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# Swanson v Citibank and the 1L Canon

William H.J. Hubbard†

## INTRODUCTION

Part of what's special about teaching 1Ls is that 1L year initiates law students into the community of lawyers. This community not only shares a common set of professional commitments and qualifications. Thanks to their 1L courses, lawyers share familiarity with a pantheon of famous cases that have been taught for decades. These canonical cases connect the law school experiences of generations of lawyers.

Civil procedure has its share of these classics. Virtually every first-year law student learns the *Strawbridge* rule for federal diversity jurisdiction.<sup>1</sup> *International Shoe* is part of every 1L's vocabulary.<sup>2</sup> And no law student who learns it forgets the name *Erie Railroad Co v Tompkins*.<sup>3</sup> We insist on teaching *Hickman v Taylor*,<sup>4</sup> a gem of a case but much of which, at least strictly speaking, has been superseded by amendments to the Federal Rules of Civil Procedure.<sup>5</sup>

For 1Ls taking civil procedure in the past decade, no cases have loomed as large in their collective imagination as *Bell Atlantic Corp v Twombly*<sup>6</sup> and *Ashcroft v Iqbal*.<sup>7</sup> This pair of cases—known (dis)affectionately by the portmanteau “*Twiqbal*”—established the doctrine of “plausibility pleading” for federal civil

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<sup>1</sup> See generally *Strawbridge v Curtiss*, 7 US (3 Cranch) 267 (1806). Past cohorts of Judge Diane Wood's students learned the *Strawbridge* rule on the first day of class.

<sup>2</sup> See generally *International Shoe Co v Washington*, 326 US 310 (1945).

<sup>3</sup> 304 US 64 (1938).

<sup>4</sup> 329 US 495 (1947).

<sup>5</sup> Every casebook I know (including my own) features *Hickman*. *Hickman* established work product protection in federal court, but work product protection is now defined by Federal Rule of Civil Procedure 26(b)(3). Rule 26(b)(3) was added in the 1970 amendments and largely codified *Hickman*, although it also resolved court splits on ambiguities in and questions left open by *Hickman*. See FRCP 26, Notes of the Advisory Committee on Rules—1970 Amendment, Note to Subdivision (b)(3).

<sup>6</sup> 550 US 544 (2007).

<sup>7</sup> 556 US 662 (2009).

actions. *Twombly* and *Iqbal* are broadly understood to have raised the bar for a complaint to survive a motion to dismiss in federal court. Plausibility pleading immediately became a staple of the case reporters and an essential topic in every 1L civil procedure course. Over the decade-plus since they came down, *Twombly* and *Iqbal* have been the subject of near-universal condemnation in the academy for their incomplete reasoning, lack of grounding in the federal rulemaking process, and anticipated devastating effect on plaintiffs facing motions to dismiss.

But what *Twombly* and *Iqbal* need is not denouncement but denouement. For 1Ls trying to understand the Rules and the workings of the US courts, *Twombly* and *Iqbal* are a poor prescription for progress. Their fuzzy reasoning leaves students perplexed at what, if anything, the legal rule actually is. And the gathering gloom they portend leaves students to speculate about lower courts in chaos.

Of course, if this really were the state of affairs in federal court, then civil procedure teachers would be duty bound to make these the lessons of *Twiqbal* for students. But this isn't the state of affairs—at least not where it matters most. The Supreme Court may be supreme, but the “inferior” courts are the business end of Article III. For every federal action decided by the Supreme Court, there are more than six thousand actions resolved in the lower federal courts,<sup>8</sup> and from an access-to-justice perspective, how cases are handled in these lower courts is what matters to the vast majority of plaintiffs, who lack the combination of resources and exceptional legal theories sufficient to reach the Supreme Court.<sup>9</sup> Plaintiffs, in other words, like Gloria Swanson.

Swanson, proceeding pro se, was the plaintiff in *Swanson v Citibank, N.A.*<sup>10</sup> She alleged that Citibank's denial of her

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<sup>8</sup> Adam Feldman, *Final Stat Pack for October Term 2018* (SCOTUSblog, June 28, 2019), archived at <https://perma.cc/PC6A-PHVW> (counting sixty-one merits decisions by the Supreme Court in October Term 2018 that originated in federal court); Administrative Office of the US Courts, *U.S. District Courts – Judicial Business 2018*, archived at <https://perma.cc/FAV9-SMXU> (reporting 370,085 civil and criminal cases filed in the US district courts in 2018).

<sup>9</sup> By their very nature, cases decided by the Supreme Court are atypical. It selects cases for unusually difficult issues, important fact patterns, or even particularly distinguished advocates. Professor Suja Thomas has labeled *Twombly* and *Iqbal* “oddball” cases, see generally Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U Ill L Rev 215, and there is no doubt that their enormous stakes and implications for national security and separation of powers, respectively, rendered them unrepresentative cases.

<sup>10</sup> 614 F3d 400 (7th Cir 2010).

application for a home equity loan was the product of race discrimination and sought damages under the Fair Housing Act (FHA).<sup>11</sup> The district court judge dismissed the complaint for failure to state a claim, but the Seventh Circuit, in an opinion by Judge Diane Wood, reversed. My claim in this Essay is that, at least for teachers of civil procedure, *Swanson* belongs in the canon of 1L civil procedure cases alongside *Twombly* and *Iqbal*.

Casebooks prioritize Supreme Court decisions for obvious reasons. But an excessive focus on the Supreme Court misses an important part of how our hierarchical court systems operate. For every climactic Supreme Court decision, there is long aftermath in which lower court judges do the dirty work of sorting through the often-nebulous directions from the Court and making the law happen for millions of plaintiffs and defendants.

*Swanson* exemplifies this. In a concise opinion, Judge Wood rationalizes the muddle of pronouncements in *Twombly* and *Iqbal* and grounds the doctrine in the text of Rule 8. *Swanson* does a better job teaching 1Ls pleading rules than *Twombly* or *Iqbal* and does so in a context closer to the kinds of cases most students will encounter as lawyers or judges. It shows that liberal pleading has life after *Twombly* and provides an opportunity for students to reflect on the extent to which, even in a hierarchical court system, the common law process of continuous but incremental change still operates.

And *Swanson* was a hard case. Judge Richard Posner dissented and argued that, in reversing the dismissal of the complaint, the majority misread *Twombly* and *Iqbal* and got the outcome wrong. *Swanson* gives students a simple—yet balanced—case, perfect for debate and reflection. When I teach *Swanson*, students routinely split on the proper outcome. Perhaps Judge Posner is more faithful to the language of *Twombly* and *Iqbal*, but perhaps Judge Wood is more faithful to the terms and history of Rule 8.

In this Essay, I argue that *Swanson* is the rare case that belongs in the 1L canon. Part I briefly reviews the doctrine on federal civil pleading and introduces *Swanson*. I then show how *Swanson* can serve as the centerpiece of a discussion about

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<sup>11</sup> 42 USC § 3605. *Swanson* also brought claims alleging common law fraud and violations of the Equal Credit Opportunity Act (ECOA), 15 USC § 1691(a)(1). The ECOA claims were dropped on appeal, see *Swanson*, 614 F3d at 405–06, and the Seventh Circuit affirmed the district court’s dismissal of the fraud claims under Rule 9(b)’s heightened pleading standard, see *id.* at 406–07.

pleading doctrine, judging, and legal change. Part II provides an epilogue to *Twombly* and *Iqbal*, showing that *Swanson* was right to say that the story of plausibility pleading is a story of continuity, not discontinuity, in doctrinal evolution. Part III presents my attempt at synthesizing current pleading doctrine, with a heavy dose of reliance on *Swanson*. Part IV concludes with thoughts on *Swanson's* pedagogical value as a close case.<sup>12</sup>

### I. PLAUSIBILITY PLEADING AND SWANSON

The basic regime for pleading in a federal civil action is familiar, and I will only briefly sketch it here. Federal Rule of Civil Procedure 8(a)(2) provides that, to avoid dismissal for failure to state a claim, a complaint “must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>13</sup> In the seminal Supreme Court case, *Conley v Gibson*,<sup>14</sup> the Court made clear that the gatekeeping function of federal judges was limited: “notice pleading” requires only that the complaint “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>15</sup>

Fifty years later, *Twombly* ushered in a new era in federal pleading, with the Court emphasizing that a complaint must allege “enough facts to state a claim to relief that is plausible on its face.”<sup>16</sup> Two years later, in *Iqbal*, the Court reiterated that “only a complaint that states a plausible claim for relief survives a motion to dismiss.”<sup>17</sup> While *Twombly* did not claim to introduce a new approach to pleading, but rather to clarify the meaning of Rule 8(a)(2), these cases came as a shock to the bar and legal academy alike. Scholars saw a revolution underway and decried “plausibility pleading” as a “radical departure from prior practice.”<sup>18</sup> *Twombly*, *Iqbal*, and plausibility pleading have been intensely controversial ever since.<sup>19</sup>

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<sup>12</sup> Although this Essay extracts three main ideas from *Swanson*, there are plenty more. This is part of what makes *Swanson* so useful for teaching. Judge Wood’s opinion also tees up discussions of discovery costs, asymmetric information in litigation, and the appropriateness of the formal rulemaking process when changing pleading standards.

<sup>13</sup> FRCP 8(a)(2).

<sup>14</sup> 355 US 41 (1957).

<sup>15</sup> *Id.* at 47 (quotation marks omitted).

<sup>16</sup> *Twombly*, 550 US at 570.

<sup>17</sup> *Iqbal*, 556 US at 679.

<sup>18</sup> Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L J 1, 22, 28 (2010).

<sup>19</sup> The literature spawned by *Twombly* and *Iqbal* is too vast to cite. For an early survey, see Adam N. Steinman, *The Pleading Problem*, 62 Stan L Rev 1293, 1305 (2010). I

Notwithstanding the enduring controversy over *Twombly* and *Iqbal* and uncertainty about what makes a claim “plausible,” the Supreme Court had spoken. It fell to the lower federal courts to make sense of these new precedents. In the years since *Iqbal*, the lower federal courts have heard hundreds of thousands of motions to dismiss and appeals from rulings on motions to dismiss. One such appeal was *Swanson v Citibank*.

\* \* \*

*Swanson* was a simple case. Gloria Swanson, an African American woman proceeding pro se, sued Citibank and Citibank’s house appraisers for discrimination on the basis of race.<sup>20</sup> Swanson had sought a home equity loan from Citibank in February 2009.<sup>21</sup> Citibank conditionally approved her application, but her house was appraised for a lower amount (\$170,000) than Swanson had estimated in her loan application (\$270,000), and Citibank rejected the application.<sup>22</sup> In her complaint, she pointed to facts from which she inferred racial discrimination: Her initial request to apply was turned away by a Citibank employee named Skertich, who said her husband had to be present—something Swanson suspected “was a ploy to discourage loan applications from African-Americans.”<sup>23</sup> When she later completed the application process with Skertich, “Skertich pointed to a photograph on his desk and commented that his wife and son were part African-American.”<sup>24</sup> After being rejected by Citibank, Swanson obtained an appraisal, which valued her home at \$240,000.<sup>25</sup>

The central claim was for violation of the FHA, which among other things prohibits racial discrimination in the provision or use of appraisals.<sup>26</sup> Eventually, the district court dismissed

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discuss the literature somewhat in William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U Chi L Rev 693, 694–97 (2016). For an example of more recent work on more subtle doctrinal implications of *Twombly* and *Iqbal*, see generally A. Benjamin Spencer, *Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by Iqbal*, 41 Cardozo L Rev 1015 (2020) (arguing that *Iqbal*’s interpretation of Rule 9(b) ran counter to the rule’s text and original purpose, and has harmed litigants by accelerating case dismissals).

<sup>20</sup> *Swanson*, 614 F3d at 402.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Swanson*, 614 F3d at 402–03.

<sup>25</sup> *Id.*

<sup>26</sup> 42 USC § 3605.

Swanson's amended complaint for failure to state a claim under Rule 12(b)(6).<sup>27</sup> Swanson appealed.

In the Seventh Circuit, she drew a unique panel of jurists: then-Chief Judge Frank Easterbrook, Judge Posner, and Judge Wood, all of whom were faculty at the University of Chicago Law School. On July 30, 2010, the court reversed the dismissal of Swanson's FHA claims.<sup>28</sup> Judge Wood authored the decision, which Chief Judge Easterbrook joined.

It was barely a year since *Iqbal*. Judge Wood's opinion began by noting that *Twombly* "disapproved" of *Conley*, but that courts "are still struggling" with the question of "how much higher the Supreme Court meant to set the bar."<sup>29</sup> The court then took the opportunity to expound on pleading generally. For now, I skip reciting the ensuing discussion of pleading standards, as I will quote heavily from it in the remainder of this Essay. Returning to the complaint before it, the court concluded:

Swanson's complaint identifies the type of discrimination that she thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home-equity loan). This is all that she needed to put in the complaint.<sup>30</sup>

Judge Posner dissented from the reversal of the FHA claims. He argued that it was not "plausible" that racial discrimination, rather than a merely mistaken appraisal, was the reason why Citibank denied the loan application.<sup>31</sup> Further, "[e]ven before *Twombly* and *Iqbal*, complaints were dismissed when they alleged facts that refuted the plaintiffs' claims."<sup>32</sup> His argument was that Swanson had pleaded herself out of a claim. Her application was based on her house being worth \$270,000, Posner noted, but her "house had been appraised at \$260,000 in 2004, and the complaint alleges that home values had fallen by 'only' 16 to 20 percent since," meaning that her house was worth less than

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<sup>27</sup> *Swanson*, 614 F3d at 403.

<sup>28</sup> *Id.* at 407.

<sup>29</sup> *Id.* at 403.

<sup>30</sup> *Id.* at 405.

<sup>31</sup> *Swanson*, 614 F3d at 408 (Posner dissenting).

<sup>32</sup> *Id.* (citing pre-*Twombly* cases). See also *id.* ("This case is even stronger for dismissal because it lacks the competitive situation—man and woman, or white and black, vying for the same job and the man, or the white, getting it. We had emphasized this distinction, long before *Twombly* and *Iqbal*.").

\$220,000.<sup>33</sup> In other words, according to her own allegations, Swanson had far less equity in her house than her application claimed—making her request for a \$50,000 home equity loan a dead letter.

With Swanson's FHA claims revived, the case returned to the district court for further proceedings. After eighteen months of discovery, and with a motion for summary judgment by the defendant pending, the parties reached a settlement. Pursuant to the settlement, the case was dismissed with prejudice on March 12, 2012.<sup>34</sup>

\* \* \*

In the decade since the Seventh Circuit's decision, *Swanson* has been cited over 1,300 times in judicial opinions.<sup>35</sup> It has been cited hundreds of times in secondary sources.<sup>36</sup> And some civil procedure casebook authors have taken notice. Casebooks give *Swanson* varying amounts of attention, from a full-blown case edit to a mere citation to no mention at all.<sup>37</sup>

## II. LIFE AFTER *TWIQBAL*

With *Twombly*, *Iqbal*, and *Swanson* in the books, we can ask, in a very preliminary way, what legacy they have. *Twombly* and *Iqbal* were surprising cases that triggered concerns that they would lead the federal courts to ramp up the dismissal of civil actions. *Swanson*, in contrast, prompts no sense of alarm. It suggests that the story of doctrinal change after *Twiqbal* is one of continuity rather than revolution.

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<sup>33</sup> Id at 409.

<sup>34</sup> Notification of Docket Entry, *Swanson v Citibank*, No 1:09-cv-02344, \*1 (ND Ill filed Mar 12, 2012).

<sup>35</sup> According to Westlaw, *Swanson* was cited in cases 1,393 times as of October 19, 2020, and 99.4 percent of the citations were positive. Westlaw search, citing references of *Swanson*, Oct 2020 (over 98 percent of its out-of-circuit citations are positive).

<sup>36</sup> According to Westlaw, *Swanson* was cited in secondary sources 328 times as of October 19, 2020. Westlaw search, citing references of *Swanson*, Oct 2020.

<sup>37</sup> See, for example, Barbara Allen Babcock, Toni M. Massaro, and Norman W. Spaulding, *Civil Procedure: Cases and Problems* 361–69 (Wolters Kluwer 6th ed 2017) (full case edit); Jack H. Friedenthal, Arthur R. Miller, John E. Sexton, and Helen Hershkoff, *Civil Procedure: Cases and Materials* 592–93 (West 11th ed 2013) (note case); A. Benjamin Spencer, *Civil Procedure: A Contemporary Approach* 481 (West 5th ed 2018) (cited). See also generally Stephen C. Yeazell and Joanna C. Schwartz, *Civil Procedure* (Aspen 10th ed 2019) (absent). Perhaps needless to say, I give *Swanson* a full case edit. William H.J. Hubbard, *Civil Procedure* (Foundation forthcoming).

It is now a decade since *Swanson*, and we have the benefit of years of empirical work seeking to measure the impact of *Twombly* and *Iqbal* on cases in federal court. The data indicate subtle rather than dramatic change. *Twombly* and *Iqbal* led to a greater frequency in the filing of motions to dismiss and the amendment of complaints, but neither *Twombly* nor *Iqbal* precipitated meaningful changes in dismissals with prejudice, settlement patterns, or filing rates.<sup>38</sup> There is some evidence, though, of a small but statistically significant effect on dismissal rates for complaints by pro se plaintiffs.<sup>39</sup>

In other words, *Swanson* better reflects the on-the-ground legal reality than *Twombly* or *Iqbal*. This may seem surprising, given that *Twombly* and *Iqbal* are Supreme Court cases and the law of the land, while *Swanson* is merely one instance of a lower court interpreting the high court's rulings. But by the same token, *Swanson* better captures the pulse of the federal courts. It was decided by judges who must decide every case that comes to them, and who see cases involving parties and circumstances far more typical than blockbusters like *Twombly* and *Iqbal*. Indeed, in a recent article, Professor Adam Steinman identifies and explains this dynamic,<sup>40</sup> and unsurprisingly, Judge Wood appears prominently in his discussion of the federal courts' response to *Twombly* and *Iqbal*. Importantly, he shows that Judge Wood is hardly alone among judges in seeing continuity, not discontinuity, in the law.<sup>41</sup>

*Swanson* also invites us to consider how legal change reflects something more like common law evolution rather than hierarchical command-and-control. Professor Edward Cooper made this point back in 2012:

It would be easy to emerge from studying the *Twombly* opinion uncertain, or even bewildered, as to what is intended. . . . But it is the Court's own uncertainty. Hoping that something might be done through initial evaluations at the pleading stage to advance the Rule 1 goals of "just, speedy, and inexpensive determination," the Court does not know just what that something might be. Rather than attempt a firm answer, it has invited the lower courts to carry on, more openly and

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<sup>38</sup> See generally William H.J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J Empirical Legal Stud 474 (2017).

<sup>39</sup> *Id.* at 498–99, tbl 9.

<sup>40</sup> See generally Adam N. Steinman, *Notice Pleading in Exile*, 41 Cardozo L Rev 1057 (2020).

<sup>41</sup> *Id.* at 1065–67.

more freely than in the past, a common-law process of developing pleading standards.<sup>42</sup>

This is essentially the view of *Twombly* and *Iqbal* that Judge Wood took even earlier in *Swanson*. Rather than overturning the system of notice pleading, Judge Wood argued, *Twombly* and *Iqbal* were an invitation to clarify and refine three elements of pleading doctrine:

The Court was not engaged in a *sub rosa* campaign to reinstate the old fact-pleading system. . . . Instead, the Court has called for more careful attention to be given to several key questions: [1] what, exactly, does it take to give the opposing party “fair notice”; [2] how much detail realistically can be given, and should be given, about the nature and basis or grounds of the claim; and [3] in what way is the pleader expected to signal the type of litigation that is being put before the court?<sup>43</sup>

It’s a brilliant work of rhetorical craftsmanship: By its literal terms, this passage defends the Supreme Court against those who would accuse it of stealthily undermining the Rules. Yet in the same breath, does Judge Wood sap *Twombly* and *Iqbal* of their force? According to Judge Wood, *Twombly* and *Iqbal* do not mark a revolution in pleading—they merely open a conversation with lower courts about pleading standards. In reading this passage, one might ask: Has Marc Antony come to praise Caesar, or to bury him?

I think it was neither: *Swanson* was not defiance—nor was it compliance. Indeed, it could not have been either one. The opinions in *Twombly* and *Iqbal* are a muddle. They say things that, taken literally, are either unhelpful or nonsensical.<sup>44</sup> Thus, the lower courts had no choice but to try to make sense of them and to provide their own answers to questions left unanswered. It is in this light that we can best understand Judge Wood’s reframing of *Twombly* and *Iqbal* as part of a dialogue. The opinion defends but also gently corrects the Supreme Court, in the spirit of one who politely redirects the conversation when a friend says something that doesn’t quite make sense.

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<sup>42</sup> Edward H. Cooper, *King Arthur Confronts TwIqy Pleading*, 90 Or L Rev 955, 966 (2012), quoting FRCP 1.

<sup>43</sup> *Swanson*, 614 F3d at 404, citing Charles A. Wright and Arthur R. Miller, 5 *Federal Practice and Procedure* § 1215 at 165–73 (3d ed 2004) (introducing “basis or grounds” phrasing).

<sup>44</sup> See notes 59–64 and accompanying text.

In the next Part, I show how the three questions Judge Wood extracts from *Twombly* and *Iqbal* provide a framework for organizing the doctrine on pleading. These three questions (albeit in different order) frame a three-step inquiry that, in my view, represents the simplest way to understand the requirements for pleading under Rule 8(a)(2). This framework applies equally to pleading doctrine before *Twombly* and after *Iqbal*, showing that those cases do not mark a new pleading regime, although of course they do mark an important doctrinal shift—an effort by the Supreme Court to intensify courts’ attention on one step of the pleading process. For students, *Swanson* thus sets the stage for a discussion on pleading doctrine that offers some glint of clarity after the opacity of *Twombly* and *Iqbal*.

### III. PLEADING IN THREE STEPS

The attention showered on *Conley*, *Twombly*, and *Iqbal* tends to obscure the fact that pleading in a federal civil action is governed by the Federal Rules of Civil Procedure. Here, *Swanson* rides to the rescue. Judge Wood reminds us, “Critically, in none of [its] recent decisions . . . did the Court cast any doubt on the validity of Rule 8 of the Federal Rules of Civil Procedure. To the contrary: at all times it has said that it is interpreting Rule 8, not tossing it out the window.”<sup>45</sup>

*Swanson* invites us to do what the Supreme Court hasn’t ever quite done—sort out the doctrine to clarify both how to plead under Rule 8(a)(2) and where the hard doctrinal questions lie. In this Part, I take a small stab at this. I call it “pleading in three steps.” My goal is not a novel theory of pleading, but a framework for making sense of pleading doctrine and practice, with a debt to prior scholarship and special reliance on *Swanson* as a leading example.<sup>46</sup>

The analysis begins with Rule 8(a)(2), which requires that a complaint provide “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>47</sup> This phrase can be parsed into three requirements: (1) there must be “a short and plain statement”; (2) the statement must be a statement “of the claim”; and (3) the statement must “show[ ] that the pleader is

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<sup>45</sup> *Swanson*, 614 F3d at 409.

<sup>46</sup> My approach is descriptive and doctrinal. I avoid important normative questions about whether and how pleading should be more generous, or less generous, to plaintiffs.

<sup>47</sup> FRCP 8(a)(2).

entitled to relief.” These three requirements provide a textual grounding for a three-step approach to pleading under Rule 8(a)(2). This three-step approach incorporates the lessons of *Conley*, *Twombly*, *Iqbal*, and (especially) *Swanson*, while (admittedly) leaving open important and contestable questions about the precise contours of plausibility pleading. I call the three steps the “story,” the “claim,” and the “basis”:

*The Story.* The plaintiff tells her story—“a short and plain statement” that describes what happened.

*The Claim.* The plaintiff’s statement is “of a claim”—there exists some law that provides relief for the plaintiff’s injury.

*The Basis.* The plaintiff’s story provides a basis for bringing the claim—some “showing that the pleader is entitled to relief.”

These concepts should seem familiar. They are all based on existing doctrine and academic commentary and correspond roughly to what others have called “factual sufficiency” (under notice pleading), “legal sufficiency,” and “plausibility,” respectively.

#### A. The Story

Step 1 is for the plaintiff to tell her story. The complaint must answer the question, “What happened?” The story is a summary of the events during which the defendant interacted with the plaintiff, and the plaintiff ended up injured in some way.

This is the essence of notice pleading, and nothing about the requirement of a “story” has changed since before *Conley* or after *Twombly* and *Iqbal*. The defendant must have notice of the actions and events for which the plaintiff seeks to hold the defendant liable. *Swanson* asked, “[W]hat, exactly, does it take to give the opposing party ‘fair notice’?”<sup>48</sup> As *Swanson* exemplifies, the complaint must give the defendant a sense of the who, what, when, and where that motivate the plaintiff’s suit.<sup>49</sup>

Crucial here is that factual detail has no intrinsic value. It is only necessary insofar as it serves to inform the defendant what it is the parties are going to fight about. The defendant must be able to tell that the plaintiff’s action is about *this* event on *this* day that caused *this* injury, and not that other event on that other day that caused that other injury.

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<sup>48</sup> *Swanson*, 614 F3d at 404.

<sup>49</sup> See note 30 and accompanying text.

Further, the “story” need not have any legal content. To tell the story, the plaintiff need not allege “violations” or “wrongs” or “breaches of duties” or whatnot. Indeed, for purposes of the “story,” assertions of wrongdoing or legalese tend to diminish the quality of notice to the defendant. This is why I tell my students that a good pleading paints a clear picture of “what happened” even for a reader who knows literally nothing about the law. Compare the following hypothetical allegations:

*Example A:* Defendant Acme Corp violated the Sherman Act § 1 by entering into agreements with its competitors in restraint of trade. Plaintiff Doe seeks damages for his injuries from this concerted price fixing, which raised prices for all consumers.

*Example B:* In February 2020, executives in the widget industry, including the CEO of defendant Acme Corp, held a “Summit on Competition” to discuss product prices. On March 9, 2020, Defendant Acme Corp. and other widget makers raised their prices for widgets by \$5. Doe was overcharged for his purchases from Acme after March 9, 2020.

Example A doesn’t answer the question “What happened?” except in what the Supreme Court might call a legally conclusory sense. It’s not that listing a cause of action isn’t helpful. (We’ll get to Step 2 soon enough.) It is that the defendant cannot prepare a defense when it doesn’t know when it allegedly restrained trade, for what product, and when or how the plaintiff has a connection to the defendant.

Example B, however, gives the defendant plenty to go on. The defendant may believe that the facts as alleged are incomplete, mistaken, misinterpreted, or even deliberately misleading. But there is no question that from these few short sentences the defendant can glean what happened, what it is being accused of, the injuries claimed, and how to begin preparing its defense.

Another example of a minimal, but adequate, story comes from the old Form 11, which provided a template for an action in negligence. A complaint using that form would look like this:

*Example C:* On March 9, 2020, at 60th Street and University Ave, the defendant negligently drove a motor vehicle into the plaintiff. As a result, the plaintiff was physically injured,

suffered physical and mental pain, and incurred medical expenses of \$5,000.<sup>50</sup>

To the eyes of a modern lawyer, these allegations contain virtually no detail. But they contain the detail that matters. The defendant knows what she has been accused of. But wait: Is the reference to “negligen[ce]” an allegation of “fact” or a “legal conclusion”? It doesn’t matter! The defendant knows what the fight is about: when, where, and how she allegedly injured the plaintiff.

## B. The Claim

Step 2 is to check whether the complaint describes an injury that amounts to a legal wrong. In other words, the plaintiff’s injury must be one for which the law allows the plaintiff to obtain relief in a civil action.

In most cases, this requirement is easily met. Gloria Swanson’s injury was being denied a home equity loan. Is that an injury for which the law gives redress? It is, if the denial was based on racial discrimination. Indeed, Swanson cited a specific federal statute—the FHA—that provides a right to bring an action.

Likewise in the examples above. In Example B, does charging a higher price to a customer create legal liability? It does if the higher price is the product of an agreement in restraint of trade. In Example C, does driving a motor vehicle into someone create legal liability? Yes, at least if a court finds you negligent. These examples cite no law, but they don’t need to. *Swanson* posed the question, “[I]n what way is the pleader expected to signal the type of litigation that is being put before the court?”<sup>51</sup> and the answer today is the same as it was eighty years ago—the plaintiff need not cite any law in her complaint.<sup>52</sup>

While the complaint need not explicitly state the law implicated by the plaintiff’s story, the plaintiff’s story must not rule out the very type of relief that the plaintiff seeks. This is called “pleading yourself out of court” and has been a basis for dismissal of a complaint since long before *Twombly* and *Iqbal*.<sup>53</sup> The argument in Judge Posner’s dissent in *Swanson* that Swanson pleaded

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<sup>50</sup> For the original version, see FRCP Form 11 (abrogated Dec 1, 2015).

<sup>51</sup> *Swanson*, 614 F3d at 404.

<sup>52</sup> See *Johnson v City of Shelby*, 135 S Ct 346, 346–47 (2014).

<sup>53</sup> See, for example, *Bennett v Schmidt*, 153 F3d 516, 519 (7th Cir 1998) (“Litigants may plead themselves out of court by alleging facts that establish defendants’ entitlement to prevail.”).

herself out of court rested on a ground for dismissal that predated *Twombly* and *Iqbal*.<sup>54</sup>

Steps 1 and 2 together constitute what many scholars would call “notice pleading”—the requirement under *Conley* that the complaint “give the defendant fair notice of what the plaintiff’s claim is.”<sup>55</sup> Giving fair notice of a “claim” requires notice of what happened and what legal right is at stake. As then-Professor Charles Clarke (the drafter of Rule 8) put it, a claim is “a group of operative facts giving rise to one or more rights of action.”<sup>56</sup> The story provides the operative facts, and so long as those operative facts suggest the law providing for relief, the defendant has fair notice of the claim.

### C. The Basis

Step 3 is to examine the connection between the story and the claim. The plaintiff’s story must provide some basis for the plaintiff’s demand for relief from the defendant. A complaint that says, “I was injured, and you should pay,” must contain a story that indicates *why* the defendant should pay. To be sure, the pleadings need not prove that the defendant should pay. That is what the rest of litigation is for. Rather, the story in the complaint must suggest a reason to hold the defendant liable, rather than blaming someone else (or no one at all) for the injury.

Litigation is stressful, time-consuming, and expensive. Presumably, a plaintiff (and her attorney, if she has one) won’t undertake the time and expense of suing unless they have reasons for thinking that the defendant should be liable. These reasons need to be articulated in the complaint; a complaint that cannot even articulate why the plaintiff is suing this defendant for this legal wrong doesn’t belong in court. After all, litigation is burdensome not only for the plaintiff but the defendant and the court as well.<sup>57</sup> It’s not too much to ask the plaintiff to include whatever parts of her story might connect it to her claim. The difficult question is how strong that connection must be.

This question brings us to *Twombly* and *Iqbal*. So far, I have discussed Step 3 without invoking these cases. This is because

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<sup>54</sup> For discussion of Judge Posner’s dissent, see text accompanying notes 31–33.

<sup>55</sup> *Conley*, 355 US at 47.

<sup>56</sup> Charles E. Clark, *Handbook Of The Law of Code Pleading* 477 (West 2d ed 1947), quoted in Simona Grossi, *The Claim*, 55 *Houston L Rev* 1, 7 (2017).

<sup>57</sup> I expand on this point in Hubbard, 83 *U Chi L Rev* at 701–04 (cited in note 19) (discussing the costs of litigation for plaintiffs and defendants).

Step 3 is not the product of *Twombly* or *Iqbal*, as I hope the discussion above makes clear. Long before *Twombly*, *Conley* reminded us that a complaint must give the defendant notice of not merely the claim but also “the grounds upon which it rests.”<sup>58</sup> The fact that *Twombly* and *Iqbal* appear to have demanded a stronger basis for the claim doesn’t change the fact that a basis has been required all along.

What do *Twombly* and *Iqbal* tell us about how strong the plaintiff’s basis for the claim must be? Unfortunately, most of what they say is confusing and ambiguous. For example, what does it mean for plaintiffs to “nudge[ ] their claims across the line from conceivable to plausible”?<sup>59</sup> And the Court’s insistence that “well-pleaded factual allegations” but not “conclusory statements” must be taken as true has sown rather than dispelled confusion.<sup>60</sup> To illustrate, is the allegation of an “agreement” factual or conclusory?<sup>61</sup> Further, some language invites nonsensical interpretations. When the Court in *Iqbal* said that plaintiffs’ allegations fail to “plausibly” state a claim “given more likely explanations,”<sup>62</sup> the most literal reading—that plaintiffs’ account of defendant’s liability must be no less likely than any competing explanation for the events alleged—is obviously wrong. This literal reading describes the “super-heightened” pleading standard that applies only to allegations of scienter in securities fraud suits subject to the Private Securities Litigation Reform Act of 1995 (PSLRA).<sup>63</sup> The Supreme Court itself said so in *Tellabs, Inc v Makor Issues & Rights, Ltd.*,<sup>64</sup> a case decided exactly one month after *Twombly*.

Once again, *Swanson* comes to the rescue. With respect to Step 3, Judge Wood reframes *Twombly* and *Iqbal* as a call for courts to reexamine the question, “[H]ow much detail realistically can be given, and should be given, about the nature and basis or

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<sup>58</sup> *Conley*, 355 US at 47.

<sup>59</sup> *Twombly*, 550 US at 570.

<sup>60</sup> *Iqbal*, 556 US at 678–79.

<sup>61</sup> See, for example, *Twombly*, 550 US at 588–89 (Stevens dissenting) (“[T]he theory on which the Court permits dismissal is that, so far as the Federal Rules are concerned, no agreement has been alleged at all. This is a mind-boggling conclusion.”).

<sup>62</sup> 556 US at 681.

<sup>63</sup> See 15 USC § 78u-4(b)(2)(A).

<sup>64</sup> 551 US 308 (2007). *Tellabs* is another pleading case in which Judge Wood had a hand. Although Judge Wood has had the last word on plausibility pleading (so far), she did not have the last word on pleading scienter under the PSLRA. The Supreme Court’s opinion in *Tellabs* reversed her opinion for the Seventh Circuit. See generally *Makor Issues & Rights, Ltd v Tellabs, Inc*, 437 F3d 588 (7th Cir 2006), revd, 551 US 308 (2007).

grounds of the claim”?<sup>65</sup> In answering that question, Judge Wood’s opinion gives a helpful gloss on *Iqbal*: “[A]bstract recitations of the elements of a cause of action or conclusory legal statements’ do nothing to distinguish the particular case that is before the court from every other hypothetically possible case in that field of law.”<sup>66</sup> In other words, rather than attempting the (at best) fuzzy task of drawing a line between “conceivable” and “plausible” or between “factual” and “conclusory,” *Twombly* and *Iqbal* demand that a complaint contain allegations that distinguish this plaintiff’s case from every other possible case, taking into account the type of claims (the “field of law”) at issue.

To put it another way, a court should ask whether the plaintiff has distinguished this action from a hypothetical case brought against a defendant the plaintiff had no reason to sue.<sup>67</sup> Presumably, the plaintiff’s story contains something indicating what made the plaintiff suspect that the defendant committed a legally redressable wrong. Relative to the baseline of lawful and legally innocuous conduct, the defendant did something that deviated from this baseline, thereby creating a basis for the plaintiff and the court to suspect wrongdoing. As Professor Robert Bone has argued, “[W]hat the *Twombly* Court requires are allegations that differ in some significant way from what usually occurs in the baseline and differ in a way that supports a higher probability of wrongdoing than is ordinarily associated with baseline conduct.”<sup>68</sup>

Compare Examples A and B above. One can say that Example A contains “bare recitals” and “conclusory statements,” but the more helpful observation is that every complaint alleging a Section 1 claim, including a groundless one, will contain essentially the same allegations as Example A. Exactly as Judge Wood put it, this allegation does “nothing to distinguish the particular case that is before the court from every other hypothetically possible case in that field of law.”<sup>69</sup> Example B, in contrast, gives a reason why this defendant has been singled out for a lawsuit alleging a violation of antitrust law. The allegations are far from

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<sup>65</sup> *Swanson*, 614 F3d at 404.

<sup>66</sup> *Id.* at 405 (citation omitted), quoting *Brooks v Ross*, 578 F3d 574, 581 (7th Cir 2009).

<sup>67</sup> Or at least no legitimate reason to sue. Obtaining a nuisance settlement for a baseless claim is a reason to sue, just not a good one.

<sup>68</sup> Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 Iowa L Rev 873, 885–86 (2009).

<sup>69</sup> *Swanson*, 614 F3d at 405.

proof of an antitrust cabal, but they raise suspicions with respect to *this* defendant in *this* action.<sup>70</sup>

This approach to determining the sufficiency of a complaint's basis or grounds for the claim avoids (at least some) metaphysical questions about the meaning of "plausibility." It also makes sense of *Twombly's* dismissiveness of allegations that were "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy."<sup>71</sup> Such allegations neither raise nor lower the level of suspicion.

Of course, the "pleading in three steps" framework doesn't settle the question of how far from the baseline a complaint must shift the level of suspicion. As I have described it, Step 3 requires only that the plaintiff's story be probative of the plaintiff's claim—in other words, that one's belief that the defendant is liable for the claim is strengthened (even a little) if the story is true. Perhaps *Twombly* or *Iqbal* require something more than this mere quantum of probative value, at least in some circumstances. But the *Swanson* court, in the circumstances of the *Swanson* case, did not require more than this.

Nor does this framework eliminate the fact that there will be hard cases. And indeed, part of what makes *Swanson* so illuminating is that it is best understood as a hard case.

#### IV. HARD CASES AND GOOD LAW

This brings me to my final point. *Swanson* is valuable because it is a hard case. To be sure, the judges who decided *Swanson* may not have thought it was a hard case. Judge Posner, in dissent, made clear that he thought Swanson's complaint easily failed the plausibility pleading standard. But Judge Posner was alone in dissent, and the court concluded that the complaint stated a claim despite its far-from-compelling allegations. Could Swanson's complaint have alleged much less and still survived? Maybe not. In this sense, *Swanson* was a hard case—it was a close call, a borderline case. It helps us probe for the boundaries of permissible pleading—to see how far the deliberate liberality of federal pleading can go, even after *Twombly* and *Iqbal*.

It is clear enough that the complaint in *Swanson* passes the first two steps above. As noted above, Swanson's complaint gave

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<sup>70</sup> Example B is very loosely based on *In re Text Messaging Antitrust Litigation*, 630 F3d 622, 628–29 (7th Cir 2010), a case in which Judge Wood also participated.

<sup>71</sup> *Twombly*, 550 US at 554.

the who, what, when, and where of her story. She claimed racial discrimination in home equity lending, which violates the FHA. But what about Step 3? Does her story provide sufficient basis or grounds for her claim?

We know the court said yes. Should it have? As Judge Posner pointed out in dissent, it sure looks like Citibank denied her application because, as Swanson's own allegations indicated, her house was worth less than the amount claimed in her application—not to mention that her application was denied in February 2009, when hardly anyone was getting a loan.<sup>72</sup> Indeed, a different lender had already denied her loan application.<sup>73</sup> Regardless of whether Swanson had pleaded herself out of court, her own story made her claim to relief implausible.

It's hard to deny the premises of this argument. I doubt any of the judges on the panel expected Swanson to ultimately win the case, or even survive summary judgment. The case was a long shot, and the most likely consequences of reversing the dismissal were more time and money spent by all, and further heartache for Swanson.

But we already know that Rule 8 does not require the plaintiff's claim to be the most likely explanation for the facts alleged. An unlikely claim is an adequate claim, so long as the story provides a reason to treat this claim differently from the thousands of nonactionable loan application denials that occur every day. The plaintiff doesn't have to prove her claim, but she does have to connect the dots from her story to her claim. As Judge Wood put it in *Swanson*, "the plaintiff must give enough details about the subject-matter of the case to present a story that holds together."<sup>74</sup> This does not mean a "story that holds together" in the minimal, linguistic sense of being a coherent as opposed to an incoherent story. (Even *Conley*, which required a pleading to give notice of the claim "and the grounds upon which it rests,"<sup>75</sup> demanded more than linguistic coherence.) It means a "story that holds together" as a basis for the plaintiff's claim.

This is a low bar, but one that Swanson cleared. She had, after all, been preapproved by Citibank; the appraisal she later obtained was far higher than the appraisal Citibank commissioned; and the loan officer who handled her application seemed eager to

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<sup>72</sup> *Swanson*, 614 F3d at 409 (Posner dissenting).

<sup>73</sup> *Id.* at 402 (majority).

<sup>74</sup> *Id.* at 404.

<sup>75</sup> *Conley*, 355 US at 47.

display his bona fides with respect to her race. Perhaps, Swanson may have thought, the gentleman doth protest too much?

This was a slender basis for claiming race discrimination, but it was something, and for two of the three judges on the panel, it was enough. To me, it's a genuinely close case. And the students to whom I teach *Swanson* tend to think so, too. A lot of students agree with the decision, and a lot side with the dissent. Either way, though, they're not entirely comfortable with the outcome in the case.

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In this way, *Swanson* brings us full circle to another classic case on notice pleading, *Dioguardi v Durning*.<sup>76</sup> In *Dioguardi*, the plaintiff John Dioguardi filed a complaint, "obviously home drawn," making "a series of grievances against the Collector of Customs at the Port of New York growing out of his endeavors to import merchandise from Italy 'of great value,' consisting of bottles of 'tonics.'"<sup>77</sup> He alleged that "when defendant sold the merchandise at 'public custom,' 'he sold my merchandise to another bidder with my price of \$110, and not of his price of \$120,' and . . . '[that] two cases, of 19 bottles each case, disappeared.'"<sup>78</sup> After the district court dismissed, Dioguardi appealed pro se. The Second Circuit, in an opinion by Judge Charles Clark, reversed, concluding that, "however inartistically they may be stated," plaintiff's allegations met the Rule 8 standard.<sup>79</sup>

*Dioguardi* has long stood for the liberality of pleading standards under the Rules. Its force comes precisely from the fact that it was a hard case, in the sense that it involved a weak and obscure claim. It is not merely that the complaint was barely intelligible. It is that little indicated a legal wrong; it is hard to tell whether the price at which the merchandise was sold, or the disappearance of the bottles, violated the legal duties of the collector of customs. Nonetheless, the collector of customs had legal duties, and the disappearance of merchandise is unusual rather than usual. That was enough.

*Dioguardi* was a hard case in another sense. Judge Clark surely had no illusions about Dioguardi's likelihood of ultimate

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<sup>76</sup> 139 F2d 774 (2d Cir 1944).

<sup>77</sup> *Id.* at 774.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 775.

victory in his suit. Judge Clark chided the district judge's dismissal of Dioguardi's complaint as "another instance of judicial haste which in the long run makes waste,"<sup>80</sup> yet he surely knew there was a good chance that the greater waste would be a full-blown trial consuming Dioguardi's time and scarce resources only to end in abject defeat. Was reversing the dismissal only prolonging the inevitable? Only time would tell.<sup>81</sup>

The generous and liberal tone of *Dioguardi* contrasts with the comparatively exacting and restrictive tone of *Iqbal*. Would *Dioguardi* come out the same way if it had been decided in 2010 rather than 1944? I think it would have come out the same way—and maybe, in a sense, it did.

*Swanson* is the *Dioguardi* for our time. It presents the same dilemmas. We have a pro se plaintiff whose complaint states a claim, but just barely. More so than John Dioguardi, Gloria Swanson tells "a story that holds together," but little in either plaintiff's story tends to inculcate the defendants. The "basis" for the claim is awfully thin. And the plaintiff is proceeding alone and will likely struggle to navigate the litigation process. The only redress the plaintiff is assured of is that she gets to continue her proverbial day in court. For Judge Clark and Judge Wood, and for John Dioguardi and Gloria Swanson, that must suffice.

This is perhaps the greatest gift *Swanson* provides to students of civil procedure. It offers no tidy narrative of aloof judges giving a pass to big business run amok. Nor is it a tale of an underdog vindicated in the end against impossible odds. *Swanson* instead occupies an uneasy space where the just result may be unknowable, and all we can do is hope that our commitment to fair process is justice enough.

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<sup>80</sup> *Dioguardi*, 139 F2d at 775.

<sup>81</sup> And it did. Twenty-one months later Dioguardi was before the same panel of judges in the Second Circuit appealing his total defeat at trial. In a *per curiam* opinion, the court affirmed, concluding that from "plaintiff's own showing and the facts now of record, it is clear that his lively sense of injustice is not properly directed against the customs officials." *Dioguardi v Durning*, 151 F2d 501, 502 (2d Cir 1945).