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The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases

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ARTICLE

THE CHANGING SHAPE OF FEDERAL CIVIL PRETRIAL
PRACTICE: THE DISPARATE IMPACT ON CIVIL RIGHTS
AND EMPLOYMENT DISCRIMINATION CASES

ELIZABETH M. SCHNEIDER[†]

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[†] Rose L. Hoffer Professor of Law, Brooklyn Law School. Thanks to Martha Minow, Margaret Berger, Joe Cecil, Minna Kotkin, and Kevin Clermont for helpful discussion and comments. This Article was selected for presentation at the Section on Civil Procedure program at the 2009 Association of American Law Schools Annual Meeting, *The Changing Shape of Federal Civil Pretrial Practice*, together with articles by Scott Dodson and Edward Hartnett included in this issue. I am grateful to Catherine Struve for organizing this program as well as for her Foreword to these articles in this issue, and to the other contributors. Thanks as well to participants in the Section on Civil Procedure program at the 2009 Annual Meeting; Faculty Workshops at Columbia Law School in 2008, and Cornell Law School in 2009; and panels at the 2009 Law and Society Association Annual Meeting and the 2009 Annual Meeting of the National Employment Lawyers Association (NELA) for helpful comments on the ideas reflected in this Article. I am also grateful to the Advisory Committee on Civil Rules for inviting me to participate in the Mini-Conference on Rule 56 in November 2007; the National Association of Women Judges for generative collaboration; enthusiastic students in my 2008 and 2009 Federal Civil Litigation, Public Law and Justice seminars; and Emma Glazer, Columbia Law School '09; Katherine Cser, Brooklyn Law School '11; and Nina Oksman, Brooklyn Law School '11 for helpful research assistance. The Brooklyn Law School Summer Research Program generously supported my work on this Article.

INTRODUCTION

Pretrial practice in federal civil litigation has dramatically changed over the last thirty years. Pretrial practice, pleading, discovery, *Daubert* motions,¹ summary judgment, and settlement have become the focus of federal civil litigation while trials have vanished. Judges have become managers and gatekeepers, while juries have disappeared. Public adjudication in courts has been reduced. Judicial gatekeeping is happening at an earlier stage than ever before. The recent Supreme Court decisions in *Bell Atlantic Corp. v. Twombly*² and *Ashcroft v. Iqbal*,³ which have dramatically heightened pleading standards, are already turning 12(b)(6)⁴ motions to dismiss into early summary judgments.⁵ *Iqbal* has been described as the “sleepor case” of the 2008 Term because of its unexpected impact on every federal civil matter filed in the federal courts.⁶ One commentator noted that “*Iqbal* is the most significant Supreme Court decision in a decade for day-to-day litigation in the federal courts.”⁷ Justice Ruth Bader Ginsburg, who dissented from the decision, told a group of federal judges at the Second Circuit Judicial Conference that the ruling was both important and dangerous.⁸ “In my view,” she said, “the [C]ourt’s majority messed up the federal rules” governing civil litigation.⁹

¹ See *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592-93 (1993) (holding that the trial judge must review proposed expert scientific testimony and assess “whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue”).

² 550 U.S. 544 (2007).

³ 129 S. Ct. 1937 (2009).

⁴ FED. R. CIV. P. 12(b)(6) (providing for dismissal for “failure to state a claim upon which relief can be granted”).

⁵ See *Twombly*, 550 U.S. at 586 (Stevens, J., dissenting) (“Everything today’s majority says would . . . make perfect sense if it were ruling on a Rule 56 motion for summary judgment. . . . But . . . a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage.”).

⁶ Lawrence Hurley, *Supreme Court Ruling Hits Plaintiffs’ Attorneys: Term’s “Sleepor Case” Requires Plaintiffs to List Specific, Detailed Allegations to Reach Discovery*, L.A. DAILY J., July 28, 2009, at 1 (noting that *Iqbal*’s “impact is likely to prove far greater than anyone envisioned before it was argued”).

⁷ Adam Liptak, *From Case About 9/11, Broad Shift on Civil Suits*, N.Y. TIMES, July 21, 2009, at A10 (internal quotation marks omitted) (quoting Thomas C. Goldstein).

⁸ See *id.* (reporting the remarks of Justice Ruth Bader Ginsburg).

⁹ *Id.* (internal quotation marks omitted) (quoting Justice Ruth Bader Ginsburg).

Although some have argued that concerns about the cost of litigation, especially discovery, are shaping these developments—the majority suggested as much in both *Twombly*¹⁰ and *Iqbal*¹¹—this is not the whole story. Many factors beyond litigation cost are influencing these decisions. Judicial decisions at every level, including the Supreme Court, have expressed a widespread and generalized “hostility to litigation.”¹² The Class Action Fairness Act of 2005 (CAFA),¹³ for example, was enacted in order to move tort litigation from state to federal courts, where defendants believe that they will get a more receptive hearing. As the ideological predilections of federal judges have shifted, many federal judges have expressed the view that employment discrimination and civil rights cases are often weak and without merit.¹⁴

Whatever the reasons, the greatest impact of this change in the landscape of federal pretrial practice is the dismissal of civil rights and employment discrimination cases from federal courts in disproportionate numbers. Fewer civil rights and employment cases are being filed in the federal courts. These issues have become the subject of

¹⁰ The majority in *Twombly* suggests that the cost of litigation, and especially the cost of discovery, prompted the Court’s decision, see 550 U.S. at 557-60, while the dissent points out that careful management of discovery and litigation costs can address this problem without dismissing at the pleading stage, see *id.* at 584 n.18 (Stevens, J., dissenting).

¹¹ In *Iqbal*, the majority also repeatedly emphasizes discovery costs. See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (expressing concern with the “heavy costs” imposed on the government by discovery).

¹² See Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097, 1107 (2006) (“In case after case and in wildly divergent areas of the law, the Rehnquist Court has expressed a profound hostility to litigation.”).

¹³ Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.); see also GEORGENE M. VAIRO, CLASS ACTION FAIRNESS ACT OF 2005 2-4 (2005) (noting that a key purpose of CAFA was to prevent tort plaintiffs from blocking removal to federal court). See generally Symposium, *Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005*, 156 U. Pa. L. Rev. 1439 (2008) (discussing CAFA’s historical context and impact).

¹⁴ See Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 557 (2001) (describing the unusual difficulty of proving employment discrimination claims, and arguing that this difficulty results largely from judicial bias). Although Selmi’s article focuses exclusively on employment discrimination, this Article looks at both civil rights and employment discrimination cases. Some of the data cited here cover both sets of cases and some cover only employment discrimination cases. In the Administrative Office of the United States Courts’s data, on which many of the studies rely, Code 442, “Civil Rights: Employment,” and Code 440, “Other Civil Rights,” are the relevant categories. See Nature of Suit Codes, <http://pacer.psc.uscourts.gov/documents/natsuit.pdf> (last visited Nov. 15, 2009) (listing federal suit codes).

national attention.¹⁵ In this Article, I examine the disparate impact that the changing nature of pretrial practice has on civil rights and employment discrimination cases. I argue that this serious effect raises important questions about purportedly “neutral” rules in the federal courts and should make us look closely at the impact of procedural revision on civil rights and employment cases. In addition, it raises larger questions about whether the swift termination of these cases in federal court is disposing of meritorious cases and forces us to consider the implications of these cases going to state court.

There is a substantial literature about the heavy burdens that employment discrimination plaintiffs bear in federal court.¹⁶ But new developments in federal pretrial practice that reflect the strengthening of “judicial gatekeeping”—such as *Twombly*, *Iqbal*, summary judgment, and *Daubert*—appear to be having a considerable impact on employment discrimination and civil rights cases. Empirical studies of the effect of *Twombly* and *Iqbal* suggest that these decisions have resulted in the disproportionate dismissal of civil rights cases.¹⁷ Recent data on

¹⁵ See Mary Pat Gallagher, *Where Have All the Employment Cases Gone?*, NAT'L L.J., Oct. 6, 2008, at S19 (discussing the drop in federal employment discrimination filings and the possible causes of the drop).

¹⁶ See, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 131-32 (2009) [hereinafter Clermont & Schwab, *From Bad to Worse*] (analyzing updated data to find that employment discrimination plaintiffs are filing fewer cases in federal court perhaps because they “now recogniz[e] their low chances for success”); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004) [hereinafter Clermont & Schwab, *Employment Discrimination Plaintiffs*] (finding that employment discrimination plaintiffs are less successful than other litigants at the pretrial, trial, and appeal stages in federal court).

¹⁷ See Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1013, 1014 (“[A] higher percentage of decisions . . . granted a motion to dismiss in the Title VII context when the courts relied on *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, 1815 (2008) (“The rate of dismissal in civil rights cases has spiked in the four months since *Twombly*.”). More recently, Patricia Hatamyar has reviewed 1039 reported and unreported federal district court cases deciding motions to dismiss and found that 46% of motions were granted under *Conley*, 48% of motions were granted under *Twombly*, and 56% of motions were granted under *Iqbal*. Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1487764. Additionally, she found that when courts apply the *Twombly/Iqbal* pleading standard, the odds that courts will grant a motion to dismiss are 1.5 times greater than under the *Conley* standard. *Id.* Hatamyar determined that constitutional civil rights cases are the “largest category of cases in which 12(b)(6) motions are filed.” *Id.* She concluded that motions to dismiss in constitutional civil rights cases were granted at a higher rate (53%) than in cases overall (49%), and the rate of granting 12(b)(6) mo-

summary judgment in three district courts support this disparate impact.¹⁸ And the most recent Federal Judicial Center study of summary judgment, prepared in conjunction with the Advisory Committee on Civil Rules's proposed amendment providing for a summary judgment "point-counterpoint" format for movant and respondent, suggests that the "prominent role" of summary judgment in civil rights and employment cases is "striking."¹⁹

I have recently explored some of these questions in the context of summary judgment.²⁰ But it is important to look at these issues more broadly in light of the interrelated dimensions of federal pretrial practice. There is a widespread view that our federal civil litigation system continues to be "transsubstantive,"²¹ with rules that apply the same way to all types of actions. Each procedural dimension—pleading, discovery, *Daubert* motions, or summary judgment—is viewed as neutral, discrete, and operating independently of the others. Yet recent experience with the Civil Rules Committee's proposed amendment to Rule 56, which would have mandated "point-counterpoint" summary judgment presentation as a presumptively uniform procedure for most cases (ultimately rejected by the Committee) suggests the need for close scrutiny of the operation of federal pretrial practice on civil rights and employment cases on summary judgment.²² Many com-

tions in constitutional civil rights cases increased in the cases selected from *Conley* (50%) to *Twombly* (55%) to *Iqbal* (60%). *Id.*

¹⁸ See Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* 17-18 (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 08-022, 2008), available at <http://ssrn.com/abstract=1138373> (finding that "summary judgment rates in employment discrimination and other civil rights cases are consistently higher than rates in contract and torts cases").

¹⁹ Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Michael Baylson, 2-3 (Aug. 13, 2008) [hereinafter Cecil & Cort Memorandum], available at [http://www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/\\$file/insumjre.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/$file/insumjre.pdf). In this Article, I refer to the Advisory Committee on Civil Rules as the "Advisory Committee," the "Civil Rules Committee," or the "Committee," and the Standing Committee on Federal Rules of Practice and Procedure as the "Standing Committee."

²⁰ See Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 714-15 (2007) (analyzing the effect of summary judgment in gender cases and its tendency to "permit subtle bias to go unchecked").

²¹ For a recent discussion of "transsubstantive" procedure, see Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1016 (2008), which examines the relationship between substance and procedure and the limits of "transsubstantive" procedure in "war on terror" cases.

²² Comments submitted concerning the proposed "point-counterpoint" amendment to Rule 56(c) are available on the Rules comment website. Admin. Office of the

mentators raised questions as to whether this purportedly purely “procedural” reform of the Rule would lead to increased grants of summary judgment and dismissals in civil rights and employment cases.²³ An amended Rule 56 became effective December 1, 2009.²⁴

In this Article, I analyze three discrete aspects of the shift in pre-trial practice—pleading, summary judgment, and *Daubert*—in depth and then assess their cumulative impact on civil rights and employment cases. My concern with this issue stems from my experience as a civil rights litigator at a time when federal courts were viewed as the bulwark of civil rights protection. I am sensitive to the historical dialectic between federal/state parity and civil rights preferences that affect whether federal or state courts are the best venues for the resolution of civil rights matters.²⁵ Now, however, cases involving matters of public importance are relegated to state courts, where judges are subject to greater political pressure. Lawyers and judges now perceive that state courts have become the forum for plaintiffs, while federal courts are the forum for defendants.²⁶

U.S. Courts, 2008 Civil Rules Comment Chart, http://www.uscourts.gov/rules/2008_Civil_Rules_Comments_Chart.htm (last visited Nov. 15, 2009). Indeed, many witnesses who testified at the Advisory Committee’s three public hearings, and many comments that were submitted, focused on the potential deleterious impact of these proposals on civil rights and employment cases as well. See *infra* Part II (discussing “point-counterpoint”).

²³ Several participants at the Advisory Committee on Civil Rules’s Mini-Conference on Rule 56 in November 2007 had raised this issue. See Letter from Elizabeth M. Schneider, Brooklyn Law Sch., to Peter G. McCabe, Sec’y, Comm. on Rules of Practice and Procedure, Admin. Office of the U.S. Courts (Nov. 12, 2008), available at <http://www.uscourts.gov/rules/2008%20Comments%20Committee%20Folders/CV%20Comments%202008/08-CV-049-Testimony-Schneider.pdf> (noting that several participants at the conference expressed concern about the way the proposed rule would operate and that academics and judges have underscored the dangers of summary judgment with respect to civil rights and employment cases).

²⁴ See Memorandum from Hon. Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure (May 8, 2009, revised June 15, 2009) [hereinafter Kravitz Memorandum], in COMM. ON THE RULES OF PRACTICE & PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE app. at C-1 (2009), available at http://www.uscourts.gov/rules/Reports/Combined_ST_Report_Sept_2009.pdf.

²⁵ Compare Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1116 (1977) (arguing that federal courts are “institutionally preferable” to state courts “as forums in which to raise federal constitutional claims”), with William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 599-600 (1999) (noting that gay litigants have had greater success in state courts, which suggests that state courts might sometimes have institutional advantages for disfavored clients).

²⁶ See Gallagher, *supra* note 15 (noting that plaintiffs’ lawyers have attempted to keep their cases in state courts because of the higher success rate there); Hurley, *supra*

Part I of this Article begins with an overview of changes in federal pretrial practice and a review of recent data on civil rights and employment cases in the federal courts. It then turns to the procedural aspects of pleading and the history of special pleading burdens in civil rights cases, which were rejected by the Supreme Court, and the impact of *Twombly* and *Iqbal*. This part then proceeds to discuss the procedural aspects of summary judgment, summary judgment decision-making in general and in civil rights and employment cases in particular, the impact of *Twombly* and *Iqbal* on summary judgment, and the problematic approach to summary judgment reflected in *Scott v. Harris*.²⁷ Part I concludes with a brief look at the procedural aspects of *Daubert* motions, the way they are tied to summary judgment, and their effect on civil rights and employment discrimination cases. Part II examines the broader implications of these developments for federal pretrial practice, and focuses on the need for a close analysis of the impact of “neutral” Rules, such as the proposed but rejected “point-counterpoint” amendment to Rule 56, on employment discrimination and civil rights litigation. Part III explores why these changes are occurring and considers what it would take to reverse this trend.

I. THE CHANGING NATURE OF PRETRIAL PRACTICE IN THE FEDERAL COURTS

From our current vantage point, there have been tremendous changes in federal pretrial practice over the last thirty years. These changes include the development of heightened pleading standards, the increased use of summary judgment, the development of *Daubert* hearings, more settlements, the greater use of managerial judging, and the disappearance of civil trials. Although each of these developments involve different sources of law and may be occurring for arguably different reasons, they are all interrelated. Some of these changes—such as increased settlement and the disappearance of civil trials—may be cumulative, the results of interaction among other developments.

This notion of interrelationship among parts is fundamental to the operation of procedure under the Federal Rules. The idea of simple notice pleading was integrally related to (and indeed interdependent with) provisions for extensive discovery and summary judg-

note 6 (“Thanks to the U.S. Supreme Court[’s *Iqbal* decision], plaintiffs’ attorneys now have to think twice before filing civil lawsuits in federal court.”).

²⁷ 550 U.S. 372 (2007).

ment. The majorities' rationales for heightening the burden of pleading in *Twombly* and *Iqbal* were to reduce the expense and duration of discovery. Change in one aspect of the rules and the litigation process inevitably impacts every other aspect of the process, although we do not always know how. Yet we need to look at these changes in a systemic way. Stephen Yeazell has made this point:

Although we consciously chose the individual legal changes, we have not entirely comprehended their combined effect. As a consequence, we sometimes debate particular features—for example, styles of judging, the virtues and vices of discovery, abuses of the legal system, alternatives to litigation, and various docket-speeding local experiments—without acknowledging their links to the system as a whole. We need a better sense of these connections and a more comprehensive sense of how process functions as a system.²⁸

Historically, federal courts were the place for civil rights relief. Our vision of the federal courts over the last half century has been shaped by the civil rights movement. Civil rights and employment discrimination cases often raise issues of social importance and require a public forum. Public exposure of these cases legitimates stories of harm. The erasure of these cases from federal court makes the cases and their histories invisible. Yet the impact of these various developments has been to dismiss these cases and take them out of federal court.

Between 1988 and 2003, the number of employment discrimination cases in federal court “rose in absolute numbers and as a proportion of all civil litigation.”²⁹ But today, it is widely recognized that employment discrimination and civil rights cases face enormous hurdles in federal court. There is a considerable literature on this issue that looks at all phases of the litigation process.³⁰ In virtually every phase

²⁸ Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632.

²⁹ Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States* 13 (Am. Bar Found. Research Paper Series No. 08-04, 2008), available at <http://papers.ssrn.com/abstract=1093313>. The authors describe 1988–2003 as a high point of employment civil rights enforcement because “protections against employment discrimination were extended to older workers, the disabled, and those in need of family and medical leave”; sexual harassment was recognized as a violation of Title VII in 1986; the passage of the Civil Rights Act of 1991 expanded the right to damages and to jury trial; and the Americans with Disabilities Act was passed in 1992. *Id.*

³⁰ See, e.g., Clermont & Schwab, *From Bad to Worse*, *supra* note 16 (describing data on employment discrimination plaintiffs' lack of success in federal trial and appellate courts); Selmi, *supra* note 14, at 559–60 (providing data on civil rights and employment plaintiffs' low success rates in federal court).

of the process, now ranging from pleading to appeals, there appears to be a disparate impact on employment discrimination and civil rights cases.

In their pioneering 2004 study on employment discrimination cases in federal court, Kevin Clermont and Stewart Schwab rely on data from the Administrative Office of the U.S. Courts beginning in 1970.³¹ They conclude that

[e]mployment discrimination plaintiffs have a tough row to hoe. They manage many fewer happy resolutions early in litigation, and so they have to proceed toward trial more often. They win a lower proportion of cases during pretrial and at trial. Then, more of their successful cases are appealed. On appeal, they have a harder time upholding their successes and reversing adverse outcomes.³²

Clermont and Schwab have recently updated this study, looking at five more years of current data from the same source.³³ In this new article, they argue that matters have changed for the worse for employment discrimination plaintiffs.³⁴ They report a “startling drop” in the number of employment discrimination cases in federal court: the category of employment discrimination cases “has dropped in absolute number of terminations every year after fiscal year 1999, and it has dropped as a percentage of the docket every year after fiscal year 2001.”³⁵ In 1997, employment discrimination was the largest single category of civil litigation cases in federal court.³⁶ By 2006, employment discrimination cases accounted for less than 6% of the federal civil docket (from 10% five years before) and were no longer the largest category of cases.³⁷ Clermont and Schwab conclude that judicial bias at all levels of the litigation process may be discouraging litigants and lawyers from pursuing these cases in the federal courts.³⁸

³¹ Clermont & Schwab, *Employment Discrimination Plaintiffs*, *supra* note 16 (discussing the special difficulties employment discrimination plaintiffs face because of judicial bias).

³² *Id.* at 429.

³³ Clermont & Schwab, *From Bad to Worse*, *supra* note 16, at 103.

³⁴ *Id.* at 131 (“Maybe the situation has not gone from bad to worse in the last five years. But those plaintiffs may have gone from merely faring badly to feeling bad about their chances for success, which would affect their litigation behavior.”).

³⁵ *Id.* at 104.

³⁶ Clermont & Schwab, *Employment Discrimination Plaintiffs*, *supra* note 16, at 437 fig.4.

³⁷ Clermont & Schwab, *From Bad to Worse*, *supra* note 16, at 117.

³⁸ *Id.* at 104-05 (“The fear of judicial bias at both the lower and appellate court levels may be discouraging potential employment discrimination plaintiffs from seeking relief in the federal courts.”).

Their statistics are indeed startling. Between 1979 and 2006, the plaintiff win rate in federal court for “jobs cases” (15%) was dramatically lower than for “nonjobs cases” (51%).³⁹ During that same time period, employment discrimination plaintiffs won only 3.59% of pre-trial adjudications, while other plaintiffs won 21.05% of pretrial adjudications.⁴⁰ On appeal, there was a 41% reversal rate of plaintiff wins in job cases at the district court level but only a 9% reversal rate of defendant wins in those cases at the district court level.⁴¹ Although Clermont and Schwab emphasize that this phenomenon shapes pre-trial dispositions, settlement, trial, and appeals, this Article focuses on the formal aspects of pretrial practice.

Settlement is another locus of disparate impact. Settlement is always lurking in the background of pretrial practice and often results after a ruling on summary judgment. A recent study on settlement in federal trial courts by Theodore Eisenberg and Charlotte Lanvers suggests that employment discrimination cases settle less frequently than other kinds of cases and that at least part of the reason for such “poorer performance” is in-court treatment.⁴² They observe that

[t]he pattern of employment case outcomes persists from the pretrial stage through the appellate stage. Employment cases have fewer early terminations than other cases, a much lower plaintiff win rate on pretrial motions than other cases, a much lower plaintiff win rate at trial than other cases, a much lower win rate in judge trials than in jury trials of employment cases, a higher trial rate than other cases, a strong anti-plaintiff effect on appeal, and a diving number of filings.⁴³

I turn now to the major aspects of pretrial litigation: pleading, summary judgment, and *Daubert*.

³⁹ *Id.* at 127.

⁴⁰ *Id.* at 128.

⁴¹ *Id.* at 110 display 2.

⁴² Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 145 (2009).

⁴³ *Id.* A recent study of settlement rates drawing on data from federal cases in the Eastern District of Pennsylvania and the Northern District of Georgia suggests that settlement rates in employment discrimination cases are among the lowest of those case categories studied. *See id.* at 135 (noting that the settlement rate of employment discrimination cases in the two districts from 2001–2002 was “relatively low” compared to other case categories, including tort and contract); *see also* Vivian Berger, Michael O. Finkelstein & Kenneth Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 50-67 (2005) (studying summary judgment motion dispositions in district courts of the Second Circuit in order to identify the factors that parties to an employment discrimination case should consider when estimating a case’s expected settlement value).

A. Pleading

The traditional view is that the Federal Rules established notice pleading. Rule 8 provides for “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁴⁴ In *Conley v. Gibson*, the Court stated that a complaint should not be dismissed unless the plaintiff “can prove no set of facts in support of his claim which would entitle him to relief.”⁴⁵ For fifty years, *Conley* meant that Rule 12(b)(6) motions were disfavored. The only type of claim for which the Federal Rules required a higher burden of pleading was Rule 9(b) fraud. Otherwise, notice pleading was the rule as a transsubstantive matter.

Beginning in the early 1990s, however, some district court judges began to challenge the assumption of notice pleading in civil rights cases because of their own views of these cases. They wrote decisions requiring a higher burden of pleading in civil rights cases, dismissing the cases on 12(b)(6) grounds.⁴⁶ But in *Swierkiewicz v. Sorema N.A.*, the Supreme Court rejected this effort.⁴⁷ One reason for the Court’s rejection was that district courts had sought to carve out this higher burden of pleading in civil rights cases on their own through case law, even though the Rules were intended to be transsubstantive.

In *Twombly*, a 2007 antitrust case, the Court wrote an opinion that started a revolution in pleading and the federal civil litigation system.⁴⁸ In rejecting the longstanding rule of *Conley v. Gibson*, the Court ruled that pleading allegations had to be “plausible” and emphasized the importance of judicial gatekeeping where heavy litigation costs were a threat.⁴⁹ The standard of *Conley v. Gibson*, the Court ruled, “ha[d]

⁴⁴ FED. R. CIV. P. 8(a)(2).

⁴⁵ 355 U.S. 41, 45-46 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

⁴⁶ *See, e.g.*, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165 (1993) (reversing the district court’s application of a “heightened pleading standard” to a § 1983 claim). *See generally* Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 939 (1990) (examining courts’ increasing demand that civil rights complaints meet a stricter pleading standard).

⁴⁷ *See* 534 U.S. 506, 515 (2002) (“Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits.”).

⁴⁸ *See* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming Mar. 2010) (manuscript at 12-13), *available at* <http://ssrn.com/abstract=1448796> (arguing that *Twombly* and *Iqbal* establish an invented test for pleading that is novel, unpredictable, and disruptive and that generally destabilizes the federal civil litigation system).

⁴⁹ 550 U.S. at 559.

earned its retirement.”⁵⁰ Since *Twombly*, judges, lawyers, and legal scholars have debated the meaning of the Court’s holding.⁵¹ The case has been widely cited, and there has been considerable scholarly discussion of the implications of the decision.⁵² Discussion initially focused on whether the Supreme Court intended the case to reach pleading generally or whether it was limited to antitrust cases.⁵³ The 2009 *Iqbal* decision makes clear that *Twombly* set out a general pleading standard and is not limited to antitrust cases.

Iqbal, a five-to-four decision, fully overturns *Conley v. Gibson*.⁵⁴ *Iqbal* was a *Bivens* civil rights claim alleging discriminatory detention and treatment of a man of Pakistani descent after 9/11.⁵⁵ The decision is very broad, rejects the concept of notice pleading, and requires the district court to determine whether there is a “plausible” claim based on the facts alleged in the complaint and the substantive law. *Iqbal*

⁵⁰ *Id.* at 563.

⁵¹ For example, *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam), decided after *Twombly*, seems to suggest a more liberal pleading standard when the plaintiff is a pro se litigant.

⁵² See, e.g., Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 81-99 (2007) (arguing that the *Twombly* standard should not govern cases in which public facts do not negate the thrust of a complaint but should apply when the “defendant has negated all inferences of culpability”); Seiner, *supra* note 17, at 1015, 1026-53 (arguing that “courts should exercise great caution before applying *Twombly* too rigidly” in employment discrimination cases and proposing a uniform framework by which to evaluate the sufficiency of Title VII complaints); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008) (criticizing *Twombly* as a decision that allows “the interests of protecting defendants against expensive discovery and managing burdensome case-loads . . . to prevail over the interests of access and resolution on the merits”); Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1878 (2008) (arguing that the decision in *Twombly* violates the Seventh Amendment’s guarantee of a citizen’s right to a jury trial); Hannon, *supra* note 17, at 1835-46 (providing an empirical study of *Twombly*’s effect on the role of dismissals in district court cases and concluding that its immediate impact has been on civil rights cases).

⁵³ See e.g., Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 138 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf> (arguing that the “plausibility” standard is absolute and not restricted to antitrust cases); Spencer, *supra* note 52, at 457 (stating affirmatively that “*Twombly* is not merely an antitrust case”); Thomas, *supra* note 52, at 1888 (stating that the *Twombly* ruling affects more than just antitrust cases); Mary J. Hackett & Patricia E. Antezana, *All but Two Circuits Interpret ‘Twombly’ Broadly*, NAT’L L.J., Oct. 27, 2008, at S3 (“Federal circuit courts of appeals across the country have, for the most part, embraced the new *Twombly* standard in all types of cases.”).

⁵⁴ See *Aschcroft v. Iqbal*, 128 S. Ct. 1937, 1953 (2009) (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions,’ and it applies to antitrust and discrimination suits alike.” (citation omitted)).

⁵⁵ *Id.* at 1943.

now requires plaintiffs to come forward with concrete facts at the outset of a lawsuit and instructs district judges to dismiss lawsuits that rest on implausible legal claims.

It is important to look closely at the language of *Iqbal* to discern what the Court now requires from pleading. In his majority opinion, Justice Kennedy writes:

As the Court held in *Twombly*, the pleading standard Rule 8 announces does not require “detailed factual allegations,” but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation. A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.”

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . .

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.⁵⁶

⁵⁶ *Id.* at 1949-50 (citations omitted).

Justice Kennedy's characterization of what a district court should do stands in sharp contrast to Justice Souter's account in his *Iqbal* dissent. Justice Souter authored the majority opinion in *Twombly*. In analyzing the complaint in *Iqbal*, Souter criticizes defendants Ashcroft and Mueller's claim that *Iqbal*'s allegations were "implausible" because such high-ranking officials "tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command."⁵⁷ He goes on to spell out the following:

[T]his response bespeaks a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. *We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here.*⁵⁸

Thus, Justice Souter's view of the district court's task in reviewing factual allegations in the complaint dramatically differs from the majority.⁵⁹ It is significant that Justice Kennedy's opinion emphasizes that "[d]etermining whether a complaint states a plausible claim for relief . . . requires the reviewing court to draw on its judicial experience and common sense."⁶⁰ Presumably, the Court intended to emphasize that the district court should explicitly apply these factors to the assessment of whether the plaintiff's pleading is plausible. But reliance on "judicial experience" and "common sense" necessarily adds a more subjective element to a district court's assessment of whether a plaintiff's claim should go forward. As Stephen Burbank has observed, this aspect of the *Iqbal* decision "obviously licenses highly subjective judgments. . . . This is a blank check for federal judges to get rid of cases they disfavor."⁶¹ Further, the new heightened pleading standard seems to render summary judgment irrelevant because district judges

⁵⁷ *Id.* at 1959 (Souter, J., dissenting) (citations omitted).

⁵⁸ *Id.* (emphasis added) (citations omitted).

⁵⁹ The murky distinction between factual and legal allegations in the 12(b)(6) context haunts this decision. Justice Kennedy writes, "Although for purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 1949-50 (majority opinion) (internal quotation marks omitted).

⁶⁰ *Id.* at 1950.

⁶¹ Liptak, *supra* note 7, at A10 (quoting Stephen Burbank).

can now simply dismiss cases on Rule 12(b)(6) motions and not wait for summary judgment.⁶²

What is breathtaking is that the Court made these changes on its own in light of *Conley* and Rule 8. Rule 8 was not amended; Congress did not pass a statute changing pleading standards. The Court changed federal pleading standards for all cases, despite prior decisions such as *Swierkiewicz*, in which the Court explicitly rejected the notion that pleading requirements in civil rights and employment cases should change.⁶³ The Court also ignored the rulemaking process that is in place for procedural reform of federal civil litigation.⁶⁴ Indeed, scholars and practitioners have been so outraged by *Iqbal* that Senator Arlen Specter has now submitted a bill, the Notice Pleading Restoration Act of 2009, which would reverse *Iqbal* and *Twombly* and reinstate *Conley*'s "no set of facts" standard as the prevailing pleading standard.⁶⁵ Scholars have proposed alternative language for bills that might accomplish the same result.⁶⁶ A hearing in the House of Representatives, entitled *Access to Justice Denied: Hearing on Ashcroft v. Iqbal*, was held by the Judiciary Committee in October 2009. Professor Arthur Miller and representatives of civil rights organizations testified concerning the devastating impact of *Iqbal* on access to the federal courts,

⁶² See Michael C. Dorf, *Should Congress Change the Standard for Dismissing a Federal Lawsuit?*, FINDLAW, July 29, 2009, <http://writ.news.findlaw.com/dorf/20090729.html>. See generally Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly* (Oct. 27, 2009) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1494683.

⁶³ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (rejecting heightened pleading standards).

⁶⁴ *Id.* Clermont & Yeazell, *supra* note 48 (manuscript at 32-33) (discussing *Twombly* and *Iqbal*'s potentially disruptive effect on the process for procedural reform that has developed since the promulgation of the Rules in 1938). In *Jones v. Bock*, Chief Justice Roberts wrote, just a few months before *Twombly* was decided, that "adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts." 549 U.S. 199, 224 (2007).

⁶⁵ Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009) (as introduced in the Senate by Senator Specter, July 22, 2009). S. 1504 would "provide that Federal courts shall not dismiss complaints under Rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*." *Id.* (italics added); see also Tony Mauro, *Groups Unite to Keep Cases on the Docket: Plaintiffs' Lawyers Seek to Stop Dismissals After Iqbal Decision*, NAT'L L.J., Sept. 21, 2009, at 1 (detailing efforts taken by plaintiff's lawyers to overturn the *Iqbal* and *Twombly* decisions).

⁶⁶ Dorf, *supra* note 62 (analyzing the difficulties of amending *Twombly* via legislation).

and on employment discrimination cases and civil rights cases in particular.⁶⁷

After *Twombly*, several empirical studies of district court judicial interpretation of the case suggested that it had led to dismissals of civil rights and employment cases.⁶⁸ The first study examined cases on Westlaw that were brought under Title VII and district court decisions on motions to dismiss for failure to state a claim in the year after *Twombly* and compared the numbers with cases prior to *Twombly*.⁶⁹ The author concluded that *Twombly* “has already made the pleading requirements more difficult (and certainly more confusing) for Title VII litigants” and that the district courts are aggressively using the Supreme Court’s recent decision to “rais[e] the bar as to what an employment discrimination plaintiff must plead” to survive dismissal of employment discrimination claims.⁷⁰ The second study, conducted by a law student, examined all cases found through Westlaw searches that cited *Twombly* from June 2007 to December 2007, the first seven months after the decision.⁷¹ From the 3287 district court cases sampled, a civil rights action citing *Twombly* was 39.6% more likely to be dismissed than a random case selected from the set.⁷²

These preliminary findings raised significant questions. First, district judges applying *Twombly* did not appear to limit the decision to, or, indeed, even apply it to, the very factual context in which it arose—antitrust claims.⁷³ Second, judges appeared to be interpreting

⁶⁷ *Access to Justice Denied: Hearing on Ashcroft v. Iqbal Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2009). The Hearing was chaired by Representative Jerrold Nadler (D-NY). The witnesses included: Arthur R. Miller, Professor, New York University School of Law; Gregory Katsas, Former Assistant Attorney General, Civil Rights Division, U.S. Department of Justice; John Vail, Senior Litigation Counsel and Vice President, Center for Constitutional Litigation; and Debo P. Adegbile, Associate Director of Litigation, NAACP Legal Defense and Educational Fund.

⁶⁸ Seiner, *supra* note 17, at 1026-31 (discussing the higher rate of employment discrimination dismissals in cases relying on *Twombly*); Hannon, *supra* note 17, at 1837 (noting the pronounced increase in dismissals of civil rights complaints post-*Twombly*).

⁶⁹ See Seiner, *supra* note 17, at 1027-29 (describing in full the methodology used to perform the study of *Twombly*’s effect on motions to dismiss).

⁷⁰ *Id.* at 1037-38.

⁷¹ For a discussion of the methodology utilized in the study, see Hannon, *supra* note 17 at 1828-35.

⁷² See *id.* at 1838.

⁷³ See *id.* at 1814-15 (stating that an empirical study of *Twombly*’s effect demonstrates its application to “every substantive area of law governed by Rule 8”); Seiner, *supra* note 17, at 1013 (“Though *Twombly* arose in the context of an antitrust case, its holding has already been extended by the lower courts to other areas of the law.”).

the decision vigorously and disproportionately to dismiss civil rights and employment discrimination cases. Indeed, *Iqbal* itself is a civil rights case in which the pleading issue relates to government immunity.⁷⁴ These statistics also raise doubts about the rationale the majority gives in *Twombly* for imposing a higher burden of pleading in civil rights cases—the cost of discovery. Since most civil rights and employment discrimination cases in the federal courts are individual cases and not cases that involve group litigation or class actions, it seems unlikely that concern over the cost of discovery is animating these judicial decisions.

Since *Iqbal*, there have been many district court (and even some circuit court) decisions but only limited empirical data.⁷⁵ A review of the many district and circuit court decisions that have already interpreted *Iqbal* is astonishing. *Twombly* and *Iqbal* have transformed the analytic work the district judge has to do at the pleading stage. Rule 12(b)(6) decisionmaking is now extraordinarily complex, fact- and law-intensive, and lengthy. District courts are now forced to write detailed analyses of both the plaintiff's factual claims and of the legal sufficiency of those claims. Plaintiffs are required to produce a considerable degree of factual detail at the very beginning of the lawsuit before they have been able to conduct any discovery. Further, judges have to parse the factual and legal claims and analyze the merits of these legal claims at the nascent stages of the lawsuit. Moreover, despite *Swierkiewicz*,⁷⁶ the emerging picture suggests that, like *Twombly*, *Iqbal* has strengthened district court discretion to dismiss civil rights and employment cases. I turn to some of these cases in order to illustrate the problems faced by district court judges under *Iqbal*.

In many cases, defendants' 12(b)(6) motions have been granted. For example, in *Williams v. City of Cleveland* the district court dismissed a § 1983 claim against the City of Cleveland for false arrest and prosecution.⁷⁷ In dismissing the claim, the district judge held that the

⁷⁴ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (discussing the plausibility standard that complaints must meet to survive a 12(b)(6) motion in the context of a detainee's civil rights action against high-ranking governmental officials).

⁷⁵ As of September 21, 2009, a Westlaw search produced 1500 district court and 100 appellate court opinions. Mauro, *supra* note 65, at 31 (showing that "*Iqbal* motions" to dismiss have already become commonplace in federal courts); see also Hatamyar, *supra* note 17.

⁷⁶ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (ruling that there was not a higher standard of pleading in employment discrimination cases).

⁷⁷ No. 1:09-1310, 2009 U.S. Dist. LEXIS 61346, at *11 (N.D. Ohio July 16, 2009).

[p]laintiff must allege facts, which if true, demonstrate the City's policy, such as examples of past situations where law enforcement officials have been instructed to ignore evidence. . . . [Plaintiff] has not alleged facts from which it can be inferred that this conduct is recurring or that what happened in his case was due to City policy.⁷⁸

However, without discovery, complaints like these can easily be dismissed. The court granted the motion to dismiss and plaintiff's motion for leave to amend, citing the complaint's conclusory manner and lack of specific factual allegations.⁷⁹

In *Jones v. Town of Milo*, the plaintiff sued when she lost her job as Milo Town Manager after seventeen years of service.⁸⁰ The plaintiff alleged that while working for the defendant, she had never received an evaluation rating her performance as less than "excellent" until her final year.⁸¹ Magistrate Judge Kravchuk recommended dismissal of the complaint based on *Iqbal*, stating that courts may not "indulge an inference exposing the defendant to liability . . . when the factual allegations support a more likely inferential finding that is incompatible with liability."⁸² The magistrate judge determined that the plaintiff failed to allege facts necessary to state a disqualifying claim for a due process violation.⁸³ Similarly, in *Snavely v. Arnold*, the plaintiff, a former police officer, brought a § 1983 claim against city officials for violating his First Amendment rights.⁸⁴ The court dismissed the complaint, noting that the plaintiff had failed to include specific words or conduct that would constitute protected free speech.⁸⁵

In *Rivera v. Prince William County School Board*, a plaintiff brought a Title VII hostile work environment claim.⁸⁶ The plaintiff alleged that her co-worker made comments about her sexual relationship with her husband, offered to buy the plaintiff lingerie for Christmas, and asked whether she would wear lingerie for her husband or for him.⁸⁷ She also alleged that he would use sexual innuendo to refer to male genitalia, that she received e-mail making sexual references, and that her

⁷⁸ *Id.* at *12.

⁷⁹ *Id.*

⁸⁰ No. 09-80, 2009 WL 1605409, at *1 (D. Me. June 5, 2009).

⁸¹ *Id.* at *2-3.

⁸² *Id.* at *5.

⁸³ *Id.* at *6-8.

⁸⁴ No. 1:08-12165, 2009 U.S. Dist. LEXIS 51415, at *1 (M.D. Pa. June 18, 2009).

⁸⁵ *Id.* at *5.

⁸⁶ No 1:09-341, 2009 WL 2232746, at *1 (E.D. Va. July 22, 2009).

⁸⁷ *Id.* at *2.

co-worker smacked her behind.⁸⁸ In reviewing the defendant's 12(b)(6) motion, the district court noted that complaints relying on "naked assertions devoid of further enhancement" are insufficient⁸⁹ and that the claims presented must allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.⁹⁰ The court "sliced and diced" the plaintiff's allegations, saying that the harassment had only spanned seventeen months and involved only four instances of sexual harassment, clearly minimizing the harm that the plaintiff claimed.

Several district court opinions have, in employment discrimination cases, considered *Swierkiewicz* and puzzled over the particular impact of *Iqbal* on *Swierkiewicz*.⁹¹ District courts have repeatedly cited the language of *Iqbal*, and several circuits have already disagreed on this issue. District courts have suggested that "threadbare recitals of the elements of the cause of action" do not suffice to state a claim, often finding complaints "conclusory."⁹²

There are also numerous employment and civil rights cases in which district courts have granted leave to amend. The process of amending complaints could go on for a long time and be very time-consuming and expensive. *Iqbal* has opened the door to minute and searching judicial analysis of each factual and legal allegation in the complaint.

Despite approval of *Iqbal* in many lower courts, some judges have expressed hostility to the decision. In a transcript on a 12(b)(6) motion in *Madison v. City of Chicago*,⁹³ Judge Milton Shadur chided the defendant for treating the *Twombly* and *Iqbal* standard as a "universal 'get out of jail free' card."⁹⁴ Judge Shadur expressed special concern with the way *Twombly* and *Iqbal* will be interpreted in employment discrimination cases. He suggested that the Supreme Court had adopted a

⁸⁸ *Id.*

⁸⁹ *Id.* at *3 (internal quotation marks omitted) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)).

⁹⁰ *Id.* (citing *Iqbal*, 129 S. Ct. at 1949).

⁹¹ See, e.g., *Fowler v. UPMC Shadyside*, No. 07-4285, 2009 WL 2501662 (3d Cir. Aug. 18, 2009); *Kabil v. Youngblood*, No. 1:08-00281, 2009 WL 2475006 (E.D. Cal. Aug. 11, 2009); *Doe ex rel. Gonzales v. Butte Valley Unified Sch. Dist.*, No. 09-245, 2009 WL 2424608 (E.D. Cal. Aug. 6, 2009); *Oshop v. Tenn. Dep't of Children's Servs.*, No. 3:09-0063, 2009 WL 1651479 (M.D. Tenn. June 10, 2009).

⁹² *Oshop*, 2009 WL 1651479, at *6.

⁹³ Transcript of Proceedings at 2, *Madison v. City of Chicago*, No. 09-3629 (N.D. Ill. Aug. 10, 2009).

⁹⁴ *Id.* at 2.

“fact-pleading regime rather than the notice-pleading regime that the federal courts operate under.”⁹⁵ Judge Shadur was unwilling to grant the motion and ordered the parties to begin discovery with the required advance disclosures.⁹⁶ He admonished defense counsel regarding *Iqbal*:

Well, you know defense counsel—how will I characterize it? You ask if it's new. It's Pavlovian. You know, the bell has rung and defense counsel salivates. They say, “Wow! Here is our chance to dump a lot of cases.” . . . But you see employment discrimination cases have a long history of confirmation by our Court of Appeals and others that say that all you have to [do] is to say, “I was discriminated on based on my sex” and identify the . . . adverse employment action. In that case, that's what discovery is really for.⁹⁷

Other judges have also resisted *Iqbal*. In *Chao v. Ballista*, the plaintiff brought a claim against the supervisors of a prison for failure to investigate and prevent sexual abuse under § 1983.⁹⁸ She alleged that while she was an inmate, she had between 50 and 100 sexual encounters with one of the defendants and that the same defendant had a sexual relationship with another female inmate.⁹⁹ The defendants argued that the plaintiff failed to allege “the personal involvement of supervisory officials.”¹⁰⁰ Judge Nancy Gertner determined that the plaintiff's allegations were plausible enough for the court to infer that the sexual abuse could have been prevented had better policies and procedures been implemented.¹⁰¹

Twombly and *Iqbal* have effectively commanded district judges to assess pleadings and the credibility of plaintiffs' allegations as though they were summary judgment motions. As we see in the next Section, summary judgment decisionmaking has been problematic and controversial. For a district judge to be called on to make a similar assessment on pleading, based on “judicial experience” and “common sense” and before discovery, is absurd.

⁹⁵ *Id.* at 3.

⁹⁶ *Id.* at 10.

⁹⁷ *Id.* at 11-12.

⁹⁸ 630 F. Supp. 2d 170 (D. Mass. 2009).

⁹⁹ *Id.* at 177-78.

¹⁰⁰ *Id.* at 173-74.

¹⁰¹ *Id.* at 174.

B. Summary Judgment, Iqbal, and Scott

There has been considerable change over the years in summary judgment practice before the federal courts.¹⁰² Rule 56 provides that summary judgment can only be granted if there is “no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”¹⁰³ Historically, summary judgment was disfavored and was not to be granted liberally because of the preference for jury trial. Cases that presented issues of credibility and weight of evidence were deemed inappropriate for summary judgment.

However, the trilogy of Supreme Court decisions in 1986—*Matsushita*,¹⁰⁴ *Liberty Lobby*,¹⁰⁵ and *Celotex*¹⁰⁶—provided impetus and encouragement to district courts to grant summary judgment more frequently.¹⁰⁷ Federal trial judges are now more likely to grant summary judgment,¹⁰⁸ thereby depriving litigants of the opportunity to have

¹⁰² The discussions of summary judgment in this Section and of *Daubert* in the next Section draw heavily on my article, *The Dangers of Summary Judgment*. Schneider, *supra* note 20. See generally Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897 (1998) (tracing the historical development of Rule 56).

¹⁰³ FED. R. CIV. P. 56(c).

¹⁰⁴ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (holding that a party opposing summary judgment cannot succeed merely by casting “metaphysical doubt” about material facts and that policy implications and factual context can increase the nonmovant’s burden).

¹⁰⁵ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (holding that, in motive cases, as in others, the party opposing summary judgment must provide affirmative evidence to defeat a Rule 56 motion).

¹⁰⁶ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (holding that a movant need only show that the party opposing summary judgment lacks sufficient evidence to prevail).

¹⁰⁷ Some scholars argue that the trilogy merely reflected changes that were already taking place with respect to summary judgment practice and that the cases did not cause those changes. See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 620 (2004) (asserting that the rise in case termination often attributed to the 1986 case trilogy began during the 1970s). One empirical study of federal court summary judgment practice over the last twenty-five years “call[s] into question the interpretation that the trilogy led to expansive increases in summary judgment.” Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 862 (2007). There is, however, no dispute that the trilogy has encouraged district judges to view summary judgment as an appropriate and important vehicle to dispose of cases. For a full discussion of the history of summary judgment, see Burbank, *supra*, at 594-603, and Wald, *supra* note 102, at 1898-1917.

¹⁰⁸ See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1133 (2003) (arguing that courts value efficiency over litigants’ rights to jury trials). Judge Patricia Wald has also noted this phenomenon:

their claims resolved on a full factual record before a jury (and the chance to have the merits of their claims determined by a more diverse group of decisionmakers). For this reason, the federal “summary judgment industry”¹⁰⁹ has been the subject of much recent scholarly attention.¹¹⁰ Increasing concern with the “vanishing trial” in federal civil cases¹¹¹ makes summary judgment a particularly important

My review of the D.C. Circuit’s summary judgment rulings over a six-month period suggests that judges will stretch to make summary judgment apply even in borderline cases which, a decade ago, might have been thought indisputably trial-worthy. It also suggests that appellate courts will, by and large, uphold these dispositions, unless they think the trial judge got the law wrong.

Wald, *supra* note 102, at 1942.

¹⁰⁹ See Milton I. Shadur, *From the Bench: Trial or Tribulations (Rule 56 Style)?*, LITIG., Winter 2003, at 5, 5 (2003) (“[T]he growth of the summary judgment industry [is] a replacement for the civil trial.”).

¹¹⁰ See Miller, *supra* note 108, at 984-85 (arguing that current summary judgment practices threaten the right to a jury trial); Wald, *supra* note 102, at 1898 (examining the changes to summary judgment over its six-decade history); see also John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 522-27 (2007) (arguing that summary judgment costs more than it saves); Edward Brunet, *Markman Hearings, Summary Judgment, and Judicial Discretion*, 9 LEWIS & CLARK L. REV. 93, 112-20 (2005) (analyzing the impact of summary judgment timing on patent litigation); Burbank, *supra* note 107, at 591-92 (exploring summary judgment from “historical, empirical, and normative perspectives”); Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 91-95 (2002) (debating whether judges may or should be able to deny summary judgment even when it is technically appropriate); Jack Achiezer Guggenheim, *In Summary It Makes Sense: A Proposal to Substantially Expand the Role of Summary Judgment in Nonjury Cases*, 43 SAN DIEGO L. REV. 319, 320-21 (2006) (explaining how the typical concerns regarding summary judgment are not present in a bench trial); Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1331 (2005) (suggesting an expansion of courts’ ability to “reach the merits of summary judgment” and a “more tempered approach to the actual summary judgment decision”); Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 82-86 (2006) (reexamining *Celotex* to align it with prior cases, the text of Rule 56, and its own conflicting rationales); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 140-45 (2007) (claiming that summary judgment, as currently used, violates the Seventh Amendment).

¹¹¹ In December 2003, the American Bar Association (ABA) Section of Litigation convened a meeting of federal and state judges, law professors, and lawyers to discuss the “vanishing trial” in both civil and criminal cases. See Adam Liptak, *U.S. Suits Multiply, but Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at 1 (examining the decreasing proportion of trials and discussing several viewpoints on the decrease); see also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) (tracing the decline in the proportion and number of cases terminated by trial); John Lande, *Introduction to Vanishing Trial Symposium*, 2006 J. DISP. RESOL. 1, 5 (explaining the causes of changing trial patterns, speculating about the effect of such changes, and recommending improvements); Margo Schlanger, *What We Know and What We Should Know About*

subject of inquiry. Because of the current importance of summary judgment in federal civil litigation, the Advisory Committee on Civil Rules has just spent several years revising Rule 56.¹¹²

Summary judgment has played a major role in federal civil litigation.¹¹³ For plaintiffs, summary judgment is the place of “do or die.” Summary judgment lurks over pleading, Rule 12(b)(6) motions to dismiss, Rule 11, discovery, and mediation or dispute resolution if the case is diverted to a “neutral third party,”¹¹⁴ for the question is always what will happen on summary judgment. It impacts and intertwines with every aspect of litigation—alternative dispute resolution (ADR),

American Trial Trends, 2006 J. DISP. RESOL. 35, 38-39 (proposing areas for future investigation of the “vanishing trial” trend). Ironically, this project led to the development of the new ABA Principles Relating to Juries and Jury Trials. See Terry Carter, *The Verdict on Juries*, 91 A.B.A. J. 40, 42 (describing the recommendations). Legal commentators have recently taken note of these developments. See Adam Liptak, *Cases Keep Flowing In, but the Jury Pool Is Idle*, N.Y. TIMES, Apr. 30, 2007, at A14 (noting a significant decrease in the proportion of cases going to trial).

¹¹² As of December 1, 2009, the recently amended Rule 56 reads as follows:

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(b) By a Defending Party. A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Time for a Motion, Response, and Reply; Proceedings.

(1) These times apply unless a different time is set by local rule or the court orders otherwise:

(A) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(C) the movant may file a reply within 14 days after the response is served.

(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56.

¹¹³ See Burbank, *supra* note 107, at 594-603 (discussing the history of summary judgment). For a general overview of summary judgment, see EDWARD J. BRUNET & MARTIN H. REDISH, *SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE* (3d ed. 2006). Judge Patrick Higginbotham has noted the change in the Administrative Office of the U.S. Courts’s definition of “trial,” which now includes “any contested matter in which the judge takes evidence.” Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1406 (2002).

¹¹⁴ See Berger, Finkelstein & Cheung, *supra* note 43, at 46 (describing the value of mediation in employment actions).

pleading, discovery, and trial. The threat of summary judgment shapes settlement even in advance of a motion being filed. And when summary judgment is denied, lawyers and judges report that defendants immediately offer to settle, often with far more generous settlement offers than they might have otherwise considered. A shift in power from plaintiffs to defendants is the result.¹¹⁵

But as I suggested in the prior Section, the Supreme Court's recent decisions in *Twombly* and *Iqbal* now raise serious questions as to whether summary judgment will continue to play this central role in federal pretrial practice. Since the ball has been moved forward to pleading, and a district court can simply grant a Rule 12(b)(6) dismissal, summary judgment may become less central. With *Iqbal*, the Court is ruling that there is no need for discovery, and the case ends at a very early stage—a stage that was not contemplated by the Federal Rules.

Although *Iqbal's* impact on pleading may be dramatic, it is important to emphasize how controversial even granting dismissals on summary judgment—a much later stage in the litigation where there has already been discovery—has been in the federal courts. In 1998, Judge Patricia Wald, former Chief Judge of the D.C. Circuit, expressed concern about the development and direction of summary judgment in the federal courts.¹¹⁶ She emphasized the importance of

ensuring that summary judgment stays within its proper boundaries, rather than encouraging its unimpeded growth. Its expansion across subject matter boundaries and its frequent conversion from a careful calculus of factual disputes (or the lack thereof) to something more like a gestalt verdict based on an early snapshot of the case have turned it into a potential juggernaut which, if not carefully monitored, could threaten the relatively small residue of civil trials that remain.¹¹⁷

Other scholars have also been critical of the “new” summary judgment,¹¹⁸ and some have proposed reforms.¹¹⁹ Some recent scho-

¹¹⁵ See Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 100-03 (1990) (examining how summary judgment affects the settlement process); see also Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 89-90 (2006) (arguing that the burden of production is systematically biased against plaintiffs).

¹¹⁶ Wald, *supra* note 102, at 1917.

¹¹⁷ *Id.*

¹¹⁸ See generally Miller, *supra* note 108 (arguing that judges often place too much weight on judicial efficiency and not enough on litigants' right to a jury trial).

¹¹⁹ See, e.g., Burbank, *supra* note 107, at 623 (“Unless the rules for determining when an issue of fact is triable are determinate and enforced, summary judgment as an equilibrating device is bound to get out of balance somewhere.”); Friedenthal & Gardner, *supra* note 110, at 125-30 (proposing a cost-benefit analysis for the denial of sum-

larship has proposed that summary judgment should be abolished on the ground that it is unconstitutional as a violation of the Seventh Amendment right to jury trial, or simply on the ground that it is inefficient.¹²⁰ There are, of course, other views.¹²¹ But summary judgment may now play less of a role in federal pretrial practice because of *Iqbal*. While the Supreme Court's recent procedure decisions underscore the Court's enthusiasm for and endorsement of summary judgment,¹²² pleading has now moved to the fore.

The Civil Rules Committee's work over several years on proposals to amend Rule 56 suggests the recent importance of summary judgment in federal civil litigation.¹²³ The amended Rule 56, which became effective December 1, 2009, has made some significant changes in summary judgment practice. While the impact of these changes on civil rights and employment discrimination cases may be more subtle than the "point-counterpoint" proposal—which the Advisory Committee rejected in part because of concern about how it would impact civil rights or employment cases in light of opposition from scholars and

mary judgment); Redish, *supra* note 110, at 1355-57 (rejecting the idea that absolute judicial discretion in granting summary judgment is needed).

¹²⁰ See Bronsteen, *supra* note 110, at 527-38 (reasoning that, without summary judgment, many disputes would settle earlier rather than going to trial, if those were the only two options); Miller, *supra* note 108, at 1110-14 (questioning the "efficiency" justification for summary judgment—though stopping short of calling for its abolition); Thomas, *supra* note 110, at 140-45 (arguing that summary judgment not only violates the Seventh Amendment, but also imposes substantial costs on the judicial system).

¹²¹ District Judge Shira Scheindlin has approached summary judgment more sympathetically and questioned the assumption that juries, not judges, should be evaluating sexual harassment cases. See Shira A. Scheindlin & John Eloffson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL'Y REV. 813, 852 (1999) ("For all their virtues, juries cannot contribute much to the effort to define sexual harassment better—by granting summary judgment in proper cases and carefully reviewing jury findings, however, judges can."); see also Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1853 (2004) (proposing a new mandatory summary judgment procedure at the beginning of a lawsuit to dispose of "nuisance-value" claims).

¹²² In both *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Scott v. Harris*, 550 U.S. 372 (2007), the Supreme Court confirmed the importance of summary judgment. In *Twombly*, the Court suggested a heightened standard of pleading for Rule 12(b)(6) motions that would result in dismissal of cases even earlier than summary judgment. See *supra* Section I.A. In *Scott*, the Supreme Court reversed the lower court's denial of summary judgment in a § 1983 action involving a claim for damages against the police for a car chase. 550 U.S. at 386. The Court watched a video of the chase and found that there was no need for a jury determination. *Id.* at 379-81; see also *infra* Section I.B.

¹²³ See *supra* note 112 (reprinting the proposed amendment to Rule 56).

the plaintiff, civil rights, and employment bars—the new Rule will need to be closely watched.¹²⁴

Even with *Iqbal*, summary judgment deserves continuing attention and analysis as part of the larger picture of federal pretrial practice. Although, ironically, much of the Advisory Committee's work over several years of drafting amendments to Rule 56 occurred before *Iqbal* was decided (and may have made summary judgment less central), there will still be cases not dismissed at pleading that will go on to discovery and summary judgment. Summary judgment is necessarily a very case-, fact-, and law-specific determination. Summary judgment decisionmaking at the trial level and review of grants of summary judgment at the appellate level involve subtle assessments of the strength of the plaintiff's case based on what may be a very abbreviated record of discovery. Traditional application of summary judgment meant that judges should not grant it if there were material issues of fact in dispute, for issues of fact and credibility were to be assessed by the jury. These days, however, federal judges—spurred on by the Supreme Court, pressure to clear dockets, and perhaps even dislike of or discomfort with certain claims (whether employment discrimination, sexual harassment, or Family Medical Leave Act cases)—grant summary judgment regularly. Summary judgment decisionmaking necessarily involves a tremendous amount of discretion, and discretion can be the locus of hidden discrimination.

Why is the grant of summary judgment a problem? The first reason is that it ends the case for the plaintiff: the plaintiff does not have the opportunity for a jury trial (in those cases where the plaintiff would otherwise have a right to a jury trial).¹²⁵ Of course, not every plaintiff should have the right to a jury trial, for not every case is meritorious. The purpose of summary judgment is to separate out “necessary” trials from “unnecessary” trials; the issue in any case in which a motion for summary judgment is made is whether trial is “necessary.” In civil rights or employment discrimination cases, however, where subtle issues of credibility, inferences, and close legal questions may be involved, where issues concerning the “genuineness” or “materiality” of facts are frequently intertwined with law, a single district judge

¹²⁴ See *infra* Part II (discussing the amended Rule 56).

¹²⁵ Is there a difference between summary judgment and bench trial? The factfinder is the same, but the nature of the proof, the evidence, and the procedural posture are different. See Guggenheim, *supra* note 110, at 320-24 (deducing that, since limitations on summary judgment exist to protect a plaintiff's right to a jury trial, those limitations do not apply to bench trials).

may be a less preferable decisionmaker than a jury. Juries are likely to be far more diverse and to bring a broader range of perspectives to bear on the problem.¹²⁶

Even if we do not assume that a jury would reach a different conclusion than a judge on the facts of a particular case, the presentation of live evidence before a jury and the telling of the full story in a public setting can make an important difference to a civil rights or employment discrimination plaintiff. The plaintiff will have a “day in court,” and the facts of the case will be heard and arguably even authenticated. These issues of “process” can matter a great deal to plaintiffs.¹²⁷ Public disclosure of legal issues also matters in important ways to the evolution of the law. If plaintiffs’ experiences of harm—which would otherwise be “invisible”—are heard more frequently in courts and public settings, judges may ultimately view them as constituting a legal claim. Thus, disclosure can help plaintiffs’ claims take on legal “visibility.” Even more importantly, federal jurisprudence

¹²⁶ In *Gallagher v. Delaney*, Judge Jack Weinstein observed that “[a] federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations” and that “a jury made up of a cross-section of our heterogeneous communities” is the best arbiter of such issues. 139 F.3d 338, 342 (2d Cir. 1998). Judge Weinstein further observed that “[w]hatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications.” *Id.*

Current statistics on the diversity of the federal judiciary support this view. Across all federal courts, there are 1285 sitting judges. Fed. Judicial Ctr., Judges of the United States Courts, http://www.fjc.gov/history/home.nsf/judges_frm (follow “The Federal Judges Biographical Database” hyperlink) (last visited Nov. 15, 2009). Of these judges, only 18% are female. *Id.* Looking at both male and female judges, 9% are African American, 5% are Hispanic, and less than 1% are either Asian American or Native American. *Id.* Of female judges, 12% are African American, 7% are Hispanic, and only one, accounting for less than 1% of female judges, is Asian American. *Id.* There are no Native American female judges. *Id.*

Data seem to support the proposition that juries are more diverse and bring broader perspectives to bear. In one study of several major cities, women comprised 52.9% of federal court juries. See Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 325 n.3 (1995); see also JAMES SUROWIECKI, *THE WISDOM OF CROWDS*, at xiii-xv (2004) (arguing that groups of people are “remarkably intelligent” and that “[e]ven if most of the people within a group are not especially well-informed or rational, [the group] can still reach a collectively wise decision . . . when [its members’] imperfect judgments are aggregated in the right way”).

¹²⁷ See, e.g., Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 358-69 (2003) (arguing that the Victim Compensation Fund failed to address expectations of justice and moral accountability for harm).

should be developed on a live record, with law shaped by facts, not on pleadings or on summary judgment.¹²⁸

In a ruling on summary judgment, the judge writes a decision in which, if there are material facts in dispute, she often acts as factfinder, determining whether there is enough evidence to reach a jury. Judicial opinions on summary judgment are often so mechanistic that they become “sliced and diced,” a process that, as Stephen Burbank puts it, “sees less in the parts by subjecting the nonmovant’s ‘evidence’ to piece-by-piece analysis” instead of analyzing it contextually.¹²⁹ The judge makes her own inferences from the record and then grants summary judgment if she concludes that no “rational trier of fact” could find for the nonmoving party based on the showing made in the motion and response¹³⁰ or, to put it more directly, that no reasonable juror could find for the nonmovant or disagree with the judge. The determination of whether a “reasonable juror” could find for the plaintiff is key. On summary judgment, the judge is effectively sitting as a juror and deciding whether she could find for the plaintiff.

What is now shocking is the degree to which the Supreme Court’s decision in *Iqbal* has made the analytic problems that have been so deeply troubling in summary judgment jurisprudence explicit at the pleading stage. Many cases that have already been decided on the pleadings under *Twombly* and *Iqbal* replicate the very problems that scholars have identified concerning summary judgment. On a plaintiff’s complaint and a defendant’s Rule 12(b)(6) motion (or answer), the court is deciding whether there is “enough” to go forward with the case—i.e., whether the plaintiff’s complaint and allegations are “plausible.” However, in contrast with the analysis on summary judgment,

¹²⁸ See Wald, *supra* note 102, at 1942-43 (questioning whether a jurisprudence based largely on summary judgment motions can effectively account for the “multivalenced and perspectival qualities of human events”).

¹²⁹ See Burbank, *supra* note 107, at 624-25 (calling this process factual and legal “carving”). Michael Zimmer has also used the phrase “slicing and dicing”: he describes “the common practice of courts in slicing and dicing the evidence supporting plaintiff’s case in order to grant motions for summary judgment and judgment as a matter of law.” Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 577 (2001). In this Article, I use the phrase “slice and dice” to include both factual and legal carving. Some have suggested that this occurs because law clerks are writing the opinions instead of judges. Penelope Pether suggests that the de facto delegation of the vast majority of Article III judicial power to judicial clerks and staff attorneys has resulted in a disproportionate number of decisions against “have-nots.” Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 10 (2007).

¹³⁰ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

the complaint, Rule 12 motion, and answer provide an extremely sparse record on which the district court must make a decision. At pleading, there has been no opportunity for discovery or for the fuller elaboration and argumentation that is presented in summary judgment. We are now seeing 12(b)(6) decisions in which the district court is simply “slicing and dicing” the factual and legal claims presented in the plaintiff’s complaint and making threshold and critical conclusions, which necessarily involve credibility determinations as to whether the plaintiff’s claims are “plausible” and whether the plaintiff’s case should go forward. In a sense, it is almost as if all the problems that have previously been identified with summary judgment have been accelerated to the pleading stage. With *Iqbal*, a summary judgment decision is effectively disguised as a Rule 12(b)(6) motion before any discovery occurs.

Summary judgment has also been understood in the context of a “settlement,” not “trial,” culture.¹³¹ Among the most important concerns of courts are docket pressures, and these same docket pressures may affect *Iqbal* decisionmaking. Some district and circuit judges, such as Judge Posner, have expressed their concern regarding the use of summary judgment to alleviate “caseload pressures” and simply clear their civil calendar.¹³² *Iqbal*’s message to district judges is to use Rule 12(b)(6) instead to clear the civil calendar. For many judges these pressures are undoubtedly contributing to 12(b)(6) grants on pleading, as well as to grants of summary judgment.

¹³¹ See Friedenthal & Gardner, *supra* note 110, at 117 (noting that judicial participation in settlement conferences enhances judges’ ability to clear their dockets); see also Samuel R. Gross & Kent D. Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 50-51 (1996) (observing that most litigants cannot afford to go to trial without a contingent-fee attorney or liability insurance). There are also serious questions concerning the expense and cost-benefit ratio of making summary judgment motions. See Nielsen, Nelson & Lancaster, *supra* note 29, at 17-20 (detailing the cost impact of summary judgment motions on settlement negotiations).

¹³² Judge Posner’s opinion in *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394 (7th Cir. 1997), says this clearly:

The expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial. The drift is understandable, given caseload pressures that in combination with the Speedy Trial Act sometimes make it difficult to find time for civil trials in the busier federal districts. But it must be resisted unless and until Rule 56 is modified . . .

Id. at 1397 (citations omitted); see also *Door Sys., Inc. v. Pro-Line Door Sys., Inc.*, 83 F.3d 169, 172 (7th Cir. 1996) (warning judges against using summary judgment to alleviate heavy caseloads). *But cf.* *Anthony v. BTR Auto. Sealing Sys., Inc.*, 339 F.3d 506, 517 (6th Cir. 2003) (“The timing of trials and docket control are matters best left to the discretion of the trial court.”).

How much proof is enough to deny summary judgment? Most lawyers believe that the plaintiff has to convince the judge of the merits of the case—perhaps even that the plaintiff would win the case—to survive summary judgment and that the primary impact of the trilogy is that it focuses judges entirely on the sufficiency and weight of the plaintiff's proof as developed in discovery.¹³³ But on summary judgment, this proof is in the form of affidavits and depositions. While depositions are subject to cross-examination, affidavits are problematic because they are not. This should mean that affidavits are not very useful or persuasive.¹³⁴ “Snippets” of testimony from either party can be problematic because they are likely to be misleading.¹³⁵ Questions of proof may inevitably involve issues of admissibility and judicial determination of the weight of the evidence.¹³⁶ Of course, it depends on the discovery that was completed and the substantive-law requirements of the claims made. This presents a fundamental conundrum of summary judgment: issues of credibility are supposed to be decided by the jury, but in order to decide if the proof is enough for a “reasonable juror,” the judge must implicitly decide issues of credibili-

¹³³ But for a different view, see the comments of District Judge Laura Taylor Swain of the Southern District of New York, who suggests that in employment cases, plaintiffs “do not need to convince the court of the merits of the case, just that fact issues have been raised.” Patrick F. Dorrian, *Federal Judges Provide Insights on Summary Judgment Motions*, 23 EMP. DISCRIMINATION REP. 516, 516 (2004) (paraphrasing Judge Laura Taylor Swain's comments on pleading standards in employment disputes). That may have been true in the “old” summary judgment framework but, in the “new” framework, judges may grant summary judgment unless they think that the plaintiff can win at trial.

¹³⁴ See *id.* at 516 (paraphrasing the comments of Judge John F. Keenan, who believes that affidavits are generally “not as likely to be [as] persuasive as a witness's deposition” because they are not subject to cross examination (internal quotation marks omitted)).

¹³⁵ *Id.* If summary judgment requires such extensive discovery and is so fact intensive, there is a serious question whether it is worthwhile for a judge to do this much on paper rather than to allow the case go forward to trial. See Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 2000 (2004) (observing how summary judgment motions typically focus on only a few issues, thus failing to create an integrated narrative of law and fact). This implicates old procedural disputes concerning the dichotomy between law and equity: in law, there is a presumption in favor of oral testimony, while equity favors paper trials. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 992-1000 (1987) (surveying the procedural differences between equity and common law).

¹³⁶ See, e.g., *Rubens v. Mason*, 387 F.3d 183, 191-92 (2d Cir. 2004) (reversing the lower court's grant of summary judgment because the affidavit that was the basis for the district judge's decision was inadmissible).

ty.¹³⁷ With *Iqbal*, allegations in complaints are now effectively treated as proof.

The Supreme Court's recent decision in *Scott v. Harris* provides a dramatic example of the summary judgment problem.¹³⁸ *Scott* involved a § 1983 action brought by a motorist against the police and other officials claiming use of excessive force during a high-speed chase, in violation of his Fourth Amendment rights.¹³⁹ The district court denied a summary judgment motion by the defendant, and the Eleventh Circuit affirmed.¹⁴⁰ In the Supreme Court, eight Justices reversed the denial of summary judgment and entered judgment for the defendant.¹⁴¹ The Justices watched a videotape of the chase and concluded that "no reasonable jury" could find for the plaintiff.¹⁴² Only Justice Stevens, in a vigorous dissent, challenged this view. He criticized his colleagues for sitting as "jurors" rather than a reviewing court:

Relying on a *de novo* review of a videotape of a portion of a nighttime chase on a lightly traveled road in Georgia where no pedestrians or other "bystanders" were present, buttressed by uninformed speculation about the possible consequences of discontinuing the chase, eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are. The Court's justification for this unprecedented departure from our well-settled standard of review of factual determinations made by a district court and affirmed by a court of appeals is based on its mistaken view that the Court of Appeals' description of the facts was "blatantly contradicted by the record" and that respondent's version of the events

¹³⁷ Cf. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . ."). In addition, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000), the Supreme Court emphasized the importance of jury determinations of credibility. On the one hand, *Reeves* suggests that resolving credibility issues and drawing inferences from the evidence "is the job of the jury" and that courts must disregard such issues at summary judgment. See Dorrian, *supra* note 133, at 517 (reporting on the comments of attorney Patricia Breuninger). On the other, *Reeves* "eliminated the assumption held by many that employment cases are uniquely appropriate for trial." *Id.* (quoting Gary D. Friedman). In theory, the judge should not weigh credibility, must draw all reasonable inferences against the moving party, and should deny the motion if there is a genuine issue of material fact. But is this really possible when the judge has to weigh the evidence in order to decide whether the plaintiff has a chance of winning at trial?

¹³⁸ 550 U.S. 372 (2007).

¹³⁹ *Id.* at 375-76.

¹⁴⁰ *Id.* at 376.

¹⁴¹ *Id.* at 386.

¹⁴² *Id.* at 379-80.

was “so utterly discredited by the record that no reasonable jury could have believed him.”¹⁴³

Justice Stevens refers to the Justices in the majority as “[m]y colleagues on the jury,”¹⁴⁴ criticizing the Court for having “usurped the jury’s factfinding function and, in doing so, implicitly label[ing] the four other judges to review the case unreasonable.”¹⁴⁵ Significantly, he notes that “[i]f two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court’s characterization of events.”¹⁴⁶

The impact of *Scott v. Harris* becomes even more important now in the context of *Iqbal* because of the limited record on which a judge decides whether to dismiss under Rule 12(b)(6). Now, judges must apply the “no reasonable jury” standard at pleading. Much of the scholarly discussion concerning *Scott* has focused on the problem of “cultural cognition” and the degree to which the Supreme Court Justices’ own normative values shaped the decision.¹⁴⁷ In *Iqbal*, however, these cognitive factors are spelled out with greater specificity. Judges are ordered to use their “judicial experience and common sense” to determine if the plaintiff’s claims are plausible and the case should proceed.

From empirical work on summary judgment and the “vanishing trial,” we have information on the actual practice of summary judgment in federal district courts. Longitudinal studies conducted by the Federal Judicial Center on summary judgment show a particularly high rate of termination by summary judgment in civil rights and employment discrimination cases.¹⁴⁸ The most recent Federal Judicial

¹⁴³ *Id.* at 389-90 (Stevens, J., dissenting).

¹⁴⁴ *Id.* at 392.

¹⁴⁵ *Id.* at 395.

¹⁴⁶ *Id.* at 396; see also Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 894-902 (2009) (discussing the importance of “judicial humility”).

¹⁴⁷ See Dan M. Kahan, “Ideology in” or “Cultural Cognition of” Judging: What Difference Does It Make?, 92 MARQ. L. REV. 413, 421 (2009) (investigating the influence of cultural values on judicial decisionmaking and distinguishing between conscious bias—“ideology”—and unconscious bias—“cultural cognition”). But see Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1959-63 (2009) (questioning Kahan’s distinction between ideology and cultural cognition).

¹⁴⁸ See Cecil & Cort Memorandum, *supra* note 19, at 17 tbl.12 (presenting summary judgment statistics disaggregated into various categories of actions: contracts, torts, employment discrimination, other civil rights, and other).

Center Report prepared for the Advisory Committee concluded that “the prominent role of summary judgment in such cases is striking. Summary judgment motions by defendants are more common in such cases, are more likely to be granted, and more likely to terminate the litigation.”¹⁴⁹ Recent data suggests that 70% of summary judgment motions in civil rights cases and 73% of summary judgment motions in employment discrimination cases are granted—the highest of any type of federal civil case.¹⁵⁰

Federal Judicial Center studies of summary judgment practice have determined that summary judgment is granted disproportionately to dismiss civil rights and employment cases.¹⁵¹ In the most recent study conducted by the Federal Judicial Center, 77% of summary judgment motions in employment discrimination cases and 70% of summary judgment motions in other civil rights cases were granted, in whole or in part, as compared with 61% of summary judgment motions in torts cases, and 59% of summary judgment motions in contracts cases.¹⁵² Further, 20% of employment discrimination cases and 10% of other civil rights cases had at least one summary judgment motion granted, in whole or in part, as compared with 5% of tort and 6% of contracts cases.¹⁵³ Additionally, 15% of employment discrimination cases and 6% of other civil rights cases were terminated by summary judgment, as compared with 3% of torts and 4% of contracts cases.¹⁵⁴ Another recent study of Federal Judicial Center database cases for fiscal year 2006 showed that an employment discrimination plaintiff faced an over 80% likelihood that a summary judgment motion would be granted in whole or in part.¹⁵⁵

¹⁴⁹ *Id.* at 3 (citations omitted).

¹⁵⁰ Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Hon. Michael Baylson 6 tbl.3, 9 tbl.4 (Apr. 12, 2007, revised June 15, 2007) [hereinafter Cecil & Cort Memorandum], available at [http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/\\$file/sujufy06.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf). In some judicial districts, grants of summary judgment in employment discrimination cases were as high as 93%. *Id.* at 9 tbl.4. This confirms the anecdotal reports from federal race- and gender-bias task force reports that have suggested that the application of summary judgment in employment discrimination cases is problematic. See Wald, *supra* note 102, at 1938-39 (discussing several reports that suggest a judicial bias against employment discrimination cases).

¹⁵¹ See Cecil & Cort Memorandum, *supra* note 19, at 3 (noting the “prominent role” of summary judgment in employment discrimination cases).

¹⁵² *Id.* at 9 tbl.4.

¹⁵³ *Id.* at 16 tbl.11.

¹⁵⁴ *Id.* at 17 tbl.12.

¹⁵⁵ Seiner, *supra* note 17, at 1033 tbl.C.

It appears that there is wide variation in practice between different district courts.¹⁵⁶ Although summary judgment is transsubstantive like all federal procedural rules, scholars have reported the special use of summary judgment to dismiss sexual harassment and hostile work environment cases,¹⁵⁷ race and national origin discrimination cases,¹⁵⁸ Americans with Disabilities Act (ADA) cases,¹⁵⁹ age-discrimination cases,¹⁶⁰ and prison-inmate cases.¹⁶¹

In sum, summary judgment has historically been viewed as the major procedural hurdle in federal civil litigation, but *Iqbal* has now changed the game and pleading has become more crucial. The “double-whammy” of high pleading standards and defendant friendly summary judgment practices is a reason for plaintiffs to prefer state court to federal court.¹⁶² Thus, although the information available on

¹⁵⁶ See Burbank, *supra* note 107, at 591 (finding “evidence that the [summary judgment] termination and other activity rates vary, sometimes dramatically, among courts and case types”); see also Dorrian, *supra* note 133, at 516 (quoting Judge John F. Keenan of the United States District Court for the Southern District of New York, who cautions, “You have to be aware of your circuit and its local rules,” and contrasting Judge Keenan’s practice of holding pre-motion conferences in employment discrimination cases with that of Judge William J. Martini of the United States District Court for the District of New Jersey, who does not hold pre-motion conferences and was “not aware of the practice in the District of New Jersey”).

¹⁵⁷ See Schneider, *supra* note 20, at 709-11 (citing evidence that summary judgment is granted more frequently in employment discrimination cases with female plaintiffs).

¹⁵⁸ See Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 895 (2006) (arguing that, based on an empirical study of race, age, and gender cases, race-based employment cases are more likely to be dismissed at the summary judgment phase). Parker’s study found that plaintiffs won summary judgment motions in race discrimination cases only 25% of the time. *Id.* at 910 n.98.

¹⁵⁹ See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101 (1999) (arguing that courts may be abusing summary judgment in ADA cases); see also Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade?*, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 363 (2000) (noting that “employees face a Catch-22 situation” when they are forced to demonstrate severe disabilities that do not simultaneously prevent them from doing their jobs, a situation which often leads to a grant of summary judgment for the defendant).

¹⁶⁰ See Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 232-33 (1993) (arguing that courts’ refusal to evaluate the adequacy of employers’ alleged reasons for discharge “prejudices plaintiffs opposing summary judgment motions”).

¹⁶¹ See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1594-95 (2003) (reporting that a great majority of inmate civil rights cases are resolved in favor of defendants at the pretrial stage).

¹⁶² See Gallagher, *supra* note 15 (attributing the decline in federal employment cases at least in part to plaintiffs’ preference for state courts); see also Mauro, *supra* note 65 (discussing the possible causes for this exodus from federal court, including judicial bias and ADR).

plaintiff's choice of forum and preference for state courts was gathered before *Iqbal* was decided, summary judgment now plays a role in choice of forum in cases that could be filed in either state or federal court.¹⁶³ With the Class Action Fairness Act of 2005, more tort cases that would otherwise be heard in state court will now be heard in federal court.¹⁶⁴ Furthermore, new pleading rules and summary judgment decisionmaking have made it far more difficult for civil rights and employment discrimination plaintiffs to get relief in federal court.

C. Daubert

Although *Daubert* motions regarding expert testimony most often precede motions for summary judgment, I briefly discuss the former here in conjunction with summary judgment. *Daubert* motions, typically presented in motions in limine, are usually initiated by defendants to exclude expert testimony that would be proffered at trial by plaintiffs.¹⁶⁵ They are another significant form of judicial gatekeeping that has developed over the last thirty years.

There is significant interplay between summary judgment and *Daubert* determinations of expert evidence. *Daubert* plays a critical role in summary judgment cases because if the judge determines that the plaintiff's expert evidence is inadmissible, granting summary judgment becomes significantly easier. *Daubert* is now viewed as a "summary judgment substitute."¹⁶⁶ The "abuse of discretion" standard of review used in *Daubert* judgments is more limited than the more general "de novo" standard used in summary judgment. Thus, *Daubert* rulings may be the preferred method of district court resolution be-

¹⁶³ See, e.g., Clermont & Schwab, *From Bad to Worse*, *supra* note 16 (presenting data gathered between 1970 and 2007).

¹⁶⁴ See JoEllen Lind, "Procedural Swift": *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 745-50 (2004) (describing how CAFA has expanded federal court jurisdiction over tort claims arising under state law).

¹⁶⁵ In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court directed federal judges to act as "gatekeepers" in examining the method or reasoning underlying proposed expert evidence and to admit only evidence that is reliable and relevant. In this Article, I use "*Daubert*" as shorthand for the trilogy of cases that developed the procedural rules for admissibility of expert testimony, the other cases forming the trilogy are *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

¹⁶⁶ See Lind, *supra* note 164, at 771 (asserting that the *Daubert* hearing is the best example of "summary judgment substitutes" by which "a litigant's potential to rely on expert testimony to stave off summary judgment can be foreclosed in advance").

cause they provide greater discretion for district court judges and less chance of reversal on appeal.¹⁶⁷

There is no question that *Daubert* has both changed the way that federal district judges assess expert evidence in civil cases and increased summary judgment. A 2001 empirical study prepared for the RAND Corporation found that “[t]he rise that took place in both the proportion of evidence found unreliable and the proportion of challenged evidence excluded suggests that the standards for admitting evidence have tightened.”¹⁶⁸ The authors of the RAND study, in a section on the interplay between *Daubert* and summary judgment, concluded that challenges to expert evidence increased summary judgments and case dismissals.¹⁶⁹ They noted that the frequency with which summary judgment was requested

may be due partly to *Daubert*, but it may be driven by broader trends in litigation practices that have nothing to do with *Daubert*. For example,

¹⁶⁷ See Margaret A. Berger, *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court’s Trilogy on Expert Testimony in Toxic Tort Litigation*, LAW & CONTEMP. PROBS., Spring/Summer 2001, at 289, 324 (noting the more lenient standard of review that judges enjoy when granting *Daubert* motions). The procedural interconnections and overlap between *Daubert* and summary judgment are troubling. A 2006 petition for certiorari to the Supreme Court in an antitrust case presented the following questions: first, “[w]hether lower courts err when they meld the standards for summary judgment under [FED. R. CIV. P.] 56 and the relevance and reliability requirements for admissibility under [FED. R. EVID.] 702”; and second, “[w]hether, in order to clarify the distinction between admissibility decisions and evidence sufficient to grant summary judgment, courts have an obligation to give reasons—which cannot include weighing testimony—why admissible expert evidence that reaches all material facts necessary to establish a claim for relief under applicable law is not sufficient to avoid summary judgment.” Petition for Writ of Certiorari at i, *Kochert v. Greater Lafayette Health Servs.*, 549 U.S. 1209 (2007) (No. 06-822). For a discussion of the confusion between admissibility standards relevant to *Daubert* determinations and sufficiency standards involved in summary judgment that arise in *Daubert*/summary judgment decisionmaking, see Bobak Razavi, *Admissible Expert Testimony and Summary Judgment: Reconciling Celotex and Daubert After Kochert*, 29 J. LEGAL MED. 307, 309-11 (2008), which discusses the “monumental problem” created when summary judgment determinations are made in the guise of admissibility decisions.

¹⁶⁸ LLOYD DIXON & BRIAN GILL, RAND INST. FOR CIVIL JUSTICE, CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE *DAUBERT* DECISION, at xiii (2001); see also *id.* at xv (“Our analysis of district court opinions suggests that after *Daubert*, [federal] judges scrutinized reliability more carefully and applied stricter standards in deciding whether to admit expert evidence.”); Carol Krafka et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL’Y & L. 309, 328-31 (2002) (reporting results from surveys of judges and attorneys that suggest greater scrutiny of scientific evidence in the wake of *Daubert*).

¹⁶⁹ See DIXON & GILL, *supra* note 168, at 56 (positing that “challenges to plaintiffs’ evidence have increasingly resulted in case dismissals”).

judges may have become more receptive to summary judgment requests in an attempt to resolve cases more quickly and at lower cost. But *Daubert* may have led challengers to expand the scope of their challenges to the point where they increasingly challenged the entire basis of the case and thus more frequently requested summary judgment.¹⁷⁰

Although *Daubert* was thought to primarily affect toxic tort cases,¹⁷¹ it now impacts a wide range of cases. *Daubert* has been applied to anti-trust cases involving economic experts¹⁷² as well as to cases involving social science experts, including gender discrimination and gender stereotyping cases.¹⁷³ In the tort context, however, “[t]he resulting effects of *Daubert* have been decidedly pro-defendant.”¹⁷⁴ Indeed, “[i]n the civil context, *Daubert* has empowered defendants to exclude certain types of scientific evidence, substantially improving their chances of obtaining summary judgment and thereby avoiding what are perceived to be unpredictable and often plaintiff-friendly juries.”¹⁷⁵

Some scholars have argued that *Daubert* has effectively changed the substantive law of torts.¹⁷⁶ Others assert that *Daubert*'s elimination of jury deliberation for certain litigants has serious race and class consequences.¹⁷⁷ The interrelationship between *Daubert* and summary judgment is a crucial dimension of current summary judgment practice.¹⁷⁸

¹⁷⁰ *Id.* at 56-57.

¹⁷¹ See Berger, *supra* note 167, at 290 (noting that *Daubert*'s effect on plaintiffs' ability to prove causation drove some to assert that “toxic tort law is being reformulated in federal court to the advantage of defendants”).

¹⁷² See Robert G. Badal & Edward J. Slizewski, *Economic Testimony Under Fire*, 56 A.B.A. J. 56, 56 (noting that courts are excluding expert economic testimony as unreliable with “increasing frequency” in the wake of *Daubert* and *Kumho*).

¹⁷³ See Peter Nordberg, *Daubert* Decisions by Field of Expertise, <http://daubertontheweb.com/fields.htm> (last visited Nov. 15, 2009) (listing pertinent federal cases organized by type of expert witness involved, including cases involving gender discrimination).

¹⁷⁴ See Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 473 (2005).

¹⁷⁵ *Id.*

¹⁷⁶ See, e.g., Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 335 (1999) (arguing that federal trial judges have used *Daubert* to make “substantive legal rules on causation” in product-liability cases by raising the threshold of admissibility for scientific evidence, effectively requiring plaintiffs to meet a higher evidentiary standard to survive summary judgment).

¹⁷⁷ See Frank M. McClellan, *Bendectin Revisited: Is There a Right to a Jury Trial in an Age of Judicial Gatekeeping?*, 37 WASHBURN L.J. 261, 264, 279-80 (1998) (asserting that *Daubert* has made it “substantially more difficult for plaintiffs to win product liability cases” and that it has race and class implications).

¹⁷⁸ Although I briefly discuss *Daubert* issues here, a close study of *Daubert* in civil rights and employment discrimination cases is beyond the scope of this Article.

Experts are now widely used in civil rights and employment cases.¹⁷⁹ An article written soon after *Daubert* was decided reported that, based on a Westlaw search, one in every eight federal cases citing to *Daubert* was a civil rights action.¹⁸⁰ The author predicted that, because of the development of such new claims as disability discrimination and the need for economic proof, *Daubert* cases would be widespread.¹⁸¹ Gender and race stereotyping is an issue at the heart of many cases, whether involving “maternal wall” or sexual harassment or race discrimination, and there has been considerable scholarship and expert testimony on cognitive bias in many race and gender discrimination contexts. Cognitive bias research examines the subtle, often unconscious biases that affect behavior and decisionmaking.¹⁸² Expert testimony on cognitive bias can address problems of race, sex, or age discrimination in the workplace.¹⁸³ For example, Joan Williams and Nancy Segal discuss the potential use of expert testimony on cognitive bias to defeat motions for summary judgment by shifting judicial inferences in “maternal wall” cases.¹⁸⁴ Theresa Beiner has proposed the

¹⁷⁹ For example, the use of expert testimony in women’s rights cases is not new. An early women’s rights case involving expert testimony was *Price Waterhouse v. Hopkins*, in which social psychologist Susan Fiske testified that sex stereotyping likely affects employment decisions such as partnership selection. 490 U.S. 228, 235-36 (1989); see also Harriet Antczak, *Assisting the Trier of Fact: The Relevance of Daubert to Gendered Expert Testimony in Civil Litigation* (Feb. 16, 2009) (unpublished manuscript) (arguing that expert testimony in gender cases is often denied on relevance grounds).

¹⁸⁰ Gordon J. Beggs, *Novel Expert Evidence in Federal Civil Rights Litigation*, 45 AM. U. L. REV. 1, 6 n.34 (1995).

¹⁸¹ See *id.* at 6-7 (listing three possible causes for an increase in the number of plaintiffs who employ expert testimony: the increasingly “technocratic” nature of our society, new claims recognized by case law and statute, and the increased value of employment discrimination cases).

¹⁸² See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995) (“[C]ognitive bias may well be both unintentional and unconscious . . . [and biases] operate beyond the reach of decisionmaker self-awareness.”).

¹⁸³ This area of research has expanded to include “implicit bias” and its effects on discrimination. See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006) (introducing “implicit bias” and using analytical methods to prove its existence); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1024 (2006) (describing and examining legal actors’ behavioral tendencies).

¹⁸⁴ See Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 132 (2003) (“Evidence from empirical social psychology . . . can show that bias against mothers may not fit the model of a generalized dislike of women; instead, bias may reflect a more subtle set of stereotypical assumptions about who is competent and who is not.”).

admission of social science evidence in sexual harassment cases to deal with the gap between the judge and the jury.¹⁸⁵ But, with *Daubert*, would this testimony even be admitted?¹⁸⁶

We know that *Daubert* decisions are a cause of the disappearance of jury trials and public adjudication in federal civil trials.¹⁸⁷ We also suspect that *Daubert* has had a chilling effect on plaintiffs.¹⁸⁸ But there have been no recent empirical studies on the impact of *Daubert* generally or on civil rights or employment discrimination cases specifically. There is less information on what is actually happening with *Daubert* in the pretrial context than on other aspects of pretrial procedure.¹⁸⁹ Since expert testimony is now widely used in civil rights and employment discrimination cases, there is good reason to believe that the lethal combination of *Daubert* and summary judgment has affected these cases as well.

¹⁸⁵ THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* 12-14 (2005).

¹⁸⁶ See Minna Kotkin, Book Review, 55 J. LEGAL EDUC. 613, 617 (2005) (reviewing BEINER, *supra* note 185) (questioning whether expert testimony in sexual harassment cases would be effective because it would “undoubtedly provoke a *Daubert* attack”).

¹⁸⁷ See Allan Kanner & M. Ryan Casey, *Daubert and the Disappearing Jury Trial*, 69 U. PITT. L. REV. 281, 298 (2007) (“*Daubert* certainly can be abused. The opportunity to dismiss a case which should be heard by a jury is within every judge’s grasp.”).

¹⁸⁸ See Clermont & Schwab, *From Bad to Worse*, *supra* note 16, at 121 (“Discouragement . . . could explain the recent downturn in the number of [employment discrimination] cases.”). The impact of *Daubert* on forum shopping is elusive because some states have accepted *Daubert*. See Cheng & Yoon, *supra* note 174.

¹⁸⁹ Both Margaret Berger, Professor at Brooklyn Law School, and Joe Cecil, Senior Research Associate at the Federal Judicial Center, have studied the impact of *Daubert* in a number of different capacities. Both say that conducting a reliable study of *Daubert*’s impact on these cases using the Administrative Office of the U.S. Courts’s data would be difficult for a variety of reasons. There has been little scholarly discussion of the impact of *Daubert* in civil rights or discrimination contexts. See John V. Jansonius & Andrew M. Gould, *Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility*, 50 BAYLOR L. REV. 267, 318 (1998) (discussing *Daubert*’s impact in the employment-litigation context); Deborah Dyson, Comment, *Expert Testimony and “Subtle Discrimination” in the Workplace: Do We Now Need a Weatherman to Know Which Way the Wind Blows?*, 34 GOLDEN GATE U. L. REV. 37, 72 (2004) (analyzing the effect *Daubert* will have on assessing expert testimony in a racial discrimination case). One study of district judges who have decided *Daubert* motions suggests that judges appointed by Democratic presidents are more likely to admit expert testimony than those appointed by Republican presidents. See Jeremy Buchman, *The Effects of Ideology on Federal Trial Judges’ Decisions to Admit Scientific Expert Testimony*, 35 AM. POL. RES. 671, 680-81, 690 n.11 (2007).

II. IMPLICATIONS FOR FEDERAL CIVIL LITIGATION

Many important implications, although preliminary, can be drawn from the gathered data. First, both pleading and summary judgment decisions appear to result in a high dismissal rate for civil rights and employment cases. Now, with *Iqbal*, district judges are likely to dispose of civil rights and employment cases at pleading—the earliest possible stage. What used to be done at summary judgment can be done at pleading, much earlier in the litigation process and without the need for discovery. With summary judgment and *Daubert*, cases are dismissed as well, but later in the process, and usually after some discovery. These trends raise important questions as to whether meritorious cases are being dismissed in the federal courts. These cases are certainly being decided on incomplete factual records. There are also significant policy concerns with the fact that these cases are now effectively being sent to state courts.

Another implication is that the judicial decisionmaking involved in Rule 12(b)(6), *Daubert*, and summary judgment motions with respect to civil rights and employment discrimination cases becomes private, not public, adjudication. Although not all of these cases may raise important issues of public concern, many of them will raise innovative or novel claims. Yet if these cases are dismissed on pleading, *Daubert*, or summary judgment grounds, they are not likely to enter the public sphere, with the attendant legitimization of claims and public knowledge of new harms, unless they were particularly newsworthy when filed. And, of course, cases that are dismissed at the pleading and summary judgment stages are being decided by district judges, not juries.

Judicial decisionmaking in all these phases is shockingly consistent, regardless of procedural context. Pleading rules, *Daubert* decisions, and summary judgment rules are all discrete and purportedly “neutral,” yet it appears that these “neutral” procedures are being interpreted by many courts in the same way. The consistency of judicial interpretation in these various procedural contexts, at least at pleading and summary judgment, suggests the need for careful analysis of federal procedural revision. Every new rule, aspect of a rule, or procedural development, always claimed to be “neutral,” can create an opportunity for judges to dismiss these cases and interpret the rules in such a way as to have a “disparate impact.” Thus, every new rule—or procedural dimension of a new rule, like the proposed Rule 56 “point-counterpoint” amendment—must be carefully scrutinized, even if it

looks “neutral” on its face, because it provides an additional opportunity for differential treatment.

This is a significant point which goes back to some of the most important themes in procedure—the fundamental interrelationship between substance and procedure. We cannot just assume that procedural developments are neutral and ignore the substantive impact, particularly on a whole body of law. Substantive decisions can be “disguised as process” and process decisions can operate as a proxy for substantive impacts.¹⁹⁰

An example of the need for close analysis of “neutral” Rules was the proposed “point-counterpoint” amendment to Rule 56 that had been enthusiastically advanced by the Civil Rules Committee. As mentioned earlier, revision of summary judgment in general became a major priority for the Advisory Committee over several years. The Civil Rules Committee had said that the Rule 56 revisions were proposed in order to change procedural aspects governing submission of a summary judgment motion and *not* to change the legal standard for summary judgment.¹⁹¹ Although the Advisory Committee ultimately rejected the “point-counterpoint” amendment, a revised Rule 56 was recently enacted.¹⁹²

The most significant revision was the Committee’s proposal of a “point-counterpoint” procedure for all district courts. In “point-counterpoint”, the movant submits its summary judgment motion and identifies those issues of material fact that are not in dispute, the nonmovant responds in kind, and the process ends with the movant’s response. Some jurisdictions have, or have had, local rules that required this. The Advisory Committee amendment sought to make this “point-counterpoint” process a presumptively uniform procedure for summary judgment motions in most cases.

The Committee’s Request for Comment described the proposed Rule 56 “point-counterpoint” amendment in the following way:

Rule 56 is revised to improve the procedures for presenting and deciding summary judgment motions and to make the procedures more consistent with those already used in many courts. The changes are proce-

¹⁹⁰ See Martínez, *supra* note 21, at 1017 (describing how ostensibly procedural rulings in the “war on terror” cases have had profound substantive impacts).

¹⁹¹ The movant must show that there is no “genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(e).

¹⁹² The Advisory Committee appointed a subcommittee on Rule 56 that held a meeting with lawyers and a Mini-Conference. The Committee then subjected the proposed Rule to public comment and three public hearings around the country.

dural only and do not affect the standard for granting summary judgment. The proposed rule requires that unless the court orders a different procedure in a case, a party moving for summary judgment must submit a statement of facts that it asserts are not in genuine dispute and entitle it to summary judgment. The statement must list the asserted undisputed material facts in separate, numbered paragraphs, with citations to the record. The party opposing the motion must file a response to the statement that addresses each fact by accepting, disputing, or accepting it in part and disputing it in part, either generally or for purposes of the motion only. The statement and response are separate from the briefs.¹⁹³

During its revisions of Rule 56, the subcommittee in charge of Rule 56 held two meetings, the second of which was a miniconference held in November 2007. Several participants—individuals, representatives of organizations, and federal judges—expressed considerable concern about the way in which this proposed “point-counterpoint” format could operate, and argued that it would have a serious impact on civil rights and employment discrimination cases. There was good reason to be concerned about whether this new “point-counterpoint” format would simply exacerbate the “slice and dice” tendencies currently present in summary judgment decisionmaking.¹⁹⁴ As discussed above, scholars and judges have highlighted the “slice and dice” tendencies of federal judicial decisionmaking on summary judgment, particularly with respect to civil rights and employment discrimination claims.¹⁹⁵ In addition, some participants emphasized the risk of added expense and litigation costs, particularly for plaintiffs and their lawyers. Nonetheless, this provision was kept in the proposed rule when it was subjected to comment and hearings.

Comments regarding the proposed amendments were submitted between September 2008 and March 2009 and were posted online. Three hearings were also held during this time, and the comments

¹⁹³ ADMIN. OFFICE OF THE U.S. COURTS, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF PRACTICE AND PROCEDURE: A SUMMARY FOR BENCH AND BAR (2008), <http://www.uscourts.gov/rules/Reports/Brochure.pdf> [hereinafter SUMMARY OF PROPOSED AMENDMENTS].

¹⁹⁴ Cecil & Cort Memorandum, *supra* note 19 (studying what the proposed amendment’s effect, if any, would be on summary judgment practice in federal courts).

¹⁹⁵ These are cases in which judges often have to consider whether there are genuine issues of material fact in a holistic way and consider disparate aspects of evidence and discovery together in the context of legal claims. Yet, consistently in these cases judges fail to do this. For a discussion of how summary judgment opinions “slice and dice” in a way that eliminates contextual analysis, see Burbank, *supra* note 107, at 624-25, and Schneider, *supra* note 20, at 721-25.

were fascinating.¹⁹⁶ The Chief Judge of the District of Alaska, John Sedwick, who had judicial experience both in Arizona (a jurisdiction with local rules similar to the proposed “point-counterpoint” format amendments) and Alaska (a jurisdiction without similar rules) wrote in opposition to the proposed “point-counterpoint” format. He stated that his experience “indicate[d] that the requirement to submit lengthy enumerated statements of fact supported by citations to the record wastes the time of counsel and the court without providing any perceptible benefit.”¹⁹⁷ He detailed the enormous amount of time spent on summary judgment motions in Arizona as opposed to Alaska and argued that the proposed rule “will likely shift more responsibility for civil litigation from district judges to magistrate judges.”¹⁹⁸ Several of his colleagues on the bench with similar dual-jurisdiction experience, along with several other district judges experienced with “point-counterpoint” local rules, wrote letters to the Committee in concurrence.¹⁹⁹

Many comments were submitted by individual civil rights and employment discrimination lawyers, as well as plaintiffs’ employment law firms and civil rights impact organizations.²⁰⁰ One comment from a partner in a plaintiffs’ employment discrimination firm emphasized how these proposed rules would deleteriously affect his firm’s practice and the practices of other small firms that represent employment discrimination plaintiffs.²⁰¹ He detailed his experience with local “point-

¹⁹⁶ The hearings were held in Washington, D.C., in November 2008; San Antonio, Texas, in January 2009; and San Francisco, California, in February 2009. SUMMARY OF PROPOSED AMENDMENTS, *supra* note 193.

¹⁹⁷ Letter from Hon. John W. Sedwick, Chief Judge, U.S. Dist. Court for the Dist. of Alaska, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice and Procedure, Admin. Office of the U.S. Courts (Oct. 15, 2008), <http://www.uscourts.gov/rules/2008CommentsCommitteeFolders/CVComments2008/08-CV-017-Comment-Sedwick.pdf>.

¹⁹⁸ *Id.*

¹⁹⁹ Admin. Office of the U.S. Courts, 2008 Civil Rules Comments Chart, http://www.uscourts.gov/rules/2008_Civil_Rules_Comments_Chart.htm (last visited Nov. 15, 2009).

²⁰⁰ *See, e.g.*, Letter from Robert J. Wiley, Rob Wiley, P.C., to Peter G. McCabe, Sec’y, Comm. on Rules of Practice and Procedure, Admin. Office of the U.S. Courts 1 (Feb. 17, 2009), <http://www.uscourts.gov/rules/2008CommentsCommitteeFolders/CVComments2008/08-CV-179-Comment-Wiley.pdf> (highlighting an employment law specialist’s opposition to the proposed changes because of their ineffectiveness with indirect evidence).

²⁰¹ Letter from Joseph D. Garrison, Garrison, Levin-Epstein, Chimes, Richardson & Fitzgerald, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice and Procedure, Admin. Office of the U.S. Courts 1-2 (Oct. 15, 2008), <http://www.uscourts.gov/rules/2008CommentsCommitteeFolders/CVComments2008/08-CV-016-comment-garrison.pdf>.

counterpoint” rules that were particularly resource intensive, and he argued that the proposed rule would make the playing field even more uneven between plaintiffs and defendants in employment cases in federal courts.²⁰² Other comments emphasized the narrative structure of civil rights and employment cases and argued that “point-counterpoint” responses would not work well with “the complex narratives typical to [such] cases,” encouraging lawyers to get caught up in minutiae and overwhelming technicalities.²⁰³

A particularly critical set of comments emerged from federal judges who had worked with “point-counterpoint” local rules but decided to stop using them because they found them onerous. Judge Claudia Wilken of the U.S. District Court for the Northern District of California wrote an especially influential memorandum on behalf of all district and magistrate judges in the Northern District agreeing with many of the concerns that others had expressed and explaining that judges in her district had found the proposed rules problematic and ultimately decided to do away with them.²⁰⁴

As the Advisory Committee was developing its proposals, it asked the Federal Judicial Center to examine summary judgment practice across federal district courts as a means of assessing the potential impact of the proposed amendments to Rule 56. The Federal Judicial Center Report compared summary judgment practice across districts with three different types of local rules as well as types of cases including both employment discrimination and other civil rights cases.²⁰⁵ The Report noted that

²⁰² *Id.* A listing of all comments on the then-proposed changes to Rule 56 is available on the website of the U.S. Courts. See 2008 Civil Rules Comments Chart, *supra* note 199.

²⁰³ Letter from Stefano G. Moscato, Program Dir., Nat’l Employment Lawyers Ass’n, to Peter G. McCabe, Sec’y, Comm. on Rules of Practice and Procedure, Admin. Office of the U.S. Courts 3 (Jan. 27, 2009), <http://www.uscourts.gov/rules/2008CommentsCommitteeFolders/CVComments2008/08-CV-143-Testimony-Moscato.pdf>; see also Letter from John Vail, Constitutional Litig. Ctr., to Hons. Mark R. Kravitz and Michael Baylson (Nov. 10, 2008), <http://www.uscourts.gov/rules/2008%20Comments%20Committee%20Folders/CV%20Comments%202008/08-CV-046-Testimony-Center%20For%20Constitutional%20Litigation%20%28Vail%29.pdf>.

²⁰⁴ See Letter from Hon. Claudia Wilken, U.S. Dist. Court for the N. Dist. of Cal., to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure & Hon. Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Procedure 1-2 (Dec. 11, 2009), <http://www.uscourts.gov/rules/2008CommentsCommitteeFolders/CVComments2008/08-CV-090-Comment-Wilken.pdf> (“A complex narrative cannot be effectively told in a list of undisputed facts.”).

²⁰⁵ Cecil & Cort Memorandum, *supra* note 19, at 3.

[w]hile we found few differences across the three [different types of local rules] in employment discrimination cases, the prominent role of summary judgment in such cases is striking. Summary judgment motions by defendants are more common in such cases, are more likely to be granted, and more likely to terminate the litigation. This is true without regard to the nature of the local rules regarding summary judgment.²⁰⁶

This strong conclusion does not fully capture the tremendous disparities among types of cases that the data on summary judgment showed, including a 15% termination rate by summary judgment in employment discrimination cases, as opposed to a 3% rate in tort cases.²⁰⁷

The intense comment and hearing period on the Rule 56 revisions focused primarily on the “point-counterpoint” proposal. One could fairly ask the question, if employment cases are already “hammered” by summary judgment, why would the “point-counterpoint” format make any difference?²⁰⁸ My argument, shared by many other civil rights and employment discrimination lawyers who submitted comments or presented testimony at the hearings, was based on a combination of factors, including the disparate impact that the “point-counterpoint” provision would have on the narrative dimensions of civil rights and employment discrimination cases, and the likelihood that it would exacerbate the judicial tendency to “slice and dice” issues in summary judgment decisionmaking, which is even more problematic in these cases. In addition, the “point-counterpoint” format increases expense and presents a burden for plaintiffs’ lawyers. Finally, there seemed to be no real reason that judges needed the format to help them decide summary judgment motions. All of these factors weighed against the “point-counterpoint” proposal, and the Committee ultimately rejected it.²⁰⁹

²⁰⁶ *Id.* at 3 (citations omitted).

²⁰⁷ *Id.* at 17 tbl.12.

²⁰⁸ This question was presented to me by Joe Cecil. My written submission to the Committee and my testimony at the Washington, D.C., hearing in November 2008 attempted to answer this question. See Letter from Elizabeth Schneider, *supra* note 23. In addition to the “point-counterpoint” provision of the proposed amendments, and in light of my argument about “neutral” rules, there are other provisions of the amended Rule 56 not discussed here that I believe require close scrutiny because they could affect civil rights and employment cases.

²⁰⁹ The Committee recognized that this amendment was controversial and had “provoked a near avalanche of comments.” Kravitz Memorandum, *supra* note 24, app. at C-7. It concluded that “the time has not come to mandate it as a presumptively uniform procedure for most cases. The comments and testimony showed the perils of misuse and suggested that there is less desire for national uniformity than might have been expected.” *Id.* at 7.

While this was a good result, the summary judgment amendments emerged from a civil rulemaking process that has been fairly criticized, both for not being sufficiently attentive to issues of access to court as well as for arising from committees that are not broadly representative of the legal profession.²¹⁰ Relatively few plaintiffs' lawyers have been members of the Advisory Committee on Civil Rules compared with the number of defense lawyers. Lawyers who are appointed to the Committee are usually partners in large law firms who mostly represent defendants, not full-time public service lawyers. Unsurprisingly, in the wake of the Bush administration and the Rehnquist/Roberts Court, Republican-appointed federal judges outnumber Democrat-appointed judges on the Committee. It is not yet clear whether the composition of either the Advisory Committee or the Standing Committee will change significantly during the Obama administration, given that Chief Justice Roberts makes the appointments.²¹¹ One certainly hopes that it will. In the meantime, these amendments will affect employment discrimination, civil rights cases, and plaintiffs' lawyers. In light of the picture presented here, this is troubling.

III. WHY IS THIS HAPPENING?

Many factors may have given rise to these developments in federal pretrial practice. It is often difficult to understand developments in federal civil litigation reform, to identify their various influences, and to evaluate their impact. There are rarely simple cause-and-effect relationships. I have used the phrase "disparate impact" advisedly to describe the effect that these procedural changes appear to have on civil rights and employment discrimination cases. The phrase is associated

²¹⁰ See, e.g., Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. (forthcoming 2009) (manuscript at 45-49), available at <http://ssrn.com/abstract=1266315> (proposing that the rulemaking process be restructured to enhance access by modifying the composition of the Civil Rules Committee); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 613-18 (2001) (arguing that rulemaking committees are disproportionately composed of practitioners from large law firms that represent corporate defendants).

²¹¹ For the present composition of the Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, see U.S. Courts, Current Membership with Terms, http://www.uscourts.gov/rules/Committee_Membership_Lists/ST_Roster_2009.pdf (last visited Nov. 15, 2009). The Chief Justice makes the Committee appointments. See U.S. Courts, Committees of the Judicial Conference, http://www.uscourts.gov/judconf_committees.htm (last visited Nov. 15, 2009) ("The Chief Justice has sole authority to make Committee appointments.").

with the problem of neutral rules that are applied unequally in employment discrimination law. Here, all we know are the output results, not why they occurred. In this Part, I explore potential causes.

The first is the change in the composition of the federal judiciary over time. To the extent that political affiliation of the appointing president is a good proxy for political ideology,²¹² data suggest that a majority of sitting federal judges are ideologically conservative.²¹³ Both because of political affiliation and age, many current federal judges do not have a strong sense of the federal courts' history as protectors of civil rights and civil liberties, nor of the role they played in the American civil rights movement. Indeed, a recent empirical study of the relationship between the political party of the president who appointed a federal district court judge and outcomes in employment discrimination cases found a statistically significant difference between a plaintiff's chance of success on a summary judgment motion before a judge appointed by President Clinton and a judge appointed by President George W. Bush.²¹⁴ President Obama's election could, therefore, have an important effect on federal civil litigation employment discrimination and civil rights cases. One recent commentator analyzed the impact President Obama's judicial nominations could

²¹² See Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 314-15 (2004) (presenting data showing that a judge's ideological tendency in several areas of law can be predicted by the party of the appointing president).

²¹³ As of July 16, 2008, 362 of 660 federal district court judges were appointed by Republican presidents, while 298 judges were appointed by Democratic presidents. Daniel De Groot, *Fourth Circuit Majority Auditions for JP Stevens' Job*, OPEN LEFT, July 16, 2008, <http://openleft.com/showDiary.do?diaryId=6966>. Republican-appointed judges made up a majority of district court judges in eight of the twelve circuits (including the D.C. Circuit). *Id.* At the circuit court level, ninety-nine judges were Republican appointees, while sixty-seven were Democratic appointees. *Id.* Ten of the thirteen circuits had mostly Republican-appointed judges, two had a majority of Democratic judges, and one was split evenly. *Id.* On the Supreme Court, seven justices were Republican appointees and two were Democratic appointees (although this split has shifted to six Republican appointees and three Democratic appointees with Justice Souter's resignation and Justice Sotomayor's appointment). *Id.*

²¹⁴ See John Friedl & Andre Honoree, *Is Justice Blind? Examining the Relationship Between Presidential Appointments of Judges and Outcomes in Employment Discrimination Cases*, 38 CUMB. L. REV. 89, 96-97 (2007) (showing that plaintiffs had a 38.7% chance of surviving a summary judgment motion before a Clinton appointee, compared to a 27.8% chance before a Bush II appointee). However, this is a controversial issue. See Edwards & Livermore, *supra* note 147, at 1905-07 (arguing that empirical studies do not meaningfully reflect the effect of ideology on appellate decisionmaking).

have on the composition of the federal judiciary.²¹⁵ The possibilities for change are significant.²¹⁶

The limited view of federal courts' historical importance in civil rights matters that many district judges now hold is ironic, given the crucial federal subject matter jurisdiction case law that emphasizes the federal judiciary's unique role, characterizes the federal courts as a precious resource, and often seeks to restrict diversity jurisdiction because it effectively requires federal judges to act as state judges, rather than fulfilling their unique federal duties. Although my focus here is pretrial practice, the recent Clermont and Schwab study shows that jury trials result in considerably more favorable verdicts for civil rights plaintiffs than bench trials.²¹⁷ This seems to suggest that judges are getting rid of civil rights cases, whether through their pretrial decisions on the pleadings, summary judgment rulings, or bench trials.

Second, many federal judges appointed over the last few years appear to be deeply skeptical of civil rights and employment cases. They do not identify with employment discrimination or civil rights plaintiffs—whether because of race, gender, disability, age difference, or a lack of sensitivity to problems in the workplace.²¹⁸ Many judges apparently tend to view these cases as petty, involving whining plaintiffs complaining about legitimate employment or institutional matters, rather than important civil rights issues. Although these views have the greatest impact on plaintiffs when held by district judges, circuit judges' anti-plaintiff attitudes also affect the outcome of cases.²¹⁹

I have had numerous conversations with federal judges who have said that they believe many employment discrimination cases in federal court are weak and that lawyer case "selection bias" is a cause. But

²¹⁵ Eric R. Haren, *Commentary: The Real Battle for the Federal Judiciary*, LAW.COM, July 31, 2009, <http://www.law.com/jsp/article.jsp?id=1202432541517&thepage=1>.

²¹⁶ Since Justice Sotomayor's confirmation, a number of new district and circuit judges have been nominated. See ALLIANCE FOR JUSTICE, PACE OF PRESIDENT OBAMA'S JUDICIAL NOMINATIONS 1-2 (2009), <http://www.afj.org/check-the-facts/nominees/nomspacefactsheet91509.pdf> (reporting that, as of September 15, 2009, President Obama had nominated a total of eight circuit judges and nine district judges). The pace of these judicial nominations has become a subject of concern. Charlie Savage, *Obama Backers Fear Opportunities to Reshape Judiciary Are Slipping Away*, N.Y. TIMES, Nov. 15, 2009, at A20.

²¹⁷ Clermont & Schwab, *From Bad to Worse*, *supra* note 16, at 130-31.

²¹⁸ See Selmi, *supra* note 14, at 561-69 (arguing that judges' personal perspectives subconsciously affect their decisionmaking).

²¹⁹ See Sunstein, Schkade & Ellman, *supra* note 212, at 318-21 (showing that affirmative action, sex discrimination, sexual harassment, and disability claims reveal evidence of ideological voting).

there is no real empirical support for this proposition.²²⁰ In fact, a recent study of settlement rates concludes that employment discrimination cases settle less frequently than other types of cases, suggesting that “[i]t is unlikely that employment attorneys fail to substantially screen their cases on the merits.”²²¹ The study cites a report that “plaintiffs’ counsel accept only 5 percent of the employment discrimination claims brought to them by prospective clients, a case acceptance rate lower than that reported for plaintiffs’ tort attorneys.”²²² The authors also conclude that “the weight of evidence suggests that civil rights victims may be less likely to litigate than other victims, leaving little evidence that their claims are on average objectively weaker, and that the cases’ poor quality explains lower settlement rates.”²²³

Perhaps judges simply have a more punitive reaction to cases they perceive as weaker, or perhaps just to civil rights and employment discrimination cases. A burgeoning literature on cognitive bias helps to explain how many judges see these cases, focusing on the problems of gender, race, and class bias, as well as a lack of judicial humility and capacity to see issues outside their own perspective.²²⁴ Newly appointed Justice Sonia Sotomayor’s confirmation hearings highlight the importance of these issues.²²⁵ And since *Iqbal* has now made the

²²⁰ See Selmi, *supra* note 14, at 570-71 (noting that most employment discrimination attorneys are motivated by the profit potential of their cases, and so are unlikely to litigate frivolous claims).

²²¹ Eisenberg & Lanvers, *supra* note 42, at 143-44.

²²² *Id.* at 143-44; see also Clermont & Schwab, *From Bad to Worse*, *supra* note 16, at 114 n.34 (“Contingent-fee attorneys, as well as those looking to fee-shifting, are surely reluctant to bring questionable claims.”).

²²³ Eisenberg & Lanvers, *supra* note 42, at 145.

²²⁴ See Kahan, Hoffman & Braman, *supra* note 146, at 896-906 (recommending that judges exercise judicial humility by recognizing that others may view fact patterns differently). The concept of “judicial humility” is important and requires further discussion. See Kahan, *supra* note 147, at 417-22 (discussing cultural cognition—the tendency of individuals to evaluate risks and benefits differently depending on their past experiences); Schneider, *supra* note 20, at 766-71 (highlighting the problem presented by narrow judicial perspectives in cases involving gender); Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science and Humility* 19-20 (Univ. of Pa. Pub. Law and Legal Theory Research Paper Series, Research Paper No. 09-11, 2009), available at <http://ssrn.com/abstract=1393362> (noting that, in some courts and in some types of cases, judges’ personal characteristics influence their decisionmaking).

²²⁵ See, e.g., Kevin R. Johnson, *An Essay on the Nomination and Confirmation of the First Latina Justice on the U.S. Supreme Court: The “High-Tech Lynching” of a “Wise Latina?”* 20-30, 39-43 (UC Davis Legal Studies Research Paper Series, Research Paper No. 188, 2009), available at <http://ssrn.com/abstract=1460932> (outlining the ways in which a Latina justice may bring a new perspective to the Supreme Court’s analysis of cases and criticizing some Senators’ focus on her “wise Latina” comment).

application of “judicial experience” and “common sense” grounds for district courts’ evaluation of the “plausibility” of the allegations in plaintiffs’ complaints, the door is even more open to judicial bias.²²⁶

A third reason for employment discrimination and civil rights plaintiffs’ lack of success in federal court may be the increasing and heavy emphasis on efficiency and docket control. District judges often report that because of the schedule pressures of the criminal docket, they want to move cases off the civil docket quickly. *Twombly* and *Iqbal* thus provide a way to get rid of civil cases as quickly as possible. Given the vulnerability of civil rights and employment discrimination cases, judges are likely to exercise this option more readily than in other types of cases.

A fourth factor is the growth of antijury attitudes in many types of civil cases. In many federal civil cases, such as medical-malpractice actions, there is a move to take cases away from juries.²²⁷ *Daubert* certainly encourages this result,²²⁸ as does summary judgment. *Twombly* and *Iqbal* emerge from a similar anti-jury impulse. Several years ago, I participated on a panel at the Third Circuit Judicial Conference, entitled *The New Fact-Finder: Jury to Judge*, that discussed these developments in federal pretrial practice. Some of the federal judges on the panel discussed the importance of judicial factfinding and the way in which *Daubert* and summary judgment encouraged it. Now that *Twombly* and *Iqbal* encourage dismissal at the pleading stage, these antijury attitudes are likely to be reflected in judicial decisions with respect to pleading as well.

Fifth, it is important to acknowledge the deeply contested struggle between plaintiffs’ and defendants’ lawyers over the nature of American federal civil litigation. *Iqbal* has raised the stakes in this struggle. It is significant that the costs of discovery were identified as reasons for the higher pleading burden in *Twombly* and *Iqbal*. A joint project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System recently issued a report that proposes radical revision of the federal civil

²²⁶ See Mauro, *supra* note 65, at 1 (noting that *Iqbal* invites judges to “us[e] subjective factors” to evaluate the sufficiency of the complaints).

²²⁷ See Philip G. Peters, Jr., *Doctors & Juries*, 105 MICH. L. REV. 1453, 1454 (2007) (noting that pending legislation in Congress would transfer medical-malpractice cases from juries to administrative health courts).

²²⁸ Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1125-26 (2001) (arguing that *Daubert* stressed the judicial gatekeeping role).

litigation system, including severely limiting discovery,²²⁹ although the new report on discovery from the Federal Judicial Center suggests that discovery abuse is not the serious problem that the Court claimed it to be.²³⁰ The Standing Committee is sponsoring a conference in May 2010 that will consider some of these issues. But the entire system of federal civil litigation is under attack. Pleading is the first round of this battle, but, for some participants, the goal is the end of (or at least severe limitations on) discovery. The war is about the future of federal civil litigation and access to justice in the federal courts.

Sixth, perhaps the picture presented here is incomplete and the situation is really more complicated—perhaps more cases are going to arbitration and mediation, as some defense lawyers suggested in response to the most recent Clermont and Schwab findings.²³¹ Other “managerial” developments in the federal courts, such as settlement, summary jury trials, and the use of “neutrals,” may also have a disparate effect on civil rights and employment discrimination plaintiffs. It is difficult to analyze the impact of all of these issues, and they undoubtedly play out differently in different federal courts. However, they are vital to understanding the broader picture.

Finally, my discussion raises two important questions: First, why is it a problem if more civil rights and employment cases are filed in state court? Assumptions about the primacy and superiority of federal courts as a forum for these cases might be historically specific and romanticize many federal judges’ role in the civil rights movement. Given ideological changes in the federal judiciary, some have argued that that is the case. The traditional rationales for federal court disposi-

²²⁹ INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 4-24 (2009), available at <http://www.actl.com/Content/NavigationMenu/Publications/AllPublications/default.htm> (follow “ACTL-IAALS Official Final Report” hyperlink).

²³⁰ In a survey of attorneys in recently closed civil cases, which the Federal Judicial Center conducted in May and June of 2009, more than 60% of respondents (and two out of three defendant’s attorneys) reported that the disclosure and discovery in the closed cases generated the “right amount” of information. More than half reported that the costs of discovery were the “right amount” in proportion to their clients’ stake in the closed cases. The median estimate of the percentage of litigation costs incurred in discovery was 20% for plaintiffs and 27% for defendants. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

²³¹ See Gallagher, *supra* note 15.

tion are that life tenure protects judicial independence and that state court judges are exposed to more political pressure, particularly if matters in dispute involve state agencies or other branches of state government. Are these assumptions still true? Are they even more salient today, given the huge amount of campaign money and lobbying involved in state judicial elections?²³² The Supreme Court's recent decision in *Caperton v. A.T. Massey Coal Co.*,²³³ involving a West Virginia Supreme Court judge who received a massive campaign contribution relating to a matter pending before him but failed to recuse himself, is simply one example of corruption in state courts.

The second question goes beyond the federal/state dichotomy presented here. If more civil rights and employment discrimination cases end up in state court, will state courts begin to copy the federal procedural developments that I have described here in order to clear their dockets of these cases? Will state court judges begin to exhibit the same bias against employment discrimination and civil rights cases that we have seen federal judges develop? Many states model their procedural rules and decisions on the Federal Rules and federal procedure, so it is certainly possible.²³⁴ The data on state judges' political affiliations is more elusive because each state has a different court system with different subject matter jurisdictional requirements. Moreover, as I have already suggested, the risks of political pressure are more considerable in state court. This suggests that state courts might not permit civil rights and employment discrimination cases to be determined on the merits any more than federal courts appear to permit.

²³² See Editorial, *The Best Judges Business Can Buy*, N.Y. TIMES, June 18, 2007, at A18 (reporting that thirty-nine states elect at least some of their judges and arguing that "[t]he problem of wealthy interests' trying to influence court decisions by pouring money into state judicial elections continues to escalate So does the threat to the impartiality, independence and integrity of the nation's courts."); see also *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (holding that judges can announce their political beliefs during judicial election campaigns); Brendan H. Chandonnet, Note, *The Increasing Politicization of the American Judiciary: Republican Party of Minnesota v. White and Its Effects on Future Judicial Selection in State Courts*, 12 WM. & MARY BILL RTS. J. 577, 582-83 (2004) (discussing the financing of state judicial campaigns).

²³³ 129 S. Ct. 2252 (2009).

²³⁴ See STEPHEN C. YEAZELL, CIVIL PROCEDURE 17 (7th ed. 2008) ("[T]he Rules have had an influence far beyond the courts for which they were written. Federal courts hear only 2 percent of civil cases in the United States. But the model represented by the [Federal Rules of Civil Procedure]—merger of law and equity, relaxed pleading, flexible joinder of claims and parties, and broad discovery—have deeply influenced the procedure of state courts. . . . [E]very state now uses a procedural model that embraces most of these principles. Thirty-five states have gone so far as to adopt the 'federal' Rules as their own procedural code.").

IV. CORRECTING THE IMPACT

Understanding the impact of these seemingly interrelated dimensions of the federal litigation process raises doubts about what “neutral” means for rule and procedural change in the federal courts. We cannot assume that procedural revision will not provide an additional excuse for dismissal, or application of a higher pleading burden, or summary judgment. Clearly our aspirations for transsubstantive federal procedure are not being met. Federal courts are getting rid of civil rights and employment discrimination cases and implicitly sending a message that state courts are where these cases should be heard. The federal judiciary is transforming a major portion of its civil caseload. Although we can debate the pros and cons of federal and state courts as the protectors of rights, the shift is undeniably big.

So what would make a difference? First, proceduralists and rule-makers need to pay close attention to the disparate impact of federal procedure on civil rights and employment cases. Of course, it is hard to find solutions to these problems for the reasons that I discussed previously. Second, the appointment of more federal judges whose life experiences and perspectives make them open to the kinds of circumstances that employment discrimination and civil rights cases present might also have an effect. We need judges who are willing to consider and understand experiences outside of their often privileged circumstances. We need judges who recognize the need for humility and who understand the limits of judicial factfinding.²³⁵ We need judges who have a sense of history and of the federal courts’ importance to “little people,” not just corporations.²³⁶ These issues, which emerged in sharp relief during Justice Sonia Sotomayor’s Supreme Court nomination and confirmation hearings, highlight the need for appointment of federal judges with diverse perspectives.²³⁷ Hopefully, the new federal judges that President Obama nominates will be confirmed and bring these broader perspectives to their judging.

Federal judges should not be dismissing employment discrimination and civil rights cases so early in the pretrial process. The developments in federal civil pretrial practice that I have described have

²³⁵ See Kahan, Hoffman & Braman, *supra* note 146, at 896-906 (arguing that judges should not privilege their own factual perceptions).

²³⁶ Thanks to Vicki Jackson for this point.

²³⁷ See, e.g., Johnson, *supra* note 225, at 39-43 (criticizing senators who spoke at Justice Sotomayor’s confirmation hearing for focusing on the Justice’s “wise Latina” statement, because the statement merely suggests that she believes that “diversity of perspective among judges matters”).

not only harmed many civil rights and employment discrimination plaintiffs, but they have skewed the role of the federal courts and the development of federal jurisprudence. There should be a presumption that judges will allow cases to go forward and become fully developed on the basis of the facts. This will ensure that judges make reasoned decisions about the merits of the cases. We have to recognize the disparate impact of transsubstantive procedure on civil rights and discrimination claims. The historic role of federal courts in the protection of civil rights and freedom from discrimination is at stake.