GRASSROOTS APPROACH TO RESTORING NEUTRALITY IN CIVIL PROCEDURE

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INTRODUCTION

Designing a system of civil procedure rules can be like playing a game of "whack-a-mole." The rules are designed to balance different objectives including neutrality, transparency, access to justice, and efficiency. They must work in concert with each other to support the goals of the legislature. Because the rules do not exist in a static framework, establishing, or even just interpreting a rule generates the possibility of new and unintended consequences. Judicial decision making whose precedents shape future interpretations drives a legal environment that is constantly developing and evolving. Over time, this evolutionary process can, decision by decision, cause some values to crowd out others, propelling procedure in unanticipated directions. Even if the language of the rules stays the same, the rules can produce outcomes that are far from their original purpose. The choice then becomes to accept the new legal environment, change the rules, or introduce a new factor to alter the evolutionary trend of the rules.

This Note examines the original goals of the 1938 Federal Rules of Civil Procedure ("Rules") and how over the last thirty-five years, a system-wide prioritization of efficiency has introduced higher levels of judicial discretion into civil procedure. This focus on efficiency has exacerbated the impact of implicit bias in judicial decision-making and highlights the need for a grassroots strategy to soften the less-desirable outcomes of higher levels of discretion.

First, this Note reviews how the historical context of the 1938 Federal Rules of Civil Procedure sets the stage for the values that the Rules Enabling Committee chose to prioritize. The Rules were written during the period of the New Deal with its philosophical approach to making society work for the benefit of "ordinary" people. Historians have posited that the energy, optimism, and belief in government's ability to remake society influenced the development of the Federal Rules of Civil Procedure, and imbued the Rules with values of procedural openness, neutrality, and trans-substantivity.[1]

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1. Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 456, 465-66, 520 (2014) (noting that the Rules' founders emphasized neutrality, openness in people's access to the courts, and that the Rules were designed to be trans-substantive); David Marcus, *The Collapse of the Federal Rules System,* 169 U. PA. L. REV. 2485, 2489 (2021) (explaining that the Rules were

Second, this Note identifies a change in the legal community's attitude towards civil procedure with a new focus on efficiency as a procedural value and the use of increased judicial discretion as a vehicle for achieving it. In particular, this Note will address the impact of landmark decisions that imbued higher levels of judicial discretion into the Rules, and the effect that this increased discretion has had on pleading standards and summary judgment. Overall, courts' shifting interpretations of civil procedure requirements and the resulting change in standards have led to markedly different outcomes for different classes of litigants. Empirical evidence shows that these changed standards have produced disproportionally negative outcomes for marginalized groups, such as racial minorities and women.[2]

Lastly, this Note will examine how judicial discretion can carry implicit bias and some possible options for mitigating the bias to preserve impartial judicial outcomes for all.

This Note will proceed in four parts. Part I discusses the context and history of the 1938 Rules of Civil Procedure. Part II identifies landmark cases that have increased judicial discretion in civil procedure and their effect, looking at the evolution in pleading standards and in summary judgment standards. Part III examines the link between judicial discretion and implicit bias. Part IV explores possible alternatives for mitigating the discriminatory effects of judicial discretion and offers a concrete solution.

I. HISTORY OF RULES OF CIVIL PROCEDURE

A. The Pre-1938 Rules of Civil Procedure

In England, common law pleadings in the courts of law originated in the system of writs which had a complex and rigid formulation of pleadings.[3] In frustration with this pleading system litigants sought an alternative path to justice and began appealing directly to the king and his representatives, which became

trans-substantive and value-neutral); Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and* Erie, 54 BROOK. L. REV. 1, 17 (1988) (describing the optimism of the New Deal and its support for the Rules).

2. *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, 3 (2010) [hereinafter Miller, *A Double Play*] (explaining how judicial shifts in interpretation of the Rules negatively impacts the less powerful); Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187, 195 (2013) [hereinafter Quintanilla, *Critical Race Empiricism*] (explaining how changes in civil procedure have harmed legal outcomes for people of color); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007) (discussing the ways that women and women of color have been disadvantaged by the changes in civil procedure); Jim Wilets & Areto A. Imoukhuede, *A Critique of the Uniquely Adversarial Nature of the U.S. Legal, Economic and Political System and Its Implications for Reinforcing Existing Power Hierarchies*, 20 U. PA. J.L. & SOC. 341 (2017) (noting that the adversarial system puts economically disadvantaged parties in unequal procedural positions).

3. Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER J. 85, 99-100 (1994) [hereinafter Brooks, *CRT Structure*].

known as the courts of equity.[4] The United States, as a British colony, inherited this bifurcated system of courts of law and courts of equity.[5]

Over time, as claims turned more complex, the rigidity of the existing system became increasingly onerous, and reformers began pushing for a more streamlined approach.[6] In 1848, the State of New York introduced a reform to civil procedure called the Field Code, which many states ultimately incorporated into their state procedures.[7] The new approach eliminated the system of writs, merged courts of law and equity, and simplified the standard for pleadings.[8] Under the Field Code, pleadings would focus on the facts and not legal formalities.[9] Litigants could provide, "a plain and concise statement of facts constituting each cause of action (including defense or counterclaim) without unnecessary repetition."[10] However, over time, the Field Code also became bogged down by technicalities related to the pleadings and the requirement that the pleadings state only "*ultimate* facts."[11]

By the early 1900s, the procedural aspect of the American legal system had become so rigid and technical that it was "impeding the ability of the courts to render decisions on the merits."[12] In 1906, the American Bar Association (ABA) began considering reforming the rules to avoid the technicalities preventing courts from successfully administering cases and allowing judges to address substantive issues more effectively.[13] The ABA formed a committee which advocated for a set of rules that would be efficient, open, and allow litigants to reach resolution.[14] For almost the next thirty years, proponents of refining the rules tried unsuccessfully to get Congress to pass a bill authorizing reform.[15] Finally, President Franklin D. Roosevelt's appointment of a liberal Attorney General, Homer Cummings, gave new energy to the push for legislation to address the needs of civil procedure.[16] With Roosevelt's support and Cummings's championship of the goals laid out by the ABA,[17] Congress passed the Rules Enabling Act of 1934, giving the U.S. Supreme Court rulemaking power over civil procedure.[18]

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4. *Id.* at 100.

5. Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History,* 86 FORDHAM L. REV. 697, 701 (2017).

6. *Id.* at 703; Brooks, *CRT Structure*, *supra* note 3, at 100.

7. Brooks, *CRT Structure*, *supra* note 3, at 100; Meyn, *supra* note 5, at 704.

8. Brooks, *CRT Structure*, *supra* note 3, at 100-01.

9. *Id.* at 100.

10. *Id.* at 101 (quoting N.Y. Laws 1851, c. 479, § 1).

11. Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 242 (2011) (emphasis added) (quoting Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986)).

12. Weinstein, *supra* note 1, at 6.

13. Edward A. Purcell, Jr., *Exploring the Interpretation and Application of Procedural Rules: The Problem of Implicit and Institutional Racial Bias*, 23 UNIV. PA. J. CONST. L. 2528, 2529 (2021); *see also* Weinstein, *supra* note 1, at 6.

14. Weinstein, *supra* note 1, at 7.

15. *Id.* at 11.

16. *Id.* at 16.

17. Stephen B. Burbank, *Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1096 (1982).

18. *Id.* at 1096-98; *see also* Weinstein, *supra* note 1, at 16.

Empowered to start anew, judges, lawyers, and professors collaborated to develop a modern approach to litigation that sought to eradicate narrow, technical pleading standards and establish the judicial process as a model of trans-substantivity, neutrality, and accessibility.[19] By establishing trans-substantive rules, all federal actions would be governed by the Federal Rules of Civil Procedure, no matter the substantive issue.[20] Neutrality meant procedures would be neutral with regard to substantive rights[21] and the procedures would not influence the outcome of an action.[22] The goal was to create a uniform system, such that no matter who was interpreting the rule, the outcome would be the same, without any political or personal influence.[23] Additionally, the group sought to open up the judicial process and make it more accessible.[24] To improve accessibility, "the original drafters sought to streamline pleading, ensure the presence of properly interested parties, gather all the relevant facts, and enable courts to make well-founded decisions on the merits."[25] Overall, the Rules were characterized by openness and a "liberal ethos."[26]

B. The Modern Rules of Civil Procedure

Passed in 1938, the Federal Rules of Civil Procedure declared in Rule 1 that the purpose of the Rules is to provide for "the just, speedy, and inexpensive determination of every action."[27] This transformed American civil litigation.[28] The new civil procedure rules created a world in which both plaintiff and defendant had agency in shaping the trial and where cases would be decided on the merits.[29] The overall structure had a simplified process with pleadings focused on notice,[30] broad pre-trial discovery, and a strong preference for jury trials to decide cases on the merits.[31]

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19. Weinstein, *supra* note 1, at 18.

20. Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 456 (2014).

21. Raymond H. Brescia & Edward J. Ohanian, *The Politics of Procedure: An Empirical Analysis of Motion Practice in Civil Rights Litigation Under the New Plausibility Standard*, 47 AKRON L. REV. 329, 341 (2014).

22. David M. Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure,* 51 L. & CONTEMP. PROBS. 111, 114-15 (1988).

23. Brescia & Ohanian, *supra* note 21, at 339.

24. *Id.* at 330.

25. Purcell, *supra* note 13, at 2529.

26. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986).

27. FED. R. CIV. P. 1.

28. Meyn*, supra* note 5 at 706. *See also* Miller, *A Double Play*, *supra* note 2, at 3.

29. Meyn, *supra* note 5, at 705-06.

30. Conley v. Gibson*,* 355 U.S. 41, 47 (1957). *See also* Hickman v. Taylor, 329 U.S. 495, 501 (1947).

31. *See* Miller, *A Double Play*, *supra* note 2, at 4-5. *See also Conley,* 355 U.S. at 47 (explaining that are sufficient unless it is beyond doubt that the plaintiff can show no set of facts to claim relief); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (explaining that simplified notice pleading relies

In the mid-1970s, a counter-movement began promoting a narrative that litigiousness was overwhelming the American judiciary causing excessive waste, delay, and expense.[32] Responding to the narrative that the legal system was out of control, different constituents began advocating for reforms based on their own particular objectives. Inside the legal community, "judges wanted fewer, shorter, and less-complicated cases," while "[p]laintiffs' attorneys... wanted less obstructionism by better-heeled defense counsel" and "[d]efense counsel wanted fewer frivolous plaintiffs' filings."[33] Outside the legal community, political conservatives wanted to limit civil rights litigation and the public wanted less-burdensome litigation.[34] These varied objectives of a diverse group of parties found common ground around a desire to make the system more "efficient."[35] Responding to these pressures, federal and state court research centers and the ABA worked together to promote procedural changes to the Federal Rules of Civil Procedure aimed at "reduc[ing] cost and delay."[36]

Beginning in 1986, the Supreme Court made a series of rulings related to pleadings and summary judgment.[37] Overall, these rulings introduced more judicial discretion into these processes.[38] The hope was that by allowing judges greater discretion and latitude to adjudicate cases without the time and expense of a full trial on the merits, the judicial system would become more efficient.[39] Efficiency, as defined by the Supreme Court, is the least expensive way to arrive at an accurate assessment of substantive rights.[40] These gains in judicial efficiency come, in part, through restricting access to the courts by favoring "non-trial adjudication and a shift from plaintiff receptivity to plaintiff skepticism."[41] It is notable that this concept of judicial efficiency stands in contrast with the original ethos of the Rules, which associated efficiency with easy access to the courts,[42] notice pleading, and a preference for jury trials on the merits.[43]

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on liberal discovery rules); U.S. CONST. amend. VII (guaranteeing a jury trial in civil cases in Federal court).

32. Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 349-50 (1990).

33. *Id.* at 350-51 (citations omitted).

34. *Id.* at 351.

35. *Id*.

36. *Id.*

37. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

38. Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 770-771 (2018) [hereinafter Miller, *What Are Courts For?*].

39. Linda S. Mullenix, *Is the Arc of Procedure Bending Towards Injustice?*, 50 U. PAC. L. REV. 611, 642 (2019).

40. Yamamoto, *supra* note 32, at 354. *See* Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

41. Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1778 (2015) [hereinafter Coleman, *Efficiency Norm*].

42. Yamamoto, *supra* note 32, at 356.

43. *See* Brescia & Ohanian, *supra* note 21, at 330. *See also* Yamamoto, *supra* note 32, at 356 (explaining that the law and economics theory, which undergirded the Supreme Court's narrowing of access to the courts in the name of judicial efficiency, "supports procedural reforms that shrink the system of dispute resolution and decrease participation by marginal claimants.").

II. INCREASING JUDICIAL DISCRETION IN CIVIL PROCEDURE

A. Pleadings

1. History of Pleadings

Pleadings play a prominent role in civil procedure because they are the method of initiating an action in court.[44] For the plaintiff, the Rules regarding pleading affect their access to justice and the opportunity to have their claims adjudicated on their merits.[45] For defendants, the Rules determine how easy it is to require them to appear in court to defend themselves and, for the judiciary, they drive the size of the court's caseload.[46]

However, despite the importance of pleadings, experts disagree on their particular legal function.[47] Some argue that pleadings exist to define the controversy, develop the facts, lay out the claim for the defense, and allow for rapid disposition of frivolous claims.[48] However, others argue that the pleadings' purpose is to give notice to the parties and to create a framework for the court to rule on the claims.[49]

The early years after the establishment of the Rules was a period in which the courts were solidifying their approach to pleadings.[50] Rule 8(a)(2) of the Federal Rules of Civil Procedure directs, "[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[.]"[51] In 1944, shortly after the passing of the Rules, Judge Charles Clark, a central figure in writing the Rules, heard an appeal for a case that was dismissed because of inadequate pleadings.[52] Judge Clark relied on a liberal and permissive interpretation of Rule 8 of Civil Procedure to reverse the district court and remand the action for further proceedings.[53] In his opinion, Judge Clark emphasized that Rule 8 created a new pleading standard that replaced the code pleading requirement of "facts sufficient to constitute a cause of action."[54] Going forward, he ruled, a pleading simply requires, "a short and plain statement of the claim showing that the pleader is entitled to relief."[55] A decade later, in *Conley v. Gibson*, the Supreme Court referred to Judge Clark's opinion and expressly affirmed the standard of pleading, explaining, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the

44. Brooks, *CRT Structure*, *supra* note 3, at 98.

45. Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Pleading Decisions on the U.S. Courts of Appeals*, 169 U. PA. L. REV. 2127, 2134 (2021).

46. *Id.*

47. Brooks, *CRT Structure*, *supra* note 3, at 98.

48. *Id.*

49. *Id.*

50. Weinstein, *supra* note 1, at 23.

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

52. Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).

53. *Id.* at 775-76.

54. *Id.*

55. *Id.*

plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[56] In writing this, the Court indicated its support of the concept of notice pleading, meaning that the purpose of the pleading is to alert the defendant of the lawsuit.[57] Under the standard laid out in *Conley*, the Supreme Court made it clear that a judge was to evaluate the pleading and to permit any claim to go forward as long as it was not beyond doubt.[58] While not specified in the Rules, the Supreme Court used *Conley* to establish a permissive pleading standard.[59]

Under *Conley*, the default expectation of a judge was openness. Judges were expected to examine their own mindsets and belief systems by asking if there was a way even an unexpected claim might be true.[60] The nature of this inquiry pushed judges to weigh what they thought was likely versus what was possible, thereby challenging their own biases and making space for other people's experiences. It was an open inquiry that allowed claims to be heard on their merits, even if, in a judge's mind, the plaintiffs were unlikely to prevail. Generally, the presumption was that all claims should be heard unless a pleading was outside the limit of what they defined as "beyond doubt."[61]

2. Twombly *and* Iqbal*—Heightened Judicial Discretion in the Pleading Standard*

In 2007, possibly in response to a long-term trend favoring efficiency and early case disposition,[62] as well as a generalized "hostility to litigation,"[63] the Supreme Court in *Bell Atlantic v. Twombly* walked back the standard of notice pleading.[64] The case was an anti-trust conspiracy complaint against the regional telecommunications providers which came into existence after the breakup of AT&T.[65] In *Twombly*, the Court moved away from the longstanding notice pleading that had been supported since *Conley* and wrote definitively that the "'no set of facts' language" the Court had laid out in *Conley* had decisively "earned its

56. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

57. Roy L. Brooks et al., *A Critical Race Theory Perspective*, 52 HOW. L.J. 31, 36-38 (2008) [hereinafter Brooks, *CRT Perspective*].

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

59. *See, e.g.*, Sweirkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) ("[I]mposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rules of Civil Procedure 8(a)(2)[.]"); Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163, 168 (1993) ("We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules.").

60. *Conley*, 355 U.S. at 45-46, 48.

61. *Id.* at 45.

62. Miller, *A Double Play*, *supra* note 2, at 9-10.

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

64. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). *See* Brooks, *CRT Perspective*, *supra* note 57, at 39.

65. *Twombly*, 550 U.S. at 548-49.

retirement[.]"[66] This decision raised the level of plausibility required for a plaintiff's pleading to survive a 12(b)(6) challenge for failure to state a claim.[67] In place of the notice pleading standard, the Court said that the pleading must demonstrate "enough facts to state a claim to relief that is plausible on its face,"[68] which, the Court said, will prevent "largely groundless claim[s]" from moving forward and consuming valuable resources.[69] In changing their approach, the Court transitioned away from the permissive and open ethos defined by notice pleading towards a more restrictive approach.[70]

While turning away from *Conley*, the Court in *Twombly* did reiterate the principles laid out in *Nietzke v. Williams* that "Rule 12(b)(6) does not countenance… dismissals based on a judge's disbelief of a complaint's factual allegations."[71] Further, the Court reaffirmed that "even if it appears 'that a recovery is very remote and unlikely'" the court should allow a well-pleaded complaint to proceed.[72] This guidance may have created some grey area between the previous *Conley* standard and the modern plausibility standard the Court laid out in *Twombly*. To the extent there was remaining ambiguity in the pleading standard, the Court brought clarity in *Ashcroft v. Iqbal*,[73] which extended the policy of applying judicial skepticism to the facts presented in a complaint.[74]

In *Iqbal,* the plaintiff was a Pakistani native who was detained after 9/11.[75] Iqbal alleged that both the detention and the treatment he received while detained were unconstitutional.[76] The Supreme Court heard the case and found that *Iqbal's* complaint did not meet the pleading requirement laid out in *Twombly* because, they said, his claim was not plausible, and he therefore was not entitled to relief.[77] Explaining the decision, the Supreme Court drew a distinction between facts that must be accepted as true, and conclusory statements which the Court described as "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," that courts were not bound to accept as true.[78]

The Court emphasized the importance of the plaintiff presenting a believable pleading when it wrote, the complaint must "state a claim to relief that is plausible on its face."[79] Plausibility, as defined by the Court, exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

66. *Id.* at 562-63 (quoting Conley v. Gibson, 355 U.S. 41, 45 (1957)).
67. *Id.* at 555-63. *See* Burbank & Farhang, *supra* note 45, at 2140.
68. *Twombly*, 550 U.S. at 570.
69. *Id.* at 558.
70. A. Benjamin Spencer, Iqbal *and the Slide toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 188-89 (2010).
71. *Twombly*, 550 U.S. at 556 (quoting Nietzke v. Williams, 490 U.S. 319, 327 (1989)).
72. *Id.* at 556 (quoting Scheur v. Rhodes, 416 U.S. 232, 236 (1974)).
73. Ashcroft v. Iqbal, 556 U.S. 662, 666. (2009).
74. *Id.*
75. *Id*.
76. *Id.*
77. *Id.* at 670.
78. *Id.* at 678 (citing *Twombly*, 550 U.S. at 555).
79. *Id*. (quoting *Twombly*, 550 U.S. at 570).

defendant is liable for the misconduct alleged."[80] The Court drew distinctions between possibility, plausibility, and probability.[81] It explained that that while it was not necessary that the claim be *probably* true, it was also not sufficient that it merely be *possibly* true.[82] Going forward, for a plaintiff to have the opportunity to have their case heard, the court must first review the claim and find it to be plausible.[83] The Court made it very clear that in the future, determining which cases would earn the right to be heard by the court would be "context-specific" and require the reviewing court to use its discretion and "draw on its judicial experience and common sense."[84]

3. Impact of Twombly *and* Iqbal*'s Heightened Pleading Standard*

In practice, using discretion to determine plausibility means that a judge must decide whether they can imagine that the defendant in fact did what the plaintiff claims they did.[85] In most circumstances, this is likely not a challenging inquiry. However, in cases that are farther removed from a judge's lived experience, it may be more difficult for a judge to perceive what is conceptually plausible. After *Iqbal,* the process of determining the plausibility of a claim is subject to "an individual judge's background, values, preferences, education and attitudes."[86] Therefore, the personal experiences of the presiding judge feed into whether they view a claim as "unexpected" and implausible.[87]

Under this approach, a plaintiff's access to the legal system is restricted by what a particular judge can imagine is plausible.[88] For example, an older, male judge who must evaluate the plausibility of gender discrimination suit of a younger, working-class woman may have more difficulty determining plausibility based on his experience. The need for a judge to find plausibility based on their experience and common sense could deprive a plaintiff of the ability to proceed to discovery, where the plaintiff might have more access to evidence to prove their claim. Because of this, it is possible that more subtle cases will not survive the motion to dismiss. As commentators have pointed out, there are certain cases for which it is likely that people would view the same set of facts very differently based on their "subcommunity understandings of social reality" and even judges

80. *Id.* (quoting *Twombly*, 550 U.S. at 556).

81. *Id.*

82. *Id.*

83. Ashcroft v. Iqbal, 556 U.S. at 679.

84. *Id.* (citing Iqbal v. Hasty, 490 F.3d at 157-58).

85. Quintanilla, *Critical Race Empiricism*, *supra* note 2, at 195.

86. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 336 (2013) [hereinafter Miller, *Simplified*].

87. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure,* 14 LEWIS & CLARK L. REV. 185, 196-97 (2020) (explaining that, with a heightened pleading standard, unexpected allegations may require additional supporting facts to be believed and that if a court can disbelieve claims because they are atypical there will be insurmountable obstacles to certain plaintiffs).

88. *See* Miller, *What Are Courts For?*, *supra* note 38, at 752-53.

are susceptible to these cognitive biases.[89] In effect, this "limits the reach of federal protections against discrimination" for marginalized groups.[90] As a result, by setting up a qualitative standard guided by judicial discretion, it seems that the Supreme Court has made judges gatekeepers of justice.[91]

In order to determine if the changed plausibility standard has indeed had this effect, researchers began conducting a variety of studies to see if there was empirical evidence showing a post-*Iqbal* increase in 12(b)(6) motions granted for failure to state a claim.[92] Many of the researchers who have conducted empirical studies of the *Iqbal* effect have noted that there are significant research challenges and different methodologies show varying levels of impact.[93]What is clear from the studies is that in the post-*Iqbal* period the absolute number of defendants filing 12(b)(6) motions rose by 50%.[94] A study by the Federal Judicial Center (FJC) found that, post-*Iqbal* the absolute number of orders granting dismissal increased as did the likelihood of a motion for dismissal succeeding.[95] The data set is a bit muddied because it excluded pro se litigants, who, as litigants, are disproportionately likely to bring civil rights claims.[96] In general, the studies do point to a trend of higher rates of 12(b)(6) dismissals after the introduction of the *Iqbal* standard.[97]

It has been difficult to tease out the role judicial discretion has on the higher rate of 12(b)(6) dismissals. Scholars have tried using a variety of approaches to try to account for the possibility that judges' backgrounds and experiences impact the decision to find that the plaintiff has failed to state a claim, including trying to isolate cases where bias is more likely to matter.[98] One approach to elucidate patterns in the dismissals was to examine the demographics of the presiding judges as a proxy for the "judicial experience and common sense" called for in *Iqbal* and to limit the case universe to cases where judicial discretion might play a more prominent role.[99]

Another approach used the race of the judge as a possible determining factor.[100] The author of that study found that before the plausibility standard was

89. Burbank & Farhang, *supra* note 45, at 2144-45 (citations omitted).

90. Quintanilla, *Critical Race Empiricism*, *supra* note 2, at 212.

91. *See id*. at 215-16.

92. Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(B)(6) Motions*, 46 U. RICH. L. REV. 603, 604 (2012) [hereinafter Moore, *Updated Study*].

93. *Id.* at 609.

94. *Id.* at 633.

95. Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismis*s, 6 FED. CTS. L. REV. 1, 7, 17 (2012).

96. Moore, *Updated Study*, *supra* note 92, at 607.

97. Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of* Iqbal*'s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 32 (2011) [hereinafter Quintanilla, *Beyond Common Sense*].

98. *See generally* Moore, *Updated Study*, *supra* note 92 (explaining how cases after *Iqbal* reveal that civil rights cases are much more likely to be dismissed); Brescia, *supra* note 11, at 284 (finding that motions to dismiss were much more likely to be brought in housing and employment cases after Iqbal).

99. Quintanilla, *Critical Race Empiricism*, *supra* note 2, at 203-05.

100. *Id.* at 205.

introduced, black and white judges dismissed claims of race discrimination at a rate that was statistically comparable.[101] However, after the introduction of the *Iqbal* standard and its emphasis on judicial discretion, white judges dismissed race discrimination in employment claims at twice the rate of black judges.[102] This same pattern persisted when the study controlled for the judges' political affiliations to make sure it was an effect of race and not the result of political party orientation.[103] In another study, scholars demonstrated that in employment discrimination cases, a female judge, or a panel of judges with a woman on it, were more likely to be pro-plaintiff.[104] A different study looked at the outcome of employment or housing discrimination cases, in which the litigant is more likely to be a woman or a minority, and for those cases, the rate of dismissal was significantly higher after *Iqbal*.[105] Across a variety of studies, there is a trend indicating that when it is necessary to rely on judicial discretion to determine plausibility, judges are influenced by their demographics and lived experiences.[106]

B. Summary Judgment

1. History

Summary judgment is a relatively new addition to American legal proceedings.[107] It originated in England in 1855 as a mechanism for collecting debts because it allowed a plaintiff to demand immediate payment unless the defendant could demonstrate that they had a defense that required a jury trial.[108] When it was introduced into American law, the Supreme Court saw it as a way to "preserve the court from frivolous defences."[109] Summary judgment was supposed to be used infrequently for "clear-cut cases" and did not allow a judge to weigh in on the probability of either the claim or the defense.[110] However, as part of the restructuring of the Rules in the 1930s, the Supreme Court decided to reinvigorate summary judgment so it could act as a counter-balance to the relaxed pleading

101. *Id*. at 209.

102. *Id.*

103. *Id.* at 209-10.

104. Burbank & Farhang, *supra* note 45, at 2147-48.

105. Brescia, *supra* note 11, at 240.

106. Burbank & Farhang, *supra* note 45, at 2147-48 (finding that the gender and race of a judge affected outcomes of cases involving discrimination and inequality); Brescia, *supra* note 11, at 240, 284 (explaining that housing and employment claims were much more likely to face a motion to dismiss based on inadequate pleadings, and the motions were more likely to be successful); Quintanilla, *Critical Race Empiricism*, *supra* note 2, at 205 (showing that the race of a judge impacted the likelihood that a race-based employment discrimination case was dismissed).

107. Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 76 (1990).

108. Arthur R. Miller, *The Pretrial Rush to Judgment*: *Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding our Day in Court and Jury Trial Commitments*?, 78 N.Y.U. L. REV. 982, 1016-17 (2003) [hereinafter Miller, *The Pretrial Rush*].

109. Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320 (1902).

110. Miller, *The Pretrial Rush*, *supra* note 108, at 1018.

standard.[111] The idea was that the notice pleading of Rule 8(a) would give plaintiffs increased access to the court system, and that summary judgment would act as a balance to that access, granting defendants the ability to challenge a truly frivolous complaint.[112]

Rule 56(a) of the Federal Rules of Civil Procedure describes summary judgment and directs that a judge shall grant summary judgment, "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[113] When the Rules were drafted, the intention was that summary judgment would be used rarely and only for "simple issues where the facts are on the surface," and the jury should hear cases with "genuine issues."[114] Restrained use of summary judgment would maintain the preference for jury trials that had existed since the Constitution.[115] The Supreme Court highlighted this when, in *Adickes v. S. H. Kress & Co*., Justice Black suggested that the courts should not use summary judgment to substitute for jury trials.[116] Twelve years later, in *Board of Education v. Pico*, Justice Brennan's plurality opinion articulated a similar standard for summary judgment in which the party moving for summary judgment must "foreclose the possibility" that the nonmovant might win at trial.[117]

2. Summary Judgment Gets a New Role

In the decades following World War II, civil litigation continued to expand and become more complex, and this increased pressure on the courts to find a way to move cases through the system more quickly.[118] In 1986, the Supreme Court decided three cases sometimes known as the summary judgment trilogy, *Celotex Corp. v. Catrett*, *Anderson v. Liberty Lobby, Inc.*, and *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., which radically changed the landscape of summary judgment.[119]

In *Matsushita Electric*, the Court created a new interpretation of what it means for there to be "no genuine dispute of material facts."[120] The Supreme Court held that for a motion to survive summary judgment, the non-movant "must do

111. Issacharoff & Loewenstein, *supra* note 107, at 76.

112. Miller, *The Pretrial Rush*, *supra* note 108, at 1018-19.

113. FED. R. CIV. P. 56(a).

114. Malveaux, *supra* note 20, at 509.

115. *See, e.g.*, Poller v. Columbia Broad. Sys., 368 U.S. 464, 473 (1962) (writing that "trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"); U.S. CONST. amend. VII (guaranteeing a jury trial in civil cases in Federal court).

116. Adickes v. S. H. Kress & Co., 398 U.S. 144, 176-78 (1970). *See also* Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966) (writing four years earlier, Justice Black explained that "[t]he basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion.").

117. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 875 (1982) (Brennan, J., plurality opinion).

118. Issacharoff & Loewenstein, *supra* note 107, at 78.

119. Miller, *What Are Courts For?*, *supra* note 38, at 770.

120. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596 (1986); FED. R. CIV. P. 56(a).

more than simply show that there is some metaphysical doubt as to the material facts."[121] The majority opinion introduced a plausibility standard that a judge must use to evaluate the motion for summary judgment.[122] In essence, the Court's ruling directs the judge to evaluate the plausibility of the claim as if the judge were evaluating the facts as the jury, and summary judgment must be granted if the judge believes "a rational trier of fact" could not find for the moving party.[123] Instead of a case being heard by the jury as long as it met the minimum standard of "no defense of the facts," the judge had to put themself in the mind of the jury and guess how they would perceive the claim.[124] In dissent, Justice White wrote that by asking the court to evaluate the plausibility of the plaintiff's claim, the Court was making "assumptions that invade the factfinder's province."[125]

In the second case, *Anderson v. Liberty Lobby, Inc.,* the Supreme Court established that to survive summary judgment, there must be a genuine issue of material fact – meaning a judge was to determine whether "a reasonable jury could return a verdict for the nonmoving party."[126] It is not enough for the non-movant to assert that the jury might disbelieve the movant, but the non-movant must provide some evidence to the judge to convince them of the plausibility of the case.[127]

In the final case of the trilogy, the Court, which had previously discouraged liberal use of summary judgment, gave it a promotion in *Celotex v Catrett*. In a 5-4 majority opinion, Justice Rehnquist wrote "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole[,]" and in doing so the Court's interpretation in *Celotex* expanded the original reach of summary judgment beyond the scope intended by the drafters of the Rules.[128] In interpreting the summary judgment in this new manner, the Court was giving indications to judges to "increase the procedure's availability and more aggressively enforce the procedure as a limit on the availability of trials."[129] The *Celotex* ruling directed judges to evaluate a case and if they believed that the non-moving party did not produce proof of the claim at the pleadings stage, they should rule in favor of the movant and grant summary judgment.[130]

Prior practice required, for summary judgment, a moving party had to demonstrate the nonmoving party had no genuine dispute.[131] But, in *Celotex,* the Court ruled that there is no requirement for the moving party to provide

121. *Matsushita Elec. Indus. Co.*, 475 U.S. at 586.
122. *Id.* at 587-88.
123. *Id.* at 587.
124. Malveaux, *supra* note 20, at 509.
125. *Matsushita Elec. Indus. Co.*, 475 U.S. at 599 (White, J., dissenting).
126. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).
127. *Id.* at 256.
128. Malveaux, *supra* note 20, at 505. *See* Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1333 (2005).
129. Redish, *supra* note 128, at 1339.
130. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).
131. *Id.*

documentation negating the opponent's claim.[132] In doing so, the Court shifted the burden of proof to the nonmoving party, who had to prove the existence of a genuine dispute.[133] Justice Rehnquist wrote, "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."[134]

D. Impact of Increased Judicial Discretion in Summary Judgment.

Based on *Celotex*, the judge must determine if no "rational trier of fact" could find for the nonmoving party.[135] At its core, the judge is being asked to judge (or guess) what a jury would find is believable, which will then determine whether there is no "genuine issue for trial."[136] What the judge can imagine a juror believes determines if a party survives a summary judgment motion. In making this assessment, judges must use their intuition to determine what inferences make a claim plausible and believable by a jury. Intuition, which is rooted in personal beliefs and feelings can allow bias to creep in.[137] Life experiences affect how people process facts and can cause different people to draw sharply different conclusions.[138] As a result, perceptions and social understandings of the judge play a large part in their efforts to make the link between the claim and its plausibility.[139] Like 12(b)(6) dismissals, a judge's personal experiences and thought processes are called on to play a part in determining which claims will be heard on their merits and which ones will not see a trial.

Since the standard for summary judgment calls for "no reasonable juror" it seems logical to imagine there would be little disagreement on the standard. However, when summary judgments are appealed, they are overturned between 30-39% of the time, about as often as regular trial appeals are overturned.[140] This finding suggests that what judges predict "no reasonable juror" could believe varies widely and whether summary judgment is granted, and a party is deprived of a jury trial, is very judge-dependent. Empirically, it is difficult to pin down the effect of the *Celotex* ruling on summary judgment. There has been much scholarship both criticizing and lauding the use of summary judgment, but there has not been any systematic analysis of summary judgment across the range of the civil litigation cases.[141]

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132. *Celotex Corp.*, 477 U.S. at 323.

133. *Id.* at 324.

134. *Id.* at 323-24.

135. *Matsushita,* 475 U.S. at 587-88.

136. *Id.* at 586-87.

137. *See* Schneider, *supra* note 2, at 709.

138. Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627, 649 (2012).

139. Schneider, *supra* note 2, at 766-71. *See* Scott v. Harris, 550 U.S. 372, 380-81 (2007).

140. Stempel, *supra* note 138, at 651-52.

141. Brooke D. Coleman, *What We Think We Knew Versus What We Ought to Know,* 43 LOY. U. CHI. L.J. 705, 705-06 (2012).

What is known is that since *Celotex*, the number of federal suits filed has been roughly constant, but the percent of cases resolved by trial has dropped from 5.9% to a mere 1.1%.[142] Putting this into perspective, there were approximately 3,000 federal civil trials held in 2014—around the same number as in 1945, even though the population of the United States has more than doubled.[143]

Summary judgment is very fact specific and made on the potentially small amounts of information that a plaintiff is able to gather before the full discovery phase.[144] Therefore, changing the burden of proof shifts the power away from the plaintiffs who may struggle to find proof before discovery, to the defendants who only have to show that the plaintiffs lack proof.[145] Overall, defendants are much more likely than plaintiffs to file a summary judgment motion, in part, because summary judgment allows them to resolve the case before the plaintiff has time to establish evidence through discovery.[146] Cases involving gender discrimination and racial discrimination highlight the risks of summary judgment. These cases often involve subtle issues that require careful judgment of the circumstances.[147] By empowering a single judge to determine credibility and to dismiss a case at summary judgment, the plaintiffs lose the opportunity to present their cases to a jury which, by definition, is more diverse than a single judge both demographically and in terms of life experiences.[148] It is possible that the more diverse jury would see the evidence through a different lens than a judge and find credible the plaintiffs' complaints.[149]

One study conducted by the FJC found that post-*Celotex*, both the absolute number of summary judgment motions and the rate at which they are granted has gone up for civil rights cases, which now have the highest dismissal rate of any civil suit.[150] Another report shows that summary judgment is more likely to be granted to defendants in cases of employment discrimination against female plaintiffs.[151] There are also studies showing that summary judgment is more likely

142. Coleman, *Efficiency Norm*, *supra* note 41, at 1782-83. *See also* Redish, *supra* note 128, at 1333-34 (explaining how, under the standard articulated in the *Celotex* decision, it is now "virtually inevitable that courts will reach the merits of summary judgment motions considerably more often than they would have under the pre-Celotex standard.").

143. Coleman, *Efficiency Norm*, *supra* note 41, at 1783 (citations omitted). This author explains that resolving the questions of "[w]hat has created the increased civil filing rates but decreased trial rates is a complicated question to which there is no straightforward answer." *Id.* However, as the article highlights, a driving force has been "a palpable fervor" for reforming the civil litigations system within a framework of what the author describes as the "efficiency norm." *Id.* at 1786.

144. Schneider, *supra* note 2, at 709.

145. Issacharoff & Loewenstein, *supra* note 107, at 79.

146. Edward Brunet, Markman *Hearings*, *Summary Judgment, and Judicial Discretion*, 9 LEWIS & CLARK L. REV. 93, 100-01 (2005) (explaining that summary judgment motions are "largely seen as a 'killer motion,' capable of ending a case early and without the expense of a formal, fully discovered trial.").

147. Schneider, *supra* note 2, at 709.

148. *Id.* at 712. *See* Williams v. Williams Elecs., Inc., 856 F.2d 920, 924-25 (7th Cir. 1988).

149. Schneider, *supra* note 2, at 712.

150. Fed. Jud. Ctr., Memorandum on Estimates of Summary Judgment Activity in Fiscal Year 2006 (Apr. 12, 2007, revised June 15, 2007), at 2.

151. Schneider, *supra* note 2, at 710.

used "to dismiss sexual harassment and hostile work environment cases, race and national origin discrimination cases, American with Disabilities Act (ADA) cases, age discrimination cases, toxic tort cases, and prison inmate cases."[152] It has even been suggested that judges use pleadings and summary judgment as a tactic to eliminate cases they do not think are worth trying.[153] Pieced together, the research points to a system that is more likely to use summary judgment to resolve cases that are in some way outside of the mainstream, such as civil rights or employment discrimination claims.

On a more qualitative note, allowing high levels of discretion in summary judgment can change not only the outcome of the specific cases but also the nature of civil litigation in general. It is possible that potential plaintiffs, feeling unlikely to win a case because of the risk of losing at summary judgment, will choose not to pursue litigation. In many instances, this means the public loses too, because some issues become legally invisible and are less likely to be brought to court in the future. The scarcity of claims of this sort will make a judge less familiar with them and when they do see them, the claims may seem even less plausible.[154] Aggressive use of summary judgment takes away the power of juries as representatives of the public to shape society's values.[155] The court erodes its own credibility when it rules a claim implausible, but there are people in marginalized communities who know through their own lived experiences that those types of claims are indeed both plausible and real.[156] The knowledge that summary judgment is a distinct possibility, causes parties to act in certain ways and shapes the cases even before they are heard.[157]

III. WHY INCREASED JUDICIAL DISCRETION IS CONNECTED WITH UNEVEN OUTCOMES

As discussed above, in the last several decades Supreme Court rulings have introduced more judicial discretion into the Federal Rules of Civil Procedure. Black's Law Dictionary defines judicial discretion as the "exercise of judgment by a judge."[158] As more judicial discretion is introduced into the system, there is

152. *Id*. at 726-27 (citations omitted).

153. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1937 (1998) (describing Rules 12 and 56 of the Federal Rules of Civil Procedure as a "one-two punch to KO cases [judges] don't think are worth trying as well as cases where the law clearly mandates as particular result.").

154. *See* Schneider, *supra* note 137, at 713 ("Public disclosure of legal issues also matters in important ways to the evolution of the law. If women's experiences of harm that would otherwise be 'invisible' are heard more frequently in courts and public settings, those experiences may ultimately be viewed by judges as constituting a legal claim and take on legal 'visibility.'").

155. M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgment*s, 8 S. CAL. REV. L. & WOMEN'S STUD. 311, 358-61 (1999).

156. *See* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 897 (2009). *See generally* Scott v. Harris, 550 U.S. 372 (2007).

157. Schneider, *supra* note 2, at 716.

158. *Judicial Discretion*, BLACK'S LAW DICTIONARY (11th ed. 2019).

definitionally more of a judge's judgment in the court's findings, which has been demonstrated above to lead to more uneven outcomes for parties.

A. What Thought Processes Drive Judicial Discretion

Judge Cardozo wrote, "[t]he great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judge by."[159] Judges, like all people, naturally process the world through their own lens and cannot simply will themselves to see everything in a neutral manner.[160] People's life experiences create filters through which they view the world.[161] These filters can create biases, explicit and implicit.[162] While defining these biases as explicit and implicit is a relatively modern concept, the idea of conscious and unconscious processes operating in a judge's mind is well established.[163] Judge Cardozo, in his essay, *The Nature of the Judicial Process*, identifies the difference between a judge's conscious and subconscious decision-making.[164] He explains that, while the conscious part of the mind relies on "guiding principles of conduct," the subconscious part includes a judge's "inherited instincts, traditional beliefs, and acquired convictions."[165] Both the conscious and the subconscious are present in the decision-making process. Cardozo writes that while "we [as judges] may try to see things as objectively as we please… we can never see them with any eyes except our own."[166] Further, "it is often through these subconscious forces that judges are kept consistent with themselves, and inconsistent with one another."[167] Cardozo eloquently outlines the timeless tension that judges face trying to be a force of impartiality with a human and partial mind.

B. Explicit and Implicit Biases

Conscious or explicit ways of thinking are those assumptions a person is aware of having and are typically easily identified by both the individual and an

159. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (Yale Univ. Press 1921).

160. *See* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 431-32 (2000).

161. *See* Anne D. Gordon, *Better Than Our Biases: Using Psychological Research to Inform our Approach to Inclusive Effective Feedback*, 27 CLINICAL L. REV. 195, 201 (2021).

162. *Id*.

163. *See* CARDOZO, *supra* note 159, at 2 (explaining the Judge's approach to analysis, which necessitates "distinguish[ing] between the conscious and subconscious.").

164. *Id.*

165. *Id.* at 2-3.

166. *Id*. at 3.

167. *Id*. at 2.

observer.[168] Similarly, explicit biases are ones that a person can point to and express,[169] such as racial slurs, homophobic, or anti-Semitic comments.[170]

In contrast, implicit biases are unconscious ways of thinking and categorizing people based on a stereotype of their group identification.[171] These occur when an individual is relying on embedded concepts of a specific group of people instead of intentionally evaluating a person as an individual.[172] These implicit biases are a part of humans' way of organizing information and are "a product of our brain's natural functions, molded by society, and reinforced by our environment."[173] Such thoughts are so entrenched in an individual's intellectual and psychological makeup that they operate below the level of active cognition.[174] People who express no explicit biases may still have implicit biases.[175] Often, a person does not even realize they have an implicit bias and if they did, they might be likely to deny it.[176] While implicit biases are recognized as "not generally [being] deliberate or malicious," when they are they can be "much harder to identify and to eradicate" because they operate in the background and do not make themselves easily known.[177]

C. Understanding the Research on Implicit Bias

In 1998, researchers developed a tool called the Implicit Association Test (IAT), which scholars have used to attempt to understand implicit bias.[178] The test

168. *See generally* Jerry Kang, *What Judges Can Do About Implicit Bias*, 57 COURT REV. 78 (2021) [hereinafter Kang, *What Can Judges Do*].

169. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1132 (2012) [hereinafter Kang et al., *Implicit Bias*].

170. *See* Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1044 (2019). *See* Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 69 (2017) [hereinafter Levinson et al., *Judging*].

171. Breger, *supra* note 170, at 1044-45.

172. *Id.*

173. Michael B. Hyman, *Reining in Implicit Bias*, 105 ILL. B.J. 26, 28 (2017).

174. Christina Morris, *The Corrective Value of Prosecutorial Discretion, Reducing Racial Bias through Screening, Compassion, and Education*, 31 B.U. PUB. INT. L.J. 275, 278-79 (2022).

175. Breger, *supra* note 170, at 1051.

176. *Id.* at 1044. *See also* Kang, *What Can Judges Do*, *supra* note 168, at 79.

177. Breger, *supra* note 170, at 1045.

178. The Implicit Association Test (IAT) is designed to show the viewer a series of binary options. First, they see faces, some Black and some White. The viewer is tasked with first determining the race of the faces. Then they must distinguish positive from negative words. Then the words and images are combined on the screen and the viewer is tasked with either matching Black faces and positive words or White faces and negative words. Then finally, they must match White faces and positive words and Black faces and negative words. The test measures the speed that the viewer matches the faces with the positive or negative words. Typically, Americans have a faster response time when they are matching White faces with positive words. This is described as illustrative of the positive bias Americans have for White people. While there is a minority of social scientists who have questioned the validity of the results, in general, the IAT is a well-regarded attempt to quantify hidden biases. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 952 (2006).

tries to identify implicit bias by measuring the instinctive linkages test-takers make between a certain social group and a positive or negative association.[179] Test takers are shown a rapid series of images and words that they react to, in hopes that researchers can understand how test-takers make split second judgments.[180] More than 20 million Americans have taken the IAT and the majority of them demonstrated at least several implicit biases.[181] Subsequently, researchers have developed similar tests to measure a wider range of biases, including, for the legal field, a test to look for bias in assigning guilt.[182]

The IAT is not the only measure of implicit bias. Eighteen different implicit bias measurement tools exist, including the IAT; "priming task" instruments, which show subjects something to stimulate a potential bias; and a variety of other miscellaneous prompts.[183] The IAT receives the most attention because millions have taken it, and it remains the "most used and best validated instrument for measuring implicit bias."[184]

It is important to keep in mind that these tests are intended to reveal how a person thinks at an instinctive level, not how they will act in a given situation, and as such, are not intended to highlight discriminatory acts, but inherent discriminatory bias.[185] All of these evaluative tools have limitations, and are best used for indicating trends, not as individual predictors of behavior.[186] The tests are, however, still reliable as research tools because results can be aggregated across people to demonstrate trends.[187] For most of the scholarly community, the IAT remains a valid tool for exploring bias and can be combined with other measurement tools as a way of evaluating and verifying results from the IAT.[188]

D. How Implicit Bias Affects the Judiciary

Judges have a strong professional commitment to equality and are ethically obligated to conform to the Judicial Code of Conduct which calls on judges to "maintain and enforce high standards of conduct ..., so that the integrity and independence of the judiciary may be preserved."[189] They take an oath to be impartial, and it is reasonable to assume that if they had explicit biases, they would separate them from their work and faithfully execute their jobs. Even though judges famously rely on deductive reasoning, they also extensively use their

179. Breger, *supra* note 170, at 1049. *See* Greenwald & Krieger, *supra* note 178, at 952.

180. *Id.*

181. *See* Levinson et al., *Judging*, *supra* note 170, at 80.

182. *See* Justin D. Levinson et al., *Guilt by Implicit Bias, The Guilty/Not Guilty Implicit Bias Test*, 8 OHIO STATE J. CRIM. L. 187, 189 (2010) [hereinafter Levinson et al., *Guilt*].

183. Kang, *What Can Judges Do*, *supra* note 168, at 79.

184. *Id.*

185. *See* Breger, *supra* note 170, at 1051.

186. *Id.* at 1049-51.

187. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 478 (2010) [hereinafter Kang & Lane, *Seeing*].

188. *See* Breger, *supra* note 170, at 1050.

189. CODE OF CONDUCT FOR U.S. JUDGES, ch. 2, Canon 1 (Mar. 12. 2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

intuitive faculties when acting in their capacity as judges.[190] Outside factors such as wide discretionary powers, time pressures to manage the docket, and lack of sufficient information can create additional incentives for judges to use intuitive thinking in place of a more deliberative and conscious decision-making approach.[191] While intuitive decision-making can be relatively accurate and quite useful to judges, intuition can unconsciously lead to using stereotypes to aid the decision-making.[192] These stereotypes have embedded racial, gender, or other biases that can affect legal decision making and can lead to "severe and systematic errors."[193] The danger of relying on stereotypes only increases when the judge and the litigants are from different backgrounds.[194]

E. Research on Implicit Bias in the Judiciary

As Justice Anthony Kennedy wrote in *Williams v. Pennsylvania*, "Bias is easy to attribute to others and difficult to discern in oneself."[195] In one study, researchers found that 97% of judges surveyed rated themselves as being in the top half of judges in their ability "to avoid racial prejudice in decision-making."[196] In another study, 92% of senior federal judges believed themselves to be in the top 25% of judges in their ability to avoid racial bias in decisions.[197] There is undoubtedly some overestimation of their ability to judge impartially since mathematically it is impossible for over 90% of judges to be in the top quartile of people unaffected by implicit bias. Researchers have tried to ascertain to what extent judges are making decisions based on implicit biases. Several studies have taken different approaches and are worth noting.

In one study, the researchers gave the IAT to judges from a variety of districts, to better understand the potential for racial predisposition.[198] Of the white judges, 87% of them showed a racial bias, suggesting that there is a difference between a professional commitment to equality and subconscious thought processes.[199] The judges then performed mock judgments of a criminal trial.[200] When the judge was presented with a hypothetical situation and researchers told

190. Chris Guthrie et al., *Blinking on the Bench, How Judges Decide Cases*, 93 CORNELL L. REV. 1, 27 (2007) [hereinafter Guthrie et al., *Blinking*].

191. Ronald A. Farrell & Malcolm D. Holmes, *The Social and Cognitive Structure of Legal Decision-Making*, 32 THE SOCIO. Q. 529, 532-33 (1991), https://www.jstor.org/stable/4120901.

192. Guthrie et al., *Blinking, supra* note 190, at 29-30. *See also* Farrell & Holmes, *supra* note 191, at 532-33, 536.

193. Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 438 (2011) (citation omitted); Guthrie et al., *Blinking*, *supra* note 190, at 31.

194. Masua Sagiv, *Cultural Bias in Judicial Decision Making*, 35 B.C. J. OF L. & SOC. JUST. 231 (2015).

195. Williams v. Pennsylvania, 579 U.S. 1, 8 (2016).

196. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225-26 (2009) [hereinafter Rachlinski et al., *Unconscious*].

197. Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. F. 391, 397 (2017).

198. Rachlinski, *supra* note 196, at 1205.

199. *Id.* at 1210, 1222.

200. *Id.* at 1211.

them that there was a possibility that race might affect their decision, their implicit bias did not predict the outcome of their decision.[201] The designers of the study hypothesize that because most of the judges guessed that the study was about racial bias, when presented with the race of the defendant, the judges worked hard to correct any implicit bias that they had.[202]

In a separate study, researchers chose to study bias against Asian and Jewish groups, positing that those groups are seen as "model minorities" and therefore might not provoke implicit bias responses.[203] However, the study found that there was still a strong implicit bias against these "model minorities," and that when tasked with a judgment in a civil suit, judges with higher levels of implicit bias against these groups gave longer sentences to the defendants when they were Asian-American or Jewish.[204] It is reasonable to assume that if these "model minorities" receive biased judgments it is likely members of other minority groups would fare even worse.

In one study of state judges, researchers interviewed fifty-nine state judges to understand the judges' approach to racial disparities in the courtroom.[205] In the interviews, many judges talked openly about how "implicit and explicit biases contribute to racial disparities."[206] Positive implicit bias towards a group can play out as empathy, which can cause judges to, in essence, look out for the litigants' rights.[207] As implicit biases are widespread, it is important that judges are aware of the possibility of subconscious biases as these biases influence the intuitive decision-making that is often a part of a judge's process.

No one study can provide conclusive answers to a question as broad as the impact of implicit biases on the judiciary but, taken as a whole, the studies illuminate the ways that biases exist in the judicial process.

Since implicit bias is driven largely by people's personal experiences, the demographics of the judiciary also influence the role of implicit bias in judicial decision making. In general, judges are white men, less likely to identify as part of the LGBTQ community, and more formally educated than the general population.[208] As of 2019, 80% of all sitting judges were white, 73% were men and in nearly one third of federal districts, there were no people of color on the bench.[209] Demographically, the current composition of federal judges does not reflect the demographics of America and the judges draw on life experiences very

201. *Id.* at 1223.

202. *See id.* at 1221.

203. Levinson et al., *Judging*, *supra* note 170, at 68.

204. *Id.* at 68-69.

205. Matthew Clair & Alix Winter, *How Judges Think About Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 CRIMINOLOGY 332, 332 (2016).

206. *Id.* at 341.

207. L. Song Richardson, *Book Review Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 Yale L.J. 862, 884 (2017) (reviewing Nicole Gonzalez Van Cleve, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016)).

208. DANIELLE ROOT ET AL., BUILDING A MORE INCLUSIVE FEDERAL JUDICIARY 1, 1-8 (Oct. 2019), https://www.americanprogress.org/wp-content/uploads/sites/2/2019/10/JudicialDiversity-report-3.pdf.

209. *Id.* at 6.

different than most litigants. The National Center for State Courts did an extensive study and found that in forty-two states "judges in each jurisdiction reached unfair decisions on the basis of personal characteristics such as gender."[210]

Again, it should be stressed that the suggestion here is not that the judges intend to let bias influence their decisions, but there are subconscious processes at work. In a research study of judicial decision making, the authors demonstrated that judges "rely heavily on their intuitive faculties" when acting in their capacity as a judge.[211] However, intuitive thinking can also lead to mistakes that could have been avoided with a more calculating and deliberative approach.[212] Eliminating biases "requires a strong and lasting personal commitment" that takes "years of 'effortful study' as well as accurate and reliable feedback on earlier judgments."[213] Over time, conscious dedication to greater utilization of deliberation over intuition can limit bias in the courtroom.

IV. HOW TO REDUCE IMPLICIT BIAS IN JUDGES

Reducing implicit bias is a difficult task, more complex than addressing the expression of explicit bias.[214] Researchers, the legal community, and judges themselves have made many proposals and suggestions for addressing and mitigating implicit bias in the judiciary. Most suggestions can be categorized into actions judges can take and structural changes to the judicial process. Proposals for what judges can do personally to reduce their implicit bias include educating themselves on implicit bias, imagining people who defy stereotypes, consciously trying to empathize with litigants, and developing personalized checklists.[215] There are also long-term structural proposals such as reducing the size of the dockets so judges are less time pressured, diversifying the judiciary, and creating task forces to evaluate decisions and search for implicit bias issues.[216]

Initially, research suggested that people could erase their implicit biases by generating positive counterstereotypes, such as imagining a black surgeon or a female CEO.[217] However, the corrective effect faded after only several days.[218] Similarly, educating people about implicit bias did not produce any lasting change in people's baseline biases.[219] Generally, personal interventions such as education

210. Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE L. REV. 1, 13 (2006).

211. Guthrie et al., *Blinking, supra* note 190, at 27.

212. *Id.* at 31 ("[I]ntuition is also the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system.").

213. *Id.*

214. Cynthia Lee, *Awareness as a First Step Toward Overcoming Implicit Bias*, Geo. Wash. Univ. Legal Stud. Rsch. Paper No. 2017-56, *reprinted in* ENHANCING JUSTICE: REDUCING BIAS 289, 290-91 (Sarah E. Redfield et al. eds., 2017).

215. *See* Kang, *What Can Judges Do*, *supra* note 168, at 90-91.

216. *See* Breger, *supra* note 170, at 1065.

217. Kang, *What Can Judges Do*, *supra* note 168, at 82.

218. *Id.*

219. *See* Calvin K. Lai et al., *Reducing Implicit Racial Preferences: II. Intervention Effectiveness Across Time*, 145 J. EXPERIMENTAL PSYCH. GEN. 1, 25 (2016) (concluding that "current work

and exposure to counterstereotypes have either little to no impact or, only change people's thought processes for a few days.[220] Education and sensitivity training about alternative viewpoints have not been successful in eliminating implicit bias.[221] Simply asking a judge to think about implicit bias may even backfire. Studies about eliminating bias show that when asked to avoid thinking about something, the thought becomes more prevalent.[222]

Structural changes are clearly important, notably diversifying the judiciary and lightening the workloads of judges. However, the effort to diversify the bench will require years, if not decades, to mature fully. As for reducing the dockets of judges, that would require significant government investment, which seems unlikely.

One promising approach is social contact with people from the groups that are traditionally recipients of bias.[223] A meta-analysis of 515 studies found that contact between individuals from different groups reduces prejudice, and the more contact there is, the more success there is in decreasing the bias.[224] The researchers verified that this effect was not related to "participant selection or publication bias."[225] Contact reduces both prejudice against the individual and also prejudice against the entire group.[226] Even beyond that, contact with one outgroup makes individuals more favorable to other outgroups who were not part of the initial contact.[227] The study suggests that contact with a member of a historically stereotyped group can be a positive intervention in reducing prejudice overall.[228] The effectiveness of contact in reducing prejudice proved true across subjects of different ages, genders, races, and geographies.[229] Not only do attitudes toward the immediate participants usually become more favorable, but so do attitudes toward the entire outgroup, outgroup members in other situations, and even outgroups not involved in the contact.[230] The authors concluded that their results found that intergroup contact works to reduce prejudice, and that there is little need for more studies to prove the efficacy of what they call "intergroup contact theory."[231] This result enhances the potential for intergroup contact to be a practical, applied means of improving intergroup relations.

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showcases nine interventions out of an initial field of 18 that were effective at reducing implicit preferences immediately. However, the intervention effects were fleeting, lasting less than a couple days. These findings are a testament to how the mind's prejudices remain steadfast in the face of efforts to change them.").

220. *See id. See also* Kang, *What Can Judges Do*, *supra* note 168, at 81.

221. Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE L. REV. 1, 22 (2006).

222. *Id.* at 21-22.

223. *See* Kang, *What Can Judges Do*, *supra* note 168, at 82.

224. Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCH. 751, 766 (2006).

225. *Id.*

226. *Id.* at 751.

227. *Id.* at 766.

228. *See id.*

229. *Id.*

230. *Id.*

231. *Id.* at 768.

CONCLUSION

Changes to civil procedure which lead to increased judicial discretion are driven largely by the Supreme Court, far removed from ordinary courtrooms. However, the impact of those changes is felt by litigants every day. Of the non-systemic interventions that might reduce bias in the judiciary, fostering contact with people belonging to marginalized groups has been shown to be quantitatively the most successful approach, with very low associated cost. There is a real opportunity here for the legal community to join and work on this issue together. While changing interpretations and their implications can feel theoretical and distant, there is a powerful and tangible approach to making real improvements to justice.

Sustained, intentional contact with populations underrepresented in the judiciary can be a grassroots counterbalance to the increased discretion, and the related implicit bias. What is notable is that it is not just contact, but deep and sustained contact with members of marginalized groups that reduces bias.[232] As a result, while judges interacting with the community is clearly a positive, for the contact to impact the judges and erode whatever implicit biases might exist, the contact needs to be consistent and intentional. Given that judges have a limited amount of time outside of the courtroom, that time needs to be spent wisely. A policy mandating a certain number of hours per month in relationship building might be beneficial, just as Continuing Legal Education is required to keep lawyers current in their skills. Advocacy groups who are concerned about judicial outcomes can reach out to judges and offer to connect them with people in the community who can function as positive outgroup contacts. The changes to civil procedure may be out of our hands, but the ability to change judges' minds, and the biases they might hold, is only a handshake away.

232. *See id.*