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## Plausibility Pleading Employment Discrimination

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## PLAUSIBLY PLEADING EMPLOYMENT DISCRIMINATION

CHARLES A. SULLIVAN\*

### ABSTRACT

*The Supreme Court's unanimous 2002 decision in Swierkiewicz v. Sorema N.A., which took a very permissive approach to pleading discrimination claims, may or may not remain good law after Ashcroft v. Iqbal. As is well known, Iqbal took a restrictive approach to pleading generally under the Federal Rules of Civil Procedure, and its application to employment discrimination cases could pose serious problems for plaintiffs attempting to get into federal court. In addition, there is certainly a tension between Swierkiewicz and Iqbal. This is in part because the former is a strong reaffirmation of notice pleading as it has traditionally been understood whereas the latter makes clear that "plausible pleading" is something very different. But it is also because Iqbal was, after all, a discrimination case, albeit brought under the Constitution rather than a federal statute, and its finding that the discrimination alleged there was not plausibly pled could easily be applied to statutes such as Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.*

*Numerous scholars have analyzed Iqbal generally and several have addressed the application of plausible pleading to claims under the antidiscrimination laws. A respectable view is that Swierkiewicz remains good law, although the commentators recognize legitimate questions about its continued vitality. This Article, while agreeing that readings of both Swierkiewicz and Iqbal would permit this*

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*result, nevertheless explores the contrary possibility: supposing Iqbal sub silentio overruled Swierkiewicz and applies plausible pleading to discrimination claims, what must a plaintiff plead to avoid dismissal for failure to state a claim?*

*The most obvious response is that the plaintiff should plead a prima facie case of discrimination under the traditional McDonnell Douglas Corp. v. Green standard. Although Swierkiewicz held that pleading a prima facie case was not necessary, in part because there are other ways of proving discrimination, it did not suggest that such pleading would be insufficient. There are, however, complications with pleading a traditional prima facie case that should be explored. Further, there are at least three alternatives for attorneys who cannot, consistent with Rule 11, allege such a prima facie case. First, the Article proposes that the plaintiff might survive a Rule 12(b)(6) motion by pleading “direct evidence” of discrimination. Although the term has a checkered history in discrimination jurisprudence, the pleading context suggests a new look at an old concept. Second, the Article addresses the possibility of pleading the existence of a “comparator” whose more favorable treatment than the plaintiff may make the claim of discrimination plausible.*

*Third, and perhaps most radically, the Article argues that plaintiffs should be able to take the Supreme Court at its word in Iqbal that, in deciding a motion to dismiss for failure to state a claim, a district court must take as true all facts, as opposed to legal conclusions, alleged in the complaint. The Article proposes that plaintiffs plead the existence of social science research showing the pervasiveness of discrimination. Taken as true, this body of literature may well “nudge” a particular claim across the border drawn by the Supreme Court between a “possible” claim and a “plausible” one.*

TABLE OF CONTENTS

INTRODUCTION . . . . .	1616
I. FROM NOTICE PLEADING TO PLAUSIBLE PLEADING . . . . .	1624
II. REACTIONS TO <i>TWOMBLY</i> AND <i>IQBAL</i> . . . . .	1635
III. EMPLOYMENT DISCRIMINATION PLAINTIFFS’ PLAUSIBLE PLEADING PROBLEM . . . . .	1639
IV. SATISFYING PLAUSIBLE PLEADING . . . . .	1649
A. <i>Pleading a McDonnell Douglas</i> <i>Prima Facie Case</i> . . . . .	1650
B. <i>Pleading “Direct Evidence” of Discrimination</i> . . . . .	1654
C. <i>Pleading Comparators</i> . . . . .	1660
D. <i>Pleading the Pervasiveness of Bias</i> . . . . .	1662
CONCLUSION . . . . .	1677

## INTRODUCTION

A decade ago, the Second Circuit summarily affirmed the grant of a Rule 12(b)(6)<sup>1</sup> motion to dismiss an employment discrimination complaint for failure to state a claim under which relief can be granted.<sup>2</sup> The plaintiff had alleged that he had been first demoted and ultimately fired by his employer because of his national origin and age in violation of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA).<sup>3</sup> He did plead his age (fifty-three), and national origin (Hungarian), and the younger age (thirty-two) and different national origin (French) of the favored coworker.<sup>4</sup> He also alleged that he had twenty-five years' more experience than the coworker.<sup>5</sup> Even though Rule 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief"<sup>6</sup> and the plaintiff's allegations provided the defendant with notice of the claims against it, the Second Circuit held that the failure of the plaintiff to plead even a prima facie case of discrimination within the *McDonnell Douglas Corp. v. Green*<sup>7</sup> proof scheme rendered the complaint fatally deficient.<sup>8</sup>

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1. FED. R. CIV. P. 12(b)(6).

2. *Swierkiewicz v. Sorema N.A.*, 5 F. App'x 63, 65 (2d Cir. 2001), *rev'd*, 534 U.S. 506 (2002).

3. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 509 (2002).

4. *Id.* at 514.

5. *Id.* at 508 ("Petitioner claims that Mr. Papadopoulo had only one year of underwriting experience at the time he was promoted, and therefore was less experienced and less qualified to be CUO than he, since at that point he had 26 years of experience in the insurance industry.").

6. FED. R. CIV. P. 8(a)(2).

7. 411 U.S. 792, 802 (1973); *see infra* notes 179-97 and accompanying text.

8. The Court wrote,

With respect to national origin, the only circumstances Swierkiewicz pled are that he is Hungarian, others at Sorema are French, and the conclusory allegation that his termination was motivated by national origin discrimination. We agree with the district court that these allegations are insufficient as a matter of law to raise an inference of discrimination.

... [With respect to age, t]he only circumstance that Swierkiewicz alleges gives rise to an inference of age discrimination is Chavel's comment [several years previously] that Chavel wanted to "energize" the underwriting department. We agree with the district court that this allegation is insufficient as a matter of law to raise an inference of discrimination.

*Swierkiewicz v. Sorema N.A.*, 5 F. App'x 63, 64-65 (2d Cir. 2001), *rev'd*, 534 U.S. 506 (2002).

In *Swierkiewicz v. Sorema N.A.*, an opinion written by Justice Thomas, the Supreme Court unanimously reversed, reaffirming the traditional view of notice pleading under the Federal Rules of Civil Procedure.<sup>9</sup> Put simply, the plaintiff's complaint gave the defendant employer adequate notice of both the act being challenged—plaintiff's discharge—and the legal bases upon which he was suing—national origin discrimination in violation of Title VII and age discrimination in violation of the ADEA. Since the employer knew what adverse actions were being charged, who the supposed favored employee was, and what statutory requirements were allegedly violated, the Court held that the complaint had all the information that notice pleading required.<sup>10</sup> As for the failure to plead a prima facie case under *McDonnell Douglas*, the Court noted that *McDonnell Douglas* provides “an evidentiary standard, not a pleading requirement”;<sup>11</sup> therefore, “under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case.”<sup>12</sup> Whatever hurdles employment discrimination plaintiffs had to face in their quest for vindication, pleading problems appeared to be a thing of the past.

After *Swierkiewicz*, even judges in circuits often viewed as hostile to these causes of action had little patience with Rule 12(b)(6) motions for the supposed failure of discrimination plaintiffs to state a claim. For example, in *Bennett v. Schmidt*, Judge Easterbrook wrote, “Because racial discrimination in employment is ‘a claim upon which relief can be granted,’ this complaint could not be dismissed under Rule 12(b)(6). ‘I was turned down for a job because of my race’ is all a complaint has to say.”<sup>13</sup>

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9. *Swierkiewicz*, 534 U.S. at 515.

10. *Id.* at 514. The Court also cited approvingly *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 283 n.11 (1976). *Id.* at 511. *McDonald* rejected the defendant's argument that plaintiffs “were required to plead with ‘particularity’ the degree of similarity between their culpability in the alleged theft and the involvement of the favored coemployee, Jackson. This assertion ... too narrowly constricts the role of the pleadings.” *McDonald*, 427 U.S. at 283 n.11.

11. *Swierkiewicz*, 534 U.S. at 510.

12. *Id.* at 511.

13. 153 F.3d 516, 518 (7th Cir. 1998). He went on to write, “Because success on a disparate-treatment approach under Title VII of the Civil Rights Act of 1964 ... requires proof of intentional discrimination, a plaintiff might want to allege intent—although this is implied by a claim of racial ‘discrimination.’” *Id.*; see also *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 714 (7th Cir. 2006) (“Religious discrimination in employment is prohibited by federal law.

In the past few years, however, this certainty has been severely shaken. In two remarkable cases, *Bell Atlantic Corp. v. Twombly*<sup>14</sup> and *Ashcroft v. Iqbal*,<sup>15</sup> the Court adopted a “plausible pleading” standard for Rule 12(b)(6) motions, a standard whose operational meaning remains unclear but which many believe has radically changed pleading requirements under the Federal Rules.<sup>16</sup>

If *Swierkiewicz* survives the *Twombly/Iqbal* transformation, employment discrimination litigation will largely be safe from plausible pleading; indeed, plausible pleading may itself be far less radical than some have predicted if the recent cases leave *Swierkiewicz* intact.<sup>17</sup> And there is certainly reason to believe that *Swierkiewicz* is still good law—it is a very recent, unanimous decision of the Court, and it was cited with apparent approval in *Twombly*.<sup>18</sup> Further, the Court has cautioned that lower courts should not view its opinions as overruled even if their logic appears to have been undercut by subsequent decisions,<sup>19</sup> and a number of lower courts have heeded this caution with respect to *Swierkiewicz*.<sup>20</sup>

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Accordingly, all a complaint in federal court need do to state a claim for relief is recite that the employer has caused some concrete injury by holding the worker's religion against him.... It is enough to name the plaintiff and the defendant, state the nature of the grievance, and give a few tidbits (such as the date) that will let the defendant investigate. A full narrative is unnecessary.”)

14. 550 U.S. 544, 556-57 (2007).

15. 129 S. Ct. 1937, 1949 (2009).

16. *E.g.*, *Twombly*, 550 U.S. at 597 (Stevens, J., dissenting) (stating that the majority's rule “marks a fundamental—and unjustified—change in the character of pretrial practice”); *see infra* note 130 and accompanying text.

17. Another possibility is that the plausible pleading regime will change the pleading terrain in every area except employment discrimination litigation. *See infra* text accompanying note 19.

18. *Twombly*, 550 U.S. at 569-70 (“As the District Court correctly understood, however, *Swierkiewicz* did not change the law of pleading, but simply re-emphasized ... that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements.”).

19. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (“We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989))).

20. *See, e.g.*, *Rouse v. Berry*, 680 F. Supp. 2d 233, 236 n.3 (D.D.C. 2010) (“*Twombly*

But, of course, there may be debate about precisely what *Swierkiewicz* stands for. Its broadest reading is that a plaintiff who has pled a specific adverse employment action and alleged that the employer acted because of a prohibited trait has satisfied Rule 8, and therefore the allegation of discriminatory intent must be taken as true.<sup>21</sup> A narrower view is that *Swierkiewicz* holds merely that an allegation that a plaintiff was treated worse than an identified comparator outside his protected class suffices.<sup>22</sup> In other words, there is both a broad and a narrow reading of *Swierkiewicz*, and it

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explicitly disavowed any retreat from *Swierkiewicz*, and *Iqbal* did not even discuss *Swierkiewicz*, much less disavow it.” (internal citation omitted); *Desrouleaux v. Quest Diagnostics, Inc.*, No. 09-61672-CIV-COHN/SELTZER, 2009 U.S. Dist. LEXIS 123809, at \*3-4 (S.D. Fla. Dec. 29, 2009) (“Because neither *Twombly* nor *Iqbal* involved Title VII or Section 1981 claims, this Court will continue to follow *Swierkiewicz* in the employment discrimination context.”); *Gillman v. Inner City Broad. Corp.*, No. 08 Civ. 8909 (LAP), 2009 U.S. Dist. LEXIS 85479, at \*11-13 (S.D.N.Y. Sept. 18, 2009) (“*Iqbal* was not meant to displace *Swierkiewicz*’s teachings about pleading standards for employment discrimination claims because in *Twombly*, which heavily informed *Iqbal*, the Supreme Court explicitly affirmed the vitality of *Swierkiewicz*.”); see also Andrew Blair-Stanek, *Twombly Is the Logical Extension of the Mathews v. Eldridge Test to Discovery*, 62 FLA. L. REV. 1, 28 (2010) (noting that, although some lower courts have interpreted *Twombly* as overruling *Swierkiewicz*, “this interpretation seems highly implausible, given that just five years separated the two cases; that *Twombly*’s author joined the *Swierkiewicz* opinion; that *Swierkiewicz*’s author joined the *Twombly* majority; and that five of the seven Justices on the Court for both cases joined both opinions”); Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337, 1345 (2010) (describing as “incorrect” those courts that view *Swierkiewicz* as overruled: “There is no inconsistency between rejecting heightened fact pleading and adopting nonconclusory-and-plausible pleading, because the two are different systems: the former requires factual detail, while the latter tests for factual convincingness.”).

21. See Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1341 (2010) (“The *Swierkiewicz* complaint states that the defendant terminated the plaintiff’s employment. Once that transactional core is adequately identified, certain qualities or characteristics of those events can permissibly be described with what one might call conclusory language.”). This would parallel the way that the allegation of “negligence” must be taken as true under Form 11. See *infra* text accompanying note 103.

22. Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 490 n.87 (2010) [hereinafter Hartnett, *Taming Twombly*] (arguing that the Court did not accept as true the plaintiff’s allegation of discriminatory intent in *Swierkiewicz* but rather accepted as adequate a pleading that alleged that the defendant favored a less qualified worker of another national origin and younger age); see also David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 145 (2010) (finding sufficient facts alleged in *Swierkiewicz* to raise a plausible inference of discrimination); Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 194 (2010) [hereinafter Seiner, *After Iqbal*] (“While there may be some legitimate concern about the validity of *Swierkiewicz* generally, the decision should be considered good law at least as to cases brought under Title VII.”).



may be that plausible pleading leaves at least the narrow, and perhaps the broad, reading intact.<sup>23</sup>

All of this may explain the rather confused status of *Swierkiewicz*. Between *Twombly* and *Iqbal*, some courts reaffirmed *Swierkiewicz*,<sup>24</sup> but since *Iqbal*, the support has dwindled. Shepard's Citations Service now places a red warning sign on *Swierkiewicz*,<sup>25</sup> although the actual court opinions are at least somewhat more circumspect—often at the risk of obfuscation. For example, the Third Circuit, looking to the treatment of the seminal notice pleading case, *Conley v. Gibson*,<sup>26</sup> found that “because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*.”<sup>27</sup> *Swierkiewicz* obviously “concerns pleading requirements”; indeed, it concerns nothing else, and it relies on *Conley*.<sup>28</sup> So does the Third Circuit view *Swierkiewicz* as overruled or as retaining some undefined residual value?<sup>29</sup>

As we will see, commentators who seek to tame *Twombly* and *Iqbal* take a more positive view of the vitality of *Swierkiewicz*; they typically pitch their arguments in part on the fact that the Court's having left their reading of *Swierkiewicz* untouched.<sup>30</sup> But there are

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23. *Swierkiewicz* was not uniformly applied in the lower courts even before *Twombly*. A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 120-21 (2008) (noting that a number of courts post-*Swierkiewicz* “maintained or reverted to some form of particularized fact-pleading”).

24. *E.g.*, *Lindsay v. Yates*, 498 F.3d 434, 439-40 (6th Cir. 2007).

25. LexisNexis Shepard's Citation Service Summary for *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (last visited Feb. 18, 2011).

26. *Conley v. Gibson*, 355 U.S. 41 (1957).

27. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009). A sprinkling of district courts outside the Third Circuit take a similar view. *E.g.*, *Hughes v. Colo. Dep't of Corr.*, 594 F. Supp. 2d 1226, 1240 (D. Colo. 2009). But *Fowler* itself found the complaint before it sufficient, and it has been argued that the court's analysis is more consistent with notice pleading than the new plausibility requirement. Steinman, *supra* note 21, at 1345.

28. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 514 (2002).

29. Another circuit applied *Swierkiewicz* to reject the argument that the plaintiff's failure to plead a prima facie case required dismissal of her complaint of national origin discrimination. *Dolgaleva v. Va. Beach City Pub. Sch.*, 364 F. App'x 820, 827 (4th Cir. 2010). The decision is consistent with the view that the plaintiff must plead a *McDonnell Douglas* prima facie case or facts supporting another proof structure.

30. *E.g.*, Hartnett, *Taming Twombly*, *supra* note 22, at 502 n.128 (acknowledging “serious tension” between the opinions, but arguing that “reconciliation is possible,” in part because *Swierkiewicz* rejected any requirement of pleading a *McDonnell Douglas* prima facie case when other kinds of proof structures operate under the statute); Seiner, *After Iqbal*, *supra*

other commentators who see a profound and irreconcilable tension between *Iqbal* and *Swierkiewicz*. They believe that the former *sub silentio* overruled the latter and that the Supreme Court will ultimately recognize this logic.<sup>31</sup>

The ultimate interplay between *Twombly/Iqbal* and *Swierkiewicz* remains to be finally resolved in the courts, or, perhaps, in Congress, which has considered various bills to effect a return to the pre-*Twombly/Iqbal* days of notice pleading<sup>32</sup>—although, perhaps tellingly, there is no agreement on what language would achieve this goal.<sup>33</sup>

This Article, however, takes a different tack. Several scholars have warned that plausible pleading poses a particular threat to plaintiffs in employment discrimination cases,<sup>34</sup> and I assume for

note 22, at 194 (“While there may be some legitimate concern about the validity of *Swierkiewicz* generally, the decision should be considered good law at least as to cases brought under Title VII.”); see also Noll, *supra* note 22, at 4 (“Courts will have to grapple with the many interpretative questions *Iqbal* leaves open.”). See Part II for a discussion of attempts to tame *Twombly* after *Iqbal*.

31. *E.g.*, A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 476 (2008) [hereinafter Spencer, *Plausibility Pleading*] (“The plausibility pleading standard announced by the Court in *Twombly* is no different from the Second Circuit’s heightened pleading standard that the Court rejected in *Swierkiewicz*.”); see also Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 183 (“It would not be surprising if, within a few years, the Court consigns *Swierkiewicz* to the same earned retirement to which it relegated *Conley*.”).

Some commentators see a potential upside for employment discrimination plaintiffs if plausible pleading is extended beyond complaints to defendants asserting affirmative defenses. See Melanie A. Goff & Richard A. Bales, “*Plausible*” Defense: Applying *Twombly* and *Iqbal* to Affirmative Defenses, 34 AM. J. TRIAL ADVOC. (forthcoming 2011), available at [http://ssrn.com/abstract\\_id=1737805](http://ssrn.com/abstract_id=1737805); Joseph A. Seiner, *Twombly, Iqbal, and the Affirmative Defense* (Dec. 6, 2010) (unpublished manuscript), available at [http://ssrn.com/abstract\\_id=1721062](http://ssrn.com/abstract_id=1721062). These include the bona fide occupational qualification defense to sex discrimination, see generally CHARLES A. SULLIVAN & LAUREN M. WALTER, EMPLOYMENT DISCRIMINATION LAW & PRACTICE § 3.05 (2008), and the employer’s reasonable efforts defense to respondeat superior liability for sexual harassment, *id.* § 7.07[F].

32. Senator Arlen Specter reacted to *Iqbal* by sponsoring the Notice Pleading Restoration Act, S. 1504, 111th Cong. (2009). A hearing by the Senate Judiciary Committee on December 2, 2009, explored this issue. *Has the Supreme Court Limited Americans’ Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *Iqbal Hearing*].

33. See Edward A. Hartnett, *Responding to Twombly and Iqbal: Where Do We Go from Here?*, 95 IOWA L. REV. BULL. 24 (2010), [http://www.uiowa.edu/~ilr/bulletin/ILRB\\_95\\_Hartnett.pdf](http://www.uiowa.edu/~ilr/bulletin/ILRB_95_Hartnett.pdf) (critiquing various proposed legislative overrides and proposing another).

34. See *Iqbal Hearing*, *supra* note 32, at 12-13 (statement of Stephen B. Burbank, Professor, University of Pennsylvania), available at <http://judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf>; Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly*

purposes of analysis the discrimination plaintiff's worst-case scenario, which is that *Twombly* and *Iqbal* overrule *Swierkiewicz*, and that the more extreme possible meanings of "plausible pleading" are the governing standard for such cases.<sup>35</sup> In employment discrimination cases, that means that in order to survive a motion to dismiss, the plaintiff would have to plead not merely that intent to discriminate was a motivating factor for a particular adverse employment action, but also additional facts that would make such an allegation plausible.<sup>36</sup> For example, under this hypothesis, the plaintiff might avoid dismissal by alleging facts that would, if proven, constitute a prima facie case under the *McDonnell Douglas* standard,<sup>37</sup> *Swierkiewicz's* rejection of any such requirement notwithstanding.<sup>38</sup>

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*and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556-57, 608-09, 630 (2010) (finding that district courts are dismissing complaints at a significantly greater rate after *Iqbal* and that the dismissal rate of Title VII suits increased from 42 percent pre-*Twombly* to 53 percent post-*Iqbal*); 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, 519-20 (2010); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1029-31 [hereinafter Seiner, *The Trouble with Twombly*] (finding higher dismissal rates for Title VII cases after *Twombly*); Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 923-24 n.119 (2010). *But see* REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 2-3 (2010) (reporting a substantial increase in grants of motions to dismiss in the nine months after *Twombly* as compared to the nine months before, but not reaching a conclusion as to the reason); Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 97, 117-18 (2010) [hereinafter Seiner, *Pleading Disability*] (finding little evidence of greater dismissal rates of ADA cases but also substantial confusion in the lower courts about the effect of the new pleading approach to disability cases).

35. An even more extreme possible application of plausible pleading for some discrimination cases is raised by Brian S. Clarke, *Grossly Restricted Pleading: How Twombly/Iqbal, Gross, and the Assumption of Truth Rule Could Kill Compound Employment Discrimination Claims*, UTAH L. REV. (forthcoming 2011) (manuscript at 2), available at <https://ssrn.com/abstract=1667067> ("In compound employment discrimination claims, the facts pled to satisfy *Twombly/Iqbal*, accepted as true, likely render any claim requiring but-for causation facially implausible.").

36. See *infra* text accompanying note 147.

37. See *Chacko v. Worldwide Flight Servs., Inc.*, No. 08-CV-2363 (NGG) (JO), 2010 U.S. Dist. LEXIS 9103, at \*10 (E.D.N.Y. Feb. 1, 2010) ("The elements of a prima facie discrimination claim are nonetheless relevant to the determination of whether a complaint provides a defendant with fair notice and contains 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009))).

38. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002).

But that may not be the only way to escape the more extreme applications of *Twombly/Iqbal*. Beyond pleading a prima facie case, I explore three other ways to do so: (1) pleading “direct evidence” of discrimination;<sup>39</sup> (2) pleading the existence of a “comparator”;<sup>40</sup> and (3) most radically, pleading not merely “adjudicative facts,” those facts unique to the particular dispute that triggered the lawsuit, but also “legislative facts,” the kind of more generalized factual predicates that will “nudge[] ... claims across the line from conceivable to plausible” as *Twombly/Iqbal* require.<sup>41</sup>

The Article proceeds as follows: Part I sketches the shift from notice pleading to plausible pleading. Part II describes the scholarly reaction to *Twombly* and *Iqbal*, including the efforts to tame plausible pleading in various ways. Part III details the worst-case scenario for employment discrimination pleading, and then Part IV offers a solution.

Before beginning, two preliminary notes are in order. First, *Twombly* and *Iqbal* are in some ways different cases,<sup>42</sup> and the reference to them as a single entity is for convenience only. Where differences are relevant to the argument, they are identified. Second, despite my use of the term “plausible pleading” as distinct from “notice pleading,” neither *Twombly* nor *Iqbal* purported to do away with notice pleading; they claim to be simply refining the meaning of Rule 8, not to be rejecting prior authority, with the exception of “retiring” dicta from *Conley v. Gibson*.<sup>43</sup> Indeed, *Twombly*

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39. See discussion *infra* Part IV.B.

40. See discussion *infra* Part IV.C.

41. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); see *infra* Part IV.D (discussing this approach). The phrase was repeated in *Iqbal*, 129 S. Ct. at 1951.

42. Justices Souter and Breyer obviously thought so: both joined the majority in *Twombly* but dissented in *Iqbal*. Justice Souter, who had written *Twombly*, believed that *Iqbal* went beyond *Twombly* in failing to analyze the complaint as a whole in terms of putting the defendant on notice. *Iqbal*, 129 S. Ct. at 1961 (Souter, J., dissenting). Souter also critiqued the majority in *Iqbal* as applying the probability requirement that he had explicitly rejected in *Twombly*. *Id.* at 1960 (“Here, by contrast [with *Twombly*], the allegations in the complaint are neither confined to naked legal conclusions nor consistent with legal conduct.”). See generally Hatamyar, *supra* note 34, at 577 (“[*Iqbal*] espoused an extraordinary interpretation of *Twombly*.”); Luke Meier, Why *Twombly* is Good Law (But Poorly Drafted) and *Iqbal* Will Be Overturned (Jan. 4, 2011) (unpublished manuscript), available at [http://ssrn.com/abstract\\_id=1734791](http://ssrn.com/abstract_id=1734791).

43. See *Twombly*, 550 U.S. at 563; *infra* notes 74-78, 149 and accompanying text.

explicitly endorsed *Conley*'s "fair notice" standard.<sup>44</sup> Those who are trying to limit the more radical implications of *Twombly/Iqbal* naturally stress commonalities, not differences. But, because this is a worst-case scenario Article, it seems both clearer and more efficient to stress the differences between notice pleading as traditionally understood and at least the more extreme possibilities of plausible pleading.

### I. FROM NOTICE PLEADING TO PLAUSIBLE PLEADING

Rule 8 of the Federal Rules of Civil Procedure provides that, in addition to alleging jurisdiction and demanding relief, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>45</sup> The core concept is that the plaintiff need merely give notice of the factual setting giving rise to her claim and notice of the legal rights implicated. This seemed to be the message of the official forms, which, by virtue of Rule 84, are sufficient to plead a claim.<sup>46</sup> The standard example is Form 11, which in its current version approves a pleading that "the defendant negligently drove a motor vehicle against the plaintiff," with the only other factual detail being the time and place of the accident.<sup>47</sup>

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44. *Twombly*, 550 U.S. at 555.

45. FED. R. CIV. P. 8(b).

46. *See id.* ("The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.")

47. FED. R. CIV. P. Form 11 (before the restyling of the Rules, Form 9). Similarly, Form 10 allows a complaint for goods sold and delivered without identifying the goods. FED. R. CIV. P. Form 10. Form 18 has a very barebones allegation of patent infringement: the defendant has infringed the identified patent "by making, selling, and using *electric motors* that embody the patented invention." FED. R. CIV. P. Form 18. This allegation does not specify when or where the infringement occurred nor identify the infringing items. *Id.*

Professor Edward Hartnett, however, argues that the restyled version of the Forms removes some of the detail of the original Form 9, and therefore removes the context which might make the claim more plausible. Hartnett, *Taming Twombly*, *supra* note 22, at 494 n.102 ("To the extent that the allegations in [original] Form 9 concerning the place of the collision (a public highway and not, for example, a racetrack) and the plaintiff's actions are significant, Restyled Form 11 may provide another illustration of the unintended consequences of the Restyling Project.")

Professor Hartnett also argues that Rule 8 and Rule 12(b)(6) have different purposes. That a complaint may be formally sufficient under the former does not mean that it is substantively sufficient under the latter. *Id.* at 496 n.108. With respect to Form 11 itself, for example, he argues that a claim being stated depends on state law recognizing the tort of negligence.

Although “heightened pleading” is required by the Federal Rules for a few specific kinds of claims,<sup>48</sup> the standard for “normal” pleading was, prior to *Twombly/Iqbal*, generally considered to be remarkably undemanding of the plaintiff.<sup>49</sup> This permissive approach was in part a reaction to the complexities of prior pleading regimes<sup>50</sup> and in part recognition that some of the functions formerly played by pleading could be dispensed with in light of the Federal Rules’ signature innovation of discovery for all civil cases.<sup>51</sup> In short, discovery would allow for the factual development that had previously been one role of pleading.<sup>52</sup>

*Conley v. Gibson* was the high-water mark of notice pleading.<sup>53</sup> It approved “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>54</sup> Although as many have pointed out, it was hard to take this statement literally.<sup>55</sup> The very extremity of the formulation reinforced the holding of *Conley*: the plaintiffs adequately pled a violation of the duty of fair representation under the Railway Labor Act by alleging they “were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes.”<sup>56</sup>

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48. For allegations of “fraud or mistake,” Rule 9(b) requires a plaintiff to “state with particularity the circumstances constituting fraud or mistake.” FED. R. CIV. P. 9(b). The Private Securities Litigation Reform Act also requires heightened pleading with respect to “any private action” arising from the Securities Exchange Act. 15 U.S.C. § 78u-4(b) (2006); see *Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) (observing that “the PSLRA ... imposed heightened pleading requirements”).

49. See *infra* notes 53-58 and accompanying text.

50. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437-40 (1986) (describing the Federal Rules as a reaction to the perceived failures of the Field Code).

51. *Id.* at 440 (“Rather than dwell on pleading niceties, under the new system litigants were to use the expanded discovery mechanisms provided by the Federal Rules to get to the merits of the case.”).

52. *Id.*

53. 355 U.S. 41 (1957).

54. *Id.* at 45-46.

55. *E.g.*, Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1750 (1998).

56. *Conley*, 355 U.S. at 46.

The Court explicitly rejected the defendants' argument that more specific allegations were necessary:

The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this.<sup>57</sup>

The *Conley* approach to notice pleading was sustained at the Supreme Court for at least fifty years. For example, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, the Court cited *Conley's* "decisive answer" language in rejecting a circuit court's requirement of heightened pleading in § 1983 cases seeking to hold a municipality liable for civil rights violations.<sup>58</sup> Furthermore, *Swierkiewicz* rejected any requirement that the plaintiff plead a prima facie case of discrimination under the *McDonnell Douglas* formula in order to survive a motion to dismiss.<sup>59</sup>

Then came *Bell Atlantic Corp. v. Twombly*, where, for the first time, the Court introduced plausibility into the Rule 12(b)(6) analysis, speaking of "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) [the claim] reflects the threshold requirement of Rule 8(a)(2) that the 'plain

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57. *Id.* at 47. The Court explained:

Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

*Id.* at 47-48.

58. 507 U.S. 163, 168 (1993).

59. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002); *infra* notes 167-71 and accompanying text.

statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"<sup>60</sup>

*Twombly* was an antitrust case, and the core claim was that the defendants—the “Baby Bells”—conspired to create barriers to entry by others and not to compete in each other’s markets.<sup>61</sup> There was no doubt that such a conspiracy would have violated section 1 of the Sherman Act,<sup>62</sup> and the complaint alleged that the defendants had not competed.<sup>63</sup> However, a violation of the antitrust laws requires not merely a failure to compete but also an agreement not to do so. “Conscious parallelism” is not a violation.<sup>64</sup> Plaintiffs pled such parallelism but also pled that the defendants had in fact conspired.<sup>65</sup> The Court was not persuaded: “[T]he complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement.”<sup>66</sup> It ac-

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60. 550 U.S. 544, 557 (2007). *Twombly* generated a dissent by Justice Stevens, joined in large part by Justice Ginsburg. Stevens viewed the majority’s decision as a “dramatic departure from settled procedural law.” *Id.* at 573 (Stevens, J., dissenting). While the costs of antitrust litigation and the possibility of jury confusion,

merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking. More importantly, they do not justify an interpretation of Federal Rule of Civil Procedure 12(b)(6) that seems to be driven by the majority’s appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency.

*Id.* See generally Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53 (2010) (arguing that an appropriate response to new pleading standards is a new approach to discovery, which he describes as “pre-discovery discovery”).

61. *Twombly*, 550 U.S. at 550-51.

62. 15 U.S.C. § 1 (2006).

63. *Twombly*, 550 U.S. at 551.

64. See generally John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617, 675 (2005) (“Game theory suggests that competitors may be able to raise prices to supra-competitive levels without overt communication or explicit agreement simply by taking each other’s anticipated reactions into account in setting their own prices. This phenomenon is variously labeled interdependent pricing, oligopolistic interdependence, tacit collusion, and conscious parallelism.... The courts, however, have been unwilling to allow juries to infer the existence of unlawful agreements solely on the basis of parallel behavior.”); see also Alvin K. Klevorick & Issa B. Kohler-Hausmann, *The Plausibility of Twombly: Proving Horizontal Agreements after Twombly*, in RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW (Einer Elhauge ed., forthcoming), available at <http://ssrn.com/abstract=1571632>.

65. *Twombly*, 550 U.S. at 550.

66. *Id.* at 564.



knowledge that “in form a few stray statements speak directly of agreement,” but held that “on fair reading[,] these are merely legal conclusions resting on the prior allegations.”<sup>67</sup> Because only parallel conduct was pled, the complaint did not plausibly suggest a violation.<sup>68</sup>

When the Court issued its opinion, *Twombly* could be read narrowly in a number of ways.<sup>69</sup> First, it was arguable that the Court merely held that the plaintiffs had overpleaded. Despite the “legal conclusions” dressed up as factual allegations, the complaint made clear that the plaintiff’s case rested entirely on parallel conduct, and economic theory indicated that potential competitors often act similarly without an agreement.<sup>70</sup> Secondly, the Court stressed the substantial costs of discovery in antitrust cases.<sup>71</sup> Despite the transsubstantive nature of the Federal Rules,<sup>72</sup> some thought, or hoped, that *Twombly* might merely be an “antitrust pleading” decision rather than one more generally applicable.<sup>73</sup>

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67. *Id.*

68. *Id.* at 564, 570.

69. See, e.g., Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 877 (2009) [hereinafter Bone, *Pleading Rules*] (“*Twombly* does not alter pleading rules in as drastic a way as many of its critics, and even some of its few defenders, suppose.”).

70. In this regard, *Twombly* is reminiscent of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595 (1986), where, in the summary judgment context, the Court rejected an antitrust claim of predatory pricing because economic theory indicated that such conduct would not be rational. See generally Edward Brunet, *The Substantive Origins of “Plausible Pleadings”: An Introduction to the Symposium on Ashcroft v. Iqbal*, 14 LEWIS & CLARK L. REV. 1, 9 (2010).

71. *Twombly*, 550 U.S. at 559 (“Th[e] potential [discovery] expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America’s largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.”).

72. Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 541 (“One of the foundational assumptions of modern American procedure is that the Rules Enabling Act’s reference to ‘general rules’ forecloses the promulgation of different prospective rules for cases that involve different bodies of substantive law.”). But see Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (“From antitrust to environmental litigation, conspiracy to copyright, substance specific areas of law are riddled with requirements of particularized fact-based pleading.”).

73. E.g., Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117 (2007).

These and other attempts to limit *Twombly* nevertheless had to confront not only the Court's explicit rejection of the *Conley v. Gibson* "no conceivable set of facts" dictum<sup>74</sup> but also its introduction of a plausibility requirement. Although tailored to the antitrust claim before it, the Court's language in *Twombly* certainly suggested a broader approach:

[W]e hold that stating [a § 1] claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.... [Based on precedent and a number of economic authorities, it] makes sense to say, therefore, that an allegation of parallel conduct and *a bare assertion of conspiracy will not suffice*. Without more, parallel conduct does not suggest conspiracy, and *a conclusory allegation of agreement at some unidentified point* does not supply facts adequate to show illegality.<sup>75</sup>

As the italicized language suggests, the opinion was remarkable not in its requirement that the elements of the antitrust claim be pled but rather in its suggestion that "bare assertions" and "conclusory allegations" are insufficient pleading.

Nevertheless, the *Twombly* Court seemed to go out of its way to leave *Swierkiewicz* intact. In fact, it expressly rejected the plaintiffs' argument that the *Twombly* analysis "runs counter to *Swierkiewicz*."<sup>76</sup> The Court then described its earlier decision as reversing the Second Circuit because it had "impermissibly applied

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74. *Twombly*, 550 U.S. at 563 ("[A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.").

75. *Id.* at 556-57 (emphases added). A number of commentators have noted the coupling of a plausibility requirement with the disclaimer of a probability test. *E.g.*, Bone, *Pleading Rules*, *supra* note 69, at 881 ("'Plausible' corresponds to a probability greater than 'possible.' Exactly how much greater is uncertain."); Hatamyar, *supra* note 34, at 571 ("Apparently, 'plausible' is more than 'possible' but less than 'probable.'"); Noll, *supra* note 22, at 22 ("[I]t would seem that the Court is asking for, at most, something like probable cause to believe the defendant breached a legal duty owed to the plaintiff.").

76. *Twombly*, 550 U.S. at 569 (denying that "our analysis runs counter to *Swierkiewicz*").

what amounted to a heightened pleading requirement.”<sup>77</sup> In contrast, *Twombly* did not “require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”<sup>78</sup>

Despite this reassurance, those who thought that plausible pleading might be limited and perhaps applicable merely to the antitrust arena had their hopes dashed by *Iqbal*, which not only stressed the transsubstantive nature of *Twombly* but also sharpened its analysis.<sup>79</sup> *Iqbal*, who had been detained in the wake of the September 11 terrorist attacks, claimed to have been subjected to especially harsh incarceration because of his religion and nationality.<sup>80</sup> That is, he claimed that his conditions were imposed because he was Arab and Muslim.<sup>81</sup> At first glance, this would seem pretty plausible—the September 11 attacks orchestrated by al-Qaeda relied on recruits who were Arab and Muslim,<sup>82</sup> and it was widely recognized that the counterterrorist response focused on members of these groups.<sup>83</sup> But understanding the legal basis for *Iqbal*’s suit requires a more nuanced approach to the claim he was making.

The plaintiff brought a *Bivens* claim, that is, a challenge to the actions of federal officials on the ground that they violated the plaintiff’s constitutional rights.<sup>84</sup> The constitutional rights in question were equal protection, under the Due Process Clause of the Fifth Amendment, and free exercise of religion. A violation of those rights requires the violator to have the requisite intent:<sup>85</sup> “Under extant precedent purposeful discrimination requires more than ‘intent as volition or intent as awareness of consequences.’ It instead involves a decisionmaker’s undertaking a course of action ‘because of,’ not merely ‘in spite of,’ [the action’s] adverse effects upon an identifiable group.”<sup>86</sup>

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77. *Id.* at 570.

78. *Id.*; see also *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (citing *Swierkiewicz* post-*Twombly* for the proposition that “when ruling on a defendant’s motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint”).

79. *Ashcroft v. Iqbal*, 129 S. Ct. 1973, 1950 (2009).

80. *Id.* at 1942.

81. *Id.* at 1951.

82. *Id.*

83. *Id.* at 1952.

84. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971).

85. *Iqbal*, 129 S. Ct. at 1952.

86. *Id.* at 1948 (quoting *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979)).

That meant that the defendants must have acted “not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.”<sup>87</sup> To be liable, therefore, the defendants must have subjected the plaintiff to especially difficult conditions of incarceration because he was Arab or Muslim.<sup>88</sup> Further, it was necessary for each defendant—including the Attorney General John Ashcroft and the Director of the Federal Bureau of Investigation Robert Mueller—to have had this intent in order for that defendant’s conduct to be actionable under *Bivens*.<sup>89</sup> Merely approving the actions of a subordinate who possessed that intent was not enough.<sup>90</sup>

As the case reached the Court, the only question was whether Ashcroft and Mueller were proper defendants. The Court reasoned that, although it might have been plausible that lower-level officials acted from inappropriate motives, it was not plausible that Ashcroft and Mueller did so.<sup>91</sup> For these top-level officials, other motives—such as a desire to protect national security by keeping “suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity”—were more apparent.<sup>92</sup> The

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87. *Id.* at 1949.

88. *Id.* at 1952.

89. *Id.* at 1948.

90. The dissenters in *Iqbal* viewed the majority as entirely eliminating supervisory liability despite the defendants’ concessions that they would be liable if they had actual knowledge of subordinate discrimination and were deliberately indifferent to it; they also critiqued the Court as so doing without full briefing. *Id.* at 1954-55 (Souter, J., dissenting) (“This case is here on the uncontested assumption that [*Bivens*] allows personal liability based on a federal officer’s violation of an individual’s rights under the First and Fifth Amendments, and it comes to us with the explicit concession of petitioners Ashcroft and Mueller that an officer may be subject to *Bivens* liability as a supervisor on grounds other than *respondeat superior*. The Court apparently rejects this concession and, although it has no bearing on the majority’s resolution of this case, does away with supervisory liability under *Bivens*.”). Whether the majority went so far is not so clear, but the Court at least rejected *respondeat superior* liability and liability for merely knowing of a subordinate’s unconstitutional actions. *Id.* at 1949 (majority opinion) (“[Plaintiff] believes a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution. We reject this argument.”). Further, as Professor Hartnett notes, the *Iqbal* Court’s rejection of supervisory liability and the requirement of “purpose rather than knowledge” for *Bivens* liability “is a crucial step in concluding that the *Iqbal* complaint was insufficient. Nowhere does the majority in *Iqbal* state that it would be implausible to infer that Attorney General Ashcroft knew about, but did nothing to stop, the actions of his subordinates.” Hartnett, *Taming Twombly*, *supra* note 22, at 497.

91. *Iqbal*, 129 S. Ct. at 1952.

92. *Id.* The relevant allegation was that the two defendants adopted a policy approving

Court therefore concluded that Ashcroft and Mueller were not proper defendants.<sup>93</sup>

The result in *Iqbal* could have been justified by the need to provide more elbow room for law enforcement in dealing with terrorism. Indeed, the Court has been generally sympathetic to immunity for government officials,<sup>94</sup> and the case could have followed *Twombly* and imposed tightened pleading requirements where the substantive law concerns made that appropriate. *Twombly*, then, would have required heightened pleading for antitrust cases whereas *Iqbal* would do so when high level government officials were sued.<sup>95</sup> Although that approach might have been hard to square with either the text of Rule 8 or the transsubstantive nature of the Federal Rules generally, it would have done less damage to notice pleading across the board. The Court, however, explicitly disclaimed any such reading and affirmed that the pleading standard it adopted applied to all cases.<sup>96</sup>

The *Iqbal* opinion essentially sets out an analytic structure that suggests that a court analyze a complaint under “[t]wo working principles.”<sup>97</sup> Drawing on *Twombly*, *Iqbal* requires a court deciding a Rule 12(b)(6) motion to identify the “factual” allegations, as distinct from legal conclusions in a complaint.<sup>98</sup> “Facts” pled must be taken as true, but allegations that do not state “facts” need not be credited: “[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclu-

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“restrictive conditions of confinement’ for post-September 11 detainees until they were ‘cleared’ by the FBI”; this “does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin.” *Id.*

93. *Id.*

94. See generally Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230 (2006) (“[T]he Court regularly and emphatically declares that the issue of qualified immunity is a pure question of law, and that qualified immunity claims can and should be resolved at the earliest stages of litigation. Its devotion to these principles is driven by what has emerged as the primary policy justification for qualified immunity—limiting the social costs of civil rights claims against public officials.”).

95. Burbank, *supra* note 72, at 558.

96. *Iqbal*, 129 S. Ct. at 1953. Some have suggested that concerns from *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), might justify application of more liberal state pleading requirements in diversity cases. Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 330 (2008).

97. *Iqbal*, 129 S. Ct. at 1949.

98. *Id.*

sions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”<sup>99</sup> Elsewhere, the majority, quoting *Twombly*, reaffirmed that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”<sup>100</sup>

Obviously, what counts as a “fact” as opposed to a legal conclusion is key to understanding this first prong of *Iqbal*, and much of the criticism of the case has focused on this aspect.<sup>101</sup> For example, is a complaint that identifies the time and place of an automobile accident and then asserts that the defendant was driving “negligently” an allegation of fact or a legal conclusion dependent on other facts that have not been alleged? As we have seen, Form 11 approves pleading a negligence claim essentially by identifying the time and place of the incident and adding “negligently” to describe it.<sup>102</sup> Form 11 does not demand any more specificity with regard to what made the defendant’s conduct negligent. But after *Iqbal* it is hard to see why “negligence” is not a mere “legal conclusion,” a “threadbare recital” of one element of the negligence cause of action.<sup>103</sup>

Once the facts alleged are identified, the second *Iqbal* step is to determine whether, accepting such allegations as true, the “complaint ... states a plausible claim for relief.”<sup>104</sup> Quoting heavily from *Twombly*, the Court explained:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to

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99. *Id.*

100. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

101. Clermont, *supra* note 20, at 1350 (“As everyone is now realizing, the determination of conclusoriness remains an unclear and undeniably subjective step.”).

102. FED. R. CIV. P. Form 11; *supra* note 47 and accompanying text.

103. While commentators view *Twombly/Iqbal* as focusing on legal rather than factual sufficiency, or, as one commentator has noted, legal rather than factual plausibility, see Kilaru, *supra* note 34, at 910, it is precisely at the point of identifying what counts as a fact that the distinction blurs.

104. *Iqbal*, 129 S. Ct. at 1950.

a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”<sup>105</sup>

This is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>106</sup>

Unlike *Twombly*, the *Iqbal* majority did not cite *Swierkiewicz*, an omission which might indicate a retreat from the *Twombly* approval or just indicate that the majority did not see *Swierkiewicz* as relevant to the case. The latter, however, seems a little odd given that both *Iqbal* and *Swierkiewicz* involved pleading what Title VII would describe as individual disparate treatment.<sup>107</sup>

It should be immediately apparent that, *Swierkiewicz* aside, application of *Twombly/Iqbal* to the employment discrimination context raises serious questions in terms of both prongs, pleading “facts” and the plausibility of the resultant claim. A plaintiff could easily plead the employment-related harm that was done to him,<sup>108</sup> but would a further allegation that the action was taken as a result of discriminatory motivations be merely “conclusory” or more like the allegation of “negligence” in Form 11? If the former, must the plaintiff plead a *McDonnell Douglas* prima facie case or something else in order to show more than “a mere possibility” that the plaintiff is entitled to relief? *Swierkiewicz* explicitly holds not,<sup>109</sup> but does *Swierkiewicz* survive *Twombly/Iqbal*?

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105. *Id.* at 1949 (internal citations to *Twombly* omitted). The Court reiterated this plausibility requirement later: “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.” *Id.* at 1950 (quoting FED. R. CIV. P. 8 (a)(2)).

106. *Id.* at 1950.

107. There are, of course, substantial differences. Whereas *Bivens* focuses on individual liability and rejects supervisory or entity liability, Title VII does just the opposite: only the employer, not the agent, may be liable for discrimination. *E.g.*, *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 181-82 (4th Cir. 1998) (Title VII). See generally SULLIVAN & WALTER, *supra* note 31, § 1.06[D]; Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509 (1996).

108. See *infra* text accompanying notes 142-43.

109. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510, 515 (2002).

II. REACTIONS TO *TWOMBLY* AND *IQBAL*

The scholarly community reacted strongly to *Twombly* and *Iqbal* as numerous commentators attempted not merely to understand and critique the decisions<sup>110</sup> but also to “tame” them.<sup>111</sup> The critiques are sweeping. Process-oriented commentators argue that, whether or not the resulting rule is optimal, it constitutes a *sub silentio* amendment of the Federal Rules of Civil Procedure rather than a mere interpretation of them.<sup>112</sup> This view finds the *Iqbal* approach illegitimate as a violation of the balance between Congress and the Court struck by the Rules Enabling Act.<sup>113</sup> Short-circuiting the amendment process also meant that the Court lacked sources of information critical to assessing the wisdom of the new regime.

Beyond the procedural critiques are the substantive criticisms. For example, there are those who argue that the new pleading regime will inappropriately restrict access to the courts for those who lack the resources to investigate claims without the benefits of discovery.<sup>114</sup> Others point out that, especially for civil rights claims, which typically require intent, the critical information to ascertaining the defendant’s state of mind is necessarily unavailable without discovery.<sup>115</sup> Still others contend that, whatever the abstract merits

110. *E.g.*, Bone, *Pleading Rules*, *supra* note 69; Edward D. Cavanagh, *Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1 (2008); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010) [hereinafter Clermont & Yeazell, *Inventing Tests*]; Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063 (2009).

111. *E.g.*, Hartnett, *Taming Twombly*, *supra* note 22.

112. *See Iqbal Hearing*, *supra* note 32, at 1 (statement of Stephen B. Burbank, Professor, University of Pennsylvania) (“[A]ny such change should be effected by amendments to the Federal Rules of Civil Procedure, by statute, or by some combination of the rulemaking and legislative processes.”).

113. For that reason, heightened pleading requirements imposed by Congress in the Private Securities Law Reform Act, 15 U.S.C. § 78u-4 (2006), do not pose the same legitimacy problems even if they tend to discourage access to the courts as does *Iqbal*. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). *See generally* Geoffrey P. Miller, *Pleading After Tellabs*, 2009 WIS. L. REV. 507.

114. Spencer, *Plausibility Pleading*, *supra* note 31, at 433.

115. Roy L. Brooks, *Conley and Twombly: A Critical Race Theory Perspective*, 52 HOW. L.J. 31, 58 (2008) (“[E]vidence of discriminatory animus ... is typically not revealed to the plaintiff until discovery.”); 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 &



of the *Iqbal* approach, it is too indeterminate to yield consistent results in the lower courts.<sup>116</sup> Indeed, its explicit reliance on “judicial experience and common sense”<sup>117</sup> of district judges guarantees that similar cases will be treated differently. The various critics draw heavily on the history of the Federal Rules of Civil Procedure, arguing that the new rule violates the original intent regarding notice pleading and threatens to replicate the problems with prior pleading regimes that the Federal Rules sought to eliminate.<sup>118</sup>

Many critiques tend to read the *Twombly/Iqbal* rule as a u-turn for pleading,<sup>119</sup> a view that is shared even by some who applaud the decisions.<sup>120</sup> But other scholars, although sensitive to these kinds of

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CLARK L. REV. 65, 82 (2010) (“At this early juncture in the litigation, legal conclusions may be the best a plaintiff can offer when the requisite proof of plausibility is in the exclusive possession of the defendant and can only be revealed via discovery.”); Schneider, *supra* note 34, at 519 (“[T]he greatest impact of this change in the landscape of federal pretrial practice is the dismissal of civil rights and employment discrimination cases from federal courts in disproportionate numbers.”); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 159, 179-80 (2000).

116. Malveaux, *supra* note 115, at 92 (“Where a judge has only his ‘judicial experience and common sense’ to guide him when determining the plausibility of an intentional discrimination claim pre-discovery, there is the risk of unpredictability, lack of uniformity, and confusion.”); Wasserman, *supra* note 115, at 159 (“[*Iqbal* will] almost certainly produc[e] more 12(b)(6) dismissals as well as wide variance from case to case, even within the same court.”).

117. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

118. *Iqbal Hearing*, *supra* note 32, at 4 (statement of Stephen B. Burbank, Professor, University of Pennsylvania) (“Those who drafted the Federal Rules objected to fact pleading because it led to wasteful disputes about distinctions—among ‘facts,’ ‘conclusions,’ and ‘evidence’—that they thought were arbitrary or metaphysical.”).

119. See Suja A. Thomas, *The New Summary Judgment Motion: The Motion To Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 18 (2010) (arguing that plausible pleading brings motions to dismiss closer to summary judgment motions); Suja A. Thomas, *Why the Motion To Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1870 (2008) (arguing that the plausible pleading shares similar constitutional infirmities to summary judgment). *But see* Clermont, *supra* note 20, at 1357-59 (noting differences between the two procedural devices).

120. See Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions To Dismiss Became (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 76-77 (2007) (arguing that the realities of modern civil litigation require a different approach to pleading); see also Bone, *Pleading Rules*, *supra* note 69, at 895 (arguing that the drafters of the Federal Rules were pragmatists who could have endorsed the *Twombly* approach as an appropriate reaction to the realities of modern litigation); Wasserman, *supra* note 115, at 167-74 (drawing on Thomas Main’s work to argue that a perceived mismatch between substance and procedure explains the *Iqbal* approach to pleading in civil rights cases). *But see* Smith, *supra* note 110, at 1088-89 (arguing that the new standard is mandated by the Federal Rules).

concerns, have interpreted the opinions to be less radical<sup>121</sup> or have argued that other Federal Rules can contain the potential damage. For example, Professor Edward Hartnett argues that *Twombly*'s plausibility requirement can be read "as equivalent to the traditional [requirement] that a factual inference be reasonable"<sup>122</sup> and that federal judges can defer deciding motions to dismiss until sufficient discovery has been had to explore the plausibility of the allegations.<sup>123</sup> And Professor Adam Steinman, taking "a uniquely sanguine view,"<sup>124</sup> argues that the plausibility question is not even reached if "a complaint contains nonconclusory allegations for every element of a claim for relief."<sup>125</sup> Under this reading, *Swierkiewicz* continues to state the law.<sup>126</sup>

Nor is the adverse reaction limited to scholars. Senator Arlen Specter introduced a bill aimed at restoring the pre-*Twombly* regime, and the Senate Judiciary Committee held hearings on the question.<sup>127</sup> Among others, Professor Stephen Burbank testified at the hearings, urging an alternative statutory correction of the decisions or an amendment to the Federal Rules of Civil Procedure,<sup>128</sup>

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121. Before *Iqbal* made clear the transsubstantive reach of plausible pleading, 129 S. Ct. at 1953 ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike."), much of this effort seemed designed to confine *Twombly* to the antitrust arena. *E.g.*, Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 932 n.185 (2009).

122. Hartnett, *Taming Twombly*, *supra* note 22, at 474.

123. *Id.* at 475 ("[D]espite a widespread assumption to the contrary, discovery can proceed during the pendency of a *Twombly* motion."); *see also* Malveaux, *supra* note 115, at 69 (arguing that predismittal discovery would be aimed at "determining the lawsuit's *viability* rather than its underlying *merits*") (emphasis added). Professor Hartnett also argues that "the *Twombly* framework can be treated as an invitation to present information and argument designed to dislodge a judge's baseline assumptions about what is natural." Hartnett, *Taming Twombly*, *supra* note 22, at 474-75; *see infra* text accompanying notes 130-31. This Article in fact is devoted to exploring one way to shift baseline assumptions in the discrimination context.

124. Wasserman, *supra* note 115, at 176. Professor Wasserman finds Steinman's approach normatively appealing but "descriptively out of step with *Iqbal*." *Id.*; *see also* Clermont, *supra* note 20, at 1363 n.128 (classifying both Hartnett and Steinman, *inter alia*, as *Iqbal* optimists).

125. Steinman, *supra* note 21, at 1298.

126. *Id.* at 1322-23 (finding *Swierkiewicz* consistent with proper application of plausible pleading).

127. *See supra* note 32.

128. *Iqbal Hearing*, *supra* note 32 (statement of Stephen B. Burbank, Professor, University of Pennsylvania).

and the number of scholarly proposals to restore what the authors view as the proper scope of notice pleading has since grown.<sup>129</sup>

The underlying policy issue at stake in this debate lies at the heart of civil litigation. Under the notice pleading regime as traditionally conceived, most of the work in sorting out potentially valid claims from invalid ones occurred not in the Rule 12(b)(6) motion to dismiss context but rather at the summary judgment stage after sometimes lengthy discovery.<sup>130</sup> This approach to pleading tended to ensure that the ultimate determination was made on the merits in light of full information. Viable causes of action would not be frustrated by the inability of the plaintiff to ascertain the relevant facts on her own, an especially difficult task if the information were under the control of the defendant.<sup>131</sup>

This advantage of notice pleading was, of course, also its biggest disadvantage: the *Conley* regime's subordination of pleading to merit determinations after full discovery subjected defendants to the burdens of discovery even for claims whose implausibility was apparent at the outset.<sup>132</sup>

The advantages and disadvantages of *Twombly/Iqbal*'s plausible pleading approach are the mirror image of those of notice pleading. Dubious claims will be filtered out early, and the (sometimes enormous) costs of discovery will be avoided; however, claims that would be well-founded if the plaintiff could get access to relevant information through the discovery process will also be dismissed. Depending on an empirical assessment of how much is baby and how much is

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129. See sources cited *supra* note 34.

130. Some have argued that the halcyon days of pre-*Twombly* and *Iqbal* notice pleading are overstated. Although one would imagine that the official ideology of notice pleading would mean dismissals were relatively rare, a substantial percentage of Rule 12(b)(6) motions were granted even before *Twombly*. See Seiner, *The Trouble with Twombly*, *supra* note 34, at 1029 ("In the year prior to the Supreme Court's decision, 54.5 percent of federal district court opinions granted (in whole) motions to dismiss when citing the *Conley* decision.").

131. Some kinds of discrimination cases do not turn on information as to which the defendant has greater access than the plaintiff, and it may not be an accident that some of the decisions finding the plaintiff's pleading inadequate focus on this aspect. For example, in a harassment case, the plaintiff should be able to allege the acts that constitute the harassment in order to allow the court to determine whether it is plausible that the conduct was sufficiently "severe or pervasive" to be actionable. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); see *infra* note 226.

132. *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974) ("Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.").

bathwater, a more rigorous approach to pleading is either good or bad policy.<sup>133</sup> This balance has led scholars like Professors Hartnett and Steinman to try to preserve the good of plausible pleading while limiting the downsides.<sup>134</sup>

### III. EMPLOYMENT DISCRIMINATION PLAINTIFFS' PLAUSIBLE PLEADING PROBLEM

Consistent with this Article's worst-case scenario for the employment discrimination plaintiff,<sup>135</sup> suppose Congress does not act and that the more extreme potential implications of *Twombly/Iqbal* are realized in the courts. That would mean that *Swierkiewicz* is overturned and that employment discrimination complaints, like all other complaints, are subjected to "plausible pleading" requirements. Further, although Professor Hartnett has suggested that, within the current Federal Rules, district courts can reach sensible results even under a plausible pleading regime by deferring decisions on motions to dismiss until after at least limited discovery,<sup>136</sup> this avenue depends on the willingness of the district judges to so act. At the outset of a case, a plaintiff will not know who the judge will be nor how likely he or she is to be sympathetic to the problems posed by *Twombly/Iqbal* for employment discrimination suits. Indeed, there is strong reason to believe that such suits are already disfavored in the federal courts,<sup>137</sup> which suggests that district court judges may apply plausible pleading enthusiastically. While it is too early to be confident, there are indications that *Twombly* and *Iqbal* have already had a significant effect on the rate

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133. Clermont & Yeazell, *Inventing Tests*, *supra* note 110, at 838 (noting that the new regime will reduce the "frequency of weakly founded suits" and "the frequency of well-founded suits that now require the assistance of discovery to make their merits clear").

134. *See generally* Hartnett, *Taming Twombly*, *supra* note 22; Steinman, *supra* note 21.

135. *See supra* note 34 and accompanying text.

136. Hartnett, *Taming Twombly*, *supra* note 22, at 509-10.

137. *See generally* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POLY REV. 103 (2009); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004); Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POLY J. 547 (2003).

of dismissals generally<sup>138</sup> and in employment discrimination cases in particular.<sup>139</sup>

To understand the impact of *Twombly/Iqbal*, it is necessary to examine how plausible pleading might apply to a typical employment discrimination case claiming individual disparate treatment.<sup>140</sup> Once this analysis makes clear the dangers posed to the antidiscrimination laws by *Iqbal*, this Article proposes solutions that assume the more extreme readings of *Iqbal* and shows how a plaintiff may nevertheless defeat a motion to dismiss.<sup>141</sup>

The putative employment discrimination plaintiff will typically know that he has suffered an “adverse employment action”—for example, that he was turned down for employment, terminated, or laid off.<sup>142</sup> In the same way that a negligence plaintiff can plead the

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138. See Hatamyar, *supra* note 34, at 598; Seiner, *The Trouble with Twombly*, *supra* note 34, at 1029. *But see* Clermont & Yeazell, *Inventing Tests*, *supra* note 110, at 839 n.66, 848 n.98 (arguing the difficulties of empirically assessing the results of plausible pleading).

139. See sources cited *supra* note 34.

140. This Article does not address, except in passing, how to plead other kinds of discrimination claims, most notably systemic disparate treatment and disparate impact. Further, there are variations on the individual disparate treatment claims that require special treatment—for example, harassment claims and retaliation claims. See *infra* note 226. Finally, pleading disability claims poses special problems. See Seiner, *Pleading Disability*, *supra* note 34, at 136-37.

141. *Infra* Part IV.

142. For most lower courts, a mere showing that the employer discriminated does not necessarily make the conduct actionable. Courts have also required an “adverse employment action,” which they have usually defined to require some material effect on the terms and conditions of employment. See, e.g., *Kassner v. 2nd Ave. Delicatessen*, 496 F.3d 229, 238 (2d Cir. 2007). Obviously, “ultimate employment decisions”—hiring and firing—suffice, *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007), and meaningful changes in compensation have also been held sufficient. See *Farrell v. Butler Univ.*, 421 F.3d 609, 614 (7th Cir. 2005) (holding that although denial of bonuses is not an adverse employment action, denial of a raise can be, and the denial to the plaintiff of a regularly conferred award resulting in the recipient getting a permanent increase in base salary is best characterized as a raise).

When it comes to less direct economic effects on employees’ lives, however, the lower courts’ decisions are confused. For example, a mid-range evaluation, *Primes v. Reno*, 190 F.3d 765, 767 (6th Cir. 1999), or even a negative evaluation that hinders future prospects, *Davis v. Town of Lake Park*, 245 F.3d 1232, 1242-43 (11th Cir. 2001), have been found to be nonactionable. This is also true of “lateral transfers,” usually defined to mean no reduction in pay or title and any diminution in pay “indirect and minor,” *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996), even though the transfer might be to a distant location, *Reynolds v. Ethicon Endo-Surgery, Inc.*, 454 F.3d 868, 872 (8th Cir. 2006); *Vann v. Sw. Bell Tel. Co.*, 179 F. App’x 491, 492-98 (10th Cir. 2006). Other courts have been more permissive, and some commentators have challenged requiring more than a change in a term, condition, or privilege of employment. See Rebecca Hanner White, *De Minimis Discrimination*,

date and time of the accident in Form 11, a discrimination plaintiff can plead the date and character of the adverse employment action.<sup>143</sup> Under plausible pleading, this might require a little more detail than would have been needed previously. Because not all employment actions taken for discriminatory reasons are sufficiently serious to be actionable, the plaintiff might have to plead more than a “conclusory” statement of “adverseness.” But this seems not much of an imposition: a plaintiff will typically be aware of the harm caused by the action being challenged.

What the putative plaintiff will rarely “know” is the employer’s intent in taking the challenged action. Unlike other areas of the law, such as breach of contract, Title VII and other antidiscrimination statutes do not bar particular conduct—such as failure to hire or a decision to discharge. Such actions are perfectly acceptable unless motivated by discriminatory intent.<sup>144</sup> Or, as Professor Suzette

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47 EMORY L.J. 1121, 1151 (1998) (“Congress’s use of the phrase ‘compensation, terms, conditions, or privileges of employment’ emphasizes the employment-related nature of the prohibited discrimination. The phrase is better read as making clear that an employer who discriminates against an employee in a non-job-related context would not run afoul of Title VII, rather than as sheltering employment discrimination that does not significantly disadvantage an employee.”) (footnote omitted).

143. In *Kolupa v. Roselle Park District*, 438 F.3d 713, 715 (7th Cir. 2006), the court rejected the necessity for specific allegations not only that particular action was taken against the plaintiff but also that those actions constituted adverse employment actions: “Whether any given step is an adverse employment action (alone or in combination with some other act) goes to the merits; these details may be explored in discovery, on motion for summary judgment, and if necessary at trial, but need not be included in complaints.” *Kolupa* held that less tangible adverse actions—such as warnings—were sufficient for pleading purposes. Whether they were sufficiently adverse to be actionable could be determined in the context of the whole case at summary judgment. *Id.*; see also *Kassner*, 496 F.3d at 240. However, these cases were decided before plausible pleading, and one possible implication of *Iqbal* is that a plaintiff must now plead the consequences of less tangible actions in order to render it plausible that the action in question was adverse.

144. The causal relationship between the act taken and the prohibited intent varies with the statute. Due to an amendment to Title VII in 1991, an employer is liable for discrimination if the prohibited intent was a “motivating factor” in an employment decision, even if the employer would have made the same decision had the factor been absent. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94-95 (2003) (stating that 42 U.S.C. § 2000e-2(m) (2006) provides for liability when a plaintiff proves that a prohibited consideration is a motivating factor in an employment decision even though the employer can limit its liability by carrying the burden of showing that it would have made the same decision in any event). In contrast, under the ADEA, the discriminatory intent must be a determinative factor, that is, a but-for cause. *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343, 2351 (2009) (“It follows, then, that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the ‘but-for’ cause of the employer’s adverse action.”). The courts have not yet definitively resolved how

Malveaux puts it, any given decision might be based on a prohibited characteristic or a legitimate employer concern, which makes the factual allegation of an adverse action “consistent with two possibilities, neither of which can be confirmed at the pleading stage.”<sup>145</sup>

The plaintiff, therefore, must plead not only the harm done to her but also the motivation. This is where the first step in *Iqbal* enters the analysis: can the plaintiff survive a Rule 12(b)(6) motion by simply alleging that the adverse employment action was motivated by discrimination? Form 11 implies that the word “discriminatory” would suffice in the same way that “negligence” suffices for the tort.<sup>146</sup> But *Iqbal* suggests the opposite—that merely pleading discriminatory motive is “conclusory,” a “formulaic recitation of the elements of [the Title VII] cause of action.”<sup>147</sup>

Prior to *Iqbal*, the text of the Federal Rules seemed to offer a basis to avoid this result. Thus, Rule 9(b) provides that “[m]alice,

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this allocation of burdens plays out under the Americans with Disabilities Act or 42 U.S.C. § 1981. See *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010) (holding that *Gross* does not require burden shifts in ADA cases).

145. Malveaux, *supra* note 115, at 87-88.

146. FED. R. CIV. P. Form 11.

147. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Professor Malveaux writes:

By discounting as implausible factual allegations because they are equally consistent with legal and illegal behavior, the new pleading standard penalizes plaintiffs who seek relief for invidious discrimination because they do not have “further factual enhancement” to cross the line from possible to plausible based on the judge’s “judicial experience and common sense.”

Malveaux, *supra* note 115, at 88 (quoting *Twombly*, 550 U.S. at 546; *Iqbal*, 129 S. Ct. at 1950). But see *Seiner, Pleading Disability*, *supra* note 34, at 136-37 (“Establishing the employer’s discriminatory intent in a case can be the most difficult hurdle for an employee to overcome. For purposes of pleading, however, simply alleging the causal link between the adverse action and the disability should be sufficient to allow the case to proceed.”).

*Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010), offers support for both positions. The majority, Judges Woods and Easterbrook, found the plaintiff stated a claim for discrimination when a bank denied a home-equity loan, even though there seemed to be a plausible business explanation for the bank’s actions. *Id.* at 405-06. The opinion relied heavily on *Swierkiewicz*. Judge Posner dissented, “hav[ing] difficulty squaring” the majority’s decision with *Iqbal*. *Id.* at 407 (Posner, J., dissenting). Although he recognized that *Swierkiewicz* should still be treated as binding under *stare decisis*, he found it distinguishable, but he was not so clear why. *Id.* at 410. Posner also viewed *Iqbal*’s plausibility standard as “opaque,” *id.* at 411, but ultimately concluded, “when a bank turns down a loan applicant because the appraisal of the security for the loan indicates that the loan would not be adequately secured, the alternative hypothesis of racial discrimination does not have substantial merit; it is implausible.” *Id.*

intent, knowledge, and other conditions of a person's mind may be alleged generally."<sup>148</sup> Whatever discriminatory intent is, it would seem to be a "condition of a person's mind." But *Iqbal* rejected this argument. It, of course, was a discrimination case, albeit not one involving employment discrimination, but the Court found Rule 9(b) unavailing:

It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8.<sup>149</sup>

Thus, the question for employment discrimination plaintiffs returns to whether alleging an identified action as being discriminatorily motivated suffices.

*Iqbal* seems to answer the question no. Of course, it might be that the discrimination charged in *Iqbal* could be distinguished from employment discrimination. One possibility is simply the source of the right: *Iqbal* turned on a question of constitutional law because the *Bivens* claim at issue allowed the plaintiff to sue for a violation of the Free Exercise Clause<sup>150</sup> and the equal protection component of the Fifth Amendment's Due Process Clause. The Court relied on *Personnel Administrator v. Feeney*,<sup>151</sup> which drew a "fine distinction

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148. FED. R. CIV. P. 9(b).

149. *Iqbal*, 129 S. Ct. at 1954.

150. Indeed, the majority questioned whether a claim of religious discrimination would lie under *Bivens* but assumed so for purposes of the case. *Id.* at 1948 ("For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, we have not found an implied damages remedy under the Free Exercise Clause.... Petitioners do not press this argument, however, so we assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*." (internal citations omitted)).

151. 442 U.S. 256 (1979). See generally Victor C. Romero, *Interrogating Iqbal: Intent, Inertia, and (a lack of) Imagination*, 114 PENN. ST. L. REV. 1419, 1442 (2010) ("The Court's retreat in *Iqbal* through its citation to *Feeney*'s purposeful intent standard betrays the legacy of its more notable commitments to individual liberty.").



between different mental states”<sup>152</sup> by holding that the foreseeability of consequences of an employment practice was not “intentional” for equal protection purposes.<sup>153</sup> Rather, the actor must have desired the result—he must have acted “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>154</sup>

Although *Feeney* did not involve a Title VII claim,<sup>155</sup> the line it drew is consistent with the traditional distinction between disparate treatment and disparate impact under that statute. Although the consequences of an employment practice can be determinative of disparate impact liability,<sup>156</sup> and they may be a basis for inferring the requisite intent, as *Feeney* itself recognized,<sup>157</sup> there must be a finding of intent in the sense of purpose to act on the basis of a prohibited characteristic for a disparate treatment violation to occur.<sup>158</sup>

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152. George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 *FORDHAM L. REV.* 2313, 2321 (2006).

153. *Feeney*, 442 U.S. at 279.

154. *Id.*

155. Veterans’ preferences at issue in *Feeney* are excluded from the statute. 42 U.S.C. § 2000e-11 (2006).

156. *Id.* § 2000e-2(k); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). *See generally* SULLIVAN & WALTER, *supra* note 31, § 4. A diluted version of disparate impact liability applies under the ADEA. *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (applying the Court’s articulation of the disparate impact theory in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), to the ADEA, which the Civil Rights Act of 1991 did not amend when it amended Title VII to codify disparate impact under that statute); SULLIVAN & WALTER, *supra* note 31, § 4.10. Disparate impact was somewhat revived for the ADEA by the Court’s subsequent decision in *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84, 91 (2008), which held that the ADEA’s provision stating that it “shall not be unlawful for an employer ... to take any action otherwise prohibited ... where the differentiation is based on reasonable factors other than age [RFOA],” 29 U.S.C. § 623(f)(1), superseded the business necessity/job relation justification that normally applies under the disparate impact, and that the burden of persuasion as to RFOA was on the employer. SULLIVAN & WALTER, *supra* note 31, § 4.10.

157. *Feeney*, 442 U.S. at 279 n.25 (“This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the law at issue], a strong inference that the adverse effects were desired can reasonably be drawn.”); *see also* *EEOC v. Dial Corp.*, 469 F.3d 735, 741-42 (8th Cir. 2006) (looking to foreseeability of adverse effects in a Title VII case as one basis to draw an inference of intent).

158. *AFSCME v. Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985) (applying *Feeney* to a Title VII disparate treatment claim); *see also* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 *LA. L. REV.* 495, 503 (2001) (“Although *Feeney* was a constitutional, not statutory, decision, the judicial approach to intentional discrimination in Fourteenth Amendment claims and its approach to intentional discrimination under Title VII has been consistent.”).

If the legal context does not serve to distinguish *Iqbal* from typical employment discrimination complaints, perhaps the factual context justifies a different approach. In *Feeney*, the Court recognized that the inference of intent to discriminate might appropriately be drawn from the disparate gender impact in some circumstances, but it found that inference negated by the history of the Massachusetts veterans' preference.<sup>159</sup> Perhaps *Iqbal* can be similarly explained. The Court stressed that there was a more plausible alternative inference to be drawn from the only "facts" it found to have been alleged against these defendants:

Though respondent alleges that various other defendants, who are not before us, may have labeled him a person of "of high interest" [sic] for impermissible reasons, his only factual allegation against [Attorney General Ashcroft and FBI Director Mueller] accuses them of adopting a policy approving "restrictive conditions of confinement" for post-September-11 detainees until they were "cleared" by the FBI." Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to "nudge[e]" his claim of purposeful discrimination "across the line from conceivable to plausible."<sup>160</sup>

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Professor Michael Zimmer has argued that the Supreme Court's recent decision in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), radically changed the definition of intent under Title VII, requiring essentially only that the employer act with knowledge of the race of the individuals affected. Michael J. Zimmer, *Ricci's Color-Blind Standard in a Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257, 1259. If that interpretation were to be accepted, much of the pleading problems under the antidiscrimination statutes would disappear.

159. *Feeney*, 442 U.S. at 275.

160. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009) (citation to the complaint omitted) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

This analysis suggests that where alternative, more plausible explanations are readily available to the court, the inference of a violation is not sufficiently likely to survive a Rule 12(b)(6) motion.<sup>161</sup> This reasoning is in accordance with *Twombly*, which can be seen as holding that, in light of economic literature suggesting that competitors tend to align their conduct without any agreement, the existence of parallel conduct suggests just that—conscious parallelism, not conspiracy.<sup>162</sup>

Granting this interpretation, it remains unclear what makes “plausible” an allegation of discrimination in an adverse employment action. Indeed, this takes us back to the Second Circuit’s view in *Swierkiewicz. McDonnell Douglas Corp. v. Green* established a three-step analytical structure for cases that later became known as “single motive” or “circumstantial” evidence cases.<sup>163</sup> The first step requires the plaintiff to establish a prima facie case of discrimination, that is, to put on enough evidence to create a presumption that the employer discriminated.<sup>164</sup> Once the prima facie case is

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161. One of my colleagues, Professor Denis McLaughlin, argues that plausibility is an all-or-nothing standard. A claim is either plausible or it is not, which means that describing a claim as “more plausible” is inaccurate. The argument is pitched largely on the Court’s speaking in terms of the “line between possibility and plausibility.” See *supra* text accompanying note 105. Although the logic is hard to resist, it is hard to view a concept that is essentially one of likelihood as not reflecting a continuum. As one moves toward the “plausibility” finish line in terms of making a claim more likely, the vector seems best described as “more plausible”—even if it is not necessarily plausible enough to survive a motion to dismiss on the pleadings.

Of course, it would help if the Court had provided a definition, or at least a better notion, of plausibility. The concept is so ill-defined that it is not even clear whether there can be only one plausible interpretation of a set of facts, or whether two or more explanations may all be plausible. See *Swanson v. Citibank, N.A.*, 614 F.3d 400, 411 (7th Cir. 2010) (Posner, J., dissenting) (“In statistics the range of probabilities is from 0 to 1, and therefore encompasses ‘sheer possibility’ along with ‘plausibility.’ It seems (no stronger word is possible) that what the Court was driving at was that even if the district judge doesn’t think a plaintiff’s case is more likely than not to be a winner (that is, doesn’t think  $p > .5$ ), as long as it is substantially justified that’s enough.”); Wasserman, *supra* note 115, at 177 (“*Twombly* and *Iqbal* together suggest that courts may look not for a conclusion of liability that is plausible, but for whether that conclusion is the more (or most) plausible one.”).

162. See Herbert J. Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 IOWA L. REV. BULL. 55, 60 (2010).

163. 411 U.S. 792, 802-04 (1973).

164. *Id.* at 802. The Court repeated this theme in *St. Mary’s Honor Center v. Hicks*: At the close of the defendant’s case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine. None does if, on the evidence presented, (1) any rational person would have to find the existence of facts

established, the employer, at the second step, has a burden of production to put into evidence a nondiscriminatory reason for the alleged discriminatory decision.<sup>165</sup> Finally, the plaintiff has the opportunity in the third step to prove that the supposed reason was really a pretext for an underlying discriminatory motive.<sup>166</sup>

*McDonnell Douglas* framed the elements of one flavor of a prima facie case—in which a job applicant is turned down but no one is hired in his place<sup>167</sup>—but it explicitly stated that other situations would require different formulations,<sup>168</sup> a qualification that has generated confusion in the lower courts about the requirements of the prima facie case in other, more common settings.<sup>169</sup> Nevertheless,

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constituting a prima facie case, and (2) the defendant has failed to meet its burden of production-*i.e.*, has failed to introduce evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action. In that event, the court must award judgment to the plaintiff as a matter of law.

509 U.S. 502, 509 (1993); *see also* *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (“Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff’s evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.”). Thus, *McDonnell Douglas* established that certain proof is sufficient for a judgment for plaintiff, whether or not the proof would require or even permit a finding of the underlying fact—that the defendant intended to discriminate.

165. *McDonnell Douglas*, 411 U.S. at 802.

166. *Hicks*, 509 U.S. at 511 (“The defendant’s ‘production’ (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved ‘that the defendant intentionally discriminated against [him]’ because of his race. The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.”); *see infra* text accompanying notes 167-71.

167. The plaintiff must establish the following elements:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

*McDonnell Douglas*, 411 U.S. at 802. These four prongs of the prima facie case were tailored to the relatively unusual facts before the Court, namely an employer’s refusal to rehire a qualified black former employee when the job in question remained vacant.

168. *Id.* at 802 n.13 (“The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.”).

169. *See generally* SULLIVAN & WALTER, *supra* note 31, § 2.09; Parisi G. Filippatos & Sean Farhang, *The Rights of Employees Subjected to Reductions in Force: A Critical Evaluation*, 6

the purpose of the prima facie case is clear: it requires merely a showing that a minority or woman has been denied an employment opportunity in circumstances in which the most obvious innocent explanations, such as the plaintiff's lack of qualifications or the absence of an opening, are inapplicable.<sup>170</sup> As the Court explained in a later case, "[a] prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."<sup>171</sup>

In retrospect, the Second Circuit's rejected view in *Swierkiewicz* seems to have foreshadowed the *Twombly/Iqbal* path: the Second Circuit merely required the plaintiff to plead sufficient facts to make the discriminatory motive claimed for the adverse employment action plausible by negating the most common nondiscriminatory explanations, thereby rendering the claim of discrimination more plausible.<sup>172</sup> Of course, this is more than notice pleading as traditionally conceived, but it seems to fit well into a plausible pleading regime. And, although *Swierkiewicz* faulted the Second Circuit for confusing a proof structure with pleading requirements and stressed that discrimination plaintiffs could prevail by different proof structures than *McDonnell Douglas*,<sup>173</sup> this possibility could

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EMP. RTS. & EMP. POL'Y J. 263 (2002) (classifying court decisions treating reductions in force). Another arena in which this debate plays out is whether a plaintiff has to identify a white "comparator" or comparators who were treated better than the plaintiff to make out a prima facie case. See *infra* Part IV.C.

170. The prima facie case eliminates the "most common legitimate reasons on which an employer might rely" for the adverse employment action. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). In *McDonnell Douglas*, these were "an absolute or relative lack of qualifications [and] the absence of a vacancy in the job sought. Elimination of these reasons ... is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one." *Id.*

171. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). The Court has not retreated from this view, although it is important more as a heuristic than as a litigation principle. Once the defendant has put in evidence of its nondiscriminatory reason, the "presumption" disappears. *Hicks*, 509 U.S. at 507. Although the fact-finder may still decide for the plaintiff, it would do so because of inferences drawn from the evidence supporting the prima facie case and the implausibility of the defendant's nondiscriminatory reason, not because of any "presumption" that arises from that prima facie case.

172. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 509 (2002).

173. *Id.* at 511-12 ("In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without

be accommodated under *Twombly/Iqbal* by recognizing that a plaintiff can satisfy Rule 8 by plausibly pleading the elements of a *McDonnell Douglas* prima facie case *or* by pleading the components of other methods of proof, such as employer admissions, so-called “direct evidence” of discriminatory intent.<sup>174</sup>

It is true that *Swierkiewicz* critiqued the Second Circuit’s “heightened pleading standard” precisely because, under that view,

a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.<sup>175</sup>

This argument is powerful—but goes to the heart of the difference between notice pleading and plausible pleading. If a plaintiff must plead a plausible case in order to be entitled to discovery, which seems to be the main thrust of *Twombly/Iqbal*, then *Swierkiewicz* has it entirely backward.

#### IV. SATISFYING PLAUSIBLE PLEADING

From a plaintiff’s perspective, the most obvious solution to the problem posed by *Twombly/Iqbal* is for the Court to reaffirm the broader views of *Swierkiewicz* and to do so by clarifying that the only requirement of a claim is notice to the defendant that a particular challenged employment decision is both “adverse” and motivated by an identified discrimination such as race, sex, or age.

But this Article assumes *arguendo* that *Swierkiewicz* is no longer good law. Further, even if an optimistic view of *Swierkiewicz*’s viability ultimately prevails, lower courts will struggle with the question of its status for the foreseeable future. That means that plaintiffs would be well advised to plead more than *Swierkiewicz*

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proving all the elements of a prima facie case.”).

174. See *infra* Part IV.B.

175. *Swierkiewicz*, 534 U.S. at 511-12.

requires.<sup>176</sup> There are four basic ways in which this can be done: first, pleading a traditional prima facie case; second, pleading “direct evidence” of discrimination; third, pleading other bases for inferring discriminatory intent, such as the existence of comparators;<sup>177</sup> and, fourth, pleading “legislative facts” that make the inference of discrimination that might be drawn from the adjudicative facts more plausible.<sup>178</sup>

### A. Pleading a McDonnell Douglas Prima Facie Case

*Swierkiewicz* rejected any requirement of pleading a *McDonnell Douglas* prima facie case,<sup>179</sup> but it never suggested that such a pleading would not suffice. Although *McDonnell Douglas* has been largely discredited by scholars who generally view the decision as both intellectually bankrupt and superseded by *Desert Palace*,<sup>180</sup> it

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176. They should also take advantage of the logic of *Twombly* and *Iqbal*. For example, courts have often under notice pleading sliced and diced plaintiffs' claims in order to separate out time-barred from timely violations. *E.g.*, *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 245 (2d Cir. 2007). Although that remains a legitimate task for a Rule 12(b)(6) motion, courts should not disregard allegations of time-barred violations in determining whether timely claims are “plausible.” Just as the statute does not bar an employee “from using the prior acts as background evidence in support of a timely claim,” *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002), allegations of time-barred conduct, taken as true, may support the plausibility of the pleading of timely claims.

177. The second and third methods could well be considered subsets of the first, given the varying uses of “prima facie case” in employment discrimination law. *See infra* notes 187-89. For purposes of exposition, however, they are treated here as separate approaches.

178. Another possibility is to bring suit for violation of the federal antidiscrimination laws in state court, which has concurrent jurisdiction. *E.g.*, *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990). Although a number of states have adopted notice pleading analogs to Rule 8, they are split as to whether to interpret their pleading regimes to satisfy *Twombly* and *Iqbal* or continue the more permissive approach under *Conley*. *Compare* *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 890 (Mass. 2008) (adopting plausible pleading), *with* *Cullen v. Auto-Owners Ins. Co.*, 189 P.3d 344, 345 (Ariz. 2008) (reaffirming *Conley*).

179. *Swierkiewicz*, 534 U.S. at 515.

180. *See, e.g.*, Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102-03 (2004); William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1576-77 (2005); William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 212-13 (2003); Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 861 (2004). *But see* Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1, 38-62 (2005); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1922-23 (2004).

remains alive and well in the courts.<sup>181</sup> Indeed, it is the more recent, and arguably more sensible, *Desert Palace* decision that is rarely cited<sup>182</sup> and, when it is, usually on the way to applying *McDonnell Douglas*.<sup>183</sup> In short, the lower courts are familiar with *McDonnell Douglas*, and any plaintiff who can plead such a prima facie case, within the limits of Rule 11,<sup>184</sup> would be well advised to do so since such a pleading should make the claim plausible.<sup>185</sup>

This is not as simple a solution as might be thought because of the divergence in the circuits as to what constitutes a prima facie case. *McDonnell Douglas* itself dealt with a very unusual situation—failure to hire when the position remained open.<sup>186</sup> Most discrimination cases involve discharges, and even when failure to hire is alleged, the position has typically been filled by a competitor. The circuits have developed a variety of versions of the prima facie case for a variety of situations.<sup>187</sup> Although some of the formulations are so generalized that satisfying them necessarily satisfies the notion of plausible pleading,<sup>188</sup> others are particularized, to, say,

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181. The case was cited 2262 times by the federal courts during 2010. LexisNexis search conducted Jan. 27, 2011. In addition, the Supreme Court's refusal in *Gross v. FBL Financial Services*, 129 S. Ct. 2343, 2350 n.2 (2009), to decide "whether the evidentiary framework of *McDonnell Douglas Corp. v. Green* utilized in Title VII cases is appropriate in the ADEA context" strongly reinforces the notion that *McDonnell Douglas* is alive and well.

182. The case was cited only 168 times in 2010. LexisNexis search conducted Jan. 27, 2011.

183. *E.g.*, *Lewis v. Metro. Atlanta Rapid Transp. Auth.*, 343 F. App'x 450, 455 (11th Cir. 2009).

184. Rule 11 operates as a significant limitation on pleading to satisfy *Twombly/Iqbal*. There seems little doubt that plaintiffs in both cases could have pled sufficient facts to state a claim, but such pleading is constrained by the requirement of Rule 11, especially 11(b)(3) requiring an attorney to ensure that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11(b)(3). Professor Hartnett suggests that the "likely [to] have evidentiary support" prong can provide a way around the broader potential implications of plausible pleading. Hartnett, *Taming Twombly*, *supra* note 22, at 505.

185. We have seen that the purpose of the prima facie case is to eliminate the "most common legitimate reasons" for an adverse employment action. *See supra* note 170. If the plaintiff's pleadings, assumed to be true, do eliminate the most common legitimate reasons, the alternative discrimination inference necessarily becomes more plausible and, presumably, plausible enough to state a claim. *But see supra* note 168.

186. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

187. *See generally* SULLIVAN & WALTER, *supra* note 31, §§ 2.07, 2.09.

188. This kind of tautological formulation is typified by *Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 767 (2d Cir. 2002):

Ordinarily, a plaintiff must first establish a prima facie case of discrimination



termination decision.<sup>189</sup> Nevertheless, tracking circuit precedent seems the simplest and most obvious response to *Twombly/Iqbal*.

It is true that an argument could be made that, under plausible pleading, even a prima facie case does not necessarily mean that discrimination is plausible, and an occasional court has so held.<sup>190</sup> Under *McDonnell Douglas*, the plaintiff at the prima facie stage need not negate all the possible, or perhaps even all the probable, legitimate reasons for the employer's action. For example, an applicant denied a job when a competitor is hired need only prove that she met the minimum qualifications to establish a prima facie case.<sup>191</sup> She need not prove that she was as or more qualified than the successful applicant. This is because the primary role of *McDonnell Douglas* has been to trigger the employer's burden of putting into evidence a "legitimate nondiscriminatory reason,"<sup>192</sup> rather than to establish discrimination per se. Indeed, the bare-

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by showing that (1) he is a member of a protected class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class.

I have previously critiqued this formulation:

The best that can be said for this "inference-from-circumstances" test is that it provides literally no guidance; the worst that can be said for it is that it is internally inconsistent. After all, if plaintiff can adduce evidence of circumstances giving rise to an inference of discrimination, as the fourth prong requires, it is not so clear what work the other three elements do.

Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 205 (2009) [hereinafter Sullivan, *Comparators*] (footnote omitted). As applied to the pleading context, however, it should be clear that both this version of the prima facie case and the requirements of *Iqbal* would be met by allegations that allowed the court to infer discrimination.

189. *E.g.*, *Freeman v. N. State Bank*, 282 F. App'x 211, 216 (4th Cir. 2008) ("[Plaintiff] was obligated to prove that (1) she is a member of a protected class, (2) she suffered an adverse employment action, (3) she was performing satisfactorily at the time of the adverse employment action, and (4) similarly situated employees outside the protected class received more favorable treatment."). With respect to this and other formulations of the prima facie case, see SULLIVAN & WALTER, *supra* note 31, § 2.09.

190. *E.g.*, *Urbanski v. Tech Data*, No. 3:07cv017, 2008 U.S. Dist. LEXIS 2528 (N.D. Ind. Jan. 11, 2008).

191. Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 768 (2005) ("[T]o make out a prima facie case, an employee must show that she met the objective or minimum qualifications for the position in question. She is not required to show that she met her employer's subjective standards. It is the employer's burden to raise these subjective standards in response to the plaintiff's prima facie case.").

192. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

bones requirements of the prima facie case may explain the Court's limited requirements for the second stage of the *McDonnell Douglas* analytical structure: once a plaintiff has made out a prima facie case, the defendant has only a burden of production to present evidence of a nondiscriminatory reason.<sup>193</sup> This production requirement does not shift from the plaintiff the burden of persuasion as to the existence of discrimination, but, rather, merely asks the defendant to put into evidence a reason that, if believed, would establish nondiscrimination.<sup>194</sup> The bulk of the work of the *McDonnell Douglas* proof structure, therefore, falls on the third, pretext stage, in which the plaintiff bears the burden of persuasion in proving that the employer's asserted nondiscriminatory reason is pretextual.<sup>195</sup> Further, a plaintiff cannot carry this burden merely by showing that the defendant's asserted nondiscriminatory reason is untrue; rather, a plaintiff must also persuade the fact-finder that that reason is a pretext for discrimination.<sup>196</sup> Fortunately for plaintiffs, the fact-finder's finding of pretext—that is, its disbelief of the supposed nondiscriminatory reason—will often, maybe typically, be sufficient to justify the further inference that it is a pretext for discrimination.<sup>197</sup>

Whatever the merits of this scheme as a proof structure, it is a procedural approach adopted for substantive reasons, not a simple factual inference. That is to say, it is an information-forcing device, which does not clearly map onto the *Twombly/Iqbal* plausible pleading regime. For example, given that typically many applicants are rejected for every successful candidate, it may be far more likely that a particular rejection was the result of the plaintiff having inferior qualifications to the person chosen rather than discrimina-

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193. *Id.*

194. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (“The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.”).

195. *McDonnell Douglas*, 411 U.S. at 804.

196. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) (“[A] reason cannot be proved to be ‘a pretext for discrimination’ unless it is shown *both* that the reason was false, *and* that discrimination was the real reason.”).

197. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (“Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.”).

tion—even though *McDonnell Douglas* would find a prima facie case if the plaintiff established she met the minimum qualifications for the position.

Nevertheless, it would take a determined district court judge not only to find *Swierkiewicz* no longer binding but also to find that a *McDonnell Douglas* prima facie case was insufficient to satisfy the plausibility standard, because *McDonnell Douglas* is so well-recognized by circuit court precedent to create a presumption of discrimination.

### B. Pleading “Direct Evidence” of Discrimination

Borrowing from *Swierkiewicz*’s reference to other methods of proof under Title VII, a second approach would be for the plaintiff to plead whatever “direct evidence” she had that discriminatory intent motivated the challenged decision. In *Swierkiewicz* itself,<sup>198</sup> the Court rejected the Second Circuit’s requirement of pleading a *McDonnell Douglas* prima facie case in part because “a plaintiff without direct evidence of discrimination at the time of his complaint [would have to] plead a prima facie case of discrimination, even though discovery might uncover such direct evidence.”<sup>199</sup> The Court’s citation to “direct evidence” was to a decision invalidating a formal employer policy of discrimination,<sup>200</sup> and, although the situation will arise rarely, it seems likely that plaintiffs will know of such policies at the time they file the complaint and can therefore plead them.

But there is another use of “direct evidence” in Title VII jurisprudence that has a checkered history but seems to offer another way to plausibly plead. In the discrimination context, the term became famous because of Justice O’Connor’s concurring opinion in *Price Waterhouse v. Hopkins*, a “mixed motive” case—that is, one in which the fact-finder had determined that both legitimate and discrimina-

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198. The question presented in *Swierkiewicz* was whether an employment discrimination plaintiff must “plead specific facts showing that at trial he can make out a prima facie case of discrimination under *McDonnell Douglas*.” Brief of Petitioner at i, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (No. 00-1853).

199. *Swierkiewicz*, 534 U.S. at 511.

200. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (holding illegal a policy barring transfer of pilots disqualified by age under FAA regulations to other positions while allowing pilots disqualified for other reasons to transfer).

tory reasons were at play in the decision.<sup>201</sup> Justice Brennan, writing for a plurality of four, held that the plaintiff need only prove, by a preponderance of the evidence, that her gender played “a motivating part” in the challenged decision.<sup>202</sup> Upon that showing, the burden of persuasion shifted to the defendant to avoid liability by proving as an affirmative defense that it would have made the same decision even had it not considered an impermissible factor.<sup>203</sup>

To form a majority of the Court, however, one of the concurrences was necessary,<sup>204</sup> and one alternative was to look to Justice O’Connor’s concurring opinion, whose approach differed from the plurality’s with regard to burden shifting.<sup>205</sup> Most saliently, she would have required a plaintiff to introduce “direct” evidence of discrimination before the defendant had any burden of persuasion.<sup>206</sup> Although it would have been possible to seek a fifth vote in Justice White’s concurrence in *Price Waterhouse*,<sup>207</sup> most lower courts looked

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201. 490 U.S. 228 (1989) (plurality opinion). The plaintiff introduced into evidence written evaluations and oral comments made in an accounting firm’s partnership process that suggested that the plaintiff’s gender played a role in the decision to put her candidacy on hold. *Id.* at 233-35. The firm, however, denied basing its decision on the plaintiff’s sex, instead insisting she had been denied partnership because of her lack of interpersonal skills. *Id.* at 234-35. The trial court credited both Hopkins’s and the firm’s explanation for her partnership denial; it found that the firm had relied on both Hopkins’s sex and her deficient interpersonal skills in denying her partnership. *Id.* at 236-37.

202. *Id.* at 258.

203. *Id.*

204. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (holding that, when there is no opinion for a majority of the Court, the holding is to be ascertained by looking to the narrowest ground upon which five members who support the judgment agree).

205. *Price Waterhouse*, 490 U.S. at 275 (O’Connor, J., concurring).

206. *Id.* at 278. Justice O’Connor would also have required the plaintiff to show that the impermissible factor, such as a plaintiff’s sex, was a “substantial” (rather than merely a “motivating”) factor in the employer’s decision. *Id.* at 261-62.

207. *Id.* at 258 (White, J., concurring). Dissenting in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, took precisely this position:

Justice White agreed with the plurality as to the motivating-factor test; he disagreed only as to the type of evidence an employer was required to submit to prove that the same result would have occurred absent the unlawful motivation. Taking the plurality to demand objective evidence, he wrote separately to express his view that an employer’s credible testimony could suffice. Because Justice White provided a fifth vote for the “rationale explaining the result” of the *Price Waterhouse* decision, his concurrence is properly understood as controlling, and he, like the plurality, did not require the introduction of direct evidence.

*Gross*, 129 S. Ct. at 2357 (Stevens, J., dissenting) (internal citations omitted).

to Justice O'Connor's concurring opinion to fashion the rule of the case.

Thus, for a number of years, courts applied a second, "direct evidence" method of proof to some Title VII cases, and they did so even after the Civil Rights Act of 1991 modified Title VII by adopting Justice Brennan's articulation of the plaintiff's "motivating factor" burden without mentioning direct evidence.<sup>208</sup> Section 703(m) provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."<sup>209</sup> Congress, generally following *Price Waterhouse*, also allowed a defense, but unlike the Supreme Court made the defense a partial one: if the employer proved that it would have made the same decision even if an illegitimate consideration had not been a factor, the plaintiff's remedies would be limited.<sup>210</sup> Although the Civil Rights Act of 1991 did not explicitly speak to a "direct evidence" threshold for applying this method of analysis under *Price Waterhouse*, lower courts for some years generally continued to require such proof to trigger burden shifting.<sup>211</sup>

This practice, however, ended for Title VII cases with the Supreme Court's 2003 decision in *Desert Palace, Inc. v. Costa*.<sup>212</sup> That decision interpreted the "motivating factor" language in § 2000e-2(m) to mean that "[i]n order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"<sup>213</sup> In short, "direct evidence"

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208. See, e.g., *Watson v. Se. Pa. Transp. Auth.*, 207 F.3d 207, 217 (3d Cir. 2000); Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 657-58 (2000).

209. Civil Rights Act of 1991 § 703(m), 42 U.S.C. § 2000e-2(m) (2006).

210. *Id.* § 2000e-5(g)(2)(B). *Price Waterhouse* had held that proof that the same decision would have been made in any event was a complete defense to liability. 490 U.S. at 254.

211. See, e.g., *Watson*, 207 F.3d at 217; Belton, *supra* note 208, at 657-58. Courts held this requirement despite the incoherence of the notion. See Charles A. Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1137-38, 1157-61 (1991).

212. 539 U.S. 90 (2003).

213. *Id.* at 101.

was no longer necessary to shift a burden of persuasion under Title VII.<sup>214</sup>

In *Gross v. FBL Financial Services, Inc.*, the Court took a different path but reached the same result in making direct evidence unnecessary—under the ADEA.<sup>215</sup> Although *Desert Palace* had ended any such requirement under Title VII, it remained unclear whether the concept continued to exist under the ADEA, and lower courts continued to apply it there.<sup>216</sup> *Gross*, however, held that neither the 1991 Civil Rights Act nor *Price Waterhouse* controlled ADEA cases.<sup>217</sup> Instead, the Court held that it is always the plaintiff's burden to prove that discriminatory intent was a determinative factor, that is, a but-for cause, of the challenged employment practice.<sup>218</sup> All evidence is relevant to making that decision, and even high quality evidence does not relieve the plaintiff of her causation burden.

In sum, although “direct evidence” is no longer necessary for burden shifting under Title VII, nor sufficient for burden shifting under the ADEA, it remains true that the more “direct” the evidence, the more likely a case will get to the jury and be decided in the plaintiff's favor.

As applied to the pleading context, this preference for direct evidence suggests that plaintiffs may satisfy plausible pleading by alleging this kind of evidence of discriminatory intent. To this point, “direct evidence” has been put in scare quotes because the concept is at best undefined by the Supreme Court and at worst incoherent. The closest Justice O'Connor's concurrence in *Price Waterhouse* came to defining the term was her statement that “the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable fact-finder could draw an inference

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214. Justice O'Connor concurred that direct evidence was no longer required, reasoning that the 1991 amendments had legislatively reversed her approach. *Id.* at 102 (O'Connor, J., concurring).

215. 129 S. Ct. 2343 (2009). See generally Michael C. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69 (2010); Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-09 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253 (2009); Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857 (2010).

216. *E.g.*, *Mereish v. Walker*, 359 F.3d 330, 339-40 (4th Cir. 2004).

217. *Gross*, 129 S. Ct. at 2349, 2351.

218. *Id.* at 2352.

that the decision was made 'because of' the plaintiff's protected status."<sup>219</sup> This statement is broader than the classical view of direct evidence: evidence is direct when no inference need be drawn to find the fact at issue.<sup>220</sup> Indeed, Justice O'Connor's statement does not distinguish the evidence she apparently had in mind from circumstantial evidence sufficient for the fact-finder to draw an inference that the defendant acted with an intent to discriminate. Justice O'Connor, however, did indicate some types of evidence that would *not* be sufficiently direct to justify the use of this method of proof:

[S]tray remarks in the workplace ... cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden.... [T]estimony such as Dr. Fiske's [that statements of some partners exhibited stereotypical thinking about the plaintiff], standing alone, would not justify shifting the burden of persuasion to the employer.<sup>221</sup>

Taking their lead from this "definition," most lower courts had defined the term "direct evidence" narrowly.<sup>222</sup> Some decisions, looking to the nineteenth-century view, held that direct evidence is evidence that proves the fact at issue without the need to draw an inference. For these courts, the only direct evidence would be statements by the decision maker directed at the decision being challenged and relatively contemporaneous with it. For example, in *Carter v. Three Springs Residential Treatment*, a witness testified that the manager who denied the plaintiff's promotion had said that she "identified [in herself] a bias against blacks and she found that

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219. *Price Waterhouse v. Hopkins*, 490 U.S. 278, 228 (1989).

220. "Direct" had been rejected as a useful categorization of evidence in the nineteenth century. See *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 311 (1850). Although Wigmore originally thought a real difference did exist between direct and circumstantial evidence, the current edition concludes that he was wrong. 1A JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 24, at 945 n.5 (Peter Tillers ed., 1983) ("[T]here is no such thing as 'direct apprehension' of any matter that may in some way directly and conclusively resolve any question as to the existence or nonexistence of some matter of fact and we therefore believe that Wigmore erred.").

221. *Price Waterhouse*, 490 U.S. at 277.

222. See *Fernandes v. Costa Bros. Masonry*, 199 F.3d 572, 582-83 (1st Cir. 1999) (canvassing the circuits for different schools of thought on the definition of direct evidence).

they were difficult for her to trust or get along with.”<sup>223</sup> This statement was found not to be direct evidence because an inference was needed to conclude that the challenged action was taken for discriminatory reasons:

First, the statement ... is susceptible to more than one interpretation. Cook, in explaining her bias to a black colleague, could have been expressing a desire to get past [prior] prejudices.... Second, the statement does not relate directly to the decision to promote Carter to the position of Program Director. To say that Cook “identified a bias” to Allen is not the same as saying that Cook exercised that bias in the case of Carter’s promotion. Direct evidence, by definition, is evidence that does not require such an inferential leap between fact and conclusion.<sup>224</sup>

While other courts took a more permissive approach to what sufficed as burden-shifting direct evidence, the term has now fallen out of use due to the developments sketched above.<sup>225</sup>

Nevertheless, this history is suggestive for our purposes: the kind of evidence at issue in these cases should, if pleaded, satisfy the *Twombly/Iqbal* standard. Perhaps more important in light of the restrictive approaches of the lower courts under the *Price Waterhouse* dispensation, evidence could be considerably less direct than many courts required and still satisfy the pleading standard. Because the issue is only plausibility, not whether there is any shift in the burden of proof, the pleadings need not reflect the kind of statements that constituted direct evidence for Justice O’Connor. Even what would have been characterized as “stray remarks” might well suffice. In *Carter*, for example, allegations that the decision maker

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223. 132 F.3d 635, 642 (11th Cir. 1998).

224. *Id.*; see also *Lim v. Trustees of Ind. Univ.*, 297 F.3d 575 (7th Cir. 2002); *Harris v. Shelby County Bd. of Educ.*, 99 F.3d 1078, 1080 (11th Cir. 1996); *Brown v. E. Miss. Elec. Power Ass’n*, 989 F.2d 858, 861 (5th Cir. 1993).

225. *E.g.*, *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992) (defining direct evidence to include some circumstantial evidence as long as that evidence is tied directly to the alleged discrimination against the plaintiff); see also *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 115, 124 n.12 (2d Cir. 2004) (concluding that the plaintiff’s supervisors’ statements that it was “not possible for [her] to be a good mother and have this job,” were not mere “stray remarks”; they were direct evidence since the alleged statements “were (1) made repeatedly, (2) drew a direct link between gender stereotypes and the conclusion that Back should not be tenured, and (3) were made by supervisors who played a substantial role in the decision to terminate”).



admitted a bias should get a complaint past a motion to dismiss under Rule 12(b)(6), whether or not the Eleventh Circuit was correct that such remarks were insufficient to take the case to the jury.<sup>226</sup>

### *C. Pleading Comparators*

Some recent scholarship seeks to move away from the *McDonnell Douglas* structure to a more general theory of unequal treatment as a basis of proving discrimination.<sup>227</sup> As part of this effort, I argued in a recent article in favor of an alternative to the *McDonnell Douglas* proof scheme for many, if not most, individual disparate treatment cases that would require the plaintiff only to identify a “comparator,” another similarly situated worker who was treated better than the plaintiff was treated.<sup>228</sup> By definition, the more alike a putative comparator is to the plaintiff, except for a protected characteristic like race, the fewer nonracial reasons exist to explain a particular decision. Of course, the point at which a coworker is

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226. One kind of case in which a kind of direct evidence is often easily pled involves harassment. Indeed, it seems likely that, if the plaintiff is unaware of objectionable conduct, it cannot constitute harassment because her environment cannot be affected by it, see SULLIVAN & WALTER, *supra* note 31, § 7.07[C], although how the employer treats harassment that does not affect the plaintiff might be relevant to an employer’s affirmative defense. *Id.* § 7.07[F]. Some of the critics of *Twombly/Iqbal* have critiqued the lower courts’ application of plausible pleading precisely because they have dismissed harassment cases. See Schneider, *supra* note 34, at 534-35 (citing *Rivera v. Prince William County Sch. Bd.*, No. 1:09cv341(GBL), 2009 U.S. Dist. LEXIS 63647 (E.D. Va. July 22, 2009)); Seiner, *The Trouble with Twombly*, *supra* note 34, at 1036 (citing *Mangum v. Town of Holly Springs*, 551 F. Supp. 2d 439 (E.D.N.C. 2008)). But such criticism may be misplaced. Actionable contaminated-environment harassment requires “severe or pervasive” conduct, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986), and a plaintiff should be able to plead sufficient incidents to satisfy this standard if they in fact occurred. Although admittedly such pleading goes beyond what notice pleading has traditionally required, see Seiner, *The Trouble with Twombly*, *supra* note 34, at 1051 n.262 (“A plaintiff should not be required to plead the specific acts that comprise the hostile work environment, as this would go well beyond the scope of notice pleading.”), the problem with cases like *Rivera* and *Mangum* may be less plausible pleading running amok than the court’s too high standard of what makes conduct severe or pervasive.

Similarly, retaliation cases turn, in the first instance, on whether the plaintiff engaged in protected conduct, by opposing action reasonably believed to be unlawful employment practices. See *Crawford v. Metro. Gov’t of Nashville & Davidson County*, 129 S. Ct. 846, 850-52 (2009). A plaintiff should be able to plead what she did in sufficient factual detail to enable the court to determine whether the opposition was plausibly protected.

227. See, e.g., Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1266-75 (2008).

228. See generally Sullivan, *Comparators*, *supra* note 188.

different enough from a plaintiff to cease to be a comparator will vary depending on perceptions of the relative likelihood of discrimination compared to other reasons for adverse actions:<sup>229</sup>

The reality on the ground is that discrimination cases today increasingly turn not on whether the plaintiff has proven her prima facie case or established that the “legitimate nondiscriminatory reason” is a pretext for discrimination (although the courts continue to invoke the *McDonnell Douglas* mantra), but rather on whether the plaintiff has identified a suitable “comparator” who was treated more favorably than she. If the comparator is sufficiently similar, that evidence alone is sufficient to permit—but not require—a jury to infer discrimination from the different treatment. Even a somewhat less perfect comparator may, together with other evidence, allow for such an inference.<sup>230</sup>

Although that article was directed at proof, not pleading, it also has useful implications for satisfying plausible pleading. Indeed, Professor Hartnett notes that *Swierkiewicz* can itself be read as a comparator case: rather than seeing the Court as accepting as true the allegation of discriminatory motive, *Swierkiewicz* can be interpreted as accepting the plaintiff’s pleading that there existed a similarly situated comparator of a different national origin and younger age who was treated more favorably than the plaintiff.<sup>231</sup> Typically in the summary judgment context, the circuits tend to require comparators to be the near twin of the plaintiff in order, on the basis of the comparison alone, to allow the case to go to the jury.<sup>232</sup> Although I argued for a more relaxed approach to comparators, the ultimate appropriateness of the comparison is largely attenuated in the pleading context.<sup>233</sup> That is, plaintiffs who identify a person who they allege to be a similarly situated but better

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229. *Id.* (arguing for a more direct method of comparator proof); see also Ernest F. Lidge III, *The Courts’ Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831 (2002) (arguing that courts should not impose a strict similarly situated requirement).

230. Sullivan, *Comparators*, *supra* note 188, at 193.

231. See *supra* note 22 and accompanying text. Further, although not referred to by the Court, paragraph 38 of the *Swierkiewicz* complaint also adduced four other comparators who had been treated better than the plaintiff with regard to severance pay.

232. Sullivan, *Comparators*, *supra* note 188, at 213-23.

233. *Id.* at 229-38.

treated member of a different race or sex should thereby typically “nudge[] their claims across the line from conceivable to plausible.”<sup>234</sup> As with all pleading, Rule 11 limits whom the plaintiff can so identify, but questions as to whether the particular comparator is sufficiently similarly situated or whether other potential comparators exist who undercut the inference of discrimination have far less relevance at the pleading stage.<sup>235</sup>

#### *D. Pleading the Pervasiveness of Bias*

A fourth approach to satisfying the more extreme possible implications of *Twombly/Iqbal* is itself more extreme but seems to be allowed, indeed invited, by the Court’s requirement that a plaintiff plead sufficient facts to make her claim plausible. Put at its simplest, it amounts to pleading that the phenomenon of discrimination is more common than the courts might otherwise believe.<sup>236</sup> As Professor Suzanna Sherry argues, “those who wish to stem the tide of increased pleading standards must attack its underlying factual assumptions,”<sup>237</sup> and this is one way to do that in the employment discrimination context.

The question, of course, is how that attack can be launched. A traditional method would be to cite social science research in briefs opposing a motion to dismiss. Less traditional would be to adduce at that stage expert reports as to the pervasiveness of discrimination.<sup>238</sup> Although both have their advantages, I propose a third

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234. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

235. Of course, a plaintiff might have to specify the basis for treating a favored person as a comparator. *See Coleman v. Md. Court of Appeals*, No. 09-1582, 2010 U.S. App. LEXIS 23291 (4th Cir. Nov. 10, 2010) (dismissing a complaint for failure to identify in what way the supposed comparator was similarly situated). For example, a complaint of wage discrimination between two individuals far apart in the defendant’s hierarchy might not suffice, but courts should be reluctant to find implausible a claim that identifies comparators and indicates the axes of comparison.

236. Other scholars have looked to evidence of the pervasiveness of discrimination as a reason to find pleadings plausible, *see, e.g.*, Malveaux, *supra* note 115, at 97-102; Seiner, *After Iqbal*, *supra* note 22, at 200-03, but they have not argued that the kind of studies they report should be pled and, accordingly, given a presumption of truth.

237. Sherry, *supra* note 31, at 184.

238. This approach might require that a motion to dismiss be converted into a summary judgment motion, which, in turn, might result in the court’s granting the plaintiff an opportunity to continue discovery. This approach is explored by Stephen R. Brown in *Correlation Plausibility: A Framework for Fairness and Predictability in Pleading Practice*

way—simply pleading this social science as a fact, thereby requiring the court to take that fact as true. As we will see, this approach has considerable merit, but some serious objections. But before we consider the propriety of such pleading, it is important to understand the nature of the enterprise.

*Twombly* itself provides a starting point. The opinion turned not on the Justices' everyday life assumptions as to plausibility, but rather on the economic research that showed that parallel conduct is as consistent with independent competitor responses to the competitive environment as it is with conspiracy.<sup>239</sup> Suppose, however, that the plaintiffs had been able to plead that economic studies showed that the kind of coordination they alleged is very unlikely absent an agreement. Taking the Court at its word, perhaps such studies should have sufficed to make the claim plausible.

Indeed, without probing too deeply into the arcana of antitrust, the Court's current perception that parallel conduct can occur without an agreement<sup>240</sup> is itself the result of changing perceptions in the economic literature. Although that view is dominant today,<sup>241</sup> it was not always the accepted wisdom either in the law and economics literature<sup>242</sup> or the courts.<sup>243</sup> If further economic and game

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*After Twombly and Iqbal*, 44 CREIGHTON L. REV. 141 (2011). For Brown, the answer will turn on whether the information adduced constitutes "matters outside the pleadings" within the meaning of Rule 12(d). The argument in this Article, of course, is that the requisite information should be pleaded and, therefore, be within the pleadings. Only if such allegations were not accorded the presumption of truth would it be necessary to reach the Rule 12(d) issue.

239. The Court also relied on the history of the telecommunications industry. *Twombly*, 550 U.S. at 567-68 ("In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation. In the decade preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. The ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.") (internal citation omitted).

240. *See id.* at 554 ("The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.").

241. *See, e.g.*, Richard A. Epstein, *Motions To Dismiss Antitrust Cases: Separating Fact from Fantasy* 3-4 (AEI-Brookings Joint Ctr. for Regulatory Studies, Related Publ'n 06-08, 2006) (discussing problem of "false positives" in section 1 suits).

242. *See generally* Gregory J. Werden, *Economic Evidence on the Existence of Collusion:*

theory research were to challenge that predicate, and if such findings were pleaded,<sup>244</sup> the logic of *Twombly* would require a different result: what was implausible in light of the state of economic knowledge in Year 1 would become plausible in Year 2 when economic findings altered, or vice versa.<sup>245</sup>

To understand how this might operate under Title VII, it is important to appreciate that the core question for disparate treatment law is how likely discrimination is to motivate a given decision at this stage in the nation's history in light of a host of other potential motivations—whether they be rational or irrational. As Professor Hartnett says, “determinations of plausibility depend on baseline assumptions about the way the world usually works.”<sup>246</sup> If a judge views bias as rarely at play in today's workplace, it will take more in the way of allegations for him to find a claim of discrimination plausible.

Nor is this objectionable or, at least, avoidable. Baseline assumptions are critical to the whole adjudicative enterprise, which depends on probabilistic determinations. Occasionally, probabilities can be assessed by scientific methods. For example, testimony about the likelihood of DNA matches is common in criminal trials,<sup>247</sup> and

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*Reconciling Antitrust Law with Oligopoly Theory*, 71 ANTITRUST L.J. 719 (2004) (tracing the origins of modern economic theory to groundbreaking work in the first half of the last century that altered prior conceptions).

243. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225-27 (1939) (allowing an inference of agreement largely as a result of parallel conduct); cf. *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) (“Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but ‘conscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely.”).

244. Hartnett, *Taming Twombly*, *supra* note 22, at 500 (“*Twombly* can be understood as inviting lawyers to present information and argument designed to convince a judge that what the judge thinks is ‘natural’ is not.”).

245. In fact, some environments are not conducive to competitors being able to coordinate their practices without an agreement facilitated by meetings among the leading members of the industry. See CHARLES A. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS 150-58* (1973) (exploring the mechanisms needed to enforce an agreement in an industry characterized by sealed bids and nonfungible products).

246. Hartnett, *Taming Twombly*, *supra* note 22, at 498; see also Bone, *Pleading Rules*, *supra* note 69, at 885-86.

247. The frequency of this testimony does not mean that there are not meaningful disputes about probabilities even in this setting. See Edward K. Cheng, *Law, Statistics, and the Reference Class Problem*, 109 COLUM. L. REV. SIDEBAR 92, 93 (2009), [http://www.columbia-lawreview.org/assets/sidebar/volume/109/92\\_Cheng.pdf](http://www.columbia-lawreview.org/assets/sidebar/volume/109/92_Cheng.pdf) (“In DNA cases, prosecutors often emphasize the random match probability (RMP), the probability that a person chosen at

in systemic employment discrimination cases, statistical analysis is often critical.<sup>248</sup> But most of the decisions the legal system must make—whether by judges or juries—are based on seat-of-the-pants perceptions of probability, which in turn depend on “baseline assumptions.” How likely is it that this witness is mistaken in her identification? How likely is it that a texter while driving was also keeping a careful eye on the road?<sup>249</sup>

Professor Hartnett argues that plaintiffs may have a heightened need to shift baseline assumptions in the discrimination arena, where it is possible that “many judges operate from a baseline assumption that unlawful discrimination is rare,”<sup>250</sup> while lawful adverse actions can stem from a variety of causes. In other words, if federal judges view discrimination as not particularly prevalent, they are likely to view pleadings attacking any given employment decision as not stating a plausible claim.<sup>251</sup> Indeed, the *Iqbal* Court’s

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random from the population will have the same profile as the one found at the crime scene. Yet, what population is appropriate for calculating the RMP? The entire human population? The defendant’s racial subgroup? The city in which the crime occurred?”).

248. See, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-11 (1977) (identifying the right comparison group from which to determine if African Americans were sufficiently underrepresented in the defendant’s workforce to suggest the operation of intentional discrimination). See generally SULLIVAN & WALTER, *supra* note 31, § 3.04.

249. See Bone, *Pleading Rules*, *supra* note 69, at 885-86 (“By a ‘baseline,’ I mean the normal state of affairs for situations of the same general type as those described in the complaint. The probability of wrongdoing for baseline conduct is not necessarily zero, but it should be very small, for otherwise the conduct in question would not be part of a socially acceptable baseline. Understood in these terms, what the *Twombly* Court requires are allegations that differ in some significant way from what usually occurs in the baseline and differ in a way that supports a higher probability of wrongdoing than is ordinarily associated with baseline conduct.”).

250. Hartnett, *Taming Twombly*, *supra* note 22, at 502; see also Sherry, *supra* note 31, at 182-83 (“To the extent that the Court has come to believe ... that invidious discrimination is no longer the most likely explanation for adverse employment actions ... *Swierkiewicz* is clearly in the crosshairs.”) (footnote omitted).

251. A good example of this is *Timmerman v. U.S. Bank, N.A.*, where the court, in the summary judgment context, indicated that even “apparently irrational differences in treatment” may not give rise to an inference of discrimination:

Sometimes apparently irrational differences in treatment between different employees that cannot be explained on the basis of clearly articulated company policies may be explained by the fact that the discipline was administered by different supervisors, or that the events occurred at different times when the company’s attitudes toward certain infractions were different, or that the individualized circumstances surrounding the infractions offered some mitigation for the infractions less severely punished, or even that the less severely sanctioned employee may be more valuable to the company for

reliance on judicial “common sense” to resolve questions of plausibility is particularly threatening for Title VII claims. Professor Malveaux is decidedly of this view, arguing that judges, especially in a post-Obama world, tend to be very skeptical of the presence of discrimination.<sup>252</sup> Although this skepticism has in the past manifested itself in restrictive doctrines and frequent grants of summary judgment to defendants, *Twombly/Iqbal* opens yet another front where a baseline assumption about the unlikelihood of discrimination will result in more pro-defendant rulings.

Should a case get to trial, baseline assumptions of the fact-finder can be shifted in a variety of ways, for example, by expert witnesses. One dramatic example of this is the use of experts to undercut “common sense” notions of the reliability of eyewitness identification.<sup>253</sup> Similarly, expert reports attempting to shift baseline assumptions can be proffered in discrimination cases in response to a summary judgment motion. In this context, the aim is to persuade the court to decide that a reasonable jury, informed by the evidence in question, could find in favor of the plaintiff. In both these contexts, the word “plausibility” is not used; rather, the question is framed in terms of whether a reasonable jury could, or will, be able to find or infer the fact at issue with the necessary certainty: preponderance of the evidence in most civil cases.

In the pleading context, the inquiry is narrower, even under *Twombly/Iqbal*. The question is not whether a reasonable jury could find discrimination—even assuming the facts pled are true—but rather whether the facts pled make the claim plausible

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nondiscriminatory reasons than is the other employee. Other times, no rational explanation for the differential treatment ... may be offered other than the inevitability that human relationships cannot be structured with mathematical precision, and even that explanation does not compel the conclusion that the defendant was acting with a secret, illegal discriminatory motive.

483 F.3d 1106, 1120-21 (10th Cir. 2007). Although the statement is literally true in that even irrational employment actions do not *necessarily* reflect discrimination, it manifests a baseline assumption that discrimination is far less common than a host of other possible explanations, including irrationality.

252. Malveaux, *supra* note 115, at 93 (“The problem is not that a judge may be sympathetic or unsympathetic to discrimination claims, but that his personal perception, rather than the law, threatens to become outcome determinative.”). Professor Malveaux also argues that judges do not understand the complex mechanisms that may lead to discrimination in today’s workplace. *Id.* at 89-90, 92-94; *see also* Schneider, *supra* note 34, at 548.

253. *See generally* Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 960-64 (2006).

and therefore justify allowing the plaintiff to conduct discovery that might reveal information that would permit such a finding at trial. But are the methods of doing so the same? The traditional way would be to simply use briefs responding to a Rule 12(b)(6) motion to cite and explain the social science literature that suggests that discrimination is common. A more aggressive approach for plaintiffs would be to adduce expert reports that bear on the plausibility question. Such reports, for example, could be tendered in response to a motion to dismiss. This timing would be a dramatically different approach to expert testimony—testifying experts tend to produce reports near the end of the discovery period when the factual information has been uncovered. Expert reports at the outset of litigation are rare. Indeed, the only major area in which a variation of the early expert report is used are “affidavit of merit” statutes, which typically require a plaintiff claiming professional malpractice to file an affidavit from an expert attesting to the merit of the claim.<sup>254</sup>

The affidavit of merit approach requires, for example, “an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices.”<sup>255</sup> It thus requires the expert to opine on the case at hand, not merely on the general standards of the profession in the abstract. Presumably, the typical medical malpractice plaintiff has enough information about her condition and treatment to secure an appropriate expert opinion.

In the discrimination context, however, an expert report aimed at the plaintiff’s particular circumstances is likely to be premature because nothing but the plaintiff’s version of events has been

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254. See generally Jeffrey A. Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, 1997 BYU L. REV. 537, 541 (concluding that lawmakers “should be wary of these special certificates and implement them for certain civil claims only after finding that there are adequate empirical bases and inadequacies in other civil procedure laws”). Such statutes have been passed in a few states. *E.g.*, N.J. STAT. ANN. § 2A:53A-27 (West 2010). Although they have generated a number of legal questions, see Melinda L. Stroub, Note, *The Unforeseen Creation of a Procedural Minefield—New Jersey’s Affidavit of Merit Statute Spurs Litigation and Expense in Its Interpretation and Application*, 34 RUTGERS L.J. 279 (2002), whether they have had much effect in discouraging meritless litigation is an open question.

255. N.J. STAT. ANN. § 2A:53A-27.



discovered yet. But perhaps an expert report could try to educate the judge about the general phenomenon of discrimination and its relative frequency in the American workplace. Indeed, a dispute is currently raging among scholars about the extent to which an expert should be allowed to take generalized findings and apply them to the particular situation before the court.<sup>256</sup> Some of those participating in the dispute are in fact testifying experts,<sup>257</sup> but others take strong positions from a less involved perspective.<sup>258</sup>

For present purposes, there is no need to enter the debate as to how tailored to the particular litigation setting such expert reports should be. At the Rule 12(b)(6) stage, the reports can scarcely be expected to do more than what most of the commentators agree is appropriate—describe generally the state of social science research

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256. David L. Faigman, Nilanjana Dasgupta & Cecilia L. Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1390 (2008); Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37 (2009); John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of “Social Frameworks”*, 94 VA. L. REV. 1715, 1718-19 (2008); Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 LAW & CONTEMP. PROBS. 133, 134-35 & nn.3-17 (1989); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 563-67 (1987); R. Matthew Wise, *From Price Waterhouse to Dukes and Beyond: Bridging the Gap Between Law and Social Science by Improving the Admissibility Standard for Expert Testimony*, 26 BERKELEY J. EMP. & LAB. L. 545, 561 (2005).

257. Hart and Secunda identify Philip Tetlock and Gregory Mitchell as partners in an LLC bearing their names that offers expert consulting services and lists a number of their clients. Hart & Secunda, *supra* note 256, at 39 n.1. Another commentator on employment discrimination matters is Dr. Susan Fiske, who testified for plaintiffs in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-36 (1989). Further, she has also coauthored work with Dr. Eugene Borgida, Susan T. Fiske & Eugene Borgida, *Providing Expert Knowledge in an Adversarial Context: Social Cognitive Science in Employment Discrimination Cases*, 4 ANN. REV. L. & SOC. SCI. 123, 128 (2008), and her testimony has also sometimes been used in employment discrimination cases, *e.g.*, *Ray v. Miller Meester Adver., Inc.*, 664 N.W.2d 355, 364 (Minn. Ct. App. 2003); *see also* Eugene Borgida, Grace Deason, Anita Kim & Susan T. Fiske, *Stereotyping Research and Employment Discrimination: Time To See the Forest for the Trees*, 1 INDUS. & ORGANIZATIONAL PSYCHOL. 405, 406 (2008) (discussing theories of expert testimony evidence); Eugene Borgida, Corrie Hunt & Anita Kim, *On the Use of Gender Stereotyping Research in Sex Discrimination Litigation*, 13 J.L. & POL'Y 613, 626 (2005) (discussing courts' use of social framework analysis). Finally, Dr. William Bielby, whose testimony is a linchpin for the plaintiffs in the potentially game-changing class action, *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1178 (9th Cir. 2007), has also appeared in the law journals urging the acceptance of social framework evidence. *See* William T. Bielby, *Social Science Accounts of the Maternal Wall: Applications in Litigation Contexts*, 26 T. JEFFERSON L. REV. 15 (2003).

258. *E.g.*, Hart & Secunda, *supra* note 256.

on the mechanisms and likelihood of discrimination in the contemporary American workplace.<sup>259</sup> This is not to suggest that there is a consensus even on this broader issue, for there is assuredly no universal agreement.<sup>260</sup> Further, even assuming general agreement

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259. The literature is vast and growing and often uses different terms for similar phenomena. Further, there is some confusion as to whether the research reveals old-fashioned kinds of biases of which the subject is well aware but will not admit or a different phenomenon, variously called cognitive bias and implicit bias. For example, the Implicit Association Test (IAT) hosted at Harvard and available on the Internet, Project Implicit, <https://implicit.harvard.edu/implicit> (last visited Feb. 18, 2011), has generated a substantial amount of social science literature analyzing the results of literally hundreds of thousands of visits. *E.g.*, Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RES. & PRAC. 101, 101-02 (2002) (reporting results from some 600,000 tests that confirm a much larger implicit preference among whites for whites than their explicit preferences).

Even assuming the IAT accurately identifies discriminatory attitudes, proof that individuals have certain attitudes is not necessarily proof that real-world decisions are influenced by them. For that, it is important to link “laboratory” proof such as the IAT to experiments such as those reported in Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004) (reporting that, when identical résumés were sent to employers, those receiving more favorable treatment were those containing non-African American sounding names); *see also* Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143 (2004) (collecting research showing biased behavior in employment situations). Another example is the dispute over whether race is influencing refereeing at NBA games. *See* Alan Schwarz, *Study of N.B.A. Sees Racial Bias in Calling Fouls*, N.Y. TIMES, May 2, 2007, at A1 (discussing a paper by two researchers who studied 13 seasons of NBA games and 600,000 fouls and concluded both that white referees called fouls at a greater rate against black players than against white players and that there was a corresponding, although lower, bias for black officials and white players).

260. For example, the use of the IAT to infer race discrimination in a wide range of workplaces has been challenged. *See* Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1023 (2006). The authors argue that

implicit prejudice research should be accepted as neither legislative authority nor litigation evidence until there is more: (1) rigorous investigation of the error rates of the new implicit measures of prejudice (and of how investigators balance Type I errors of false accusations against Type II errors of failing to identify prejudice); (2) thorough analysis of how well implicit measures of prejudice predict discriminatory behavior under realistic workplace conditions; and (3) open debate about the societal consequences of setting thresholds of proof for calling people prejudiced so low that the vast majority of the population qualifies as prejudiced.

*Id.*; *see also* Gregory Mitchell, *Second Thoughts*, 40 MCGEORGE L. REV. 687, 687 (2009) (“[C]onsiderable evidence [exists] that individuals often naturally engage in self-correction and that situational pressures often encourage self-correction .... to overcome biased

on the use of social science experts, there is room for legitimate disagreement about precisely what the baseline ought to be, that is, the level of generality that is appropriate for the exercise in question. Nevertheless, substantial literature provides reason to believe that discriminatory attitudes, whether implicit or explicit but covert, are pervasive and that they result in discriminatory decisions far more often than many would like to believe.

Thus, the most obvious use of such findings is the introduction of expert reports in response to a Rule 12(b)(6) motion. Should the court credit such reports submitted by the plaintiff, the discrimination claimed at-issue in the decision may be more plausible, perhaps plausible enough to satisfy the *Twombly/Iqbal* standard. Of course, the defendant might also submit expert reports, which will result in a battle of the experts, not at trial or even at summary judgment but rather at the outset of a case. This is odd, but perhaps where worst-case persuasive pleading will lead.

But are pre-answer expert reports necessary to achieve that end? They obviously increase the costs for the plaintiff and, perhaps worse still, leave the judge in the situation of deciding whether to credit them, that is, deciding whether they are sufficient to change

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judgments, decisions, and behavior.”). *But see* Samuel R. Bagenstos, *Implicit Bias*, “*Science*,” and *Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477, 482 (2007) (criticizing Mitchell and Tetlock because “[t]o say that the concept of implicit bias lacks validity because implicit bias does not correlate empirically with explicit prejudice is therefore to assume the very conclusion that implicit bias scholars seek to challenge—that any ‘real’ bias must be reflected in expressed attitudes”).

In response, Professors Mitchell and Tetlock argue that

the legal community is under no obligation to agree when a segment of the psychological research community labels the vast majority of the American population unconsciously prejudiced on the basis of millisecond reaction-time differentials on computerized tests. It ... should require evidence that scores on these tests of “unconscious prejudice” map in replicable functional forms onto tendencies to discriminate in realistic settings and that proposed remedies actually work before making wholesale changes to antidiscrimination law and policy.

Gregory Mitchell & Philip E. Tetlock, *Facts Do Matter: A Reply to Bagenstos*, 37 HOFSTRA L. REV. 737, 738 (2009); *see also* Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 984-85 (2008) (arguing that, even assuming that tests such as the IAT establish unconsciously biased mental associations, these associations may not be unlawful discrimination: “Biased thinking and attitudes, and mental processing of stimuli and concepts, are not the same as unlawful discrimination.”).

his baseline assumptions. This raises *Daubert* questions at a very early stage in the process,<sup>261</sup> which poses its own problems.

A more straightforward approach would be to look to both *Twombly* and *Iqbal* as requiring the district judge to credit factual allegations that mirror what such expert reports would say. That is, the judge would have to take as true, for Rule 12(b)(6) motions, allegations of such research.

Suppose plaintiffs routinely allege something along the lines of *social science research indicates that discriminatory attitudes are common, even typical, in 21st century America and further indicates that such attitudes often result in decisions adverse to African Americans* (or other minorities or women).<sup>262</sup> This allegation may or may not be supported by a series of citations. If this kind of allegation were taken as true, it would arguably make any given claim of discrimination more likely, perhaps enough to “nudge[] their claims across the line from conceivable to plausible” as *Twombly/Iqbal* require.<sup>263</sup>

For the moment I want to bracket a question that roils under the surface of this argument—the possibility that what the social science proves, if it proves anything at all, is unconscious discrimination, and unconscious discrimination may not be actionable under Title VII.<sup>264</sup> It is certainly true that requiring a court to accept as

261. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (dealing with the admissibility of expert testimony).

262. I have suggested elsewhere that one of the failures of the plaintiffs’ bar has been in educating the judiciary about the dynamics of discrimination in America in the new century. I argued that plaintiffs should make greater use, even in individual disparate treatment cases, of expert witnesses to educate the judge and jury about the psychological mechanics of cognitive bias and its operation in the workplace, and the resultant pervasiveness of discrimination even in a world populated by those who believe in equality. Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 950-51, 998-1000 (2005).

263. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). There is, of course, a chasm between generalized probabilities and individual cases. The fact that discrimination may be common does not mean that a given employer is engaged in it. But, by definition, plausible pleading seems to elide this distinction—the question is not whether this defendant engaged in the prohibited conduct but whether it is plausible that it did so on the facts pled. Certainly, the tendency of others in the defendant’s position to engage in that kind of conduct is relevant to any plausibility determination.

264. See *infra* notes 280-82 and accompanying text (noting arguments for and against a cause of action for implicit bias).

true the allegation in question could well force the conscious/unconscious question into the limelight.

Before addressing the conscious/unconscious question, however, it must be asked whether this argument is not too cute by half—whether it confuses adjudicative facts with legislative facts when only the former need be accorded a presumption of truth for Rule 12(b)(6) purposes. Adjudicative facts are the kind we usually understand to be at issue in pleading, the allegations about what the defendant did or did not do and, where disputed, are typically decided by the judge or jury sitting as fact-finder after a hearing or trial. They are to be distinguished from “legislative facts,”<sup>265</sup> which courts have traditionally found without the aid of a jury or even of a hearing. Legislative facts are found by the courts in lawmaking by drawing on, for lack of a better word, common-sense notions of how the world works,<sup>266</sup> what Professor Hartnett describes as baseline assumptions.<sup>267</sup> The parallel between legislative facts and *Iqbal*’s view that evaluating pleadings is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense” is obvious.<sup>268</sup> And a mechanism that allows parties

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265. 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03, at 353 (1958) (“When a court or an agency develops law or policy, it is acting legislatively ... and the facts which inform the tribunal’s legislative judgment are called legislative facts.”). The terminology regarding nonadjudicative facts varies. See Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 8-9 (1988) (“[Premise facts] are facts that explicitly or implicitly serve as premises used to decide issues of law. The term premise facts is not limited to those about which society is in agreement.... [A]fter a court or legislative body decides on the premise facts, they are premise facts even if many people believe the asserted factual premises do not justify the legal decision.”) (emphases omitted) (footnote omitted); Noll, *supra* note 22, at 28 (describing “judgmental facts” as “in reality, value-loaded judgments about how the world operates [that] inhabit a grey area between the substantive law and propositions so obvious or widely-accepted they may be judicially noticed”); see also Bryan Adamson, *Critical Error: Courts’ Refusal To Recognize Intentional Race Discrimination Findings as Constitutional Facts*, 28 YALE L. & POL’Y REV. 1, 10-17 (2009) (distinguishing between historical facts and evaluative facts, including legislative facts); Sherry, *supra* note 31, at 146 (“Foundational facts ... are judges’ generalized, but invisible, intuitions about how the world works. They are distinguishable from judicial values because they are, at least in theory, empirically testable. Foundational facts, however, are more generalized than what might be called the decisional facts specific to each case.”).

266. See generally Michael J. Saks, *Judicial Attention to the Way the World Works*, 75 IOWA L. REV. 1011 (1990) (responding to Peggy C. Davis, “*There Is a Book Out ...*”: *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987)); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 114 (1988).

267. See *supra* note 246 and accompanying text.

268. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

to educate judges would seem to blunt at least some of the criticisms of *Twombly/Iqbal*.<sup>269</sup>

Legislative fact-finding is reached by a kind of judicial notice, but not the very constrained variety applicable to notice of adjudicative facts.<sup>270</sup> The Advisory Committee for the Federal Rules of Evidence explicitly acknowledged a wide range of judicial power in this regard: the court should be able to “find” legislative facts in the same way it finds domestic law,<sup>271</sup> which basically includes all written or published sources, whether or not referenced by the parties. Indeed, because judges can look to their own life experiences, they are not limited to written material. Although some have argued for more formal constraints on this process,<sup>272</sup> there has been no success along these lines.

Although the courts’ determination of legislative facts is not subject to formal substantive constraints, the parties may attempt to influence such findings by evidence and citations. The Advisory Committee explicitly references the right to introduce evidence even of legislative facts, and the famous Brandeis brief<sup>273</sup> and its

269. See Schneider, *supra* note 34, at 569.

270. See FED. R. EVID. 201(a) (“This rule governs only judicial notice of adjudicative facts.”).

271. The Advisory Committee’s note states:

In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present.... [T]he parties do no more than to assist; they control no part of the process.

FED. R. EVID. 201 advisory committee’s note (alterations in original) (quoting Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270-71 (1944)). The Committee goes on to state:

This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however leave open the possibility of introducing evidence through regular channels in appropriate situations.

*Id.*

272. See Woolhandler, *supra* note 266, at 117-26 (exploring various proposals and defending the absence of formal constraints).

273. The Brandeis brief was a successful effort in *Muller v. Oregon*, 208 U.S. 412 (1908), to defend against constitutional challenge the rationality of a state law limiting the maximum hours women could work by marshalling a large amount of social science evidence. See Brief of Defendant-Appellant, *Muller*, 208 U.S. 412 (No. 107). See generally Kathryn Abrams, *The*

successors<sup>274</sup> demonstrate that legislative facts are often proffered in ways that track the offering of domestic law: citations to various authorities rather than evidentiary proof. One commentator concludes that, “[W]hen lawyers perceive that a particular showing will affect the outcome in a case, they tend to make such a showing, which courts tend to receive.”<sup>275</sup>

As applied to the plausible pleading context, the question is not whether, at some stage in the process, a court may look to its own sources, including the judge’s own life experiences to find legislative facts; rather, it is whether at the pleading stage a plaintiff may require the court to accept as true the plaintiff’s allegations in this regard. Recall that the effect of a denial of such a motion is not that the plaintiff prevail or that the allegation be accepted as true for the rest of the litigation. Rather, it is merely to permit the traditional process of discovery to go forward, during which the plaintiff will be seeking more adjudicative facts to support her claim.

Another way to frame the issue is to revisit in the pleading context the debate that played out in the Federal Rules of Evidence. The balance struck in the context of evidentiary rulings was to strictly control judicial notice for adjudicative facts but to free the judges to find legislative facts while encouraging courts to allow attorneys to “prove” such facts in a variety of ways.<sup>276</sup> A different balance might be appropriate for the law of pleading. Put simply, manageability concerns precluded any strict control of courts engaging in legislative fact-finding, given that it is central to the judicial enterprise and pervasive. With respect to pleading, however, the demands of the system are presumably much lighter—a case should get to discovery if the plaintiff alleges facts that make his claim “plausible.” Pleading along the lines suggested in this Article makes any discrimination claim more plausible, perhaps plausible enough to move to the discovery stage.

There are, of course, potential objections to this view. Presumably, it would allow any plaintiff to claim any kind of legislative fact to avoid dismissal for failure to state a claim. This,

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*Legal Subject in Exile*, 51 DUKE L.J. 27, 39-43 (2001) (exploring the approach taken by Louis Brandeis and others to expand the data considered by the courts).

274. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 489-90, 494-95 (1954).

275. Woolhandler, *supra* note 266, at 118.

276. See FED. R. EVID. 201.

however, is true in the plausible pleading regime. The *Twombly* plaintiffs could have avoided dismissal by alleging an agreement under a bridge by the defendants' CEOs; the *Iqbal* plaintiffs could have alleged that Ashcroft and Mueller met at the Department of Justice and agreed to hold Arab Muslims to "get even" for September 11. What prevented such allegations were not the pleading requirements per se but rather Rule 11's limitations on the factual investigation necessary for any court filing.<sup>277</sup> Similarly, a plaintiff might allege a legislative fact that the court might have to accept as true,<sup>278</sup> but which would result in Rule 11 sanctions if the fact were not reasonably based. In the discrimination context, however, there could be no doubt about the reasonableness, indeed the truth, of the allegation that social science research finds discriminatory attitudes and, indeed, discriminatory actions very common.

Assuming this to be true, the penultimate question is whether, accepting that properly pleaded social science studies must be accepted as true, such data should suffice to shift the judicial baseline in assessing the case before it. After all, the question for the court is not whether it is plausible to believe there is discrimination in American society but rather whether it is plausible to believe *this* defendant discriminated against *this* plaintiff. The question is akin to the famous blue bus heuristic of evidence scholarship, where scholars have debated the admissibility and probativeness of evidence regarding the relative number or buses of different colors in an accident involving an otherwise unidentified bus.<sup>279</sup> But, of course, those debates occur at a later stage than the one with which

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277. See FED. R. CIV. P. 11.

278. There may be limits even to the court's duty to accept legislative facts, as Justice Souter's dissent in *Iqbal* suggested:

We made it clear [in *Twombly*] ... that a court must take the allegations as true, no matter how skeptical the court may be. The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel.

129 S. Ct. 1937, 1959 (2009) (Souter, J., dissenting) (citations omitted).

279. See, e.g., Ronald J. Allen, *On the Significance of Batting Averages and Strikeout Totals: A Clarification of the "Naked Statistical Evidence" Debate, the Meaning of "Evidence," and the Requirement of Proof Beyond a Reasonable Doubt*, 65 TUL. L. REV. 1093 (1991); Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949 (2006); Neil B. Cohen, Comment, *The Costs of Acceptability: Blue Buses, Agent Orange, and Aversion to Statistical Evidence*, 66 B.U. L. REV. 563 (1986).



we are concerned: the present question is not whether liability can be imposed on a defendant without some more individualized proof than general probabilities; rather, the question is whether such general probabilities might properly influence the decision to let a case proceed to discovery.

The final question is one that needs to be left for development at another time, and that is, precisely what does the social science research suggest is causing discrimination? Although much of the research is consistent with attitudes and actions of which the actor is aware, even if the actor typically denies acting on such bases, it is also consistent with what has been called unconscious discrimination, that is, the treatment of members of minority groups and women differently as a result of cognitive bias. By definition, cognitive bias involves mental processes of which the actor is unaware or, perhaps, only dimly aware. There is considerable debate in the literature about whether “unconscious discrimination” is actionable,<sup>280</sup> as well as whether it should be.<sup>281</sup>

By and large, the courts have addressed that issue only glancingly<sup>282</sup> because findings of discrimination *vel non* tend to take a

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280. See generally Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009); Wax, *supra* note 260, at 984-85.

281. Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1058-59, 1072-89, 1113-21 (2009); Patrick S. Shin, *Liability for Unconscious Discrimination?: A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67, 69-70 (2010); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1133 (1999).

282. Cases speak of stereotyping but not of “attitudes” and not necessarily of the mechanism by which stereotyping occurs. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for ‘[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’” (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978))); see also *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (acting on the basis of the stereotype that “productivity and competence decline with old age” is “the very essence of age discrimination”). Justice O’Connor’s plurality opinion in *Watson v. Fort Worth Bank & Trust* does speak of “the problem of subconscious stereotypes and prejudices,” but in the context of approving disparate impact liability to combat such stereotypes: “It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain.” 487 U.S. 977, 990 (1988) (plurality opinion).

kind of blackbox approach to liability: the dominant *McDonnell Douglas* analysis could reveal the workings of either conscious or unconscious bias. Depending on the way allegations of social science findings are framed, the result of this kind of pleading to satisfy *Twombly/Iqbal* could well result in the first definitive decisions on whether adverse employment actions taken as a result of unconscious bias violate the antidiscrimination statutes.

### CONCLUSION

Pleading generally, and employment discrimination pleading in particular, is in disarray in the wake of *Twombly/Iqbal*. The continued viability of *Swierkiewicz* and the application of *Twombly/Iqbal*'s two requirements of nonconclusoriness and plausibility are certain to continue to engage the courts. Plaintiffs' attorneys can be expected to try to avoid the more serious obstacles these cases raise by pleading more than *Swierkiewicz* found necessary, and, in fact, attorneys often plead more than the barebones allegations that notice pleading, as traditionally understood, was thought to require. This Article tries to guide that effort, suggesting ways in which, even if *Swierkiewicz* were to be held a dead letter and a plea of "discrimination" were found, by itself, to be too conclusory under *Twombly/Iqbal*, a complaint could still survive a Rule 12(b)(6) motion. The Article suggests several possibilities: pleading a prima facie case under *McDonnell Douglas*; pleading "direct evidence" of discrimination; pleading the existence of a comparator; and, most importantly, pleading social science studies documenting the pervasiveness of discrimination in American society.