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"Only Procedural": oughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases

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I. INTRODUCTION

A number of important procedural decisions by the U.S. Supreme Court have had a dramatic impact on plaintiffs' access to the federal courts, their right to a jury trial, and even the substantive law of employment discrimination. The first cases involved the so-called "summary judgment trilogy,"[1] then *Iqbal*[2] and *Twombly*[3] dealing with motions to dismiss under Federal Rule of Civil Procedure 12(b)(6),[4] and most recently *Wal-Mart Stores, Inc. v. Dukes*[5] addressing class certification. In theory, these decisions were "only procedural," either addressing preliminary matters at a relatively early stage of the case or, at the very least, before the merits of the case had been litigated.

But this characterization—"only procedural"—dramatically understates the significance of these decisions. The impact of these cases stretches beyond the usual one affecting the court's evaluation of the complaint or its determination of summary judgment or class certification. Typically, these rulings can end a case, or dramatically reshape it. Threshold determinations have always required a court to make substantive predictions about the merits of the plaintiff's case. Indeed, early rulings on procedural issues, such as dismissal motions and summary judgment, have often comprised an effective revision of substantive law through the back door.

The cases we discuss here, however, have gone much further: more and more the Supreme Court is inviting—even encouraging—trial courts to evaluate the merits of the case on the basis of limited, even skewed, information long before the plaintiff has had an opportunity for discovery. As a result, more and more courts are weighing evidence, evaluating the credibility of claims and witnesses, and substituting their normative judgments for a jury's determination. Not only are factual determinations affected by the new "procedural standards," but, more significantly, the law is also affected.

Our interest in this issue was piqued by the Supreme Court's recent decision in *Wal-Mart*, where, in the course of ruling on the procedural issue of "commonality" for class certification purposes, the Court effectively reinterpreted and dramatically narrowed the substantive law of gender discrimination and equal pay. First, the Court conflated Rule 23(a)'s simple question—*are* there common questions of law and fact—with Rule 23(b)'s more complex one—*how* common are those common questions and do they predominate over issues in the individual cases. The answer to the first question, at least under the then-existing standards, was clear: there were plainly questions common to the plaintiff class, even if the Court ultimately rejected class status under Rule 23(b). But, the second finding, that the case failed the "commonality" prong of Rule 23(a) because of a failure of plaintiffs' proof, was an

1. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

2. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

3. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

4. Fed. R. Civ. P. 12(b)(6). All rules referenced throughout this essay are to the Federal Rules of Civil Procedure unless otherwise noted.

5. 131 S. Ct. 2541 (2011).

extraordinary conclusion at the class certification stage. The plaintiffs, the majority held, could show no "general policy" of discrimination, as if redressing discrimination in the twenty-first century is about ferreting out overt discrimination, the offending policy, or the explicit discriminator. While class certification cases may pose special opportunities to confuse procedure and substance, we want to briefly explore this problem in other preliminary procedural contexts as well.

This essay examines the substantive law dimensions of *Iqbal* and *Twombly*, particularly in employment discrimination cases. In both cases, the Court transformed a relatively cursory evaluation appropriate for a preliminary stage of the litigation, namely, whether any set of facts could support the allegations in a complaint, into a more searching inquiry about whether those allegations were "plausible." We predict that the discrimination complaints that count as "plausible" under this new framework are likely to be influenced by the same biases that were present in *Wal-Mart*—cases with the "smoking gun" of discriminatory policies. We consider these issues from our different vantage points as an academic and a former federal judge, both involved for many years in civil rights and employment discrimination litigation in different settings. We share a concern about how substantive law on discrimination can be shaped, misinterpreted, and misread in many of these "only procedural" rulings.

We begin in Part II with a brief discussion of *Wal-Mart* to illustrate how these preliminary procedural decisions have implications for substantive law. We then examine in Part III how *Twombly* and *Iqbal* have affected the substantive law dimensions of Rule 12(b)(6) decisions in general, and in Part IV, we consider the special problems that *Iqbal* and *Twombly* pose in employment discrimination cases in particular. Finally, in Part V, we conclude with some general lessons to be drawn from seeing "substance" in preliminary procedural decisions, the implications of this inquiry for federal civil litigation, and raise questions for further exploration.

II. THE SUBSTANTIVE LAW DIMENSIONS OF PROCEDURAL DECISIONS: *WAL-MART*

Wal-Mart, the largest employment discrimination case in the United States raising Equal Pay Act claims,[6] was brought as a class action. The class certification issues were litigated after three years of extensive pre-certification discovery, including expert testimony. The evidence showed that Wal-Mart enabled supervisors to set pay within a range of about $2 an hour and, further, that supervisors exercised that discretion in such a way as to pay women less than similarly situated men.[7] In addition, store managers would decide on promotions by choosing an individual employee, rather than following a rational, uniform process in which all employees could participate.[8] The bottom line was that men were regularly promoted over similarly situated women, and, in some cases, they were men with weaker credentials.

6. *See, e.g.*, Joan Biskupik, *Supreme Court Limits Wal-Mart Sex Discrimination Case*, USA Today (June 26, 2011, 9:24 AM), http://usatoday30.usatoday.com/money/industries/retail/2011-06-20-walmart-sex-bias-case_n.htm.

7. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 146–47 (N.D. Cal. 2004).

8. *Id.* at 148–49.

The Supreme Court ruled that because of the subjective nature of Wal-Mart's pay decisions and the lack of a centralized policy, there was insufficient commonality of the plaintiffs' claims under Rule 23(a) to qualify for class action treatment. The Court summarily rejected the extensive expert testimony, the affidavits of 120 employees, and other data. Gender disparities that were consistent across the individual discretionary decisions of supervisors were found to be insufficient to establish commonality. Rather, the Court seemed to suggest that Wal-Mart had to have an explicit policy of gender discrimination for the plaintiffs to qualify for class action treatment, in effect a "smoking gun" or an identifiable practice, like a testing requirement, that resulted in disparate treatment.[9] The requirement of an explicit or common policy is fundamentally inconsistent with employment discrimination law to date, let alone the real problems of discrimination in the twenty-first century marketplace.

Many commentators have been critical of *Wal-Mart*.[10] But one aspect of the case that has been less examined is the significance of this commonality ruling on the merits analysis. Preliminary rulings can have many impacts: they can establish the law of the case, encourage settlement, frame discovery, etc. If the case does not go forward as a class action, it may well be over; in some cases, *Wal-Mart* among them, individual cases will be too small to be individually pursued. But the Court's ruling on commonality and its implications for equal pay law may also shape other cases—not only potential class actions, but also the run-of-the-mill individual discrimination case.

Significantly, a threshold issue in the appeal in *Wal-Mart* was the scope of the class certification determination. Plaintiffs argued that the motion was simply a preliminary determination of whether there was any "common issue" under the "commonality" requirement of Rule 23(a). The defendant claimed that the class certification motion went more directly to "the merits" of the case or, as Justice Ginsburg noted, asked not simply whether there were *any* common questions of law

9. The Court rejected the testimony of Dr. William Bielby showing how the kinds of policies adopted by Wal-Mart made the company vulnerable to bias. While Dr. Bielby could show the risks of those practices, he could not say what percentage of Wal-Mart's decisions were determined by stereotyped thinking. To the Court's majority, "[i]f Bielby admittedly has no answer to that question [the precise number of decisions affected by stereotyped thinking], we can safely disregard what he has to say. *It is worlds away from significant proof that Wal-Mart operated under a general policy of discrimination*." *Wal-Mart*, 131 S. Ct. at 2563 (emphasis added). Testimony like that from Dr. Bielby had become commonplace in so called "second generation" discrimination cases. Melissa Hart & Paul Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Cases*, 78 Fordham L. Rev. 37, 41 (2009) ("Social framework testimony has become a central element of many employment discrimination disputes over the past two decades. In these cases, a plaintiff or plaintiffs typically will put forward a social psychologist or expert in organizational behavior to testify about the widespread incidence of stereotypes and bias, and to identify within the challenged workplace those policies that tend to permit or to discourage operation of such bias."). Indeed, Dr. Bielby's testimony was virtually identical to the testimony of Dr. Susan Fiske, which the Supreme Court had credited in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236 (1989). *See* Martha Chamallas, *Of Glass Ceilings, Sex Stereotypes, and Mixed Motives: The Story of* Price Waterhouse v. Hopkins, *in* Women and the Law Stories (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011).

10. *See, e.g.*, Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions:* Dukes v. Wal-Mart *and* AT&T Mobility v. Concepcion, 7 Duke J. Const. L. & Pub. Pol'y 73 (2011); Erwin Chemerinsky, *New Limits on Class Actions*, Trial, Nov. 2011, at 54, *available at* http://www.justice.org/cps/rde/xchg/justice/hs.xsl/16997.htm.

or fact, the first question of Rule 23(a), but also *how* common the law-fact questions were, the standard of Rule 23(b).[11] The majority of the Court accepted Wal-Mart's approach and evaluated "commonality" in such a way as to conflate 23(a)'s commonality prong and 23(b)'s evaluation of whether the common questions predominated. And they did so in the context of the extensive evidence that had been amassed for class certification purposes. In the light of that record, the majority's findings not only raised the bar for class action treatment, but also effectively recharacterized gender law in the workplace. Justice Scalia's majority opinion suggests that a discretionary decisionmaking process plus evidence of an adverse impact is not enough as a matter of substantive law to qualify for class action treatment and, by implication, not enough to prove discrimination at all.

Wal-Mart runs the risk of reversing many years of rulings on gender discrimination that emphasized the complexity and the nuanced nature of discrimination, rulings that demonstrated that discrimination does not involve only the explicit policy or the obviously biased decisionmaker. While there was a narrow basis on which to rule—notably, Justice Ginsburg's conclusion that there were common issues but they did not predominate given the extraordinary, nationwide scope of the case—the majority chose to sweep much more broadly. The result was dramatic: a decision that was a preliminary one in the context of the litigation, but hardly "only procedural."[12]

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11. Citing to Arthur Miller, the amicus brief noted that the "23(a)(2) commonality requirement is a 'simple, low level' requirement that there be either one significant common issue or several common issues. It is a standard that is 'relatively easy to satisfy.'" Brief for Civil Procedure Professors as Amici Curiae Supporting Respondents, at 6, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277). Indeed, before *Wal-Mart*, courts have uniformly held that determinations of fact on certification are not binding on the merits of the litigation at all. *Id.* at 8. Courts have also held that the commonality prong is analytically distinct from the predominance question, which requires a closer analysis. *Id.* at 13.

12. The impact of *Wal-Mart* could be seen almost immediately. In *Barrett v. Option One Mortgage Corp.*, No. 08-10157-RWZ (D. Mass. Sept. 18, 2012), Judge Zobel decertified a class based exclusively on the authority of *Wal-Mart*. The class had been composed of African American borrowers who had obtained mortgage loans from one of the defendants within a certain amount of time. They claimed that Option One's pricing policy, by granting brokers discretion to set higher rates, resulted in a disparate impact on African American borrowers, a claim supported by the report of Professor Ian Ayres of Yale Law School. Class Certification Report of Ian Ayers, Barrett. v. Option One Mortgage Corp., No. 08-10157-RWZ (D. Mass. Sept. 18, 2012). He concluded that, controlling for all legitimate risk factors that might affect the cost of the loan, the rates paid by the class were higher than those paid by similarly situated white borrowers, averaging $134 more per year. *Id.* at 7.

According to Judge Zobel, under *Wal-Mart*, this showing was no longer sufficient to establish commonality. The plaintiffs had to show a "common mode of exercising discretion" at the level of "each individual broker." *Id.* at 5, 8. And "aggregate, nationwide statistics" are not the way to accomplish that proof. *Id.*

In effect, the decision suggests that the only way of demonstrating a "common mode of exercising discretion," would be with explicitly discriminatory policies. Simply having unfettered discretion, and systematically exercising that discretion to the disadvantage of African Americans, is not enough. *Cf.* Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251 (D. Mass. 2008) (denying a motion to dismiss on a complaint alleging that the net effect of Countrywide's discretionary pricing policy disadvantaged African American homeowners; white homeowners with identical or similar credit scores pay different rates because of a policy that enables racial bias to play a part in the pricing scheme).

III. THE SUBSTANTIVE LAW DIMENSIONS OF PROCEDURAL DECISIONS UNDER *IQBAL* AND *TWOMBLY*

The traditional structure of the federal civil lawsuit under the Federal Rules of Civil Procedure required the resolution of preliminary procedural matters at the outset so that the case can be decided later on the merits under the substantive law.[13] Rule 12(b) motions set out some of these threshold matters: personal jurisdiction, venue, and the failure to state a claim. Rule 23 outlines the requirements for class certification. Other preliminary proceedings, like motions in limine under Rule 702, frame the requirements for the admissibility of scientific or other expert evidence.[14]

However, as in *Wal-Mart*, these rulings may be linked to merits issues in a number of ways.[15] Clearly, they may be outcome determinative, signaling the end of the litigation. They may shape the parties' ability to present their case by affecting the scope of discovery and their access to information. Rulings on the admissibility or inadmissibility of expert testimony under *Daubert*[16] may foreordain the result on summary judgment. In *Wal-Mart*, the Court's decision meant that the case could not be pursued as a class action, which, as a practical matter, meant it would not likely be pursued at all.

In addition, in order to address the legal requirements of these procedural issues, judges must often determine or preview substantive law questions that the judge will have to reach to decide the merits of the case. For example, a decision on venue may determine not only who the decisionmaker will be, but "where the claim arose," a substantive law issue that is intertwined with the merits of the claim. And in *Wal-Mart*, the Court's decision on commonality for Rule 23 purposes revised gender and equal pay discrimination law in a "back door" way as dicta.

Until 2007, modern pleading rules described the standards for evaluating complaints as the standard of "notice pleading." Under *Conley v. Gibson*,[17] dismissals under Rule 12(b)(6) required that when considering whether a pleading states a claim upon which relief can be granted, courts must "accept as true all of the factual allegations contained in the complaint."[18] In effect, the litigation was supposed to continue even if the plaintiff's allegations did not seem credible to the judge or were unlikely to be proven. The standard was a forgiving one, in contrast to the ponderous

13. In this essay, we are examining the substantive law dimensions of procedural rulings. In a sense, it is the opposite of the inquiry posed in Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 Wash. U. L. Rev. 801 (2010) (exploring the procedural aspects of substantive law claims). A fuller discussion of the procedure/substance dichotomy in its various manifestations throughout the law of civil procedure is beyond the scope of this essay. However, many others have suggested, as we do here, that procedural rules can be "a surrogate for substantive law revision." Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revisions*, 59 Brook. L. Rev. 827 (1993).

14. Fed. R. Evid. 702.

15. Cassandra Burke Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 U.C. Davis L. Rev. 1301 (2012) (describing the impact on the merits of "effects-test" cases in personal jurisdiction).

16. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

17. 355 U.S. 41 (1957).

18. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508, n.1 (2002).

pleading system it replaced. The goal of the Federal Rules of Civil Procedure was clear: "[to] reshape[] civil litigation to reflect core values of citizen access to the justice system and adjudication on the merits based on a full disclosure of relevant information."[19] *Conley* recognized that a motion to dismiss involved a very preliminary review, long before discovery, and, further, a standard that appropriately limited the extent to which a judge's predilections, or worse, biases, would intrude into the threshold decisionmaking process.

All that changed with *Bell Atlantic Corp. v. Twombly* and later *Ashcroft v. Iqbal*. With *Twombly*, the Court underscored that the governing approach was whether the allegations were "plausible," that the plain statement "possess enough heft 'to sho[w] that the pleader is entitled to relief.'"[20] In order to avoid falling "short of the line between possibility and plausibility," complaints must have "further factual enhancement."[21] In *Iqbal*, the Court reiterated the "plausibility standard" and held that the evaluation of the plausibility of complaints was a "context-specific" task in which judges were to "draw on [their] judicial experience and common sense."[22] The enterprise now involved more than determining whether the pleadings were "consistent with" liability,[23] an approach that required nothing more than a rational examination of the complaint, measuring the factual allegations against the legal claims to see if they fit. Rather, now the judge was to ask whether alternative explanations for the events complained of are "more likely" than the allegations made by the plaintiff, effectively a probabilistic determination, notwithstanding the Court's disclaimers.[24] In doing so, judges were to apply their "judicial experience and common sense." In light of the sparse factual and legal record on which district judges would be making a decision, this is an invitation for the exercise of judicial subjectivity, for judges to "fill in the gaps" of the truncated factual or legal record with what "they know" or, more significantly, what they *think* they know.

But there is a more fundamental problem. Although much of the scholarly and practitioner literature that has discussed the implications of *Iqbal* for plaintiffs has focused on greater "fact pleading," the judicial determination of plausibility is obviously both fact- and law-dependent. After *Iqbal* and *Twombly*, this pleading, the complaint, now has to bear the brunt of a very much heightened analysis on both fronts. Complaints have typically not been the place for elaborate factual narratives, much

19. Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 4 (2010).

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

21. *Id.*

22. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (citing approvingly to the standard imposed by the court below).

23. *Id.* at 678.

24. *Id.* at 680. To be sure, the Court denied that the new standard was a full "probability" standard, but it was surely moving in that direction: "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678 (citing *Twombly*, 550 U.S. at 556).

less nuanced legal arguments. Complaints were not briefs; they were not supposed to be. They do not come close to a Rule 56 statement of facts, with all its limitations. To meet the new demands of *Iqbal* and *Twombly*, law and facts now have to be wedged into a document that in many instances is ill-suited for this kind of review.[25]

Rule 12(b)(6) motions are now filed in almost every case and present a conundrum for judges. Since federal judges recognize that this is a preliminary stage, some judges will allow amendments of pleadings or early pre-dismissal discovery in order to assess the claims and see whether they should go forward. But many—too many, we believe—are dismissing the claims outright.

Scholars who have analyzed the courts' interpretations of *Iqbal* suggest that 12(b)(6) decisions are formulaic.[26] If the complaint intones the "magic words" that spell out the factual elements of a claim in a way that is recognizable to the judge and the judge believes that the claim is "plausible," the judge will allow the case to proceed.[27] Alternatively, the court will dismiss the case because of a lack of "factual specificity" and "conclusory allegations."[28] The law is rarely mentioned, unless there is a specific legal requirement on which the plaintiff is basing his or her claim that does not have a "factual hook" in the complaint. But the judge is necessarily applying the law as she understands it, in her assessment of the facts, in her understanding of which facts are salient and which are not, in her determination of what will or will not amount to proof in the case at bar. In a sense, the judge is ruling on the "law" implicit in the complaint, often without any explicit "law" or nuanced legal argument to go on.

If the case survives the 12(b)(6) hurdle, discovery follows and, typically, a summary judgment motion. On summary judgment, the court will decide whether there are genuine and material disputes of fact, or whether the uncontested facts require judgment as a matter of law. The crucial difference between the 12(b)(6) stage and summary judgment is that there is a record for the latter—a factual record from discovery and a record of legal argument in the parties' briefs.

Whatever the problems with misuse of summary judgment, at the very least, legal and factual arguments are presented in a more complete, more contextual way than in litigation challenging the sufficiency of the complaint. In arguing either "fact" summary judgment (no genuine issues of material fact) or "law" summary judgment (the plaintiff is not entitled to judgment as a matter of law), the movant is integrating fact and law. And the non-movant must respond in a way that meets those arguments in their opposition papers.

Although many scholars, including Professor Schneider, have criticized summary judgment on the grounds that judges are granting these motions and interpreting the

25. A judge reviewing a Rule 12(b)(6) motion may consider documents incorporated into the complaint by reference and matters of which the court may take judicial notice. Nevertheless, even as supplemented by these materials, the complaint is not an easy source of factual narrative or legal argument.

26. *See, e.g.*, Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 Ky. L.J. 235 (2012); Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 Yale L.J. 2270 (2012).

27. *See generally* Brescia, *supra* note 26; Gelbach, *supra* note 26.

28. *See generally* Brescia, *supra* note 26; Gelbach, *supra* note 26.

"reasonable juror" standard on problematic grounds, summary judgment decisionmaking, at the very least, engages the judge in a substantive law determination on a more complete record. The judge may be wrong or misguided. She may not really understand that she is effectively changing the legal rules, or that she is misreading the factual record. "Slicing and dicing" the record is often the name of the game in summary judgment decisionmaking, which skews the legal analysis.[29] Indeed, Judge Patricia Wald's early concern with the way that summary judgment decisionmaking predominantly shapes federal jurisprudence applies with even greater force today.[30] And because the law is now crafted at the Rule 12(b)(6) stage and on an even sparser record, the results will be more problematic.

Since *Iqbal* and *Twombly*, many commentators have noted the convergence between 12(b)(6) and summary judgment.[31] Apparently, that was what the majority intended. But this has occurred at a critical point in the litigation, and based on a document that is fundamentally ill-suited for those purposes.

IV. THE SPECIAL PROBLEMS OF THE SUBSTANTIVE LAW DIMENSIONS OF *IQBAL* IN EMPLOYMENT DISCRIMINATION CASES

The concerns that we have just outlined regarding *Iqbal*'s plausibility standard in general are exacerbated in connection with employment discrimination claims. Title VII discrimination cases are about the defendant's intent, asking whether, in the language of the statute, the defendant's action was taken "because of" "race, color religion, sex, or national origin."[32] The plaintiff's success typically depends upon what is *in the defendant's files*, to which the plaintiff has little or no access before the litigation.

In addition, the change effected by *Iqbal* is particularly troubling in employment discrimination cases for several reasons. First, there is little difference between the "common sense" and "plausibility" standards that *Iqbal* and *Twombly* encourage and the very cognitive processes that social scientists have identified as producing bias.[33] A recent article on implicit bias in the courtroom suggests the problem that this emphasis on "judicial experience and common sense" poses for 12(b)(6) decisionmaking in employment discrimination cases:

29. Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 Rutgers L. Rev. 705, 727 (2007); Michael J. Zimmer, *Slicing and Dicing of Individual Disparate Treatment Law*, 61 La. L. Rev. 577 (2001).

30. Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897 (1998).

31. *See, e.g.*, 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); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 Lewis & Clark L. Rev. 15 (2010).

32. 42 U.S.C. § 2000e-2(a)(1) (2006).

33. Nancy Gertner & Melissa Hart, *Implicit Bias in Employment Discrimination Litigation*, *in* Implicit Racial Bias Across the Law 80 (2012).

> And when judges turn to their judicial experience and common sense, what will this store of knowledge tell them about whether some particular comment or act happened and whether such behavior evidences legally cognizable discrimination? Decades of social psychological research demonstrate that our impressions are driven by the interplay between categorical (general to the category) and individuating (specific to the member of the category) information. For example, in order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff. When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to rely more heavily on our schemas.[34]

Without "sufficient individuating information" with respect to the case at hand, there is a risk that the judge's "general schemas" about the plaintiff and who she is are likely to weigh heavily in the judge's decisionmaking process. In short, in a discrimination case, perhaps even more than most, what is plausible to one judge may not be plausible to another.

Second, these changes take place at a time of a change in attitudes about employment discrimination, which has already been widely noted by scholars and examined in summary judgment cases involving civil rights claims.[35] The view reflected in recent decisions is that the United States is somehow "post-race bias" and even "post-gender bias." The market functions rationally and is discrimination-free. The discrimination that is to be ferreted out in the law is discrimination involving the aberrant individual.[36] The complex phenomenon that is discrimination can be reduced to a single paradigm—the errant discriminator or the explicit policy—neither of which exists in twenty-first century real life.[37] By this measure—looking for the "smoking guns" of discrimination—many discrimination complaints (not to mention summary judgment defenses) will fail.

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34. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1160 (2012).

35. *See* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 Minn. L. Rev. 1275 (2012); Schneider, *supra* note 31; Schneider, *supra* note 29.

36. As one scholar put it,

> courts view discrimination largely as "a problem of errant or rogue individual discriminators acting contrary to organizational policy and interest." . . . In some cases, the search for the rogue actor . . . asks the wrong question about culpability. It ignores the fact that multi-tiered or group decisionmaking processes may make it difficult or impossible to locate intent within a particular person. . . . [It] disregards the ways that both formal and informal processes and policies within an organization shape the intentions and actions of its individual members, and the ways that the actions and intentions of the individual members shape the organization.

Sandra F. Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 Ala. L. Rev. 773, 787–88 (2010).

37. Zimmer, *supra* note 29; *see also* Schneider, *supra* note 29.

Third, *Iqbal* and *Twombly* are likely to exacerbate what Judge Gertner has described as the phenomenon of "Losers' Rules."[38] When a judge grants summary judgment, usually for the defendant, the court writes a decision. But when he or she denies summary judgment, he or she does not write an opinion; the case simply proceeds to trial. Over time, as Judge Gertner describes, "[i]f case after case recites the facts that do not amount to discrimination, it is no surprise that the decisionmakers have a hard time envisioning the facts that may well comprise discrimination. Worse, they may come to believe that most claims are trivial."[39]

Simple, pro-defendant heuristics evolve[40] and are necessarily subject to systematic errors—false positives when the court finds that there may have been discrimination and there was not, or false negatives when a court finds no discrimination and there was. When courts believe that most claims are frivolous, they will be far more concerned with false positives—wrongful accusations of discrimination—not false negatives that leave claims of discrimination unredressed.

Indeed, that is precisely what the Supreme Court was concerned about in *Iqbal*—that defendants may well have been accused of a violation of rights when they had not done so, that they would feel compelled to settle cases that they should not to avoid discovery costs. Case management, it noted, had not proven sufficiently effective to control skyrocketing litigation costs.

But the analysis is misplaced in this setting. While it was one thing to be concerned about the failures of case management in complex antitrust cases, it was another to be concerned about in connection with civil rights cases. As Professor Schneider's work suggests, defendants in employment discrimination cases have been extraordinarily successful in ending litigation at summary judgment.[41]

Fourth, the fact that the *Iqbal/Twombly* decisions take place on a truncated factual and legal record, in contrast to summary judgment proceedings, means that "Losers' Rules" heuristics that have evolved in the summary judgment law are more likely to be applied and more likely to create false negatives—wrongly finding no discrimination. To be sure, the data on the impact of *Twombly* and *Iqbal* on Rule 12(b)(6) in employment discrimination cases from the Federal Judicial Center and other scholars is highly contested.[42] However while *Iqbal* and *Twombly* may not yet

38. Nancy Gertner, *Losers' Rules*, 122 Yale L.J. Online 109 (2012), http://yalelawjournal.org/2012/10/16/gertner.html.

39. *Id.* at 115.

40. Hillary A. Sale, *Judging Heuristics*, 35 U.C. Davis L. Rev. 903 (2002).

41. Schneider, *supra* note 29, at 709.

42. *See* 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, Federal Judicial Center (Mar. 2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf; 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 (Mar. 19, 2012) (Fed. Judicial Ctr., Working Paper 2012), *available at* http://dx.doi.org/10.2139/ssrn.2026103; Brescia, *supra* note 26; Gelbach, *supra* note 26; Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 Am. U. L. Rev. 553 (2010); Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions*

have produced wholesale dismissal of employment discrimination complaints,[43] given employment discrimination heuristics and precedent in other fields[44] that is a fair prediction.[45]

Indeed, even if cases are not dismissed at a higher rate, the *Iqbal/Twombly* analysis is likely to have a substantial impact on the subsequent "only procedural" rulings that a judge must make—the discovery that a court allows (for example, only discovery on the "plausible" claims), the class certification decision, and the efficacy of expert testimony. All these decisions will make summary judgment for the employer even more likely.

V. CONCLUSION: FINAL THOUGHTS AND FURTHER WORK

It is important to recognize the substantive law dimensions of preliminary procedural decisions in federal civil cases because they are often subtle and allow back-door substantive revision of the law. Decisions based on *Iqbal* pose special problems in shaping and revising substantive law on a minimal record and even more serious problems in employment discrimination cases.

But the issues that we have explored in this essay raise further questions as well, questions that we want to acknowledge even if we do not answer them here. What is

to Dismiss, 2012 Fed. Cts. L. Rev 6, *available at* http://www.fclr.org/fclr/articles/html/2010/Hoffman.pdf.

43. Indeed, the summary judgment trilogy, which made summary judgment review more robust, came about precisely because of the limitations of notice pleading that the Court emphasized. And although, by all accounts, changes in summary judgment have had a substantial impact in employment discrimination cases, the Court is now justifying further changes because of deficiencies in the courts as gatekeepers, even at the Rule 56 stage.

44. The circuit courts are split on the continued application of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). *Compare* Fowler v. UPMC Shadyside, 578 F.3d. 203, 211 (3d. Cir. 2009) (affirming the dismissal of a complaint; to the extent *Swierkiewicz* relies on *Conley* it is overruled) *with* Swanson v. Citibank, N.A., 614 F.3d. 400, 404 (7th Cir. 2010) (overturning the dismissal of a complaint, noting the continued validity of *Swierkiewicz*, which was cited with approval in *Twombly*).

45. *See, e.g.*, Morales-Cruz v. Univ. of Puerto Rico, 676 F.3d 220 (1st Cir. 2012). Morales-Cruz was a well qualified law professor who sought a one-year extension of the probationary period before being considered for tenure. The complaint—less than elegantly drafted—outlined her qualifications: outstanding performance and advanced degrees from Harvard Law School and the University of Oxford. But according to the complaint, she was denied the extension not because of issues with respect to her academic record, but because of her handling of one sexual harassment incident—failing to report that a male professor who co-taught with her had become romantically involved with a student. The discussions that ensued concerning the extension included comments about the plaintiff's "personality flaws," inability to handle "complex and sensitive" situations, and referring to her as "that girl," comments which she alleged involved gender stereotyping. *Id.* The First Circuit affirmed the dismissal of the action on *Iqbal* grounds, announcing the "rule that stray remarks, without more, cannot ground a cause of action . . . in the gender-stereotyping context." *Id.* at 226 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)). First, while the record is sparse, as it inevitably is at a motion to dismiss, the accusations could well have suggested that the sexual harassment incident was a pretext for an adverse action against an otherwise qualified applicant or, at the very least, stated a claim for retaliation. Second, there is no "rule" with respect to "stray remarks," and surely none in connection with gender stereotyping; gender stereotyping is all about such remarks. Gertner, *supra* note 38, at 119–20.

the impact of the substantive law rulings that are part of these procedural determinations? Are they, for example, law of the case? Are they binding in some preclusive sense or are they purely dicta? If the substantive law is made, not only on summary judgment, but in 12(b)(6) motions, how will this change the nature of lawmaking in the federal courts? Does this back-door revision happen more in employment discrimination cases because the courts have come to see them as frivolous, or does it apply more generally to other disfavored claims?

The bottom line is our concern that scholars, practitioners, and judges must recognize that these decisions are not "only procedural" and simply minimize their impact. To the contrary, these decisions can have an important, if unacknowledged, impact on the development of substantive law in general and in employment discrimination cases in particular.