THE HARSH REALITY OF RULE 8(A)(2): KEEPING THE *TWIQBAL* PLEADING STANDARD PLAUSIBLE, NOT PLIABLE

"[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right."[1]

I. INTRODUCTION

At first glance, the "plausibility" standard generally acts as the applicable pleading standard for all federal civil claims and provides the minimum threshold of factual allegations a plaintiff must plead in his or her complaint. Up close, however, the standard seems to contain less bite than usual. Without so much as a nod from the United States Supreme Court or amendment to the Federal Rules of Civil Procedure conducted by the Advisory Committee, comprised of our highest judicial officers, elected legislative officials, and academics, a partition of lower federal courts in the last five years has treated the plausibility standard as a pliable, rather than hardwired mechanism to evaluate claims at the pleading stage. Specifically, courts have accepted less factual specificity for claims involving statutory and constitutional violations of discrimination. To that end, discrimination claims, like all civil claims, require the same applicable standard.

Robert Cover called the Federal Rules of Civil Procedure a "trans-substantive achievement"—a set of one-size-fits-all procedural rules that would apply to all civil claims and simplify federal procedure for attorneys and judges alike.[2] The two cases that reaffirmed the Supreme Court's

1. Agostini v. Felton, 521 U.S. 203, 235 (1997).

2. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975). "Trans-substantive" theory prescribes that the same procedural rules apply to all civil lawsuits, no matter the context or complexity. Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 378 (2010). Some scholars contend that "trans-substantive" principles reflect the Federal Rules Committee's commitment to "[u]niform, simple procedural rules for the federal courts," and the Rules Enabling Act would allow the Supreme Court to "promulgate such sound and simple rules that each state would copy them." Stephen N. Subrin, *Federal Rules, Local Rules,*

commitment to this ideation of trans-substantive law in the twenty-first century were *Bell Atlantic Corporation v. Twombly*[3] and *Ashcroft v. Iqbal*.[4] These cases pronounced the Supreme Court's departure from *Conley v. Gibson*'s "notice-pleading" [5] standard and ultimately redefined what the pleader must show under Rule 8(a)(2) of the Federal Rules of Civil Procedure (hereinafter, "FRCP") to state a claim for relief.[6] The lower federal courts, in theory, were required to defer to these decisions.

In a case involving the sufficiency of a complaint alleging a Section 1 Sherman Antitrust violation, the *Twombly* Court adopted the plausibility standard, which requires the plaintiff to allege facts sufficient to show the complaint is "plausible" on its face.[7] Two years later in *Iqbal*, the Court confirmed that "plausibility" was here to stay—the standard would definitively apply to all federal civil claims.[8] Rather than defer to *Twombly* and *Iqbal*'s plausibility framework in cases where an individual alleges a discrimination claim, a significant portion of lower federal courts have deviated from the standard, which is neither prudent nor justified.

The basis of Javaid Iqbal's cause of action was purposeful and unlawful discrimination.[9] Following the September 11, 2001 terrorist attacks, Iqbal filed a complaint against the former Attorney General, and the Director of the Federal Bureau of Investigation, Robert Mueller.[10] Iqbal plead that the petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to extreme conditions of confinement based solely on his religion, race, and/or national origin and without a legitimate penological justification.[11] However, the Court found that the complaint's allegations fell below the level of specificity required under Rule 8(a), because Iqbal only alleged that various other defendants who were not before the court labeled

---

and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns, 137 U. PA. L. REV. 1999, 2005-06 (1989) [hereinafter Subrin, *Federal Rules*].

3. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

4. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

5. Conley v. Gibson, 355 U.S. 41, 47-48 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

6. FED. R. CIV. P. 8(a)(2) ("A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.").

7. *Twombly*, 550 U.S. at 570. The Court held that there was nothing suggestive of a conspiracy in the plaintiff's complaint. While parallel conduct (actions by competing companies that might be seen as implying some agreement to work together) is "admissible circumstantial evidence" from which an agreement to engage in anti-competitive behavior may be inferred, parallel conduct alone is insufficient to prove a Sherman Act claim. *Id.* at 552.

8. *Iqbal*, 556 U.S. at 687.

9. *Id.*

10. *Id.* at 666.

11. *Id.* at 680 (citing to Iqbal's Petition for Writ of Certiorari).

him a person "of high interest" and that the FBI's policies approved of the restrictive conditions of his confinement.[12] Even after three amended complaints, Iqbal failed to actually show, "or even intimate," that the government officials purposefully housed detainees in solitary confinement due to their race, religion, or national origin, and therefore acted with discriminatory purpose.[13] Much of the uncertainty that arose from the case still plagues the legal community—specifically, what standard is required to sufficiently plead a discrimination claim. Even if the answer is "plausibility," some posit whether a plaintiff can adequately allege yet-to-be-proven misconduct to show a pattern or custom of discriminatory behavior.[14]

In their attempt to answer these questions, lower courts have either relaxed the plausibility standard, requiring less factual specificity to state a claim for relief, or have chosen to ride the *Twombly* and *Iqbal* wave.[15] It is unclear why the courts do this at all if the Supreme Court explicitly stated in *Iqbal* that the standard applied to all civil claims. One hypothesis is that courts are searching for a way to make it easier for a plaintiff to sufficiently plead a discrimination claim to defeat a motion to dismiss. Or perhaps the courts aim to achieve a more just result for aggrieved plaintiffs who, without discovery, do not have access to the facts they need to show a meritorious claim. The courts that adopt separate standards for discrimination claims, however, do not realize that these decisions seem arbitrary and unpredictable.[16] Even where lower courts have relaxed the standard under Rule 8(a), plaintiffs still cannot defeat a motion to dismiss because the claim is likely unmeritorious to begin with.[17] Therefore, is it really worth lowering the standard if a plaintiff cannot succeed on the actual merits of her claim?

Two Supreme Court cases preceding *Twombly* and *Iqbal* laid the groundwork for the pleading problem surrounding discrimination claims: *McDonnell Douglas Corp. v. Greene*[18] and *Swierkiewicz v. Sorema*.[19] Both cases involved discrimination claims. Both were instructive for what

12. *Id.* at 682-83.

13. *Id.* at 683.

14. CHARLES A. WRIGHT ET AL., 5 FEDERAL PRACTICE & PROCEDURE § 1216 (3d ed.) (2018) ("[T]here are certain types of cases that will be almost impossible to bring, as all of the information necessary to state a plausible claim is owned or known by the defendants and not accessible to the plaintiffs until the discovery phase.").

15. *See* Littlejohn v. City of New York, 795 F.3d 297 (2d Cir. 2015). *Contra* McCleary-Evans v. Md. Dep't of Transp., No. CCB-13-990, 2013 WL 5937735, at *3 (D. Md. Nov. 5, 2013) *aff'd sub nom*., McCleary-Evans v. Md. Dep't of Transp., 780 F.3d 582 (4th Cir. 2015).

16. *See* discussion *infra* notes 110-15 and accompanying text.

17. *Id.*

18. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

19. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 506 (2002).

plaintiffs had to show to make out their discrimination claim either at the time of trial in the case of *McDonnell Douglas*[20] or at the pleading stage as in the case of *Swierkiewicz*.[21] It was reasonable for courts to look to these cases in their quest for answers after *Twombly* and *Iqbal*, but was it necessary?

Neither *McDonnell Douglas* nor *Swierkiewicz* comport with the principles set forth in *Twombly* and *Iqbal*, and the Court failed to articulate how these precedents could, or whether they even should, coexist with one another. Yet courts have looked to these decisions as a way to resolve the pleading problem surrounding discrimination claims and still have yet to reconcile where they fit together.[22] The reality is that *Twombly*/*Iqbal*, *Swierkiewicz*, and *McDonnell Douglas* are three passing ships in the night that were never meant to cross paths. These decisions only seem meaningful when they come together in procedural theme, but in reality they have no significant connection to one another. They belong in their own world and represent separate procedural mechanisms.

Twombly and *Iqbal* clearly cemented plausibility as the pleading standard to be used for all civil claims.[23] However, if the standard does not work in the context of claims alleging discrimination, courts should end this internal debate and allow the Advisory Committee or Supreme Court to effectuate change. Part II reasons that the drafters of the Federal Rules never intended for federal courts to change civil litigation practice at their own discretion. A clear sense of how the basic pleading standard has developed over time shows that any departure from Supreme Court precedent is unwarranted. Part III illustrates any attempt by lower courts to piece-meal *Swiekiewicz*, *Twombly*/*Iqbal*, and *McDonnell Douglas* together has led to inconsistent, and somewhat confusing results. Part IV argues that if a proper solution exists to handle discrimination claims, that solution rests in the hands of the Supreme Court or Advisory Committee for the Federal Rules.

---

20. *See McDonnell Douglas Corp.*, 411 U.S. at 802.

21. *See Swierkiewicz*, 534 U.S. at 506.

22. *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 30 (2010) (confirming that "inconsistencies and uncertainties of application have arisen, causing confusion and disarray among judges and lawyers" in an attempt to untangle conflicting precedent after *Twombly* and *Iqbal*'s holdings); *see also* Lucas F. Tesoriero, *Pre*-Twombly *Precedent: Have* Leatherman *and* Swierkiewicz *Earned Retirement Too?* 65 DUKE L.J. 1521, 1524 (2016) ("[L]ower courts are taking discordant approaches to the status of pre-*Twombly* precedent. This discord has serious consequences for litigation costs, respect for *stare decisis*, and litigant access to the judicial system.").

23. *Has the Supreme Court Limited Americans' Access to Courts? Hearing on S. 1504 Before the Comm. on the Judiciary*, 111th Cong. 136-37 (2009) (statement of Senator Cornyn) ("[O]ur courts exist to right wrongs, not to empower trial lawyers to conduct unfounded fishing expeditions or extract nuisance-value settlements.").

Finally, Part V highlights practical problems that follow from inconsistencies in procedural law. Without binding law to say otherwise, every plaintiff must plead more.

II. *TWOMBLY* AND *IQBAL'S* HISTORY AND THE RULES LEFT LOST IN TRANSLATION

Lower federal courts may not agree with the Court's decision to modify the pleading standard under Rule 8(a) and may question how the Court's decisions reconcile with the precedent that came before *Twombly* and *Iqbal*. However, Congress gave specific authority to the Supreme Court to resolve questions of interpretation with respect to the FRCP through adjudication.[24] The plausibility standard itself may not equally serve every litigant. But the Court made its bed when it decided *Twombly* and *Iqbal*. Now the lower federal courts must lie in it.

A. Out with the Old and in with the New

Just because procedural rules do not work in a vacuum, a lawmaker can still dream. With approval from President Franklin D. Roosevelt and Congress, the Supreme Court implemented the FRCP in 1938 to ensure "that the procedure followed in federal courts throughout the nation would be consistent and uniform."[25] Prior to the FRCP's adoption, federal courts followed the distinct civil procedure law of the state in which the court sat, which lead to "confusion, expense, and delay" amongst attorneys who practiced in multiple states.[26] The uncertainty as to whether a district court would conform to state procedure wasted resources and invigorated a senseless complex system of rules.[27] Scholars believed that procedural uniformity would embody a "common set of values"—fairness to litigants, judicial efficiency, and standardization.[28] However, uniformity has a tendency to clash with the legal culture itself—"[t]he habits and customs of the bench and bar, the procedural rules, and the economic, social, and

24. U.S. CONST. art. III, § 1.

25. *Federal Rules of Civil Procedure Establish Uniformity*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/federal-rules-civil-procedure-establish-uniformity (last visited Nov. 3, 2019). After multiple failed attempts to pass proposed legislation in the early part of the 1900s, Congress passed the Rules Enabling Act in 1934, and the FRCP went into effect on September 16, 1938. *Id.*

26. *See* Subrin, *Federal Rules*, *supra* note 2, at 2002-03.

27. *See id.* at 2002.

28. *See generally* Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 780, 791 (1995) ("[L]ocal rules are undesirable because they interfere with the system of uniformity and by-and-large offer little real benefit.").

political agendas of the lawyers, clients, judges, and other court personnel [interacting] with one another."[29]

As the drafters of the FRCP would have it, the rules of procedure would enable the court to adjudicate a dispute with a "minimum of motion practice," provide litigants with "equal access to all information relevant to the case's subject matter," and provide a "receptive procedural vehicle" for all types of civil litigation.[30] The FRCP would "give people access to a meaningful day in court . . . the procedural process [would] effectuate those aspirations."[31] The FRCP were written to be meaningful to everyone—to enforce "the public policies embedded in national and state statutes as well as common-law doctrines, such as antitrust, securities, civil rights, products liability, and other more recently developed substantive fields, such as environment, pension protection, privacy, and consumer rights."[32] However, the complexities of the modern world require different pleading rules than those in effect prior to enacting the FRCP, and the FRCP now require plaintiffs to articulate the reasons for their harms—a not-so-simple task.

Long before *Twombly* and *Iqbal*, the legal community demanded that the complaint include more than conclusory statements and "barebone[] allegation[s] that merely parrot[]" the legal elements to state a claim for relief.[33] Even under the *Conley v. Gibson*[34] standard that applied prior to *Twombly* and *Iqbal*, the plaintiff could not solely plead that the defendant *caused* her harm. The plaintiff would have to articulate at least some set of facts—for example, the defendant failed to perform within the time specified under the agreement. The plaintiff had to show at the pleading stage that discovery would reveal relevant evidence.[35] Courts "retain[ed] the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."[36] Even the rule stated in *Conley* required

29. Subrin, *Federal Rules*, *supra* note 2, at 2046.

30. Arthur R. Miller, *What Are Courts for? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 740 (2018).

31. *Id.* at 740.

32. *Id.* at 741.

33. *Access to Justice Denied:* Ashcroft v. Iqbal*: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 41 (2009) (prepared statement of Gregory G. Katsas).

34. Conley v. Gibson, 355 U.S. 41, 47 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

35. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005) (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975)).

36. Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 528 n.17 (1983).

the defendant to obtain "fair notice" and the "grounds" on which the claim rests.[37] The claim required at least some factual specificity to be meaningful.

Through the Rules Enabling Act of 1934, Congress authorized the Supreme Court "the power to prescribe general rules of practice and procedure" and use its discretion to interpret the FRCP when necessary.[38] In *Conley*, the Court used that power to define what a pleader must show to persuade the court it was entitled to relief,[39] but the standard had its limitations because it truly required very little for the claim to defeat a motion to dismiss. Not every litigant has a meritorious claim, nor should every litigant have to submit to the high cost of discovery. The Court saw an opportunity in *Twombly* to effectuate change that would adapt pleading rules to the conditions of the modern world—and rightfully so.

B. Decisions Preceding Twombly and Iqbal

The lower federal courts have only exacerbated the confusion by applying their own pleading standard for discrimination claims, by attempting to integrate stale civil procedure jurisprudence with *Twombly* and *Iqbal*'s pleading framework. Discrimination claims by their very nature already provide a lofty hurdle for plaintiffs at the pleading stage. Drafting the complaint requires creativity on the plaintiff and defendant's end because the evidence in every case is unique, and each party will have to find a way to convince a factfinder that "a motivating factor" for the alleged wrong was or was not discrimination.[40] A key question of fact in most claims of discrimination is whether the defendant indeed acted with an intent to discriminate.[41] Whatever "intent to discriminate" means legally, the actual reason for why the defendant acted is generally only known by the defendant and need not be shared with the plaintiff before discovery.

Two Supreme Court cases reflect how unsettled the procedural law was surrounding discrimination claims prior to *Twombly* and *Iqbal*. *McDonnell Douglas* involved the Supreme Court's first attempt at tackling the substance

37. *Twombly*, 550 U.S. at 555 n.3 ("While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant 'set out *in detail* the facts upon which he bases his claim' . . . Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief.").

38. *See generally* 28 U.S.C. §§ 2071-2072.

39. *Conley*, 355 U.S. at 45-46.

40. *See* U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716-17 (1983) (quoting Eddington v. Fitzmaurice, 29 Ch. Div. 459, 483 (1885)) ("The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much as fact as anything else.").

41. "There will seldom be 'eyewitness' testimony as to the employer's mental processes." *Id.* at 716.

of an individual's disparate treatment law under Title VII.[42] In disparate treatment claims, "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."[43] The defendant in *McDonnell Douglas* refused to rehire an African-American plaintiff it had previously laid off.[44]

Although the case came to the Court on an appeal from a motion to dismiss at the pleading stage, the Court prescribed an evidentiary burden-shifting framework to be applied at trial.[45] In other words, the Court stated that the plaintiff would have to prove by a preponderance of the evidence a "prima facie case" of discrimination.[46] The Court set forth a three-step test to establish a "prima facie case": a plaintiff had to show that he belonged to a protected class, was qualified for the position, and was subject to an adverse employment action under circumstances giving rise to an inference of discrimination.[47] If the plaintiff made out a prima facie case, the burden shifted to the defendant to "articulate some legitimate, nondiscriminatory reason" for its action.[48] Assuming the defendant met its burden, the plaintiff had to produce circumstantial evidence to show pretext, or discriminatory intent (e.g., ambiguous statements, suspicious timing).[49] In other words, the plaintiff was required to persuade the trier of fact that "a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[50]

As such, *McDonnell Douglas* did not by any means create a pleading standard. Rather, it set forth an evidentiary framework so that a jury could reasonably determine whether the employer discriminated against the plaintiff.[51] The factfinder ultimately must decide whether a plaintiff's prima facie case of discrimination, combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional

42. Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1248 (2008).

43. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

44. 411 U.S. 792, 796 (1973).

45. Angela K. Herring, *Untangling the* Twombly-McDonnell *Knot: The Substantive Impact of Procedural Rules in Title VII Cases*, 86 N.Y.U. L. REV. 1083, 1088 (2011).

46. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993).

47. *McDonnell Douglas Corp.*, 411 U.S. at 802.

48. *Id.* In *Hicks*, 509 U.S. at 506, the respondent employer met its burden by offering admissible evidence sufficient for the trier of fact to conclude that petitioner employee was fired because of his failure to maintain accurate attendance records, unrelated to age.

49. *McDonnell Douglas Corp.*, 411 U.S. at 804.

50. *Hicks*, 509 U.S. at 516-17 (citations omitted).

51. Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 10 (2005).

discrimination.[52] This is significantly different from the pleading stage where all factual allegations do not require evidentiary support, only the likelihood through articulated allegations, and that discovery will confirm or dispel the truth of those facts. Moreover, *McDonnell Douglas*'s framework is still the subject of debate—even more reason to leave it out of pleading principles.[53] For example, multiple commentators have pronounced the *McDonnell Douglas* framework as a weak basis for the court to find a presumption of discrimination, and therefore the decision should be overruled.[54] More recently, critics have observed that courts actually "tweak McDonnell Douglas in ways that make it harder for plaintiffs to prevail and which explains in part the rise in the number of early dismissals and successful employer motions for summary judgment."[55]

Nearly thirty years later after *McDonnell Douglas*, the Court in *Swierkiewicz* confirmed that *McDonnell Douglas* established an evidentiary standard that applied post-discovery and that its application at the pleading stage was inappropriate.[56] Specifically, the Court suggested that in some circumstances (e.g., discrimination contexts), the plaintiff need not plead all of the elements of a prima facie case.[57] Thus, a plaintiff could either produce direct evidence of discrimination such as through eyewitness testimony or documentation that evinces the discriminatory motive, or plead just enough facts to minimally suggest discriminatory intent.[58] This made perfect sense

---

52. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 139 (2000).

53. *See, e.g.*, Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 112-14 (2007); Michael J. Zimmer, *Title VII's Last Hurrah: Can Discrimination Be Plausibly Pled?*, 2014 U. CHI. LEGAL F. 1 (2014); *see also* Kaminshine, *supra* note 51, at 3-6.

54. *See* William R. Corbett, McDonnell Douglas*, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 203 (2003) (noting the difficulty of deciding which proof structure to apply in any particular case); Kenneth R. Davis, Price-*Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 907 (2004) ("McDonnell Douglas should retire and make a graceful retreat into history.").

55. *See* Kaminshine, *supra* note 51, at 12.

56. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 510 (2002).

57. *Id.* at 508. While the pleading stage does not impose an evidentiary standard, the plaintiff must plead sufficient facts toward every element of the claim. *See, e.g.*, Pawlow v. Dep't of Emergency Servs. and Pub. Prot., 172 F. Supp. 3d 568, 574-75 (D. Conn. 2016) (Title VII complaint required facts sufficient to allege prima face case). "Although making a prima facie case is an evidentiary requirement and not a pleading standard, this requirement lends guidance to the Court's determination of whether [plaintiff] has sufficiently alleged a . . . claim under *Twombly* and *Iqbal*." Smith v. Ill. Sch. Dist. U-46, 120 F. Supp. 3d 757, 770 (N.D. Ill. 2015).

58. *Swierkiewicz*, 534 U.S. at 511-12 ("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."). *But see* J & J Sports Prods., Inc. v. MayrealII, LLC, 849 F. Supp. 2d 586, 592 (D. Md. 2012) (stating the court was "cognizant" that some necessary facts were "unavailable to plaintiff in advance of discovery," but this difficulty does not create "license to . . . dispense with ordinary pleading requirements.") (Hollander, J.).

considering the standard at the time in 2002, when *Conley*'s "notice-pleading" framework was still the threshold standard for stating a claim to relief. But now the pleading standard requires more factual specificity under *Twombly* and *Iqbal* which supersedes *Swierkiewicz*'s holding.[59]

C. Twombly and Iqbal's Premises

While the plausibility standard may not provide the perfect standard needed to effectuate access to justice for all, legal minds have mistaken the Court's silence with respect to discrimination claims to mean that the standard required to plead a discrimination claim remains unresolved. In both *Twombly* and *Iqbal*, the Court conducted an in-depth analysis to determine the pleading practice required to defeat a motion to dismiss for failure to state a claim to which relief can be granted.[60] Under *Twombly*, the plaintiff has to show the wrong itself is "plausible" on the face of the complaint using facts—the "who, what, when, and where" surrounding the unlawful conduct.[61] The *Iqbal* Court further set forth a two-step approach to establish whether the plaintiff sufficiently showed that it was entitled to relief.[62] For purposes of a motion to dismiss, the court must accept "all of the factual allegations in the complaint as true," demanding more than an "unadorned, the-defendant-unlawfully-harmed-me accusation."[63] After separating the complaint's factual allegations from its legal conclusions, the court would draw from its "judicial experience and common sense" to determine whether the "complaint states a plausible claim for relief."[64]

Against *Twombly*'s explicit instructions, some courts have framed the plausibility standard as "heightened" pleading, rather than as the degree of specificity necessary to plead a sufficient claim for relief.[65] Critics who

59. The Third Circuit also ruled that *Swierkiewicz* was no longer valid law after *Twombly* and *Iqbal*. Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009) ("We have to conclude, therefore, 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*.").

60. Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

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

62. *Iqbal*, 556 U.S. at 679.

63. *Id.* at 678.

64. *Id.* at 679. Judges must use their discretion to deduce whether the facts sufficiently state a plausible claim for relief, not the discretion to depart from the standard altogether to further their own beliefs. *See id.*

65. *See Twombly*, 550 U.S. at 570 ("Here . . . we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."); *see also* Arista Records, LLC v. Doe 3, 604 F.3d 110, 120-121 (2d Cir. 2010) (rejecting "contention that *Twombly* and *Iqbal* require the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible.").

characterize the plausibility standard as "heightened" interpret it to mean that the plaintiff has an onerous task to properly plead her complaint, which creates a bulwark to accessing the courthouse doors.[66] This perception is reasonable, because articulating the defendant's motivation for its alleged wrongful conduct before *Twombly* and *Iqbal* required very little factual specificity—arguably too little—to gain access to discovery. Moreover, because *Twombly* and *Iqbal* failed to explicitly touch on the question of what degree of specificity the complaint requires categorically for discrimination claims, the opportunity arose for the lower courts to presume that the question was still open for further interpretation.

While some courts still resist acknowledging "the plausibility standard,"[67] others remain committed to the Court's holding—that plausibility applies to all civil suits.[68] In *Swanson v. Citibank, N.A.*,[69] the Seventh Circuit applied the plausibility standard to a discrimination claim:

> [I]n many straightforward cases, it will not be any more difficult today for a plaintiff to meet that burden than it was before the Court's recent decisions. A plaintiff who believes that she has been passed over for a promotion because of her sex will be able to plead that she was employed by Company X, that a promotion was offered, that she applied and was qualified for it, and that the job went to someone else. That is an entirely plausible scenario, whether or not it describes what 'really' went on in this

66. *See* Urda v. PetSmart, Inc., 854 F. Supp. 2d 359, 362 (E.D. Va. 2012) (explaining *Twombly* "amplified" Rule 8's pleading standard); *Has The Supreme Court Limited Americans' Access to Courts?: Hearing on S. 1504 Before the Comm. on the Judiciary*, 111th Cong. 5 (2009) (statement of John Payton, President and Director-Counsel, NAACP Legal Defense and Educ. Fund, Inc., Washington, D.C.) (acknowledging District Judge Jack Weinstein's comment about the "detrimental impact of this heightened pleading standard"); Perry F. Austin, *Motion to Dismiss for Failure to Succeed on the Merits: The EEOC and Rule 12(b)(6)*, 59 WM. & MARY L. REV. 1097, 1101 (2018) (opining that the *Twombly* Court established a "heightened" pleading standard); Honorable Shira A. Scheindlin, Twombly *and* Iqbal*: The Introduction of a Heightened Pleading Standard*, 27 TOURO L. REV. 233, 233-34 (2010) (characterizing the plausibility phenomenon as a "heightened pleading standard," akin to what is required at summary judgment).

67. *See* Susko v. City of Weirton, No. 5:09CV1, 2009 WL 5067456, at *3 (N.D.W. Va. Dec. 16, 2009) (refusing to dismiss case because it does not appear to "a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proven in support of its claim.") (quoting Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp., 910 F.2d 139, 143 (4th Cir. 1990)); Raddatz v. Bax Global, Inc., No. 07-CV-1020, 2008 WL 2435582, at *1 (E.D. Wis. 2008) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)); Pell v. Pall Corp., No. CV 07-92, 2007 WL 2445217, at *2 (E.D.N.Y. Aug. 20, 2007) (quoting *Conley*'s "no set of facts" language); Diarmuid F. O'Scannlain, *Access to Justice Within the Federal Courts—A Ninth Circuit Perspective*, 90 OR. L. REV. 1033, 1036 (2012) (doubting that *Twombly* and *Iqbal* "worked, or even could have worked, a fundamental change in federal litigation" because no motion to dismiss ever would have been granted if *Conley*'s standard was "taken to mean what it actually said.").

68. *Iqbal*, 556 U.S. at 684.

69. 614 F.3d 400 (7th Cir. 2010).

> plaintiff's case. A more complex case involving financial derivatives, or tax fraud that the parties tried hard to conceal, or antitrust violations, will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind at least, the dots should be connected.[70]

The *Swanson* court deferred to the Supreme Court's decisions in *Twombly* and *Iqbal*, positing that the plaintiff need only allege "enough details about the subject-matter of the case to present a story that holds together."[71] Rather than look to the *Swierkiewicz* and *McDonnell Douglas* decisions, the court denied the defendant's motion to dismiss because Swanson's complaint properly alleged the who (Citibank), what (racial discrimination), and when (in connection with her effort to obtain a home-equity loan), to state a claim for relief.[72]

In *McCleary-Evans v. Maryland Department of Transportation*,[73] the Fourth Circuit also reaffirmed *Twombly* and *Iqbal* and further made what this Note believes to be the more accurate determination as to how *Twombly* and *Iqbal* can be reconciled with *Swierkiewicz*. It reasoned that *Twombly* overruled the "no set of facts" standard in *Conley* and *Swierkiewicz*.[74] Moreover, the court

> [A]rticulated a new requirement that a complaint must allege a *plausible* claim for relief, thus rejecting a standard that would allow a complaint to "survive a motion to dismiss whenever the pleadings left open the *possibility* that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery."[75]

The court did not view plausibility as a more rigorous standard, but simply recognized that *Swierkiewicz* "applied a more lenient pleading standard than the plausible-claim standard now required [under] *Twombly* and *Iqbal*."[76] These decisions show that discrimination claims are not exceptions to the requirements under *Twombly* and *Iqbal*.

III. FROM PLAUSIBLE TO "MINIMAL"

This section discusses the Second Circuit's reinterpretation of Rule 8(a)(2) with respect to discrimination claims. The Second Circuit adopted a

---

70. *Id.* at 404-05.
71. *Id.*
72. *Id.* at 405.
73. 780 F.3d 582 (4th Cir. 2015).
74. *Id.* at 587.
75. *Id.* (citation omitted).
76. *Id.*

modified pleading standard in *Littlejohn v. City of New York*,[77] and later applied it to Title IX reverse discrimination claims. Other lower federal courts, however, arbitrarily apply the standard to some, but not all, discrimination claims making success rarely achievable for those plaintiffs. The Sixth Circuit, along with the majority of Circuit Courts, continues to apply *Twombly* and *Iqbal* to claims of discrimination, illustrating the underlying principle of this Note—that lower court adjudication should not resolve the information-asymmetry issue behind discrimination claims by entwining unresolved Supreme Court precedent.

A. The Second Circuit's Modified Standard

The Second Circuit prescribed the most radical departure from plausibility by using the skeletons of *McDonnell-Douglas* and *Swierkiewicz* to approach Title VII discrimination claims in a *Twombly* and *Iqbal* world. In *Littlejohn,* the plaintiff alleged she was subject to racial discrimination under Title VII.[78] She alleged that she was black, qualified for the position, demoted, and criticized (without suggesting the criticism was related to her race).[79] However, she alleged that a white employee replaced her—someone outside of her protected class, and someone without prior experience.[80] The court jumped at the opportunity to furnish a modified version of "plausibility."

The court reasoned that just as "the *McDonnell Douglas* temporary presumption reduces the facts a plaintiff would need to *show* to defeat a motion for summary judgment prior to the defendant's furnishing of a non-discriminatory motivation, that presumption also reduces the facts needed to be *pleaded* under *Iqbal*"—the facts to be alleged need only give plausible support to a "minimal inference of discriminatory motivation."[81] While the court gave a procedural justification for adopting the burden-shifting framework articulated in *McDonnell Douglas*, there is an implication that its reason for doing so was also analogous to the Court's in 1973[82]—to make it easier for a plaintiff to establish a prima facie case of discrimination.

---

77. 795 F.3d 297 (2d Cir. 2015).

78. *Id.* at 302.

79. *Id.* at 312.

80. *Id.* at 313.

81. *Id.* at 310-11.

82. *See* Tristin K. Green, *Making Sense of the* McDonnell Douglas *Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CALIF. L. REV. 983, 985 (1999). One author promulgated that once Congress enacted the Civil Rights Act of 1964, the nature of discrimination in the workforce made direct evidence of intentional discrimination hard to produce. *Id.*

This modified version of the plausibility standard simply demonstrates an illusion. Reducing the facts necessary for the plaintiff to defeat a motion to dismiss seems like a noble objective, but in reality, plaintiffs still struggle to defeat a motion to dismiss for failure to state a claim under the *Littlejohn* approach. From 2015 until 2019, nearly 50% of reported discrimination cases using the Second Circuit's "minimal inference of discrimination" standard proceeded past a 12(b)(6) motion.[83] The results do not reflect a significant increase in the likelihood that a plaintiff's discrimination claim will proceed.

Yet a small fraction of lower courts continues to smuggle this framework into the grand scheme of discrimination claims, and to what end if not to achieve results? In 2016, the Second Circuit also applied the same burden-shifting framework at the pleading stage to a different type of discrimination case.[84] The court essentially made it easier for a plaintiff to survive a motion to dismiss under a Title IX reverse discrimination claim.[85] Title IX reverse discrimination claims generally exist where a student alleges that his or her university's investigation of an alleged sexual assault was flawed as a result of gender-based bias in favor of the complainant.[86] In a typical reverse discrimination case, a male student and a female student engage in sexual activity that the male student alleges to have been consensual.[87] After a considerable amount of time passes, the female student reports that she was sexually assaulted, and a disciplinary case ensues. If the male student is later expelled or subjected to other serious discipline, he most often alleges that, in violation of Title IX, the investigation or the adjudication was flawed, the flaws were the result of a gender bias, and the university erroneously concluded that he was responsible for student-on-student sexual violence.[88]

---

83. This note acknowledges that this number is subject to change. After entering "minimal inference of discrimination" or "minimal plausible inference" and "motion to dismiss" on Westlaw, of the twelve reported cases that cite to *Littlejohn* and apply the burden-shifting framework based on principles of *McDonnell Douglas* and *Swierkiewicz*, six courts within the Second Circuit denied a defendant's motion to dismiss.

84. *See* Doe v. Columbia Univ., 831 F.3d 46 (2d Cir. 2016).

85. *Id.*

86. *See id.*

87. John Longstreth et al., *Reverse Discrimination Under Title IX*, K&L GATES (Jan. 26, 2018), http://www.klgates.com/reverse-gender-discrimination-under-title-ix-01-25-2018/.

88. *See* Doe v. Miami Univ., 882 F.3d 579 (6th Cir. 2018); Doe v. Regents of the Univ. of Cal., 891 F.3d 1147 (9th Cir. 2018); Plummer v. Univ. of Hous., 860 F.3d 767 (5th Cir. 2017); Doe v. Syracuse Univ., 341 F. Supp. 3d 125 (N.D.N.Y. 2018); Doe v. Marymount Univ., 297 F. Supp. 3d 573 (E.D. Va. 2018); Doe v. Princeton Univ., No. 17-cv-1614 (PGS), 2018 U.S. Dist. LEXIS 88027, at *1 (D.N.J. Feb. 6, 2018); Novio v. N.Y. Acad. of Art, 317 F. Supp. 3d 803 (S.D.N.Y. 2018); Rolph v. Hobart and William Smith Colls., 271 F. Supp. 3d 386 (W.D.N.Y. 2017); Doe v. Purdue Univ., 281 F. Supp. 3d 754 (N.D. Ind. 2017), *rev'd*, 928 F.3d 652 (7th Cir. 2019); Doe v. Univ. of St. Thomas, 240 F. Supp. 3d 984 (D. Minn. 2017); Doe v. Baum, 227 F. Supp. 3d 784

In *Doe v. Columbia University*, the court reasoned that Title IX claims have so much in common with Title VII claims that on "certain sorts of facts, rules the Supreme Court established for Title VII litigation appear to apply also to such similar claims of sex discrimination under Title IX," alluding to *McDonnell Douglas*, and *Swierkiewicz*.[89] The burden-shifting framework requires that the plaintiff need only present minimal evidence supporting an inference of discrimination in order to prevail—in this case gender bias.[90] The court's decision in *Columbia* echoed the Second Circuit's initial theory articulated in *Littlejohn*—that discrimination claims require a departure from *Twombly* and *Iqbal*. After the decision, one might predict that more Title IX reverse gender discrimination claims against universities would proceed past a Rule 12(b)(6) motion to dismiss, leading to increased litigation and settlements; however, this prediction appears to be incorrect.

B. The Sixth and Ninth Circuit's Commitment to Plausibility

Some courts would rather adhere to the binding precedent shown in *Twombly* and *Iqbal*—to further consistent and uniform procedural rules.[91] In *Doe v. Miami*, the court rejected the *Columbia* pleading standard as contrary to its "binding precedent" requiring a plaintiff to "meet the requirements of *Twombly* and *Iqbal* for each of his [or her] claims in order to survive a Rule 12(b)(6) motion to dismiss."[92] Factual specificity that suggested a "minimal plausible inference" was surely not enough; rather, a complaint that alleged that a university engaged in intentional gender discrimination required the complaint to be "plausible on its face."[93]

(E.D. Mich. 2017); Doe v. Lynn Univ., Inc., 235 F. Supp. 3d 1336 (S.D. Fla. 2017); Doe v. Univ. of Colo., 255 F. Supp. 3d 1064 (D. Colo. 2017); Doe v. Coll. of Wooster, 243 F. Supp. 3d 875 (N.D. Ohio 2017); Streno v. Shenandoah Univ., 278 F. Supp. 3d 924 (W.D. Va. 2017); Doe v. W. New Eng. Univ., 228 F. Supp. 3d 154 (D. Mass. 2017); Nungesser v. Columbia Univ., 244 F. Supp. 3d 345 (S.D.N.Y. 2017); Doe v. Pa. State Univ., 276 F. Supp. 3d 300 (M.D. Pa. 2017); Collick v. William Paterson Univ., No. 16-471 (KM) (JBC), 2016 U.S. Dist. LEXIS 160359, at *1 (D.N.J. Nov. 17, 2016), *aff'd in part, remanded in part by* Collick v. William Paterson Univ., 699 F. App'x 129 (3d Cir. 2017); Doe v. Brown Univ., 166 F. Supp. 3d 177 (D.R.I. 2016).

89. *Columbia Univ.*, 831 F.3d at 55.

90. *Id.*

91. *See Marymount Univ.*, 297 F. Supp. 3d at 581 ("To the extent there is a circuit split on the question of the applicable Rule 12(b)(6) standard in discrimination cases, the Sixth Circuit has taken the approach that would likely be followed by the Fourth Circuit."); *see also* Doe v. Univ. of Cincinnati, No. 1:16cv987, 2018 WL 1521631, at *1, *4 (S.D. Ohio Mar. 28, 2018) (echoing the Sixth Circuit's reluctance to rely on the Second Circuit's decision in *Columbia*, as it is contrary to binding precedent).

92. *Miami Univ.*, 882 F.3d at 589.

93. *Id.* at 588-89.

The Ninth Circuit's most recent decision in *Austin v. University of Oregon*[94] only confirms that discrimination claims should require plausible facts just like any other claim. The court addressed what the applicable pleading standard was for a Title IX claim and ultimately found that 12(b)(6) analysis does not include *McDonald Douglas* nor the approach adopted in *Doe v. Columbia* and *Littlejohn*.[95] The court clarified that the *McDonald Douglas* framework is merely "a tool to assist plaintiffs at the summary judgment stage so that they may reach trial"[96] rather than a pleading standard used to analyze the sufficiency of a complaint. The court declined to extend the Second Circuit's precedent after finding its approach unequivocally "contrary to Supreme Court precedent."[97] In this case, conclusory allegations would not suffice to show a "plausible connection" between the University's decision to discipline this plaintiff and its alleged bias against men—as the general consensus among courts stand, "[j]ust saying so"[98] certainly does not mean it is so.

C. An Illustration Through Erroneous Outcome

Courts that apply clear and consistent procedural standards paint a vivid picture of the law. Factual theories then become recognizable when the courts view the complaint, which in turn increases the likelihood that the plaintiff will defeat a motion to dismiss. A fact that may be sufficient on its own to show the defendant acted with discriminatory intent under the "minimal plausible inference" standard should, in theory, function similarly as the same fact alleged in another court. But the caselaw does not illustrate this theory. For example, the most common theory plaintiffs use in claims alleging Title IX reverse discrimination is the "erroneous outcome" theory.[99] This theory requires the plaintiff to "plead facts sufficient to (1) 'cast some articulable doubt' on the accuracy of the disciplinary proceeding's outcome, and (2) demonstrate a 'particularized . . . causal connection between the flawed outcome and gender bias.'"[100]

While using the "minimal plausible inference" standard in *Columbia*, the Second Circuit held that the complaint gave "ample plausible support to a bias with respect to sex" based on the factual allegation that many of these

94. Austin v. Univ. of Or., 925 F.3d 1133 (9th Cir. 2019) (quoting *Iqbal*, 556 U.S. at 678.
95. *Id.* at 1137.
96. *Id.* at 1136 (quoting Costa v. Desert Palace, Inc., 299 F.3d 838, 855 (9th Cir. 2002)).
97. *Id.* at 1137.
98. *Id.* at 1138.
99. *See* Doe v. Baum, 903 F.3d 575, 585 (6th Cir. 2018).
100. *Id.* (quoting *Miami Univ.*, 882 F.3d at 592).

reverse discrimination claims have in common—outside pressure on the university to carry out stricter punishments against sexual assault perpetrators.[101] The complaint alleged that the public and student body had criticized the university's toleration of sexual assault of female students, and that Columbia was motivated to accept the female's accusation of sexual assault and consciously disregard the male's claim of consent.[102] This was sufficient for the court to infer that the university panel adopted a biased stance in favor of the accusing female and against the defending male to avoid further criticism that the university turns a "blind eye" to sexual assault.[103]

However, in *Doe v. College of Wooster*, the plaintiff, relying on *Columbia*, alleged the same factual theory regarding the university's pressure to confront the problem of campus sexual assault, and the court rejected it.[104] The court concluded that the criticism may have supplied a possible motive for favoring assault victims but was ultimately insufficient to support an inference of gender bias.[105] Yet the court in *B.B. v. New School*[106] suggested that the plaintiff could have alleged a "minimal plausible inference" of gender bias by alleging that the school "faced 'substantial criticism' for its handling of Title IX investigations, and that as a result, it was 'motivated to favor the accusing female over the accused male.'"[107] Thus, even under a relaxed pleading standard, the courts cannot seem to agree as to which facts create an inference of discrimination and which do not.

The lower federal courts should consider that having multiple pleading standards exist for the same type of claim is confusing for attorneys who practice in multiple states. Attorneys then must spend extra time and resources researching what standard applies in that particular jurisdiction, and even then, there are no guarantees because the lower standard is based on persuasive law. If an attorney's methodology fails, his or her client's case naturally suffers too. Even if the plausibility standard is not ideal for every civil context, conflated rules based on unsettled laws of procedure only make the risk of inconsistent and arbitrary results that much greater.

---

101. Doe v. Columbia Univ., 831 F.3d 46, 57-58 (2d Cir. 2016).

102. *Id.*

103. *Id.* at 56-58.

104. 243 F. Supp. 3d 875, 886 (N.D. Ohio 2017).

105. *Id.*

106. No. 17 Civ. 8347 (AT), 2018 WL 2316342, at *1, *5, *8 (S.D.N.Y. Apr. 30, 2018) (opining that allegations of some flawed outcome of the proceeding coupled with a conclusory allegation of gender discrimination would be insufficient to survive a motion to dismiss).

107. *Id.* (quoting *Columbia Univ.*, 831 F.3d at 56-57) (citing Rolph v. Hobart & William Smith Colls., 271 F. Supp. 3d 386 (W.D.N.Y. 2017), where the court held that allegations of public pressure against the college supported a minimal inference of gender bias).

An empirical study conducted by Professor Bethany Corbin in 2017 illustrates the extreme hurdle reverse discrimination plaintiffs face when competing standards exist across jurisdictions.[108] Corbin's study showed that between June 1, 2009, and August 31, 2016, twenty-nine percent of Title IX reverse discrimination claims survived a motion to dismiss.[109] Partners at K&L Gates added to Professor Corbin's empirical analysis by including data where courts have applied *Columbia*'s burden-shifting framework to assess the sufficiency of complaints in Title IX reverse discrimination claims.[110] "Only 21% of those Title IX reverse discrimination claims survived a motion to dismiss pursuant to *Columbia*'s burden-shifting framework,"[111] which suggests that the Second Circuit's deviation from *Twombly* and *Iqbal* is no more effective than applying the plausibility standard itself. Of the nineteen publicly reported Title IX reverse discrimination decisions at the motion-to-dismiss stage that cite to *Columbia*, only four have allowed the claim to proceed while employing *Columbia*'s pleading standard.[112] The courts that apply the "plausibility standard" have allowed the claims to proceed without employing the burden-shifting framework at all.[113]

IV. A NEW NARRATIVE TO RESOLVE THE DISCRIMINATION DILEMMA WITHOUT MODIFYING PLAUSIBILITY

If the Supreme Court fails to explicitly resolve what pleading standard discrimination claims must meet across jurisdictional lines, the Advisory Committee should impart a proper resolution to give discrimination plaintiffs an opportunity to be heard.[114] The rulemaking process incorporates the

108. *See* Bethany A. Corbin, *Riding the Wave or Drowning?: An Analysis of Gender Bias and* Twombly/Iqbal *in Title IX Accused Student Lawsuits*, 85 FORDHAM L. REV. 2665, 2697 (2017).

109. *Id.* at 2699.

110. Longstreth et al., *supra* note 87.

111. *Id.* For a list of cases that survived a motion to dismiss based on the *Columbia* standard, see *id.* These statistics are subject to change as more Title IX discrimination claims proceed to litigation.

112. *See* Doe v. Regents of the Univ. of Cal., 891 F.3d 1147, 1150 (9th Cir. 2018); Neal v. Colo. St. Univ. Pueblo, No. 16-cv-873-RM-CBS, 2017 WL 633045, at *16-17 (D. Colo. Feb. 16, 2017); Collick v. William Paterson Univ., No. 16-471 (KM) (JBC), 2016 WL 6824374, at *10-12 (D.N.J. Nov. 17, 2016), *aff'd in part, remanded in part by* Collick v. William Paterson Univ., 699 F. App'x 129 (3d Cir. 2017).

113. *See* Doe v. Marymount Univ., 297 F. Supp. 3d 573 (E.D. Va. 2018); Doe v. Case W. Reserve Univ., No. 1:17 CV 414, 2017 U.S. Dist. LEXIS 142002, at *20-21 (N.D. Ohio Sept. 1, 2017); Doe v. Brown Univ., 166 F. Supp. 3d 177, 190 (D.R.I. 2016) (denying motion to dismiss under an erroneous outcome theory under Title IX, but granting the motion as to deliberate indifference).

114. Professors Lumen Mulligan and Glen Staszewski propose that "the Advisory Committee, when it comes to making major changes to the policies underlying the Rules . . . possesses

fusion of federal powers—the legislative and judicial branches take part in drafting and amending the FRCP.[115] The Rules themselves echo public opinion and use input from litigators and judges to provide insight on what is and is not working procedurally and "whether [the rules] need to be changed."[116] Judges alone do not have the same access to statistical evidence or objective proof as a policy-making body. Those concerned that discrimination claims require a relaxed standard would do better lobbying for an amendment to the FRCP.

The judiciary is not the only branch of government capable of altering the procedural rules to achieve procedural uniformity. For example, Congress has adopted "unique statute-level procedural rules targeted to specific types of causes of action."[117] Heightened pleading standards apply to securities cases, and administrative exhaustion in prisoner cases—specialized rules which influence "substantive policy."[118] Thus, if society aspires to deter illegal discriminatory conduct, Congress could either carve out another exception to Rule 8, or enact specific rules pertaining to a generalized pleading standard for discriminatory intent.

The Supreme Court could also consider a loose reading of Rule 9 of the federal rules, which sets forth how an individual must plead particular matters (e.g., fraud, special damages, conditions of the mind) and therefore could apply as a proper framework for discrimination claims.[119] Under Rule 9(b), the pleader can state conditions of a person's mind, including malice, intent, and knowledge, generally.[120] Thus, without extensive factual investigation prior to discovery, a plaintiff could demonstrate a prima facie case of racial discrimination by alleging generally that the defendant acted with a "discriminatory purpose"—that the "decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not

institutional advantages such that there should be a presumption in favor of referral to that committee instead of setting policy by adjudication in the Supreme Court." Lumen N. Mulligan & Glen Staszewski, *Institutional Competence and Civil Rules Interpretation*, 101 CORNELL L. REV. ONLINE 64, 75, 82 (2016) (opining that "[w]hen difficult or controversial issues emerge that ultimately result in differences of opinion among the lower courts, their competing perspectives—and the learning that results from their divergent approaches—should provide valuable information to the Advisory Committee when it eventually embarks upon the task of establishing a uniform solution to the problem through the notice-and-comment rulemaking process.").

115. Nathan R. Sellers, *Defending the Formal Federal Civil Rulemaking Process: Why the Court Should Not Amend Procedural Rules Through Judicial Interpretation*, 42 LOY. U. CHI. L.J. 327, 365 (2011).

116. *Id.*

117. Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CALIF. L. REV. 1529, 1560 (2018).

118. *See id.*

119. *See generally* FED. R. CIV. P. 9.

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

merely 'in spite of,' its adverse effects upon an identifiable group."[121] In fact, courts have allowed plaintiffs to make a general averment of intent unaccompanied by supporting factual allegations in pleading allegations of racially discriminatory animus in violation of equal protection under the Fourteenth Amendment and Section 1983 of the Civil Rights Act.[122] If the FRCP afford a relaxed requirement to establish discriminatory intent at the pleading stage, it is possible more claims will proceed to discovery. Then, discovery would reveal whether a plaintiff's claim is truly meritorious.

Until the Supreme Court or Advisory Committee explicitly determines that discrimination claims require their own pleading standard, victims of discrimination have sufficient protections under the FRCP to defeat a motion to dismiss under the "plausibility standard" if they indeed have a meritorious claim. For example, plaintiffs can amend their pleadings once as a matter of right if they so choose,[123] and the judge will often grant leave to amend when "justice so requires,"[124] unless the amendment would result in undue delay, bad faith, undue prejudice to the opposing party, or futility of the proposed amendment.[125] However, a meritless claim will render leave to amend futile no matter what standard is required to properly plead a claim for relief.

V. CONCLUSION

The lower courts' slow and steady departure from "the plausibility standard" raises disconcerting implications. Attorneys and their clients rely on well-settled law that will afford fair and just results. Plaintiffs pour their truths into the complaint only to find that the court has significantly deviated from the Court's precedent on pleading standards.[126] Moreover, defendants can move to transfer the lawsuit in a jurisdiction where the complaint requires a more stringent pleading standard. A properly plead complaint in one jurisdiction becomes insufficient in another. Deficient complaints require more time, money, and preparation at the expense of efficiency. Without an explicit signal from the Supreme Court as to where *Twombly* and *Iqbal* left

121. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

122. Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1269-70 (10th Cir. 1989); *see* Hodges by Hodges v. Pub. Bldg. Comm'n of Chi., 864 F. Sup. 1493, 1502 (N.D. Ill. 1994) (illustrating that a federal district court requires no more from the plaintiffs' allegations of intent than what would satisfy the notice-pleading minimum and Rule 9(b)'s requirement that motive and intent be plead generally).

123. *See* FED. R. CIV. P. 15(a)(1).

124. FED. R. CIV. P. 15(a)(2). This is particularly appropriate when a plaintiff brings a claim pro se, which means the plaintiff is without counsel.

125. Foman v. Davis, 371 U.S. 178, 182 (1962).

126. Tesoriero, *supra* note 22, at 1548; *see generally* Reply Brief for Defendants, Doe v. Columbia Univ., 831 F.3d 46 (2d Cir. 2016) (No. 15-1661-cv(XAP)).

the *McDonnell Douglas* and *Swierkiewicz* frameworks, the lower courts continue this wave of alteration with respect to what standard discrimination claims require—a problem better left resolved by the federal branches of government.

There has to be another way to create a standard that will actually produce consistent and certain outcomes for discrimination plaintiffs, either through Supreme Court adjudication or through the Advisory Committee. The complaint will not just be a piece of paper—it will be meaningful for everyone.

By: Kelsey Finn[*]

[*] J.D. Candidate 2020; Editor-In-Chief of the Southwestern Law Review 2019-2020. There is no discussion too long or too short that did not help in developing this piece. I would like to specifically thank Professor Cammack, Professor Rehm, Professor Aronovski, Xhesi Huisi, and every other supportive ear willing to listen—without you, this piece would not exist. And of course, to the Law Review Board and Staff, thank you for all you do. It truly takes a village.