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SUZETTE M. MALVEAUX

The Jury (or More Accurately the Judge) Is Still Out for Civil Rights and Employment Cases Post-*Iqbal*

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ABOUT THE AUTHOR: Associate Dean of Academic Affairs and Professor of Law, The Catholic University of America, Columbus School of Law. This article is based on my presentation at the *New York Law School Law Review's* symposium titled *Trial by Jury or Trial by Motion? Summary Judgment, Iqbal, and Employment Discrimination* held on April 23, 2012. This article is based on information available as of the date of the symposium. Much gratitude goes to the *New York Law School Law Review* and The Employee Rights Advocacy Institute for Law & Policy for inviting me to present at the New York Law School symposium. A special thanks goes to my Research Assistant Charles Garrison for his excellent research and editorial assistance and to Acting Dean and Professor George Garvey and the Columbus School of Law for their generous funding of this project. This article is dedicated to my father, whose guidance, work ethic, and character continue to shape and inspire me.

I. INTRODUCTION

Five years after *Bell Atlantic Corp. v. Twombly*¹ and three years after *Ashcroft v. Iqbal*,² the question regarding the impact these seminal Supreme Court decisions are having on the vitality of employment discrimination and other civil rights cases remains. This question was posed at a symposium aptly titled *Trial by Jury or Trial by Motion? Summary Judgment, Iqbal, and Employment Discrimination*, sponsored by the *New York Law School Law Review* and The Employee Rights Advocacy Institute for Law & Policy held in April 2012.³ This question is important because if potentially meritorious civil rights and employment discrimination cases are dismissed prematurely, law enforcement and deterrence will be sacrificed for expediency and efficiency. The answer to this question is that we don't know yet. The jury is still out. Or, more accurately, the *judge* is still out since most cases currently never get to a jury. Trial by motion has become standard operating procedure for modern civil litigation, with the point of dismissal far earlier in the litigation cycle.

For the five decades prior to *Twombly* and *Iqbal*, “notice pleading” dominated the pleading system in federal courts. Pursuant to Rule 8 of the Federal Rules of Civil Procedure, a claimant was only required to make “a short and plain statement” of the claim.⁴ The U.S. Supreme Court, in *Conley v. Gibson*, instructed that a claim should be dismissed only if there was “no set of facts in support of [the plaintiff’s] claim which would entitle him to relief.”⁵ However, following *Twombly* and *Iqbal*, a plaintiff must include enough facts to make his claim not only possible, but also “plausible,”⁶ a significantly higher bar than the *Conley* “no set of facts” standard.

The Federal Rules of Civil Procedure are trans-substantive, i.e., they apply to all civil cases regardless of the subject matter, unless exempted by the rules or by statute.⁷ However, many scholars—myself included—have worried that after *Twombly* and

1. 550 U.S. 544 (2007).

2. 556 U.S. 662 (2009).

3. *Trial by Jury or Trial by Motion? Summary Judgment, Iqbal, and Employment Discrimination*, N.Y.L. SCH. L. REV. (Apr. 23, 2012), <http://www.nylslawreview.com/trial-by-jury-or-trial-by-motion-summary-judgment-iqbal-and-employment-discrimination/>.

4. FED. R. CIV. P. 8(a)(1). All Rule mentions in this article refer to the Federal Rules of Civil Procedure, unless otherwise specified.

5. 355 U.S. 41, 45–46 (1957).

6. *Iqbal*, 556 U.S. at 679 (“[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.”); *Twombly*, 550 U.S. at 545, 557 (citation omitted) (holding that “[f]actual allegations must be enough to raise a right to relief above the speculative level”; they must show a “plausibility of ‘entitle[ment] to relief,’” not just a possibility). Building on *Twombly*, *Iqbal* explained that “[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.” *Iqbal*, 556 U.S. at 678. Thus, plausibility falls somewhere between possibility and probability. *Id.*

7. See David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 372 (2010).

Iqbal, litigants bringing employment discrimination⁸ and other civil rights cases⁹ will have an even more formidable climb over the higher pleadings bar.¹⁰ This is particularly true for intentional discrimination claims, which are more vulnerable to dismissal post-*Twombly* and *Iqbal* for numerous reasons.¹¹ Thus, following *Twombly* and *Iqbal*, a number of legal scholars have sought to quantitatively determine the decisions' impact on civil rights litigation by comparing the amount and success rate of Rule 12(b)(6) motions before and after *Twombly* and *Iqbal*. Early studies by a variety of scholars suggest that the decisions resulted in an increase in the filing and granting of pre-trial motions to dismiss.¹² However, a more recent study by the Federal Judicial Center (FJC) suggests that, despite an increase in both the filings and success rate of 12(b)(6)

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8. These include cases that are typically brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act, and other similar federal civil rights statutes.
 9. These include cases brought pursuant to 42 U.S.C. § 1983 (2006), alleging a government official deprived a plaintiff of a constitutional right, and to other federal civil rights statutes.
 10. See Raymond Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination*, 100 KY. L.J. 235, 284–85 (2011–2012) (concluding that plaintiffs in employment and housing cases were more likely to face motions to dismiss and that courts were more likely to grant such motions post-*Iqbal*, and suggesting that these decisions are having a chilling effect, resulting in plaintiffs settling or not bringing claims at all); Edward A. Hartnett, *The Changing Shape of Federal Civil Pretrial Practice: Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010) (discussing ways to limit the negative impact of *Twombly* and *Iqbal* on plaintiffs, including allowing discovery during the pleading stage); Suzette M. Malveaux, *Clearing Civil Procedure Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621, 623–31 (2011) [hereinafter Malveaux, *Clearing Civil Procedure Hurdles*] (discussing recent procedural changes that have made it more difficult for civil rights plaintiffs to bring claims, including the challenges raised by the tougher pleading standard announced in *Twombly* and *Iqbal*); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010) [hereinafter Malveaux, *Front Loading and Heavy Lifting*] (discussing the difficulties faced by civil rights plaintiffs as a result of *Twombly* and *Iqbal* and suggesting that allowing increased discovery before deciding a 12(b)(6) motion would help mitigate the impact on civil rights cases); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010) (discussing *Iqbal*'s effect on civil cases generally, but also focusing on the particular challenges in civil rights cases due to informational asymmetry); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010) (considering recent changes to pretrial practice, including pleadings, that have made it more difficult for plaintiffs to bring civil rights and employment discrimination cases); Joseph A. Seiner, *Plausibility & Disparate Impact*, 64 HASTINGS L.J. 287 (2013) (examining the application of *Twombly* and *Iqbal* to disparate impact discrimination cases and suggesting that plaintiffs should only be required to plead facts related to their prima facie case, and not additional facts related to the employer's business justification); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010) (discussing *Iqbal* as another marker in the evolution of a more restrictive procedural doctrine); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010) (arguing that the post-*Twombly* and *Iqbal* pleading standard essentially equates to the summary judgment standard and unfairly puts the plaintiff in a position of having to plead facts before undertaking discovery).
 11. See *infra* Part II.
 12. See *infra* Part III.A.

THE JURY (OR MORE ACCURATELY THE JUDGE) IS STILL OUT

motions, this change is not necessarily attributable to the pleading standard announced in *Twombly* and *Iqbal*.¹³

This article concludes that, in light of conflicting empirical studies and analysis, the impact of *Twombly* and *Iqbal* remains elusive, and that empirical data alone cannot answer this question. Although the varied quantitative studies offer important insights, lawmakers and scholars seeking to understand the effect of these decisions on civil rights litigation should consider non-empirical data, such as the boots-on-the-ground experiences and practices of judges and lawyers in the post-*Twombly* and *Iqbal* landscape.

This article is comprised of five parts. Part I introduces the topic. Part II analyzes the *Iqbal* decision and discusses why civil rights cases are more susceptible to dismissal under this regime. Part III reviews early quantitative studies, the Federal Judicial Center report, and more recent criticisms of both. This part also suggests that none of these studies is the definitive word on the new pleading regime's impact on civil rights and employment discrimination cases. Part IV concludes that, in order to accurately gauge how *Twombly* and *Iqbal* have affected civil rights cases, it is necessary to consider both anecdotal evidence from lawyers and trends in how judges are applying the new standard. In closing, this article concludes that although plaintiffs are facing more motions to dismiss post-*Twombly* and *Iqbal*, the degree to which these decisions are resulting in premature dismissals remains unclear.

II. IQBAL'S GREATER DISMISSAL RISK FOR EMPLOYMENT DISCRIMINATION AND OTHER CIVIL RIGHTS LITIGATION

Following the *Twombly* and *Iqbal* decisions, legal scholars identified the potential detrimental impact such decisions might have on civil rights cases. There are multiple reasons why such cases are susceptible to greater risk of dismissal, as set forth in this section.¹⁴

A. Civil Rights Plaintiffs Often Plead Facts That Are Consistent with Both Legal and Illegal Behavior

First, a plaintiff alleging intentional discrimination in her complaint often tells a story whose facts are consistent with both legal and illegal behavior. This is not surprising because, at the very beginning of a lawsuit, plaintiffs can only put forward information that they were able to gather through their own diligent investigation. No one has had a chance to engage in the formal discovery process, where the parties are compelled to turn over important information to the other side. But under the new pleading standard, plaintiffs must allege facts “plausibly suggesting (not merely consistent with)” illegal conduct.¹⁵

13. See *infra* Part III.B.

14. These reasons were previously discussed in my articles Malveaux, *Clearing Civil Procedure Hurdles*, *supra* note 10, at 623–28, and Malveaux, *Front Loading and Heavy Lifting*, *supra* note 10, at 87–101. The following discussion is drawn from these prior works.

15. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

This makes it tricky for a plaintiff alleging intentional discrimination to survive dismissal. To prove liability, a plaintiff has to prove that the defendant's adverse action was *because* of some impermissible factor; it's what *motivated* the defendant. But at the early pleading stage, a defendant's conduct can suggest a discriminatory motive or a purely innocent one—indistinguishable from each other. This means that pre-discovery, a plaintiff may not be able to eliminate innocence as a credible explanation—resulting in dismissal.

This was true in *Iqbal*. There, Javid Iqbal was detained and held on various charges immediately following the 9/11 terrorist attacks because of his designation as a person of “high interest.”¹⁶ Iqbal, a Pakistani who ultimately pled guilty to criminal charges and served his time, alleged that he had been mistreated by federal officials while in a special, maximum-security unit, in violation of his constitutional rights.¹⁷ More specifically, he contended that then-Attorney General John Ashcroft and FBI Director Robert Mueller designated him a person of “high interest” and subjected him to harsh conditions of confinement because of his race, religion, or national origin, in violation of the First and Fifth Amendments.¹⁸ His complaint alleged that these constitutional violations were a matter of policy for which Ashcroft and Mueller were personally responsible.¹⁹

Iqbal's factual allegations were consistent with both illegal and legal conduct. On the one hand, the facts could explain invidious discrimination, meaning the government targeted and subjected Iqbal to mistreatment because of his race, religion, or national origin.²⁰ On the other hand, the facts could explain legitimate anti-terrorism activity, meaning the government detained Iqbal as part of a neutral anti-terrorism strategy.²¹ At the pleading stage, without the benefit of discovery, it was too early to tell.²²

B. *The Iqbal Plausibility Test Is Overly Subjective*

Second, because of its overly subjective nature, the new plausibility test²³—to be determined by “judicial experience and common sense”²⁴—fails to give judges enough

16. *Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009).

17. *Id.* at 666, 668.

18. *Id.* at 667–69.

19. *Id.* at 666.

20. *Id.* at 681.

21. *Id.* (“Taken as true, these allegations are consistent with petitioners’ purposefully designating detainees ‘of high interest’ because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.”).

22. Perhaps discovery of government memoranda or depositions of officials could have tested Iqbal's claims.

23. *Iqbal*, 556 U.S. at 678 (explaining that “[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”).

24. *Id.* at 679.

THE JURY (OR MORE ACCURATELY THE JUDGE) IS STILL OUT

guidance on how to determine whether a complaint should be dismissed. Based on the differences among judges, one judge may dismiss a complaint, while another judge may conclude that an identical complaint survives, solely because of the way in which each judge applies his or her “judicial experience and common sense.” This is bound to create unpredictability, lack of uniformity, and confusion. Further, this may be particularly problematic for cases alleging civil rights violations.

For example, studies indicate that there are significant differences in perception among racial groups over the existence and pervasiveness of race discrimination.²⁵ With the election of Barack Obama, the first African American President, there has been a particularly acute focus on whether American society has become “post-racial.” Following this historic election, many Americans have concluded that race discrimination is no longer a significant issue.²⁶ Consequently, some judges, like many Americans, may operate from the presumption that race discrimination is a thing of the past. This perception may lead a judge to conclude that, based on the facts before him, intentional discrimination is implausible, especially in light of alternative explanations available. Without a suitable legal standard in which to anchor the plausibility determinations, judges are vulnerable to the criticism that their decisions

25. See Kevin Sack & Janet Elder, *The New York Times Poll on Race: Optimistic Outlook But Enduring Racial Division*, in *HOW RACE IS LIVED IN AMERICA: PULLING TOGETHER, PULLING APART* 385 app. (2001) (noting that 44% of African Americans believe they are treated less fairly than whites in the workplace, while 73% of whites believe African Americans are treated fairly); Gary Langer & Peyton M. Craighill, *Fewer Call Racism a Major Problem Though Discrimination Remains*, ABCNEWS.COM (Jan. 18, 2009), <http://abcnews.go.com/PollingUnit/Politics/story?id=6674407&page=1> (“[African Americans] remain twice as likely as whites to call racism a big problem (44 percent vs. 22 percent), and only half as likely to say African-Americans have achieved equality.”); K.A. DIXON ET AL., *A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB* 8 (2002), available at http://www.heldrich.rutgers.edu/sites/default/files/content/A_Workplace_Divided.pdf (finding that African American employees are five times more likely than their white counterparts to believe that African Americans are the most likely victims of discrimination; 50% of African American employees believe employment practices are fair, in comparison to 90% of their white counterparts).

26. See Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration*, 98 CALIF. L. REV. 1023, 1066 (2010) (“Partly through colorblindness and partly through the accumulated weight of cultural beliefs and historical practices, most Americans accept that major American institutions are race-neutral and that these institutions produce vast racial disparities.”); see also *PBS NewsHour: Debate on Race Emerges as Obama’s Policies Take Shape* (PBS television broadcast Sept. 16, 2009), available at http://www.pbs.org/newshour/bb/politics/july-dec09/rage_09-16.html. For example, in a discussion among columnists and academics with Gwen Ifill, Democratic pollster Cornell Belcher concluded:

We’re two very different countries racially, where right now you have a majority of whites who, frankly, do think we’re post-racial because they think African-Americans have the same advantages as they do, while African-Americans do not. And you have a large swath of whites right now who are just as likely to see reverse discrimination as an issue as classic discrimination.

Id. But see Associated Press, *Ex-President Sees Racism in Outburst*, N.Y. TIMES, Sept. 16, 2009, at A14 (attributing Representative Joe Wilson’s outburst during President Obama’s health care speech as “based on racism” and noting that “[t]here is an inherent feeling among many in this country that an African-American should not be president”); Jeffrey M. Jones, *Majority of Americans Say Racism Against Blacks Widespread*, GALLUP, Aug. 4, 2008, <http://www.gallup.com/poll/109258/Majority-Americans-Say-Racism-Against-Blacks-Widespread.aspx>.

are based on factors outside of the law.²⁷ This excessive subjectivity can result in different outcomes depending not on the facts, but on the identity of the judge.²⁸

In *Iqbal* itself, the Supreme Court concluded that the factual allegations, taken as true, were consistent with intentional illegal discrimination, but then found that these allegations were not as likely as a more innocent rationale.²⁹ The arrest and detention of thousands of Arab Muslim men as part of the FBI's post-9/11 terrorism investigation could mean that Ashcroft and Mueller intentionally designated such detainees as persons of "high interest" on the grounds of race, religion, or national origin. But a more benign reason could explain the same conduct: i.e., Ashcroft and Mueller instituted a legitimate anti-terrorism policy that happened to have a disparate impact on Arab Muslim men because of the connection between the 9/11 attack and its perpetrators.³⁰ In comparing the plaintiff's intentional discrimination theory to the defendants' more innocent one, the Court rejected the plaintiff's theory as implausible on the ground that it was less likely.³¹

As illustrated in *Iqbal*'s five-to-four decision, likelihood is in the eye of the beholder, and is based on the limited evidence available pre-discovery. But a court is not supposed to weigh the relative merits of alternative theories at the pleading stage, before both parties have had an opportunity to collect evidence to prove their case.³² These kinds of judgment calls are to be made by a jury after everyone has had a chance to gather evidence and argue the merits.

C. Lack of Discovery Makes It Difficult for Plaintiffs to Sufficiently Plead Facts Showing Intentional Discrimination

Finally, discriminatory intent is often difficult, if not impossible, to unearth before the parties have had some discovery. Discrimination has become more subtle

27. See Brescia, *supra* note 10, at 286 n.153 (citation omitted) ("It is always possible that implicit bias may be infecting these decisions to dismiss discrimination claims, and the *Twombly/Iqbal* precedents play into unconscious bias within the judges' experience and common sense.")

28. Jeffrey J. Rachlinsky et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (finding that judges harbor implicit biases); Paul Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107 (2010) (analyzing the "cultural cognition theory" in labor and employment law and finding that judges' backgrounds impact their decisions); see generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

29. *Iqbal*, 556 U.S. at 681 ("Taken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin.")

30. *Id.* at 682.

31. *Id.*

32. See, e.g., *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515 (2002) ("Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits."); *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) ("[R]uling on a motion for dismissal pursuant to Rule 12(b)(6) is not an occasion for the court to make findings of fact.")

THE JURY (OR MORE ACCURATELY THE JUDGE) IS STILL OUT

and institutional.³³ It can be harder to detect because it is less overt and transparent; instead it takes the form of stereotypes and unconscious bias.³⁴

Moreover, it is hard for plaintiffs to unearth discrimination because of the unequal access parties may have to evidence. In the absence of discovery, it is particularly difficult for civil rights claims to survive dismissal when plaintiffs cannot access information that is exclusively in the defendant's possession, such as evidence of a defendant's intent or institutional practices. This unequal access to information—informational asymmetry—between the parties is unfair and puts plaintiffs at a significant disadvantage when challenging the misconduct of employers, corporations, and other institutions.³⁵

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33. See *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 86 (2009) (testimony of Debo P. Adegbile, Director of Litigation of the NAACP Legal Defense & Education Fund, Inc.); Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1138–61 (2008); *id.* at 1146 (“The reality is that the root of the discrimination remains concealed in the web of modern workplace design, including work teams and collective decision-making processes.”); see also Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 646–48 (2005) (noting that work culture may perpetuate discrimination); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 661 (2003) (noting that class actions can “identify and address organizational sources of discrimination”); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (“‘Second generation’ claims involve social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups. Exclusion is frequently difficult to trace directly to intentional, discrete actions of particular actors, and may sometimes be visible only in the aggregate. Structures of decisionmaking, opportunity, and power fail to surface these patterns of exclusion, and themselves produce differential access and opportunity.”).
34. See Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 743 (2005) (“Contemporary sociological and psychological research reveals that discriminatory biases and stereotypes are pervasive, even among well-meaning people. In fact, recent studies have focused particular attention on the unconscious biases of people whose consciously held beliefs are strongly egalitarian.”); see also John F. Dovidio et al., *Why Can't We Just Get Along? Interpersonal Biases and Interracial Distrust*, 8 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 88, 94 (2002); John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829, 831 (2001); John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 315 (2000) (“[M]any people who explicitly support egalitarian principles and believe themselves to be nonprejudiced also unconsciously harbor negative feelings and beliefs about blacks and other historically disadvantaged groups.”); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164, 1186–88 (1995); Lawrence, *supra* note 28, at 322 (“[W]e are all racists.”); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 901–902 (1993) (quoting Lawrence, *supra*, at 337–39) (“Thus, through personal and cultural experience the individual comes to associate characteristics such as ‘intelligence,’ ‘laziness,’ ‘honesty,’ or ‘dirtiness’ with classifications of people.’ Since our ‘categorization’ of people is learned and experienced at a very young age, we may not be conscious of having internalized those feelings and beliefs.”).
35. See Roy L. Brooks, Conley and Twombly: *A Critical Race Theory Perspective*, 52 HOW. L.J. 31, 68–69 (2008). Professor Brooks explains:

[The Plausibility pleading rule] disadvantages the prosecution of civil rights cases because it imposes a difficult, if not impossible, burden on the plaintiff to make specific factual allegations about evidence (or ‘proof’) known only to defendants. For example, evidence of discriminatory animus or institutional practices is typically not revealed to

Plaintiffs are caught in a catch-22. They must put facts in their complaint to nudge their claim from possible to plausible. Often the only way to get such facts is through discovery. But the court will not permit discovery unless the plaintiffs provide the very facts they cannot discover. Thus, plaintiffs' complaints die on the vine not because they lack merit, but because plaintiffs do not have the same access to information that the defendants do. By raising the pleading bar to plausibility, the Supreme Court has created an untenable situation for plaintiffs challenging discrimination where there is informational asymmetry.

III. EXAMINATION OF POST-*TWOMBLY* AND *IQBAL* EMPIRICAL STUDIES

So what has been the impact of *Twombly* and *Iqbal* on the survival of civil rights cases? Have our worst fears been realized? Not surprisingly, empirical evidence indicates that post-*Twombly* and *Iqbal*, defendants are filing more motions to dismiss for failure to state a claim. Studies by the FJC, among others, note a statistically significant increase in the filing rate of 12(b)(6) motions to dismiss following the elevated pleading requirement, which can be attributed to *Twombly* and *Iqbal*.³⁶ This is true not only generally, but also for employment discrimination cases and non-prisoner civil rights cases brought under 42 U.S.C. § 1983 in particular.³⁷ In general,

the plaintiff until discovery; yet, under the [plausibility pleading rule], the plaintiff is forced to plead such undiscovered evidence or face early dismissal of his or her civil rights claim. Cases are dismissed without ever reaching the merits.

Id. at 58 (footnotes omitted); see also Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 957 (1990) (noting that the plaintiff in *Strauss v. City of Chicago*, 760 F.2d 765 (7th Cir. 1985), would not normally have the requisite factual predicate to show the city had a "custom and practice" of discrimination pre-discovery, thereby making it "nearly impossible" for his civil rights claim to escape 12(b)(6) dismissal); Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 138–39 (2007) (noting the same occurrence in the antitrust context); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1261–62 (2008) (criticizing *Twombly* for "informational asymmetries"); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 26 (2009) ("[A] standard that dismisses valid claims at the very front end of the system based on an inability to offer facts that claimants are, at this early stage, unlikely or unable to know blocks access to the courts in a way that is fundamentally improper."); Ettie Ward, *The After-Shocks of Twombly: Will We "Notice" Pleading Changes?*, 82 ST. JOHN'S L. REV. 893, 912 (2008).

36. JOE S. CECIL ET AL., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 8 (2011); Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 7 (2012) (relying on FJC study to conclude that "[a]fter *Iqbal*, a plaintiff was twice as likely to face a motion to dismiss as compared with the period before *Twombly*"); THOMAS E. WILLGING, USE OF RULE 12(B)(6) IN TWO FEDERAL DISTRICT COURTS tbl.4 (1989) (presenting statistics for the pre-*Twombly* and *Iqbal* period). Professor Brescia confirmed this trend post-*Iqbal* for motions that specifically challenge a complaint's factual allegations. See Brescia, *supra* note 10, at 262 ("[P]laintiffs faced a considerably higher number of motions to dismiss in which their pleadings were challenged as lacking specificity.")

37. CECIL ET AL., *supra* note 36, at 8–9 (2011) (noting the likelihood of a motion to dismiss for failure to state a claim being filed goes from 10.5% in 2006 to 12.4% in 2010 for civil rights cases). In civil rights cases, the likelihood of a motion to dismiss being filed increased, but was not statistically significant at

THE JURY (OR MORE ACCURATELY THE JUDGE) IS STILL OUT

under the new pleading regime, plaintiffs are twice as likely to face this dispositive motion; the probability has doubled from roughly 3% to 6%.³⁸ For employment discrimination cases, the probability went from 7.7% to 10.1%;³⁹ and for civil rights cases, it went from 11.7% to 12.7%.⁴⁰ Defendants readily admit to strategically filing motions to dismiss as a matter of course,⁴¹ and the statistics bear this out. The consequence of this trend is that plaintiffs have to expend greater time and money to stave off early dismissal,⁴² a luxury not afforded to everyone.⁴³

Given the greater propensity for defendants to try to eliminate cases right out of the gate, has this trend led to an increase in the dismissal rates of civil rights and employment discrimination cases post-*Twombly* and *Iqbal*? Here, the empirical data are mixed.

A. Early Studies Attribute the Rise in Dismissals to *Twombly* and *Iqbal*

On the one hand, in earlier studies, a number of legal scholars found that the more rigorous pleading standard resulted in a greater dismissal rate for civil right and employment discrimination cases. For example, comparing 12(b)(6) orders shortly before and after *Twombly*, Kendall W. Hannon concluded that under *Twombly*, a civil rights action alleging a constitutional violation⁴⁴ was “39.6% more likely to be

the 0.05 level. *Id.* at 8. For the subcategory of civil rights cases involving non-prisoner § 1983 cases, however, there was a statistically significant increase at the 0.05 level. *Id.* at 9.

38. *Id.* at 10 & tbl.2 (noting the probability of filing went from 2.9% in 2006 to 5.8% in 2010, controlling for federal district court and case type); Hoffman, *supra* note 36, at 15.

39. CECIL ET AL., *supra* note 36, tbl.2.

40. *Id.*; see also Brescia, *supra* note 10, at 280–83 (stating plaintiffs in employment and housing discrimination cases are far more likely to face a 12(b)(6) motion to dismiss on factual specificity grounds post-*Iqbal* than pre-*Twombly*).

41. See, e.g., John C.S. Pierce & D. Kirby Howard, *To Twombly or Not to Twombly—That is the Question, FOR THE DEFENSE*, Sept. 2009, at 89, available at http://forthedefense.org/articles/2009/09_September/FTD-0909-PierceHoward.pdf (suggesting that after the *Twombly* decision defense attorneys “have an opportunity and even an obligation to test the strength of poorly pled claims [by filing 12(b)(6) motions]”). Similarly, attorney John A. Freedman, a partner at Arnold & Porter LLP explained, “I think now I’m more likely to advise a client that given the Supreme Court’s guidance on [12(b)(6) motions], yes, you ought to look more seriously at filing a [12(b)(6)] motion [but] don’t count on it being granted.” *ACS Convention Panel: Access to Federal Courts after Iqbal and Twombly*, AM. CONSTITUTION Soc’y FOR L. AND Pol’y (July 18, 2010), <http://www.acslaw.org/news/video/acs-convention-panel-access-to-federal-courts-after-iqbal-and-twombly>.

42. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 840–41 (2010) (predicting additional costs for plaintiffs as a result of anticipated increase in 12(b)(6) motions); Patricia Hatamary Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 633 (2012) (noting additional 12(b)(6) motions result in “higher costs for litigants and more work for federal judges”).

43. Hoffman, *supra* note 36, at 16.

44. Hannon’s civil rights claims are constitutional claims. More specifically, he defines “civil rights” claims as those “brought under 42 U.S.C. §§ 1981, 1982, 1983 (and § 1983’s counterpart against federal officials—so-called *Bivens* actions), and 1985 as well as generalized claims of due process or equal protection violations.” Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of*

dismissed than a random case in the set,⁴⁵ and was more likely to be dismissed after *Twombly* than before.⁴⁶ Professor Joseph A. Seiner picked up where Hannon left off by conducting a similar study that focused on the impact of *Twombly* on cases alleging employment discrimination under Title VII of the Civil Rights Act of 1964.⁴⁷ Comparing the dismissal rate of employment discrimination cases one year before and after *Twombly*, Professor Seiner discovered a 2% increase post-*Twombly*.⁴⁸

Bell Atlantic Corp. v. *Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1836 n.161 (2008). Excluded from the “civil rights” category were actions brought under statutes such as Title VII of the Civil Rights Act of 1964, the American with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). *Id.* These actions were categorized as “Federal Other,” for which there wasn’t sufficient data to conduct a meaningful analysis. *Id.* at 1836 & n.161.

45. *Id.* at 1838. “This result was statistically significant to the 0.05 level.” *Id.*
46. *Id.* at 1837. A motion to dismiss a civil rights case was likely to be granted 41.7% of the time before *Twombly*, and 52.9% after *Twombly*. *Id.* The study did not examine whether there was a difference between motions granted with or without prejudice.

The Hannon study analyzed 3287 federal district court orders that responded to a 12(b)(6) motion. *Id.* at 1836. The study compared cases that cited *Conley* in the year prior to *Twombly* with those that cited *Twombly* in the seven months after it was decided. *Id.* The study examined only those orders published in the Westlaw database. *Id.* at 1829. The study excluded fraud cases governed by Federal Rule of Civil Procedure 9(b)’s particularity pleading standard, cases brought under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, which are subject to a more stringent standard under the Private Securities Litigation Reform Act (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15, 18 U.S.C.), and in forma pauperis and pro se cases, which are arguably subjected to a lower pleading standard. *Id.* at 1829–34. Cases were also removed from the database if they did not reflect the “spirit” of the search. *Id.* at 1834. These included cases involving motions for summary judgment, to amend, to reconsider a ruling, or to dismiss for lack of subject matter jurisdiction. *Id.*

The methodology has its advantages and disadvantages. Drawbacks of the methodology include its exclusive reliance on the Westlaw electronic database, and its timing. Only seven months post-*Twombly*, district courts did not have the benefit of appellate guidance on the appropriate understanding and application of the new pleading standard, and some were seemingly unaware of the standard altogether. *Id.* at 1830. On the other hand, the timing was also advantageous. Because the “vast majority” of cases involved complaints drafted pre-*Twombly*, the change in dismissal rate can more readily be attributed to the change in pleading standard rather than a change in attorney drafting. *Id.* at 1831.

47. Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1027 (2009). The Seiner study analyzed 396 federal district court orders that responded to a 12(b)(6) motion in a Title VII case. *Id.* at 1029. The study compared 191 cases that cited *Conley* in the year prior to *Twombly* with 205 that cited *Twombly* in the year after it was decided. *Id.* The study examined only those orders published in the Westlaw database. *Id.* at 1027–28. In contrast to Hannon, Seiner included cases brought by pro se litigants. *Id.* at 1029 n.134.

Because Seiner’s methodology is similar to Hannon’s, their studies share many of the same strengths and weaknesses. *See id.* at 1029, 1031; *see also supra* text accompanying note 46. In addition, given that Seiner’s study examines only 396 cases, it is admittedly “difficult to draw any concrete conclusions from a purely mathematical perspective” and the results are not statistically significant. Seiner, *supra*, at 1030 n.140, 1032.

48. Seiner, *supra* note 47, at 1029–31. More specifically, in the pre-*Twombly* year, 54.5% of the federal district court orders granted the motion to dismiss in whole, while in the post-*Twombly* year, 57.1% granted the motion. *Id.* at 1029. Additionally, in the pre-*Twombly* year, 77.6% of the court orders granted the motion to dismiss (in whole or in part), while in the post-*Twombly* year, 75.4% granted the motion. *Id.* at 1030.

THE JURY (OR MORE ACCURATELY THE JUDGE) IS STILL OUT

Professor Seiner also duplicated his study for cases alleging employment discrimination under Title I of the Americans with Disabilities Act (ADA) or employment-related retaliation under Title V of the ADA.⁴⁹ Again, comparing the dismissal rates one year before and after *Twombly*, Professor Seiner found a similar increase in the dismissal rate of cases under the ADA post-*Twombly*.⁵⁰ In another study, Professor Patricia W. Hatamyar Moore found that dismissal orders in general increased from 46% to 48% to 56% two years before *Twombly*, two years after *Twombly*, and immediately following *Iqbal*, respectively.⁵¹ For dismissal orders in

49. Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 115–16 (2010). The Seiner study analyzed 124 federal district court orders that responded to a 12(b)(6) motion in cases involving either Title I ADA employment discrimination claims or Title VI ADA employment-related retaliation claims. *Id.* at 116–17. The study compared fifty-nine cases that cited *Conley* in the year prior to *Twombly* with sixty-five that cited *Twombly* in the year after it was decided. The study examined only those orders published in the Westlaw database. *Id.* The study included cases brought by pro se litigants. *Id.* at 117.

Seiner’s ADA study shares the same strengths and weaknesses of his prior Title VI study. *See id.* at 118–21; *see also* Hoffman, *supra* note 36, at 16. Because Seiner’s ADA study examines even fewer cases than the Title VII study (only 124), the ADA study makes it even more “difficult to draw any substantial conclusions regarding the resulting differentials between data sets” from a “purely numerical standpoint.” Seiner, *supra*, at 119. Again, the results were not statistically significant. *Id.* at 118–19.

50. Seiner, *supra* note 49, at 118, 120 (2010). More specifically, in the pre-*Twombly* years, 54.2% of the federal district court orders granted the motions to dismiss in whole, while in the post-*Twombly* years, 64.6% granted such motions. *Id.* at 120. Additionally, in the pre-*Twombly* year, 64.4% of the court orders granted the motion to dismiss (in whole or in part), while in the post-*Twombly* years, such granting increased to 78.5%. *Id.* at 120–21. Thus, there was a 14.1% increase in the rate at which ADA cases were partially dismissed post-*Twombly*. *Id.* at 121.

Although Seiner found an increase in the dismissal rates for both Title VII and ADA cases, he did not find the judicial reaction to these cases to be the same. In the disability context, there has been more confusion and inconsistency over the meaning and application of the plausibility standard. *Id.* at 121–26.

51. Hatamyar, *supra* note 42, at 556. This result was not statistically significant. *Id.* at 602 (noting the probability of this distribution occurring by chance is 15.2%—“too high for conventional statistical significance”).

The Hatamyar Moore study randomly selected 500 federal district court opinions ruling on a 12(b)(6) motion in the two years before *Twombly*, 500 in the two years after *Twombly*, and 200 in the six months following *Iqbal*. *Id.* at 555–56. The study examined only those orders published in the Westlaw database. *Id.* at 584. The study excluded prisoner litigation brought under the Prison Litigation Reform Act and seeking to proceed in forma pauperis. *Id.* at 585. The study also excluded dismissals on grounds other than 12(b)(6), such as lack of subject matter or personal jurisdiction, improper venue, failure to join an indispensable party, and summary judgment. *Id.* at 586. Cases involving a more rigorous pleading standard—such as those alleging fraud or a PSLRA violation—were also excluded. *Id.* at 587. The study included 12(c) motions for judgments on the pleadings and 12(b)(6) motions from any opposing party, such as counterclaims. *Id.* at 588. The study also included pro se cases. After applying these exclusions and inclusions, Hatamyar Moore examined a total of 1039 cases in the database: 444 under *Conley*, 422 under *Twombly*, and 173 under *Iqbal*. *Id.* at 585. Like the Hannon and Seiner studies, Hatamyar Moore’s initial study advises the reader to exercise caution when interpreting the data because of the small data pool and time period involving *Iqbal* decisions. *Id.* at 556.

civil rights cases,⁵² the increase went from 50% to 53% to 58% for the same periods, respectively.⁵³

B. The Federal Judicial Center Study Finds That Twombly and Iqbal Have No Statistically Significant Impact on the Dismissal Rate

On the other hand, in 2011, the FJC's empirical studies set forth an alternative interpretation of the fate of employment discrimination and civil rights cases. Commissioned by the Judicial Conference Advisory Committee on Civil Rules, the FJC published a report in March of 2011 and an update the following November, comparing motion practice in 2006 and 2010.

In its favor, the FJC's study had the benefit of more time and a greater data pool. By the time the FJC conducted its analysis, the legal landscape—previously littered with contradictory district court opinions—had been cleaned up by courts of appeals. The appellate courts had reversed some of the dismissals and clarified the appropriate application of the new pleading standard.⁵⁴ The FJC also benefitted by having access to federal district court records, rather than being limited to electronic databases like Westlaw and Lexis. While there is disagreement over whether electronic databases

52. Hatamyar Moore categorized type of cases by those listed on the federal district court docket sheet. Because the vast majority of cases identified as “Prison Petitions” alleged civil rights violations, she included this category in the “Civil Rights” category. The “Civil Rights” category is comprised of:

[1] Cases in which the plaintiffs alleged federal constitutional violations, whether or not they purported to bring the case under 42 U.S.C. § 1981 (equal rights under the law), 42 U.S.C. § 1983 (civil action for deprivation of rights), 42 U.S.C. § 1985 (conspiracy to interfere with civil rights), or *Bivens* actions.

[2] Cases in which the plaintiffs alleged unlawful employment discrimination on the basis of race, sex, religion, or national origin under Title VII of the Civil Rights Act of 1964.

[3] Cases in which the plaintiffs alleged violations of the Age Discrimination in Employment Act (“ADEA”), the Americans with Disabilities Act (“ADA”), or the Rehabilitation Act of 1973.

[4] Any other civil rights actions, including sex discrimination under Title IX.

Id. at 591–92.

53. *Id.* at 607. Disaggregating this further for dismissal orders in constitutional civil rights cases, the increase went from 50% to 55% to 60%, and for dismissal orders in Title VII cases, the increase went from 42% to 54% to 53%. *Id.* at 608–09.

54. See CECIL ET AL., *supra* note 36, at 2–3 n.6 (citing cases from the First, Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits that provide clarification of the *Twombly* and *Iqbal* pleading standard, some of which have resulted in reversals of dismissals). For more recent reversals, see also *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1 (1st Cir. 2011) (reversing the dismissal of a 42 U.S.C. § 1983 claim by an employee in the Governor of Puerto Rico's mansion against the Governor and other officials) and *Sheppard v. David Evans & Assoc.*, 694 F.3d 1045, 1050 (9th Cir. 2012) (quoting *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404–05 (7th Cir. 2010)) (reversing the dismissal of an administrative assistant's Age Discrimination in Employment Act claim against her employer, and providing an example of what an employment discrimination plaintiff must plead to survive a 12(b)(6) motion: “[a] plaintiff who believes that she has been passed over for a promotion because of her sex will be able to plead that she was employed by Company X, that a promotion was offered, that she applied and was qualified for it, and that the job went to someone else”).

THE JURY (OR MORE ACCURATELY THE JUDGE) IS STILL OUT

over-represent dismissals and therefore skew outcomes,⁵⁵ it was to the FJC's advantage to have a more complete dataset for analysis.

The FJC's study, like other initial studies, found that the percentage of motions to dismiss being granted post-*Twombly* and *Iqbal* had increased. More specifically, the dismissal rates increased from 66% to 75% for all civil cases,⁵⁶ from 70% to 78% for civil rights cases, and from 67% to 71% for employment discrimination cases.⁵⁷

However, the FJC's study advised caution in interpreting these results for primarily two reasons. First, the FJC found that, in general, there was an increase in motions granted with leave to amend, but a decrease in motions granted without leave to amend, conceivably providing plaintiffs with more opportunities to fix their complaints.⁵⁸ The FJC found this distinction sufficiently meaningful to break down its analysis and present its findings on the basis of whether a motion to dismiss was granted with or without prejudice.⁵⁹

Second, even though the FJC found an increased dismissal rate in civil cases, it did not attribute the increase to *Twombly* and *Iqbal*. After controlling for additional variables that might explain the higher dismissal rate,⁶⁰ the FJC found no statistically significant increase in the rate at which motions to dismiss were granted (with or without an opportunity to amend) for all cases, with the exception of those challenging financial instruments.⁶¹ Moreover, there was no statistically significant increase in the dismissal rate for civil rights and employment discrimination cases.⁶²

55. Compare Joe S. Cecil, *Of Waves and Water: A Response to Comments on the FJC Study: Motions to Dismiss for Failure to State a Claim After Iqbal* 4 & n.11, 27–31 (Fed. Judicial Ctr., Working Paper, 2012), available at <http://ssrn.com/abstract=2026103> (“[M]issing orders in the Westlaw database are more likely to deny motions to dismiss, thereby building a bias into studies that rely on such sources.”), with Moore, *supra* note 42, at 608–09, 644–45 (“These results tend to weaken the hypothesis advanced by the FJC that published cases are more likely to report the grant of a 12(b)(6) motion to dismiss than unpublished cases.”).

56. CECIL ET AL., *supra* note 36, at tbl.4. This increase is statistically significant at the $p \leq 0.01$ level. *Id.*

57. *Id.* This increase is not statistically significant at the $p \leq 0.05$ level. *Id.*; see also Hoffman, *supra* note 36, at 7 (“As for dismissal orders, the FJC found that in every case category that was examined there were more orders granting dismissal after *Iqbal* than there were before *Twombly*, both with and without prejudice. Most importantly, in every case category examined it was more likely that a motion to dismiss would be granted.”).

58. CECIL ET AL., *supra* note 36, at 13. The only case where this was not true was for cases challenging financial instruments. See Brescia, *supra* note 10, at 270 (failing to find a significant rise in dismissal rates with prejudice post-*Twombly* or *Iqbal*).

59. CECIL ET AL., *supra* note 36, at 13.

60. The FJC controlled for differences in caseloads among district courts, types of cases, and the existence of an amended complaint. *Id.*

61. *Id.* at 21. These cases are comprised primarily of individuals challenging lenders or loan servicing companies over residential mortgages or refinances and are largely associated with the financial housing crisis. *Id.* at 12. These cases were the only type more likely to be dismissed with prejudice. *Id.* at 21. The FJC did not attribute this greater dismissal rate to plaintiffs' failure to sufficiently plead facts under *Twombly* and *Iqbal*. *Id.*

62. *Id.* at 39 (“[W]e found no statistically significant increase [at the 0.01 or 0.05 level] in the likelihood that motions were granted for . . . [non-financial instrument] cases.”).

In short, the FJC did not attribute the rise in grants of dismissal motions to the pleading standard announced in *Twombly* and *Iqbal*.

C. Criticism of the FJC's Methodology and Interpretation

The results of the FJC's long-awaited study surprised many in the legal community, including the primary drafter himself.⁶³ This has led to a robust debate among academics over what the data means and what is happening on the ground. The FJC study is controversial because its outcome was surprising and counter to the trend observed by many empiricists and predicted by most scholars. Moreover, the study is important because it carries significant weight, as the product of an independent agency tasked with conducting research at the request of the Judicial Conference Advisory Committee on Civil Rules. The FJC's study directly informs policymakers considering whether the relevant Federal Rules of Civil Procedure need to be amended and whether the civil litigation system needs to be reformed. Hence, the robust debate. Some of the major issues are set forth below.

1. The Role of Statistical Significance

One critique of the FJC's study centers around the concept of "statistical significance"—how to define it, whether to disclose it, and what meaning to ascribe to it. When assessing the results of a quantitative study, a researcher must ascertain whether the results are due to an independent variable or to coincidence. To do this, a researcher determines the "p-value"—i.e., "[t]he probability of getting, just by chance, a test statistic as large as or larger than the observed value."⁶⁴ If it is unlikely that the same result would occur by chance, the p-value is low, and the result is "statistically significant."⁶⁵ The FJC's study set the p-value at 0.05, meaning that for a result to be statistically significant there had to be a less-than 5% probability that the observed outcome was due to chance, rather than due to an independent variable.

One criticism of the FJC's study was whether it should have used the conventional 0.05 level of statistical significance or a more forgiving one, such as the 0.10 level.⁶⁶ This makes a difference because applying a standard above 0.05 yields statistically

63. Cecil, *supra* note 55, at 34 ("When we began our study, I also expected that we would find higher grant rates [for 12(b)(6) motions to dismiss], at least in civil rights and employment discrimination cases, as suggested by almost all of the scholarly commentary that immediately followed *Twombly* and *Iqbal*.").

64. David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 211, 291 (3d ed. 2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D07.pdf/\\$file/SciMan3D07.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D07.pdf/$file/SciMan3D07.pdf).

65. *Id.* at 291. A relationship whose "existence cannot be explained by chance alone" is "statistically significant." Lee Epstein et al., *On the Effective Communication of the Results of Empirical Studies* (pt. I), 59 VAND. L. REV. 1811, 1813 n.3 (2006).

66. A p-value of 0.10 means that the results are statistically significant if there is a less than a 10% probability that the results are due to chance. More specifically, a 0.05 p-value means that to attribute the increase in 12(b)(6) filings and dismissals to the new pleading standard, the likelihood of the observed outcome being due to chance is 5% or less. At a 0.10 level, the likelihood of the increase being due to chance is 10% or less.

THE JURY (OR MORE ACCURATELY THE JUDGE) IS STILL OUT

significant increases in the dismissal rate of civil rights and employment discrimination cases.⁶⁷ By selecting the conventional 0.05 measure, the FJC study comes to the opposite conclusion. Scholars, such as Professor Lonny Hoffman, contend that the 0.05 level is an “inappropriately high threshold” and worry that those reading the FJC study—especially policymakers—will consequently conclude that *Twombly* and *Iqbal* have had *no* effect on the dismissal rate of such cases.⁶⁸ This misunderstanding may, in turn, undermine efforts to revise the Federal Rules of Civil Procedure, which are designed to enhance court access.⁶⁹ However, the FJC’s use of the 0.05 level is not uncommon,⁷⁰ and there are sound reasons for using it. Most importantly, the 0.05 level—the standard p-value—helps minimize the risk of erroneously concluding that the dismissal increase is due to *Twombly* and *Iqbal* when it may not be.⁷¹

Whether an empiricist ascribes to the conventional standard or an alternative one, critics are correct that the FJC should disclose its results for various “statistical significance” standards (i.e., whether the probability value is 0.05, 0.10, or some other p-value), and let the reader determine what the appropriate significance level should be.⁷² Such transparency would promote greater understanding of what the findings mean and don’t mean. In response to this concern, the FJC has reported the statistical significance standards—i.e., the p-values—in its updated report.⁷³

Statistical significance is important because it enables a reader to discern the extent to which an outcome may be explained by chance. However, a finding of no statistical significance does not mean that a causal relationship has been affirmatively disproved; it only means that chance cannot be ruled out as a potential explanation for the observed outcome.⁷⁴ By not explicitly explaining the limitations of statistical

67. Letter from Alexander A. Reinert, Assoc. Professor of Law, Benjamin Cardozo School of Law, to Andrea L. Kuperman, Chief Counsel to the Rules Comm. (Mar. 29, 2011) (on file with author); see Alex Reinert, *Pleading as Information Forcing*, 75 LAW & CONTEMP. PROBS. 1 & n.4 (2012); see also Hoffman, *supra* note 36, at 26 (“[A]t a lower [threshold of significance] level many of the observed differences would have been statistically significant.”).

68. Hoffman, *supra* note 36, at 17–18 (“By emphasizing that none of the dismissal increases in the [case categories other than financial instruments] were statistically significant, the FJC’s study leads readers to assume that the study proved *Twombly* and *Iqbal* were not responsible for the higher number and rate of dismissals, as well as to overlook the effects that were observed.”).

69. *Id.* at 7 (“[T]he FJC’s work is now being cited as powerful support for the case against pleading rule reform.”).

70. Hatamyar, *supra* note 51, at 599 n.254 (“As the minimally acceptable level of so-called ‘statistical significance,’ researchers commonly require a maximum probability of 10%—preferably no higher than 5%—that the result could have occurred by chance.”); see ABA SECTION OF ANTITRUST LAW, ECONOMETRICS 18 (2005) (“Levels of significance below 10 percent are rarely accepted.”).

71. Hoffman, *supra* note 36, at 22.

72. Reinert, *supra* note 67, at 1; Hoffman, *supra* note 36, at 25–27.

73. Cecil, *supra* note 55, at 10 & n.34; CECIL ET AL., *supra* note 36, at tbl.4.

74. There are numerous reasons why an outcome may not be statistically significant. Professor Hoffman offers four. He contends that: 1) the FJC study may have used empirical models that relied on faulty assumptions; 2) the sample size of certain subsets of cases—such as torts and employment discrimination—

significance, the FJC's study may lead some policymakers to incorrectly conclude that *Twombly* and *Iqbal* have affirmatively *not* affected the dismissal rate.⁷⁵

More fundamental than the question of the appropriate level of statistical significance is whether one should be used at all. Professor Hoffman faults the FJC for not explaining what a no statistical-significance finding means, and urges the FJC to give greater attention to an alternative indicator—"substantive significance."⁷⁶ "Substantive significance" means that although the relationship between two variables may not be statistically significant, the outcome is practically important.⁷⁷ Diminished access to the courts—as demonstrated by an overall increase in the number and percentage of dismissal orders—remains problematic. By emphasizing statistical over substantive significance, policymakers may not recognize or appreciate this problem of access.⁷⁸ But the debate over statistical versus substantive significance seems really about the emphasis given to each type of significance and the implications of that choice, rather than whether one should choose one metric to the exclusion of the other.⁷⁹ The author of the FJC report correctly notes that selection between statistical and substantive significance is a false choice. The debate is not over which to use, given the important role that each plays; statistical significance should merely be the starting point that enables researchers to eliminate random selection as an explanation for a certain outcome.⁸⁰

were too small; 3) the threshold of significance level selected (0.05) was too rigorous, thereby masking statistically significant results at the 0.10 level; and 4) the use of a two-tailed test (rather than a one-tailed test)—although arguably appropriate—prevented most of the dismissal grant increases from reaching the 0.05 statistical significance threshold. Hoffman, *supra* note 36, at 22–27. He criticizes the FJC for not discussing these possible explanations for a no statistically significant finding in its report and attributes reader confusion to this omission. *Id.* at 8–9, 27.

75. *Id.* at 9, 17, 19, 22. Moreover, Professor Hatamyar Moore criticizes the FJC's summary narrative for "relentlessly downplay[ing]" findings that demonstrate *Iqbal's* impact by not emphasizing statistically significant increases in termination rates and grants with leave to amend in cases, such as civil rights. See Moore, *supra* note 42, at 633–34.
76. Hoffman, *supra* note 36, at 7 ("By summarily announcing that the observed increases were not statistically significant, but not explaining what the technical terminology means (and, as importantly, what it does not mean), the study confuses readers into thinking that it demonstrated the Court's decisions had no impact on dismissal practice."); see also *id.* at 20–21.
77. See *id.* at 20–21.
78. *Id.* at 22. Professor Hatamyar Moore's updated study confirms the same. Moore, *supra* note 42, at 633–34, 634 n.87 (citing another source) (describing "FJC's focus on 'statistical significance' [as] both partially inaccurate and substantively misleading").
79. See Hoffman, *supra* note 36, at 19–21 (arguing that scholars often focus too much on statistical significance and ignore the substantive results); Kaye & Freedman, *supra* note 64, at 291–92 ("Statistical significance does not necessarily establish practical significance. With large samples, small differences can be statistically significant.").
80. Cecil, *supra* note 55, at 12–14; *id.* at 13 ("[B]oth statistical significance and substantive significance are necessary to determine if the findings represent an important change over time.").

2. *Controlling for Independent Variables*

Another dispute fueled by the FJC's study is the propriety of controlling for variables, other than chance, that might explain the decreased dismissal rate. Professor Hoffman questions whether the variables chosen by the FJC were, in fact, independent of *Twombly* and *Iqbal*'s effects.⁸¹ Moreover, Hoffman's study focuses primarily on raw numbers and percentages of filings and dismissals, without consideration of mitigating factors. This approach is rebuked by the FJC's primary drafter and others:⁸²

[F]actors other than the courts' response to the Supreme Court cases are plausible explanations for the changes over time. The multinomial models [those controlling for factors other than *Twombly* and *Iqbal*] allow us to rule out plausible alternative explanations and to better isolate the changes attributable to the courts' response to the cases. . . . Our disagreement over the role of these multinomial models is at the core of our differences⁸³

Moreover, the drafter criticizes Professor Hoffman for his selective incorporation of and reliance on the multinomial models' results, noting his inconsistent rejection of the FJC's approach.⁸⁴

While we can all agree that the number and percentage of orders granting dismissal have gone up post-*Iqbal*,⁸⁵ the important question is why. More specifically, are *Twombly* and *Iqbal* responsible for these changes? The answer to this question, from an empirical standpoint, requires that we be able to rule out other factors that may explain the observed changes. This cannot happen until consensus is reached over how to identify and isolate these potential influences.

81. Hoffman, *supra* note 36, at 23.

82. Cecil, *supra* note 55, at 4–8. Other scholars have cautioned against the same. For example, Professor Hatamyar Moore states:

It is important to note that inferences—if any—to be drawn from the statistics should be confined to the regressions. I believe that the raw frequencies . . . may be of interest to the reader. However, multiple factors may affect the ruling on the 12(b)(6) motion, and two-way tables cannot account for any confounding effects of other variables. As presented in two-way tables, any apparent relationships between the independent variables and outcomes can be misleading.

Hatamyar, *supra* note 51, at 596–97. Consequently, Professor Hatamyar Moore conducts a multinomial logistic regression analysis, in which she controls for the variables pro se status, nature of suit, and circuit where the case was brought to see if these independent variables impact the ruling on 12(b)(6) motions. *Id.* at 617. Her updated study is similar. See Moore, *supra* note 42, at 619–22 (using a multinomial logistic regression controlled for independent variables: circuit, type of judge, pro se status, class action, and case type).

83. See Cecil, *supra* note 55, at 5, 8.

84. *Id.* at 8; see also *id.* at 17 (“Professor Hoffman seems interested in discussing only those effects that indicate an increase in grant rate and ignores any evidence that points in the opposite direction.”).

85. Hoffman, *supra* note 36, at 11–12, 17.

3. *The Significance of the Opportunity to Amend*

An important question raised by the FJC study is the significance of a plaintiff having an opportunity to amend his or her complaint once a 12(b)(6) motion has been granted. The FJC found it relevant that although the percentage of motions granted had generally increased, the distribution between those granted with and without prejudice had changed.⁸⁶ The likelihood of a complaint being dismissed with prejudice has gone down, while the likelihood of one being dismissed without prejudice has gone up.⁸⁷ The greater likelihood of dismissal with leave to amend being granted means that plaintiffs have another bite at the apple.

But does this extra bite help a plaintiff ultimately survive dismissal? In a follow-up study, whose findings were published in a report in November of 2011, the FJC found that a plaintiff's opportunity to amend the complaint reduced the defendant's success in obtaining a dismissal by approximately 10% post-*Iqbal*. However, after controlling for various variables, this advantage existed at a statistically significant level only for those cases challenging financial instruments.⁸⁸ Moreover, the FJC's initial study indicates that once a plaintiff amends a complaint, that complaint is more likely to be dismissed than the original one.⁸⁹ And certainly, it is no help to plaintiffs who don't have access to information—exclusively within the defendant's possession—to be afforded the opportunity to amend the complaint.⁹⁰ This pre-discovery informational asymmetry makes dismissal with the opportunity to amend a Pyrrhic victory. Thus, it is little solace that the motions being granted are those permitting amendment.

86. Consequently, the FJC decided to conduct its analysis and present its findings on the basis of whether a granted dismissal motion was with or without leave to amend. Other scholars have also found the increased dismissal rate, largely due to grants with leave to amend. *See, e.g.*, Hatamyar, *supra* note 51, at 556, 607–08; *id.* at 599 (“[T]here was a slight decline in the proportion of motions granted without leave to amend from the Database under *Conley* (40%) to *Twombly* (39%) to *Iqbal* (37%). However, the percentage of 12(b)(6) motions in the Database that were granted with leave to amend increased from 6% under *Conley* to 9% under *Twombly* to 19% under *Iqbal*.”). More specifically, Professor Hatamyar Moore concluded:

Under *Twombly*, the odds of a 12(b)(6) motion would be granted with leave to amend, rather than denied, were 1.81 times greater than under *Conley*. Under *Iqbal*, the odds . . . were over 4 times greater than under *Conley*, holding all other variables constant.

Id. at 556.

87. JOE S. CECIL ET AL., UPDATE ON RESOLUTION OF RULE 12(b)(6) MOTIONS GRANTED WITH LEAVE TO AMEND; REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1, 18 (2011). More recent studies, however, indicate that this distinction is not dispositive. *See* text accompanying *supra* note 74.

88. CECIL ET AL., *supra* note 87, at 1, 4–5. Like the March 2011 study, the FJC controlled for district court, case type, and the existence of an amended complaint. *Id.* at 4.

89. *Id.* at 19.

90. *See* Hatamyar, *supra* note 51, at 600–01 (“In such cases, a grant of a 12(b)(6) motion, even with leave to amend, will be just the preliminary step in the dismissal of a complaint (or part thereof) with prejudice.”).

4. *The Appropriate Data Pool*

Finally, there are a number of questions about the composition of the FJC's data pool. More specifically, the study has been questioned for excluding motions to dismiss for failure to state a claim in response to counterclaims and affirmative defenses (such as qualified immunity),⁹¹ Rule 12(c) motions for judgment on the pleadings (whose standard is identical to Rule 12(b)(6)),⁹² and cases filed by prisoners and pro se parties (especially where some courts have applied *Iqbal* in such cases),⁹³ while at the same time including motions where the statute of limitations, failure to exhaust administrative remedies, or other immaterial defenses were raised,⁹⁴ as well as cases governed by a higher pleading standard than Rule 8(a)(2) (such as federal securities and fraud cases).⁹⁵ These choices are material. For example, Professor Hatamyar Moore's early study found that pro se status was the biggest predictor of whether a 12(b)(6) motion was granted⁹⁶ and that pro se litigants were four times more likely to have their cases dismissed in response to a 12(b)(6) motion than

91. See Reinert, *supra* note 67, at 2; Moore, *supra* note 42, at 634, 641–42.

92. See Moore, *supra* note 42, at 641–42.

93. Reinert, *supra* note 67, at 2; Hoffman, *supra* note 36, at 33–34; Moore, *supra* note 42, at 634, 638–40.

94. Reinert, *supra* note 67, at 2; Brescia, *supra* note 10, at 260 (criticizing FJC initial report for looking “simply at success rates for all motions to dismiss, regardless of the basis for the motion, including motions based on exhaustion of administrative remedies, statute of limitations, and other grounds not related directly to the specificity of the pleadings [such as *res judicata*, collateral estoppel and immunity]”); see also Hoffman, *supra* note 10, at 34–35 (raising the coding of motions and search terminology as possible places where FJC may have missed Rule 12(b)(6) activity).

Other studies have included a wider range of cases in the data set. For example, the Hatamyar Moore study excluded cases that were decided under Federal Rule 9(b); cases decided sua sponte under the Prison Litigation Reform Act, 28 U.S.C. § 1915A(b)(1) (2006), and the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15, 18 U.S.C.); and cases decided on other grounds, such as lack of subject matter jurisdiction or summary judgment under Federal Rule 56. However, Professor Hatamyar Moore included pro se cases decided under Rule 12(b)(6). See Moore, *supra* note 42, at 609; Hatamyar, *supra* note 51, at 586–87. Kendall Hannon's study excluded fraud cases governed by Federal Rule 9(b)'s particularity pleading standard; cases brought under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, which are subject to a more stringent standard under the PSLRA, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15, 18 U.S.C.); and in forma pauperis and pro se cases, which are arguably subjected to a lower pleading standard. Hannon, *supra* note 44, at 1830–34. Cases were also removed from the database if they did not reflect the “spirit” of the search. These included cases involving motions for summary judgment, to amend, to reconsider a ruling, and to dismiss for lack of subject matter jurisdiction. *Id.* at 1834; see Clemont & Yeazell, *supra* note 42, at 840–42.

95. See Moore, *supra* note 42, at 642–43. Federal securities cases brought under the PSLRA and fraud cases governed by Rule 9 are subjected to more rigorous pleading standards than Rule 8(a)(2), and therefore their inclusion could inflate the percentage of Rule 12(b)(6) motions granted.

96. See Hatamyar, *supra* note 51, at 621 (“[B]y far, the variable with the largest predicted effect on whether a 12(b)(6) motion will be granted (with or without leave to amend), as opposed to the motion being denied, is whether the plaintiff is pro se.”); *id.* at 623.

represented litigants.⁹⁷ This factor is particularly relevant for plaintiffs bringing civil rights cases, half of whom are pro se.⁹⁸

In its defense, the FJC excluded cases it thought might distort the application of the new pleading standard or fail to apply it all together.⁹⁹ The FJC also excluded cases because the disposition did not center on the plaintiff's case-in-chief—such as those responding to counterclaims, cross-claims, and Rule 12(c) motions.¹⁰⁰ Moreover, supplemental analyses by the FJC indicated that there is no statistically significant effect from excluding certain types of cases based on a movant's chance of prevailing post-*Iqbal*.¹⁰¹

D. Consensus Among Empiricists

Although there is substantial debate among empiricists over *Twombly* and *Iqbal*'s impact, there is also noteworthy consensus. The FJC and other empiricists agree that there are more 12(b)(6) motions being granted post-*Iqbal*.¹⁰² According to the FJC:

Even if the rate at which motions are granted remains unchanged over time, the total number of cases with motions granted may still increase. The 7% increase in case filings combined with the increase in the rate at which motions are filed in 2010 may result in more cases in recent years, with motions granted, even though the rate at which motions are granted has remained the same.¹⁰³

The FJC and other empiricists also agree that the FJC's initial study is subject to limitations. It does not take into account the substantive law upon which cases were

97. *Id.* at 621. Professor Brescia's study also found that pro se litigants, which comprised a quarter of the cases analyzed, were at a distinct disadvantage in the dismissal rates of employment and housing discrimination cases post-*Iqbal*. See Brescia, *supra* note 10, at 272–73.

98. Hatamyar, *supra* note 51, at 613. Professor Hatamyar Moore's updated study confirms the same. See Moore, *supra* note 42, at 615–17, 622, 626.

99. Cecil, *supra* note 55, at 21–23.

100. *Id.* at 23.

101. *Id.* at 25.

102. See Brescia, *supra* note 10, at 241 (“[T]wo things are clear: motions to dismiss challenging the sufficiency of the pleadings are much more common since *Iqbal*, and far more cases are being dismissed after the release of that decision than before. At least in this regard, then, the initial fears about the impact of *Twombly* and *Iqbal* seem well founded, regardless of whether dismissal rates have changed dramatically.”); *id.* at 262 (“[A]part from the mere dismissal rate, the number of cases in which complaints were dismissed, either in whole or in part, rose dramatically after *Iqbal*.”).

103. CECIL ET AL., *supra* note 36, at 22; see also CECIL ET AL., *supra* note 87, at 5 (finding an increased filing rate of 12(b)(6) motions combined with stable grant rate results in overall increase in percentage of cases dismissed); Cecil, *supra* note 55, at 11 (stating that prior study “explicitly acknowledges that increases in filing rates of motions to dismiss due to *Twombly* and *Iqbal* may result in an increase in the number of motions granted even if the grant rate remains unchanged”).

THE JURY (OR MORE ACCURATELY THE JUDGE) IS STILL OUT

decided,¹⁰⁴ or the change in the pleading practices of the plaintiffs' bar.¹⁰⁵ The study cannot discern whether plaintiffs are deterred from filing valid cases post-*Twombly* and *Iqbal*,¹⁰⁶ or whether meritorious cases have been dismissed.¹⁰⁷

The study also has design limitations. It did not: examine motions to dismiss for failure to state a claim under 12(b)(6) that were filed after the first ninety days of a case;¹⁰⁸ cover all types of cases (e.g., anti-trust cases were excluded); include all relevant motions and orders;¹⁰⁹ exclude cases dismissed for reasons other than insufficient factual pleadings;¹¹⁰ or focus on cases more vulnerable to dismissal because of informational asymmetry.¹¹¹ Critics have been the catalyst for a variety of subsequent changes, ranging from the FJC's disclosing results at different p-values, to including pro se cases and those containing counterclaims and cross-claims.¹¹²

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104. CECIL ET AL., *supra* note 36, at 22; CECIL ET AL., *supra* note 87, at 5.
 105. CECIL ET AL., *supra* note 36, at 22–23, 23 n.37; CECIL ET AL., *supra* note 87, at 5 (“Nor were we able to take into account changes in pleading practice, or the fact that recent complaints are more likely to include a recitation of facts that support the claim.”); Moore, *supra* note 42, at 609.
 106. Cecil, *supra* note 55, at 18 (“These findings do not prove that cases are not being deterred from filing in federal court”); Hoffman, *supra* note 36, at 28–30; Moore, *supra* note 42, at 609; *cf.* Miller, *supra* note 10, at 77 (discussing the likelihood of *Twombly* and *Iqbal* in deterring plaintiffs from filing potentially meritorious cases because of a more rigorous pleading standard and increased costs associated with defending against a 12(b)(6) motion); Malveaux, *Front Loading and Heavy Lifting*, *supra* note 10, at 102–03 (discussing the more rigorous pleading standard’s potential chilling effect on filing meritorious cases).
 107. Cecil, *supra* note 55, at 1 n.2; Moore, *supra* note 42, at 609; *cf.* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011) (suggesting that *Iqbal* and *Twombly* have not helped filter out meritless cases).
 108. Cecil, *supra* note 55, at 10 (“We acknowledge that the filing rates for motions to dismiss throughout the life of the case will be higher than the rates we found after 90 days, and noted this in our report.”); Hoffman, *supra* note 36, at 33. The FJC study has also been criticized for limiting its data pool to only six-month periods in 2006 and 2010 and to only twenty-three federal district courts. *See* Moore, *supra* note 42, at 637–38, 634–35.
 109. CECIL ET AL., *supra* note 87, at 1. The FJC is attempting to locate the missing motions and orders and to subsequently reanalyze the data to see if these errors change the outcome. Cecil, *supra* note 55, at 3–4.
 110. Cecil, *supra* note 55, at 37 (“[O]ur method may have its own shortcomings (such as including some irrelevant cases that are not affected by the *Twombly/Iqbal* standard). . . .”); CECIL ET AL., *supra* note 36, at 23; CECIL ET AL., *supra* note 87, at 5 (“Unfortunately, we were not able to restrict this study to motions that involve issues of the sufficiency of the factual pleadings.”); Moore, *supra* note 41, at 609; Hoffman, *supra* note 36, at 30–31; *see* Brescia, *supra* note 10, at 260 (“[S]imply at success rates for all motions to dismiss, regardless of the basis for the motion, including motions based on exhaustion of administrative remedies, statute of limitations, and other grounds not related directly to the specificity of the pleadings.”); Clermont & Yeazell, *supra* note 42, at 839 n.66 (stating that because only a subset of 12(b)(6) motions challenge the factual sufficiency of allegations under *Twombly* and *Iqbal*, the total number of 12(b)(6) motions will hide the impact of such cases); Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337, 1366 n.140 (2010).
 111. CECIL ET AL., *supra* note 87, at 5 (“These findings do not rule out the possibility that the pleading standards established in *Twombly* and *Iqbal* may have a greater effect in narrower categories of cases in which respondents must obtain the facts from movants in order to state a claim.”); Cecil, *supra* note 55, at 1 n.2.
 112. Cecil, *supra* note 55, at 1 n.3.

The FJC continues to do important empirical work in the pre-trial area and there are additional promising initiatives being taken by the FJC. For example, the FJC has proposed a comprehensive study of pre-trial dispositive motions to the Advisory Committee on Civil Rules. Based on collaboration between the FJC and various scholars, the study will examine the role and interaction of such motions, and motion practice changes over time.¹¹³ Additionally, at the behest of Judge Lee Rosenthal, a pilot project has been developed to provide a new pre-trial procedure in federal employment cases that may improve litigation efficiency and discovery.¹¹⁴

E. Recent Studies Suggest Compromised Viability of Civil Rights Cases

More recent empirical studies following the FJC's reports indicate that the viability of civil rights cases under the new federal pleading standard has been compromised. In an updated study attempting to replicate the FJC's study,¹¹⁵ Professor Hatamyar Moore found a substantially greater dismissal rate post-*Iqbal* than the FJC did.¹¹⁶ Her updated study—which included a larger sample of post-*Iqbal* cases—indicated that, in general, 12(b)(6) motions were more likely to be granted in full (with and without leave to amend) post-*Iqbal*.¹¹⁷ Courts granted such

113. Memorandum from Joe Cecil, Senior Research Associate, Fed. Judicial Ctr., to Hon. David Campbell, Chair of the Advisory Comm. on Civil Rules, Fed. Judicial Ctr. 1–3 (Mar. 13, 2012).

114. FED. JUDICIAL CTR., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (2011). This pilot project “creates a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action.” *Id.* at 2. Both sides are entitled to this discovery thirty days after the defendant files a responsive pleading or motion. *Id.* Under this new process, both sides are also required to disclose certain information and documents to assist the parties in narrowing the issues and streamlining subsequent discovery. *Id.* This system replaces the initial disclosure process, but does not preclude further discovery. *Id.* at 1–15.

115. Professor Hatamyar Moore's updated study is based on the same design as her original one, except she increased the number of randomly selected federal district court opinions ruling on a 12(b)(6) motion from 200 to 500 in the year following *Iqbal*. Moore, *supra* note 42, at 609–10. Like her prior study, she examined only those orders published in the Westlaw database. *Id.* at 612. The study excluded dismissals on grounds other than 12(b)(6). *Id.* at 610–11. Cases involving a more rigorous pleading standard—such as those alleging fraud or a PSLRA violation—were also excluded. *Id.* at 610–11. The study included pro se cases that were consistent with the 12(b)(6) procedural posture and the Rule 8(a)(2) pleading standard. After applying these exclusions and inclusions, Hatamyar Moore examined a total of 1326 cases in the database: 444 under *Conley*, 422 under *Twombly*, and 460 under *Iqbal*. *Id.* at 604, 611.

In an attempt to replicate the results of the FJC's study, Professor Hatamyar Moore's updated study removed pro se plaintiffs' cases and limited the time frame to cases decided in 2006 and 2010. *Id.* at 608. However, her updated study differed because it drew cases from eighty-six rather than twenty-three federal district courts; relied on the entire 2006 calendar year, but only the first six months of 2010; and included only Westlaw-published cases. *See id.* at 643–44.

116. *Id.* at 608–09.

117. *Id.* at 614. This study found that 61% of motions were granted under *Iqbal*, in comparison to 46% under *Conley*. *Id.* at 609. Moreover, cases are more likely to be terminated under *Iqbal* than *Conley*. *Id.* at 624–26, 648–50.

THE JURY (OR MORE ACCURATELY THE JUDGE) IS STILL OUT

motions at an even higher rate for constitutional civil rights cases.¹¹⁸ This is true even when pro se plaintiffs were excluded.¹¹⁹

Another recent empirical study by Professor Raymond Brescia focused exclusively on a database of employment and housing discrimination cases, and also offers promise for understanding the impact of the new federal pleading standard on the viability of civil rights cases. Although the study found little impact on the dismissal rates post-*Twombly* in employment and housing cases, it found a considerable increase post-*Iqbal* for such cases.¹²⁰ Unlike other empirical studies, Professor Brescia's study is unique in its focus on a discrete subset of civil rights cases and on dismissals based on the sufficiency of the factual allegations pled.¹²¹

Not only do more recent studies conclude that civil rights complaints are more vulnerable to dismissal post-*Iqbal*, but the studies demonstrate that this vulnerability exists—at a statistically significant level—regardless of whether a judge grants leave to amend the complaint. While the increase in dismissals is largely attributable to grants with leave to amend,¹²² there is now evidence that grants *without* leave to amend are on the rise. Civil rights plaintiffs run a greater risk of having their complaints dismissed with prejudice and in their entirety. For example, in his examination of employment and housing discrimination cases, Professor Brescia found that courts were not only more likely to dismiss such cases post-*Iqbal*, but to dismiss them with prejudice.¹²³ Likewise, Professor Hatamyar Moore's updated study indicates that the risk that a 12(b)(6) motion to dismiss will be granted with prejudice, compared to denied, was 1.75 times greater under *Iqbal* than *Conley*.¹²⁴ Unlike Professor Hatamyar Moore's prior study, her updated study found that this risk was statistically significant.¹²⁵ Moreover, unlike her prior study, the probability of a

118. *Id.* at 618–19. The study found that 64% of motions were granted under *Iqbal* for constitutional civil rights cases, in comparison to 41% under *Conley*. *Id.* at 619. Moreover, for constitutional civil rights cases, courts were 3.77 times more likely to grant in full a motion to dismiss with prejudice under *Iqbal* than under *Conley*. *Id.* at 623 & tbl.4. And for a motion to dismiss without prejudice, the courts were fourteen times more likely to grant the motion in full, rather than deny, under *Iqbal*. *Id.* at 623.

119. *Id.* at 618–19.

120. Brescia, *supra* note 10, at 239–40. Professor Brescia examined the impact of the new federal pleading standard on motions to dismiss for failure to state a claim under Rule 12(b)(6) and motions for judgment on the pleadings under Rule 12(c) in employment and housing discrimination cases. *Id.* at 239. The study included claims brought under Title VII, the Rehabilitation Act, the Americans with Disability Act, the Age Discrimination in Employment Act, the Family Medical Leave Act, the Fair Housing Act, the Equal Protection Clause, and retaliation provisions. *Id.* at 266. He limited his study to federal district court orders in the Lexis database that assessed the factual specificity of the pleadings forty-one months before *Twombly*, twenty-four months between *Twombly* and *Iqbal*, and nineteen months after *Iqbal*. *Id.* at 262–63. He also excluded pro se cases. *Id.* at 268. His study does not control for factors the FJC did, such as circuit and district courts, or amended complaints.

121. *Id.* at 260.

122. Moore, *supra* note 42, at 606–08, 621.

123. See Brescia, *supra* note 10, at 260–61, 268–70.

124. Moore, *supra* note 42, at 605.

125. *Id.* at 605, 621.

plaintiff's case being entirely dismissed with prejudice was 1.71 times greater under *Iqbal* than *Conley*, a statistically significant rate.¹²⁶ The risk was even worse for civil rights cases at 3.77 times greater.¹²⁷ Thus, whatever optimism existed because plaintiffs could at least amend their complaints post-dismissal has been dampened.

But the battle of the experts continues. The author of the FJC's report criticizes these new studies as well. Professor Hatamyar Moore's study is taken to task for excluding certain relevant variables,¹²⁸ relying on the Westlaw database,¹²⁹ and using flawed search terms for capturing post-*Iqbal* decisions.¹³⁰ Similarly, Professor Brescia's study is faulted for relying on the Lexis database, not controlling for certain variables, and using pre-*Twombly* cases that are atypical of pleadings practice at the time.¹³¹ This battle is unlikely to be won anytime soon.¹³²

IV. ACCURATELY ASSESSING THE POST-TWOMBLY AND IQBAL LANDSCAPE USING BAR AND BENCH FEEDBACK

The empirical data, although important, clearly cannot tell the whole story. There are other indicia of impact, drawing on feedback from the bar and bench, that policymakers should consult.

A. Lawyers' Perspectives

One source of feedback is the lawyers themselves, those in the trenches who litigate civil rights and employment discrimination cases every day. Although some lawyers report not seeing an impact of the new pleading standard on their practices,¹³³ the plaintiffs' bar is responding to 12(b)(6) motions that they never would have faced before *Twombly* and *Iqbal*. In a survey of lawyers with the National Employment Lawyers Association (NELA), 75% reported this to be the case.¹³⁴ Practitioners

126. *Id.* at 605.

127. *Id.* at 623 & tbl.4 (“[I]n constitutional civil rights cases courts were 3.77 times more likely to grant motions to dismiss in full without leave to amend, as compared to deny, under *Iqbal* than under *Conley*.”).

128. Cecil, *supra* note 55, 25–27.

129. *Id.* at 27–31.

130. *Id.* at 31–34.

131. *Id.* at 36–37. A follow-up study of a subset of employment and housing discrimination cases by the FJC found an increase in the dismissal rate that did not meet the conventional standard of statistical significance. *Id.* at 35–36.

132. See Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012) (finding that *Twombly* and *Iqbal* have a negative impact on 15 to 21% of plaintiffs who face 12(b)(6) motions).

133. See THOMAS E. WILLGING & EMERY G. LEE III, IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 25 (2010) (finding that telephone interviews with thirty-five attorneys revealed that most did not see a change in their practices).

134. EMERY G. LEE III & THOMAS E. WILLGING, ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 12 (2010).

THE JURY (OR MORE ACCURATELY THE JUDGE) IS STILL OUT

revealed that they have changed their pleading practices, when possible, to accommodate the more rigorous pleading standard. For example, employment lawyers report making more factual allegations in their complaints following the Supreme Court's seminal pleadings decisions.¹³⁵ In addition, 70% of NELA lawyers who filed employment discrimination cases post-*Twombly* said they changed the way they structured their complaints.¹³⁶ Of those attorneys, 94% included more factual allegations in their complaint post-*Twombly*.¹³⁷ Some lawyers have been chilled or discouraged from bringing potentially meritorious cases altogether.¹³⁸

B. Judicial Trends

Another source for learning about the impact of the new pleading standard is the judges themselves, those actually deciding these dispositive motions. Some district courts are dialing back¹³⁹ from what initially seemed like a rigid pleadings approach and a bleak picture for the viability of civil rights and employment discrimination cases. Although the federal courts of appeals affirm most 12(b)(6) dismissals under *Iqbal*,¹⁴⁰ some courts are emphasizing a flexible, context-specific approach whose leniency is dependent on the circumstances.¹⁴¹ In line with this approach, some

135. *Id.*

136. *See id.* at 11–12.

137. *See id.* at 12.

138. *See* JOSHUA CIVIN & DEBO P. ADEGBILE, RESTORING ACCESS TO JUSTICE: THE IMPACT OF *IQBAL* AND *TWOMBLY* ON FEDERAL CIVIL RIGHTS LITIGATION 9–10 (Sept. 2010). For example, Elizabeth J. Cabraser, legal scholar and partner at Lieff Cabraser Heimann & Bernstein, LLP, explained the impact *Twombly* and *Iqbal* had on her plaintiff-based practice by stating:

We spend a lot more time [crafting pleadings] and I will say that we do reject some cases that we believe do have merit because the truth is implausible on its face. History is just one implausible thing after another, and sometimes what happens to people is implausible, too So, it has had an impact, probably more on my clients and potential clients than on our law firm.

ACS Convention Panel: Access to Federal Courts after Iqbal and Twombly, *supra* note 41. The FJC's empirical data, however, does not support this conclusion. *See* Cecil, *supra* note 55, at 34 ("These findings do not prove that cases are not being deterred from filing in federal court Nevertheless, these findings offer no support to those who believe that such deterrence is taking place, and no better evidence appears to be available.")

139. For example, Professor Patricia Hatamyar Moore's updated study found that from 2009 to 2010, the rate of federal district courts' grants of 12(b)(6) motions to dismiss with leave to amend decreased, while denials increased. Moore, *supra* note 42, at 647. Among other explanations for the difference between 2009 and 2010, she noted that "[o]ne could speculate that district courts overread *Iqbal* in 2009, and after receiving 'appellate court guidance,' backed off in 2010." *Id.*

140. Moore, *supra* note 42, at 626–27. Of the roughly one hundred appellate court cases collected by the Civil Rules Law Clerk up to July 26, 2010, 73% of them affirmed district court grants of 12(b)(6) motions. Memorandum from Andrea Kuperman, Rules Law Clerk to Hon. Lee A. Rosenthal, to Civil Rules Comm. & Standing Rules Comm. (July 26, 2010) [hereinafter Kuperman Memo], available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_072610.pdf. Of the forty-six civil rights dismissals under 12(b)(6), 74% of them were affirmed. *Id.*

141. CECIL ET AL., *supra* note 36, at 2–3.

district court judges are permitting pleading “upon information and belief” when appropriate, and liberally granting leave to amend, as confirmed by the empirical data.¹⁴² And, rather than ruling immediately on a motion to dismiss, some judges are even permitting the parties to take limited, targeted discovery before ruling on a 12(b)(6) motion to dismiss in which the defendant claims that the plaintiff’s claims are implausible.¹⁴³ This approach—which I have advocated elsewhere¹⁴⁴—addresses the informational asymmetry problem and levels the playing field for civil rights claimants who cannot get court access because of defendants’ exclusive possession of critical evidence pre-discovery.

Moreover, in a study of employment and housing discrimination cases conducted by Professor Brescia, it seems the manner in which many judges are using the plausibility standard does not comport with the way the Supreme Court used it in *Twombly* and *Iqbal*; they are rarely dismissing a case if there exists an equally plausible, legal alternative explanation for a defendant’s conduct, and are rarely appearing to explicitly invoke their “judicial experience and common sense.”¹⁴⁵ To determine how and to what extent district court judges are using the plausibility test, Professor Brescia examined a subset of ninety-eight post-*Iqbal* cases in which motions to dismiss were granted in full with prejudice and non-disparate impact claims were raised exclusively. Professor Brescia concluded that only about half of these cases applied the *Twombly* and/or *Iqbal* plausibility standard and, where the standard was cited, rarely did district courts do more than simply insert boilerplate language about the new standard. Professor Brescia found that in only 4% of the ninety-eight cases did the court apply the “more plausible” test, i.e., comparing the plaintiff’s allegations to an alternative explanation for defendant’s conduct.¹⁴⁶

Indeed, the Supreme Court itself reminded litigants of the relative ease with which pleadings can be brought in *Skinner v. Switzer*,¹⁴⁷ citing pre-*Twombly* and *Iqbal* case law. Unfortunately, not much can be read into *Skinner*. While the Court in *Skinner* reiterates Rule 8’s requirement that only a short and plain statement of a

142. *Id.* at 1 n.4; Kuperman Memo, *supra* note 140, at 4–5, 35.

143. See *Swanson v. Citibank, N.A.*, 614 F.3d 400, 412 (7th Cir. 2010) (Posner, J., dissenting) (“If the plaintiff shows that he can’t conduct an even minimally adequate investigation without limited discovery, the judge presumably can allow that discovery, meanwhile deferring ruling on the defendant’s motion to dismiss.”); *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 821–22 (7th Cir. 2009) (allowing a pro se prisoner limited discovery to ascertain names of defendants); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051–52 (9th Cir. 2008) (affirming the district court’s 12(b)(6) dismissal of the amended complaint after the court permitted discovery so the plaintiffs could gather facts to meet antitrust pleading requirements); *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 321 (N.D. Cal. 2007) (allowing for limited discovery under *Twombly*); see Malveaux, *Front Loading and Heavy Lifting*, *supra* note 10, at 131 n.388, 137–38.

144. See generally Malveaux, *Front Loading and Heavy Lifting*, *supra* note 10.

145. Brescia, *supra* note 10, at 240–41.

146. See *id.* at 279.

147. 131 S. Ct. 1289, 1296 (2011) (holding that plaintiff, a death row inmate, had alleged a plausible claim that the State of Texas violated his constitutional rights by denying him access to DNA evidence to challenge his conviction).

THE JURY (OR MORE ACCURATELY THE JUDGE) IS STILL OUT

claim is necessary, and reminds the lower courts that a plaintiff need not pin down his precise legal theory at the pleadings stage or give an “exposition of his legal argument,” the Court still requires that a plaintiff set forth a *plausible* claim.¹⁴⁸

And in *Matrixx Initiatives, Inc. v. Siracusano*,¹⁴⁹ the Supreme Court unanimously affirmed the Ninth Circuit’s reversal of the dismissal of a securities fraud class action at the pleading stage.¹⁵⁰ However, the Court’s holding that plaintiffs adequately pled the elements of materiality and scienter—while good for investors alleging violations of Section 10(b) of the Securities and Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5—is too specific to offer any broad pleadings lessons.¹⁵¹

V. CONCLUSION

In sum, the civil litigation landscape is evolving. Emboldened by *Twombly* and *Iqbal*, defendants are filing more 12(b)(6) motions to eliminate cases earlier in the pipeline, and the plaintiffs’ bar is adapting by changing its pleading practices or foregoing litigation altogether. More cases are being dismissed, and at greater rates for those with leave to amend. It remains unclear to what extent this trend is related to the more onerous pleadings bar established by these seminal cases. The courts continue to shape the contours of the pleading terrain, exercising their discretion in ways more sympathetic than initially envisioned. Trial by jury, or trial by motion? For civil rights and employment discrimination cases, the jury (or, more accurately, the judge) is still out.

148. *Id.* at 1296.

149. 131 S. Ct. 1309 (2011) (applying the plausibility standard, the Court held that plaintiff-shareholders had alleged facts plausibly suggesting that reasonable investors would have considered Matrixx’s reports of the adverse effects of a new nasal spray material to their investment decisions, and that Matrixx acted with the requisite state of mind to defraud investors).

150. *Id.* at 1313–14.

151. *See id.* at 1322, 1325.