] The researchers explain their choice of 2006 in that this period predates *Twombly* and their choice of 2010 as allowing enough time to pass after *Iqbal* so the district courts would have had "interpretation of [*Iqbal*] by the courts of appeals."[94]

However, the limitation to a six-month period in each of the two years is not explained (although it is likely due simply to time and resource constraints). My own database ends on May 18, 2010, so the cases from 2010 suffer whatever first-half-year bias there might be, although my cases otherwise run continuously from May 2005 to May 2010.

The AO's studies show that the filing rate of 12(b) motions varies by quarter.[95] To get a sense of whether there was any difference in rulings between the first and second halves of the year, I looked at the rate of 12(b)(6) motions denied by the six-month periods from 2006 to 2009 in my database, and obtained the following results:

93. FJC STUDY, *supra* note 16, at 5.

94. *Id*. at 2, 36.

95. *See supra* Figure 5.

This suggests that for whatever reason, the rate of denial of 12(b)(6) motions in the first half of the year is not necessarily the same, or even changing in the same direction, as the rate in the second half of the year. Overall, looking at the cases with represented plaintiffs in the full calendar years of 2006, 2007, 2008, and 2009, the rate for the denial of 12(b)(6) motions in the first half of the year (January to June) was 29%, while the denial rate in the second half of the year (July to December) was 25%. This means that the grant rate in the second half of the year was higher overall between 2006 and 2009, but the difference was not statistically significant at the 95% level. It does, however, raise the possibility that in its use of cases in the first half of the year, the FJC's grant rate is understated.

2. District Courts Covered

The FJC study is limited to twenty-three of ninety-four district courts.[96] The authors explain that they chose the D.C. district, plus the two districts in the eleven other circuits "with the largest number of civil cases filed in 2009."[97] In some cases they "were unable to obtain access to some of the courts' codes necessary to identify all of the relevant motions," and in such cases, they chose the court in the circuit "with the next greatest number of civil filings."[98] It is not explained whether it is possible that the twenty-three districts with the largest civil caseload might not be fully representative of all ninety-four districts. However, the FJC explains that "[t]hese 23 district courts account for 51% of all federal civil cases filed during this period,"[99] so the limitation to twenty-three may not be important.

3. Orders Retrieved

The FJC database included all orders found through its computer searches of the electronic docket records of the twenty-three district courts listed—which would include both orders reported in publicly available legal databases like Westlaw and Lexis and

96. FJC Study, *supra* note 16, at 5.
97. *Id.*
98. *Id.*
99. *Id.*

orders not reported in any publicly searchable legal database.[100] At several points, the FJC postulates that its ability to access orders that were not contained in Westlaw and Lexis could account for its findings showing a more modest impact of *Iqbal* as compared with previously published studies (including mine) that were forced to rely solely on Westlaw or Lexis.[101] The underlying premise is that orders granting motions to dismiss are more likely to be published than orders denying motions to dismiss, so that a study relying solely on Westlaw may overstate the grant rate. My results below, as compared to the FJC's, do not support this hypothesis.[102]

4. Pro se and Prisoner Cases

The FJC gives two reasons for excluding pro se cases: first, that pro se cases are "governed by standards other than *Twombly* and *Iqbal*," and second, that the researchers were afraid their method of retrieving orders would miss pro se cases.[103]

I cannot comment on the second reason. But as to the first, it is not true that pro se cases are governed by standards other than *Twombly* and *Iqbal*.[104] The court in every pro se case in my database applied *Conley*, *Twombly*, or *Iqbal* (depending on the time period) or by definition I would have excluded the case. It is true that the Supreme Court has stated that pro se pleadings should be treated leniently, but the Court has never articulated a different standard for pro se pleadings.[105] Additionally, it is unclear how the "lenient" standard actually differs from the standard for represented plaintiffs, because the "lenient" proposition has often been supported by a citation to the "no set of facts" standard of *Conley*.[106] Frequently, a court will repeat the "leniency" mantra right before granting the motion to dismiss—often without leave to amend.[107] Moreover, despite the supposed leniency given pro se

100. *Id*.

101. *Id*. at 2, 5, 21.

102. *Compare infra* Table 7, *with* FJC STUDY, *supra* note 16, at 22.

103. FJC STUDY, *supra* note 16, at 6 n.10.

104. *See, e.g.*, Swienkiewicz v. Sorema, N.A., 534 U.S. 506, 513 (2002) ("Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions.").

105. *See, e.g.*, Hughes v. Rowe, 449 U.S. 5, 9, 10 & n.7 (1980); Haines v. Kerner, 404 U.S. 519, 520–21 (1972) (per curiam).

106. *See, e.g.*, *Rowe*, 449 U.S. at 9–10; *Kerner*, 404 U.S. at 520–21.

107. *E.g.*, Mosher v. Keanster, No. H-08-2105, 2010 WL 1484728, at *1, *3 (S.D. Tex.

pleadings, many courts also caution that "'[pro se] status does not exempt a party from compliance with relevant rules of procedural and substantive law,'"[108] and many courts do not even mention the need to be lenient.[109]

The FJC further states that prisoner cases were excluded "because of the distinctive characteristics and procedural requirements of such litigation, and because they were concentrated in only 4 of the 23 districts included in this study."[110] I assume that the referenced "procedural requirements" include district courts' *sua sponte* review of prisoner complaints under the Prison Litigation Reform Act ("PLRA")[111] and of complaints submitted with an application to proceed *in forma pauperis*.[112] I excluded such cases as well, leaving in my database the still substantial number of prisoner cases that were decided on a defendant's 12(b)(6) motion. As to the concentration of prisoner cases in four districts, the FJC's statistical methods were designed to control for differences in districts and case types, so the necessity of this limitation is unclear.[113]

Apr. 12, 2010); Powell *ex rel.* CP v. Helen Ross McNabb Home Base Program, No. 3:09-CV-171, 2010 WL 419989, at *2, *5 (E.D. Tenn. Jan. 29, 2010); Caldwell v. Gutman, Mintz, Baker & Sonnenfeldt, P.C., 701 F. Supp. 2d 340, 344, 346, 356 (E.D.N.Y. 2010); Britton v. Woodford, No. S-04-0472 LKK GGHP, 2006 WL 278579, at *3–6 (E.D. Cal. Feb. 2, 2006); Doherty v. Citibank (South Dakota) N.A., 375 F. Supp. 2d 158, 160 (E.D.N.Y. 2005).

108. Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983) (quoting Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981)) (internal quotation marks omitted); *see also* Feller v. Indymac Mortg. Servs., No. 09-5720RJB, 2010 WL 1331066, at *3 (W.D. Wash. Mar. 31, 2010) ("The Court recognizes that the Plaintiff is proceeding *pro se* in this matter, but warns that frivolous arguments, unsupported by legal authority are a drain on judicial resources and [do] nothing to advance any legitimate claims she may have. Additionally, she is obligated under [Fed. R. Civ. P. 11(b)] to make claims that are supported by law.").

109. *See, e.g.*, Tillio v. Spiess, No. 111276, 2011 WL 3346787, at *1 (3d Cir. Aug. 4, 2011) (applying Rule 8(a) and affirming dismissal of pro se plaintiff's complaint without leave to amend); Madrueno v. Homecomings Fin. Co., No. CV-09-1413-PHX-DGC, 2010 WL 1654150, at *1, *3 (D. Ariz. Apr. 21, 2010); Adams v. Litton Loan, No. CV F 10-0512 LJO DLB, 2010 WL 1444527, at *1, *4, *8 (E.D. Cal. Apr. 9, 2010); Schlager v. Beard, No. 09-1231, 2010 WL 1337734, at *2 (W.D. Pa. Feb. 12, 2010); Kreit v. Corrado, No. H-05-0564, 2006 WL 2709239, at *1–3 (S.D. Tex. Sept. 20, 2006); Bockenstedt v. Dimon, No. 05-MC-58-LRR, 2006 WL 2078198, at *1 (N.D. Iowa July 24, 2006); Wimberly v. Powers, No. 6:05-cv-41 (WLS), 2006 WL 1096276, at *1, *3 (M.D. Ga. Apr. 24, 2006); Withers v. Franklin Cnty. Sheriff, No. 2:05CV0028, 2005 WL 1378828, at *1, *3 (S.D. Ohio June 8, 2005).

110. FJC STUDY, *supra* note 16, at 6 n.10.

111. *See* 28 U.S.C. § 1915A(b)(1) (2006); *see also* 42 U.S.C. § 1997e(c)(1).

112. 28 U.S.C. § 1915(e)(2)(B)(ii).

113. FJC STUDY, *supra* note 16, at vii.

5. Defense of Sovereign or Qualified Immunity

It is startling that the FJC "excluded cases in which motions were granted on the basis of sovereign or qualified immunity, which [the FJC] regarded as a jurisdictional issue and which was usually raised as an affirmative defense."[114] Since *Iqbal* itself involved a 12(b)(6) motion that raised the defense of qualified immunity,[115] the FJC's decision to exclude such cases arguably excludes the very cases that are most like *Iqbal*.

Moreover, the legal explanation the FJC offers for the exclusion—that sovereign or qualified immunity is "jurisdictional" and usually raised as an affirmative defense—is somewhat inaccurate. As stated in a leading treatise on federal procedure, "[A]ffirmative defenses that have been considered on a motion to dismiss under Rule 12(b)(6) include . . . a wide range of forms of legal immunity from suit."[116] This proposition is supported by a compendium of federal cases that ruled on the defense of either sovereign or qualified immunity via a 12(b)(6) motion.[117] The authors of this treatise further note that while a defense of sovereign immunity is often said to raise an issue of subject matter jurisdiction to be addressed by a 12(b)(1) motion, the "great weight of authority adjudicates qualified immunity from constitutional torts under Rule 12(b)(6)."[118] It should also be noted that I did not include in my database any motions that were decided under Rule 12(b)(1).

6. 12(c) Motions Directed to Complaints

The standard for evaluating a defendant's motion for judgment on the pleadings under Rule 12(c) is the same as for a 12(b)(6)

114. *Id*. at 41.

115. 556 U.S. ___, ___, 129 S. Ct. 1937, 1942–43 (2009).

116. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 & n.76 (3d ed. 2004).

117. *Id*. at § 1357 n.76. For a recent example, see *Vance v. Rumsfeld*, Nos. 10-1687, 10-2442, 2011 WL 3437511, at *1 (7th Cir. Aug. 8, 2011).

118. WRIGHT & MILLER *supra* note 116, at § 1357 n.76 (discussing the holding and analysis in *Robbins v. Bureau of Land Mgmt*., 252 F. Supp. 2d 1286 (D. Wyo. 2003)); *see* Suarez Corp. Indus. v. McGraw, 125 F.3d 222, 224, 229–31 (4th Cir. 1997); *see also* State Emps. Bargaining Agent Coal. v. Rowland, 494 F.3d 71, 77 n.4 (2d Cir. 2007) (stating "legislative immunity is not a jurisdictional bar" while not deciding whether sovereign immunity was a matter of subject matter jurisdiction).

motion,[119] yet the FJC only included 12(b)(6) motions.[120] The exclusion of cases involving 12(c) motions may be related to the search terms the FJC used.[121]

7. 12(b)(6) Motions Directed to Counterclaims

Similarly, the standard for evaluating a 12(b)(6) motion directed to a counterclaim is exactly the same as for such a motion directed to a complaint.[122] Therefore, it is unclear why the FJC excluded such cases. However, I cannot say whether the FJC's exclusion of either 12(c) motions directed to complaints or 12(b)(6) motions directed to counterclaims is important, because I did not code my cases to distinguish between these different procedural postures. Anecdotally, the number of such cases is relatively small.

8. Securities and Other Fraud Cases

Conversely, the FJC included securities cases and fraud cases in its database, which are, in fact, governed by a different—theoretically higher—standard than Rule 8(a)(2).[123] The FJC Study indicates that its database contains 68 securities cases and 48 fraud cases—a total of 116 cases (6%) of the 1922 in the database.[124] Thus, the net effect, if any, of the theoretically higher pleading standard of the PSLRA or Rule 9(b) on the FJC's results is probably small. In addition, I have argued that *Iqbal*'s interpretation of Rule 8(a)(2) is indistinguishable from the pleading

119. *E.g.*, Ades & Berg Grp. Investors v. Breeden (*In re* Ades & Berg Grp. Investors), 550 F.3d 240, 243 n.4 (2d Cir. 2008); Guidry v. Am. Pub. Life Ins. Co., 512 F.3d 177, 180 (5th Cir. 2007).

120. FJC STUDY, *supra* note 16, at vii. Unfortunately, my search terms for cases under *Iqbal* inadvertently excluded "12(c)," although cases deciding 12(c) motions were still turned up by the search and included in the database.

121. *See id.* at 5 n.9.

122. *See, e.g.*, Tyco Fire Prods. v. Victaulic Co., 777 F. Supp. 2d 893, 895–97 (E.D. Pa. 2011).

123. *See* FJC STUDY, *supra* note 16, at 39 tbl.B-2. *Compare* FED. R. CIV. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . *a short and plain statement* of the claim showing that the pleader is entitled to relief . . .") (emphasis added), *with* FED. R. CIV. P. 9(b) (requiring that the party "state with particularity the circumstances constituting fraud or mistake"), *and* 15 U.S.C. § 78U-4(b)(1)–(2) (2006) (requiring pleading with particularity in private securities fraud actions).

124. FJC STUDY, *supra* note 16, at 39–40.

standard of the PSLRA.[125] Despite these points, it is possible that the FJC's inclusion of PSLRA and Rule 9(b) cases in its database may have slightly inflated the percentage of 12(b)(6) motions granted over that which would have been obtained by including only cases decided under Rule 8(a)(2).

C. *Comparative Results*

1. Overall Rate of Rulings on Motions

Table 7 attempts to compare the overall results of the two studies. For the calculations in my database, I removed all pro se plaintiffs and limited the cases to those decided only in 2006 and 2010.

Table 7
Comparison of Ruling Rates (and Frequencies) in FJC and Hatamyar Studies 2006 and 2010

	FJC Study		**Hatamyar**	
	2006	**2010**	**2006**	**2010**
Grant all relief sought by motion	36% (251)	46%* (562)	38% (57)	48%** (81)
Grant some relief sought by motion	30% (210)	29% (354)	28% (42)	25% (42)
Denied	34% (239)	25%* (305)	34% (50)	27% (46)
Total	100% (700)	100% (1221)	100% (149)	100% (169)

Notes: Represented plaintiffs only. The FJC figures include only orders entered in 23 districts from January through June 2006 and January through June 2010. The Hatamyar figures include orders entered in 86 districts in all of calendar year 2006 and from January through May 18, 2010. Frequency numbers for the FJC Study were extrapolated from data at pp. 13-14 of the FJC Study.
* Change in rate from 2006 to 2010 is significant at $p < 0.01$.
** Change in rate from 2006 to 2010 is significant at $p < 0.05$.

Overall, as shown in Table 7, when looking at represented plaintiffs only, the two studies are close in their overall percent-

125. Hatamyar, *supra* note 6, at 577–79.

ages. First, even when the plaintiff was represented, both studies found a significant increase from 2006 to 2010 in the percentage of 12(b)(6) motions granted at least in part—from 66% to 75% in the FJC Study, and from 66% to 73% in my study. Second, both studies found that 12(b)(6) motions were denied in 34% of cases in 2006 in which the plaintiff was represented by counsel. Finally, both studies show a ten-percentage-point increase from 2006 to 2010 in the rate of granting all relief sought by the motion, and the increase in rates is statistically significant at the 95% level in both studies. In both studies, though, the increase is caused primarily by increases in the granting of motions *with* leave to amend.

a. Implications for the Representativeness of Computerized Legal Databases such as Westlaw

On another issue of interest to many researchers, a comparison of the FJC's and my results may shed some light on the debate as to whether orders reported in Westlaw fairly represent the "universe" of orders. My database included only cases reported in Westlaw, and the FJC's database included cases gleaned from the courts' electronic filing records. Yet both studies found the same percentage—34%—of motions denied in 2006. These results tend to weaken the hypothesis advanced by the FJC that published cases are more likely to report the *grant* of a 12(b)(6) motion to dismiss than unpublished cases. Further, in 2010, the percentage of motions granted at least in part (in cases with represented plaintiffs) was actually higher in the FJC study (75%) than in my study (73%), which was based solely on cases reported in Westlaw. This is the opposite of what one would predict if grants of 12(b)(6) motions were more likely to be published than denials.

Other than my own work in this paper that suggests the opposite, I am not aware of any evidence that orders ruling on 12(b)(6) motions to dismiss in computerized databases are more likely to grant than deny the motion, and the notion seems speculative. While there have been studies regarding the publishing of summary judgment orders, it is not clear that such results can be applied uncritically to the 12(b)(6) context.[126]

126. *See* FJC STUDY, *supra* note 16, at 2 n.5.

I remain unconvinced even as to the theory of why published orders might more likely be grants than denials of 12(b)(6) motions. This argument assumes, first, that someone (it is not clear who) makes a conscious decision about whether to publish each order, and second, that whoever that someone is would rather have orders granting motions be published. Assuming that "someone" is a busy judge or her clerk, the first assumption seems unrealistic, and the second is by no means obvious. The second assumption appears to be that a judge might wish to discourage nonmeritorious lawsuits by showing that she will not hesitate to grant 12(b)(6) motions. But just the opposite motivation may be true: the judge may want to discourage the filing of work-making 12(b)(6) motions and therefore prefer to publish denials of 12(b)(6) motions. Finally, even assuming *arguendo* that grants are published more frequently than denials, this would presumably have been true under both *Conley* and *Iqbal*. Thus, it is far from self-evident that looking only to published cases would overstate an increase in grants.

b. Expanding the Time Period

As noted, the results in Table 7 above only include cases decided in 2006 and 2010. When I include all the cases in my database that were decided under *Conley* and *Iqbal*—even continuing to exclude pro se cases—my results, as shown in Table 8, for *Iqbal* (but not for *Conley*) diverge more significantly from the FJC's. This is because the cases in my database under *Iqbal* run for a full year (from May 19, 2009 to May 18, 2010), whereas the FJC's cases run only for six months (from January to June 2010).[127]

127. *See id*. at 36.

Table 8
Comparison of Ruling Rates (and Frequencies) in FJC (January to June 2006 and January to June 2010) and Hatamyar (May 2005 to May 2007 and May 2009 to May 2010)

	FJC Study		**Hatamyar**	
	January to June 2006	January to June 2010	*Conley* (May 2005 to May 2007)	*Iqbal* (May 2009 to May 2010)
Grant all relief sought by motion	36% (251)	46%* (562)	37% (113)	53%** (172)
Grant some relief sought by motion	30% (210)	29% (354)	30% (93)	25% (83)
Denied	34% (239)	25%* (305)	33% (100)	22%** (72)
Total	100% (700)	100% (1221)	100% (306)	100% (327)

Notes: Represented plaintiffs only. Frequencies for some of FJC categories extrapolated from data on pages 13–14 of the FJC Study.
* Change in rate from 2006 to 2010 is significant at $p < 0.01$.
** Change in rate from *Conley* to *Iqbal* is significant at $p < 0.01$.

When looking at all of the cases decided under *Conley* or *Iqbal* involving represented plaintiffs (not just those decided in 2006 and 2010), the rate of granting a 12(b)(6) motion in full (with and without leave to amend) increased from 37% under *Conley* to 53% under *Iqbal*. The comparable increase in Table 7 above was from 38% in 2006 to 48% in 2010. The difference is due largely to the fact that in my database, the grant rates with leave to amend under *Iqbal* in the latter half of 2009 (which were not included in the FJC Study) were much higher than the grant rates with leave to amend under *Iqbal* in the first half of 2010, as shown in Table 9.

Table 9
Ruling Frequencies and Rates under *Iqbal* in 2009 and 2010
(Hatamyar database)

Ruling	Year 2009	2010	Total
Deny	26	46	72
	16.46%	27.22%*	22.02%
Mixed	41	42	83
	25.95%	24.85%	25.38%
Grant amend	39	27	66
	24.68%	15.98%**	20.18%
Grant no amend	52	54	106
	32.91%	31.95%	32.42%
Total	158	169	327
	100%	100%	100%

Notes: Represented plaintiffs only. All cases decided under *Iqbal*. The 2009 cases run from May 19 to December 31, 2009. The 2010 cases run from January 1, 2010 to May 18, 2010.

* Change in rate from 2009 to 2010 is significant at $p < 0.01$.

** Change in rate from 2009 to 2010 is significant at $p < 0.05$.

In the cases in my database, the rate of granting 12(b)(6) motions under *Iqbal* with leave to amend fell from 2009 (25%) to 2010 (16%). The rate of denying such motions under *Iqbal* correspondingly increased from 2009 (16%) to 2010 (27%). One could speculate that district courts overread *Iqbal* in 2009, and after receiving "appellate court guidance," backed off in 2010.[128] One could also speculate that the differences between 2009 and 2010 are a reflection of the normal fluctuation in ruling rates between the first and second halves of the year. Additionally, there could be some other explanation or combination of explanations.

128. *Id.*

2. Termination of All of a Plaintiff's Claims or of the Entire Case

The FJC examined in two manners whether grants of 12(b)(6) motions actually terminate cases or individual plaintiffs. First the FJC "examined the percentage of cases that terminated after . . . 90 days following an order granting all or some of the relief requested by the motion to dismiss."[129] It is not clear how the FJC determined that an individual case in its database had been terminated—presumably, it looked at the docket sheets. Nor is it clear whether the case was terminated because of the grant of the 12(b)(6) motion (most cases terminate because they are settled). And if an order only granted "some of the relief requested by the motion to dismiss," a termination of the case within ninety days could not have been due to the granting of the motion to dismiss at issue, because that order would have left part of the case pending.

In any event, the FJC found that the rate of termination ninety days after an order granting all or some of the relief requested by a motion to dismiss rose from 34.2% in 2006 to 37.7% in 2010, but the increase was not statistically significant.[130] In its "Executive Summary," the FJC Study characterizes this finding: "There was no increase from 2006 to 2010 in the rate at which a grant of a motion to dismiss terminated the case."[131] This is a bit misleading, because there was, after all, an increase; it was apparently just not statistically significant. Further, it appears that these figures included terminations after the partial grant of a motion—which, again, by definition could not have been terminations due to the partial grant. It would have been more meaningful for the FJC to present Termination Rates solely for cases in which the orders granted the 12(b)(6) motion in full.

129. *Id*. at 16.
130. *Id*. at 16 tbl.6.
131. *Id*. at vii.

Second, the FJC "explored the possibility that, when granted, motions to dismiss may be more likely to exclude all claims by one or more plaintiffs, even if the litigation continues with claims by other plaintiffs."[132] It found that "in 2010, approximately 31% of the orders granting motions to dismiss appeared to eliminate all claims by one or more plaintiffs from the litigation, compared with approximately 23% of such orders in 2006," and that this 8% increase was statistically significant.[133] In addition, the FJC found that the rate of granting motions to dismiss eliminating all claims by at least one plaintiff increased in all six case types.[134] In contract cases, the rate of eliminating all claims by at least one plaintiff increased from 20.5% in 2006 to 25.7% in 2010; in tort cases, from 20.0% in 2006 to 24.5% in 2010; in civil rights cases, from 25.1% in 2006 to 29.1% in 2010; in employment discrimination cases, from 15.8% in 2006 to 26.9% in 2010; in financial instrument cases, from 17.6% in 2006 to 43.4% in 2010; and in "other" cases, from 22.4% in 2006 to 28.2% in 2010.[135]

Despite this across-the-board increase in the Termination Rate from 2006 to 2010, the FJC reported that the rate increase was statistically significant only in financial instrument cases and in total.[136] None of these increases in the Termination Rate, even the ones noted as statistically significant, were reported in the "Executive Summary."[137] The "Discussion and Conclusion" section stated, again somewhat misleadingly in light of the earlier findings, "We also found no increase in the rate at which motions to dismiss for failure to state a claim eliminated plaintiffs in other types of cases [other than financial instrument cases]."[138] In fairness, the latter statement appears in the context of a paragraph

132. *Id*. at 17. The FJC described the methodology as follows: "In those instances in which the court granted at least some of the relief requested by the motion, we also coded whether the plaintiff was allowed to amend the complaint, and whether the motion eliminated only some claims or all claims of one or more plaintiffs." *Id*. at 5.

133. *Id*. at 17 tbl.7. The FJC noted, "These figures include the effects of orders granted both with and without leave to amend the complaint." *Id*. at 17 n.33. In addition, because of difficulties interpreting some orders, the researchers assumed that "granting a motion as to all claims by a plaintiff would terminate the plaintiff's role in the litigation unless the plaintiff was permitted to amend the complaint. As a result, our analysis may overestimate the number of cases in which an order eliminates all claims by a plaintiff." *Id*.

134. *Id*. at 18 tbl.7.

135. *Id*.

136. *Id*. at 18 tbl.7, 19.

137. *See id*. at vii.

138. *Id*. at 21.

summarizing the results of a multinomial probit model to control for factors other than *Iqbal* that might have affected the increase in Termination Rates. Taken literally and out of context, however, it contradicts the earlier findings.

My method of classifying the termination of cases due to the grant of a 12(b)(6) motion varied from the FJC's. Instead of trying to determine whether an order eliminated all claims by at least one plaintiff, I determined whether the grant-in-full of a 12(b)(6) motion without leave to amend resulted in or contributed to the dismissal of the entire case. This included cases in which the case was entirely dismissed as a combination of the granting of a 12(b)(6) motion and some other motion, such as a summary judgment motion.

Despite the differences in methodology, I also found a statistically significant increase in the Termination Rate from *Conley* to *Iqbal*.[139] Even limiting my database to represented plaintiffs, as done by the FJC, there is still a significant increase in the Termination Rate from 52% under *Conley* to 72% under *Iqbal*.[140]

Further, a logistic regression to control for factors other than *Iqbal* that might affect the Termination Rate—excluding pro se cases—continues to indicate that *Iqbal* significantly increased the odds of whether a case was entirely dismissed upon the grant of a 12(b)(6) motion. This is shown in Table 10.

139. *See supra* Section III(E).

140. Of 92 cases under *Conley* with represented plaintiffs in which the court granted the 12(b)(6) motion without leave to amend, 48 cases or 52% were entirely dismissed. Of 106 cases under *Iqbal* with represented plaintiffs in which the court granted the 12(b)(6) motion without leave to amend, 76 cases or 72% were entirely dismissed. This increase in the Termination Rate was significant at $p \leq 0.01$.

Table 10
Logistic Regression of Factors on Whether a Case was Entirely Dismissed
(Includes Only Cases with Represented Plaintiffs in which the
Motion Was Granted in Full Without Leave to Amend)

Case dism'd	Odds Ratio	Std. Err.	*z*	*p*
Twombly	0.94	0.31	-0.20	0.843
Iqbal	2.55	0.89	2.75	0.006*
Judge type	0.63	0.45	-0.65	0.513
Class action	3.89	2.21	2.39	0.017*
First Cir	0.69	0.65	-0.39	0.695
Second Cir	0.90	0.75	-0.13	0.895
Third Cir	0.60	0.51	-0.60	0.551
Fourth Cir	0.28	0.25	-1.43	0.154
Fifth Cir	0.48	0.41	-0.85	0.394
Sixth Cir	0.36	0.29	-1.25	0.211
Seventh Cir	0.28	0.25	-1.41	0.160
Eighth Cir	0.21	0.20	-1.61	0.108
Ninth Cir	0.70	0.59	-0.42	0.674
Tenth Cir	0.12	0.11	-2.22	0.026*
D.C. Cir	1.20	1.16	0.19	0.850
Tort	0.23	0.13	-2.61	0.009*
Intell prop	0.74	0.58	-0.39	0.697
Const civ rts	1.15	0.52	0.30	0.764
Title VII	1.49	1.27	0.46	0.644
ADA/ADEA	0.60	0.48	-0.64	0.520
Other civ rts	0.50	0.37	-0.94	0.348
ERISA/FLSA	1.17	0.73	0.25	0.806
LMRA/oth lab	1.70	1.41	0.64	0.524
Consum credit	0.96	0.62	-0.07	0.944
RICO	0.78	0.82	-0.23	0.816
Othr statutes	0.63	0.30	-0.98	0.329

* Significant at the 95% confidence level or higher.
Notes: Number of observations = 292. No pro se cases were included. The dependent variable is whether the case was entirely dismissed upon the motion's grant (no part of the case remained pending). The independent variables are as shown in the left column. For binary variables, non-class actions and district court judges were the reference categories. For indicator variables, district courts in the Eleventh Circuit were used as the reference category for Circuit and contract cases were used as the reference category for Case Type. Antitrust cases (only 3 observations) were dropped from the model. For this model, LR chi2(26) = 56.93; $p < 0.001$; Log likelihood = -170.29; and Pseudo R2 = 0.14.

Looking only at cases with represented plaintiffs, in which the court granted a 12(b)(6) motion in full without leave to amend, the odds of the case being entirely dismissed were 2.55 times higher under *Iqbal* than *Conley*. At a 95% confidence level, these odds could be as low as 1.31 or as high as 4.97.

VI. CONCLUSION

My earlier critical reading of *Iqbal* reveals my disagreement with several aspects of that decision and provides a theoretical basis for predicting that it would make the grant of 12(b)(6) motions more common.[141] I fear that *Iqbal* is another brick in the wall blocking access to civil justice and jury trial. The wall is taking shape with increased use of summary judgment,[142] restrictive class action interpretations,[143] the approval of mandatory arbitration clauses,[144] a parsimonious attitude towards plaintiffs' attorney's fees,[145] skepticism towards plaintiffs' expert witnesses,[146] widespread remittitur,[147] a deep antipathy towards punitive damages,[148] federal preemption of state-law tort claims,[149] and a seemingly inexorable flood of so-called "tort reform" measures.[150] This litany of procedural barriers to civil justice brings to mind Representative John Dingell's prophetic comment in 1983: "I'll let you

141. *See* Hatamyar, *supra* note 6, at 575–83.

142. *E.g.*, Celotex Corp. v. Catrett, 477 U.S. 317, 322–24 (1986); *see also, e.g.*, Richard L. Steagall, *The Recent Explosion in Summary Judgments Entered by the Federal Courts Has Eliminated the Jury from the Judicial Power*, 33 S. ILL. U. L.J. 469, 469 (2009) (chronicling the decline in the amount of federal civil cases tried); Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report*, 93 IOWA L. REV. 1613, 1614, 1616–17 (2008) (discussing federal courts' use of motions to dismiss cases prior to trial).

143. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011).

144. *E.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744, 1753 (2011).

145. *E.g.,* Perdue v. Kenny A. *ex rel.* Winn, 130 S. Ct. 1662, 1669 (2010); *see also* Nat'l Aeronautics & Space Admin. v. Nelson, 131 S. Ct. 746, 769 (2011) (Scalia., J., concurring) ("And oh yes, the fact that a losing defendant will be liable not only for damages but also for attorney's fees under § 1988 will greatly encourage lawyers to sue, and defendants—for whom no safe harbor can be found in the many words of today's opinion—to settle. This plaintiff's claim has failed today, but the Court makes a generous gift to the plaintiff's bar.").

146. *E.g.*, Alicia Gallegos, *Expert Witnesses on Trial*, AMERICAN MEDICAL NEWS (Aug. 1, 2011), http://www.ama-assn.org/amednews/2011/08/01/prsa0801.htm.

147. *E.g.*, N.Y. CIV. PRAC. LAW & RULES § 5501(c) (Consol. 2009) (explaining that a court must determine that a damages award is "excessive" if it "deviates materially from what would be reasonable compensation"); *see* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 420 (1996) (quoting N.Y. CIV. PRAC. LAW & RULES § 5501(c) in the federal district court review of a jury verdict for the plaintiff).

148. *E.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 500–03 (2008); State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 423–24 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 584–85 (1996).

149. *E.g.*, Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068 (2011).

150. *E.g.*, Patricia W. Hatamyar, *The Effect of "Tort Reform" on Tort Case Filings*, 43 VAL. U. L. REV. 559, 589–60 (2009).

write the substance on a statute and you let me write the procedure, and I'll screw you every time."[151]

Though my viewpoint is transparent, anyone can follow the methods used for this study and attempt to replicate or disprove my results. An important principle in scientific inquiry is that an independent researcher be able to replicate a test. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court recognized this as one of the factors a court should consider in deciding whether a scientific opinion is reliable enough to be admissible in evidence.[152] But an independent researcher cannot attempt to replicate the FJC's results because she does not have unfettered access to the federal district courts' electronic filing systems.

I have no doubt that the FJC Study was expertly and meticulously performed. But let us not overlook the fact that it was conceived by and completed at the direction of—although not directly performed by—federal judges. I respectfully suggest that in attempting to study what they themselves are doing, they may not be completely impartial.[153]

Still, it is relatively early in the courts' process of digesting the "deeply inscrutable" *Iqbal*.[154] Perhaps, even though this study indicates that *Iqbal* has likely contributed to increased grants of 12(b)(6), *Iqbal*'s effect pales in comparison to a host of other unquantifiable factors.

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151. *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell).

152. 509 U.S. 579, 593 (1993) ("[A] key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested.").

153. *See* THE FEDERALIST NO. 80, at 477 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (exploring that one rationale for diversity jurisdiction is that "[n]o man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias").

154. *See* Mark Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645, 645 (2011). Indeed, the Supreme Court itself may have recently signaled a softening of *Twombly* and *Iqbal* (or at least, guerrilla warfare by the dissenters in those cases). In a 6-3 decision by Justice Ginsberg, who dissented in *Twombly* and *Iqbal*, the Court reversed the district court's grant of a 12(b)(6) motion in a § 1983 case brought by a Texas prisoner seeking exculpatory DNA testing. Skinner v. Switzer, 131 S. Ct. 1289, 1296 (2011) ("[T]he question below was . . . whether his complaint was sufficient to cross the federal court's threshold, see *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 . . . . Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible 'short and plain' statement of the plaintiff's claim . . . ."). Note the Court's approving citation of *Swierkiewicz*, which many had thought implicitly overruled by *Twombly* and *Iqbal*. *Id.*

More fundamentally, neither this study nor the FJC Study answers the merits question: Does the elevated rate of granting 12(b)(6) motions under *Iqbal* happen mainly in those cases where it "should" happen? I cannot make a normative judgment here as to whether the cases that were entirely dismissed on the grant of a 12(b)(6) motion under *Iqbal* were "cases that should be allowed to go forward as a matter of right."[155] It seems doubtful that they were all "frivolous," but without studying each case in detail I do not know. For the moment, one addition to the "remarkable volume and intensity of the response" to *Iqbal*[156] is that claims in the year following that decision were dismissed at a significantly higher rate than they were before *Twombly*.

155. Epstein, *supra* note 4, at 205.

156. Rosenthal, *supra* note 78, at 1537.

Appendix A

Frequency and percentage of case types in database under *Conley* and *Iqbal*

1. All plaintiffs

Case type	Conley	Iqbal	Total
Contract	56	62	118
	12.61%	13.48%	13.05%
Tort	72	39	111
	16.22%	8.48%	12.28%
Intell prop	11	15	26
	2.48%	3.26%	2.88%
Const civ rt	141	124	265
	31.76%	26.96%	29.31%
Title VII	24	33	57
	5.41%	7.17%	6.31%
ADA/ADEA	15	8	23
	3.38%	1.74%	2.54%
Other civ rt	10	27	37
	2.25%	5.87%	4.09%
ERISA/FLSA	19	31	50
	4.28%	6.74%	5.53%
LMRA/oth lab	8	7	15
	1.80%	1.52%	1.66%
Antitrust	2	6	8
	0.45%	1.30%	0.88%
Cons credit	17	35	52
	3.83%	7.61%	5.75%
RICO	8	8	16
	1.80%	1.74%	1.77%
Other statutes	61	65	126
	13.74%	14.13%	13.94%
Total	444	460	904
	100.00%	100.00%	100.00%

2. Represented plaintiffs only

Case type	Conley	Iqbal	Total
Contract	48	60	108
	15.69%	18.35%	17.06%
Tort	66	33	99
	21.57%	10.09%	15.64%
Intell prop	9	15	24
	2.94%	4.59%	3.79%
Const civ rt	62	53	115
	20.26%	16.21%	18.17%
Title VII	11	18	29
	3.59%	5.50%	4.58%
ADA/ADEA	8	6	14
	2.61%	1.83%	2.21%
Other civ rt	6	12	18
	1.96%	3.67%	2.84%
ERISA/FLSA	19	30	49
	6.21%	9.17%	7.74%
LMRA/oth lab	8	6	14
	2.61%	1.83%	2.21%
Antitrust	2	6	8
	0.65%	1.83%	1.26%
Cons credit	14	22	36
	4.58%	6.73%	5.69%
RICO	7	7	14
	2.29%	2.14%	2.21%
Other statutes	46	59	105
	15.03%	18.04%	16.59%
Total	306	327	633
	100.00%	100.00%	100.00%

3. Pro se plaintiffs only

Case type	Conley	Iqbal	Total
Contract	4	2	6
	3.10%	1.50%	2.29%
Tort	6	6	12
	4.65%	4.51%	4.58%
Intell prop	2	0	2
	1.55%	0.00%	0.76%
Const civ rt	78	71	149
	60.47%	53.38%	56.87%
Title VII	12	15	27
	9.30%	11.28%	10.31%
ADA/ADEA	6	2	8
	4.65%	1.50%	3.05%
Other civ rt	4	15	19
	3.10%	11.28%	7.25%
ERISA/FLSA	0	1	1
	0.00%	0.75%	0.38%
LMRA/oth lab	0	1	1
	0.00%	0.75%	0.38%
Cons credit	2	13	15
	1.55%	9.77%	5.73%
RICO	1	1	2
	0.78%	0.75%	0.76%
Other statutes	14	6	20
	10.85%	4.51%	7.63%
Total	129	133	262
	100.00%	100.00%	100.00%