

## THE DISCRIMINATION PRESUMPTION

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*Employment discrimination is a fact in our society. Scientific studies continue to show that employer misconduct in the workplace is pervasive. This social science research is further supported by governmental data and litigation statistics. Even in the face of this evidence, however, it has never been more difficult to successfully bring a claim of employment discrimination. After the Supreme Court's controversial decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, all civil litigants must sufficiently plead enough facts to give rise to a plausible claim. Empirical studies show that this plausibility test has been rigidly applied in the employment context, creating a heightened pleading standard for workplace plaintiffs.*

*This Article argues that *Twombly* and *Iqbal* are largely irrelevant for employment discrimination claims. As employment discrimination is a fact, most allegations of workplace misconduct are plausible on their face, rendering these Supreme Court cases meaningless for this subset of claims. This Article summarizes the overwhelming number of social science studies that demonstrate the fact of employment discrimination, and this Article also synthesizes the governmental data and litigation in this field.*

*This Article offers a model framework that the courts and litigants can use to evaluate workplace claims, taking into consideration the widespread scientific research in this area. This proposed model navigates the Supreme Court decisions and federal rules and provides a new approach to pleading employment claims, where the fact of discrimination is presumed. This Article concludes by situating the proposed framework in the context of the broader academic scholarship.*

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*Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree.*

—Judge Irving L. Goldberg, U.S. Court of Appeals  
for the Fifth Circuit<sup>1</sup>

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## INTRODUCTION

Recent news events have seen many overt acts of high-profile discrimination. Racial tensions and violence ensued when a Confederate monument was removed in Charlottesville, Virginia.<sup>2</sup> Jewish community centers and cemeteries have recently encountered bomb threats and vandalism resulting in FBI investigations.<sup>3</sup> And in Kansas City, a man shouted a number of racial slurs before shooting two Indian men, killing one of them.<sup>4</sup> Even celebrities have recently faced overt racism, as vandals spray-painted an ugly racial

1 Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 638 (5th Cir. 1985), quoted in Charles A. Edwards, *Direct Evidence of Discriminatory Intent and the Burden of Proof: An Analysis and Critique*, 43 WASH. & LEE L. REV. 1, 16 (1986).

2 See Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N.Y. TIMES (Aug. 12, 2017), <https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html>.

3 Eric Levenson & AnneClaire Stapleton, *Jewish Center Bomb Threats Top 100; Kids Pulled from Schools*, CNN (Mar. 13, 2017), <http://www.cnn.com/2017/02/28/us/bomb-threats-jewish-centers-jcc/index.html>.

4 See Mark Berman, *Kansas Man Indicted on Hate Crime Charges in Shooting of Two Indian Men*, WASH. POST (June 9, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/06/09/kansas-man-indicted-on-hate-crime-charges-in-shootings-of-two-indian-men/>.

epithet at the home of LeBron James,<sup>5</sup> one of the best known athletes in the world.

While such blatant discrimination continues to pervade our society, many believe that employment discrimination is simply a vestige of the past.<sup>6</sup> Playing off of this belief, many federal courts have made it more difficult to bring discrimination claims, particularly those arising in the workplace.<sup>7</sup> Over a decade ago, in *Bell Atlantic Corp. v. Twombly*,<sup>8</sup> the Supreme Court dramatically changed the pleading standards under the Federal Rules of Civil Procedure, making it far more difficult for victims of employment discrimination to bring workplace claims. Prior to the *Twombly* decision, the Court had expressly endorsed a notice pleading system where a civil complaint would be allowed to proceed if there were any “set of facts” that would support the allegations.<sup>9</sup> In *Twombly*, the Court abrogated this earlier standard and put in its place a heightened pleading requirement that plaintiffs must allege sufficient facts to support a “plausible” claim.<sup>10</sup> Two years later, in *Ashcroft v. Iqbal*,<sup>11</sup> the Court would further clarify that this plausibility requirement applies to *all* civil claims brought under the federal rules. The plausibility standard has been widely critiqued in the academic literature.<sup>12</sup> The standard has largely replaced the notice pleading system endorsed years ago under the Federal Rules of Civil Procedure. By requiring that numerous facts be alleged, the plausibility requirement has been criticized in scholarship as substantially heightening the pleading requirements for federal complaints.<sup>13</sup>

There are many cases where *Twombly* and *Iqbal* have had minimal, if any, impact. For example, in a run-of-the-mill negligence claim the basic facts are quickly ascertainable and easily alleged in the complaint. If an individual were negligently injured in a hit-and-run accident, the core facts of the claim

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5 See Andrew Blankstein & Daniella Silva, *LeBron James' Los Angeles Home Vandalized with 'N-Word' Graffiti*, NBC NEWS (May 31, 2017), <http://www.nbcnews.com/news/us-news/lebron-james-los-angeles-home-vandalized-n-word-graffiti-n766651>.

6 See generally Laurence Kranich, A Simple Theoretical Argument for Affirmative Action (Sept. 3, 2012) (unpublished manuscript), <https://f-origin.hypotheses.org/wp-content/blogs.dir/1704/files/2013/12/a-simple-theoretical-argument-for-affirmative-action.pdf>.

7 See *infra* Part II (discussing empirical studies on plausibility standard).

8 550 U.S. 544 (2007).

9 See *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), *abrogated by Twombly*, 550 U.S. 544.

10 *Twombly*, 550 U.S. at 547 (“Here, the Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”).

11 556 U.S. 662, 684 (2009).

12 See, e.g., Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 852 (2010); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 2 (2010).

13 See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010); David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 119 n.12 (2010).

could be quickly uncovered by a relatively straightforward investigation and inquiry into the case.<sup>14</sup> The same cannot be said, however, for workplace discrimination cases. Where an individual is improperly fired, demoted, or disciplined on the basis of race, color, sex, national origin, or religion, in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”),<sup>15</sup> the core facts of the claim will often be in the possession of the employer.<sup>16</sup> Memoranda, emails, personnel files, and other documents that would support the claim are frequently maintained by the company that employs the worker. Without this documentation, it is often difficult—if not impossible—to uncover the critical facts in the case that would support an allegation of discrimination. Indeed, as these claims require a showing of discriminatory intent, alleging this type of unlawful motivation can be a daunting task, particularly when discovery has not even begun in the case.<sup>17</sup>

Many courts have applied an unnecessarily rigid interpretation of the plausibility requirement in workplace cases,<sup>18</sup> making it far more difficult for victims of discrimination to even proceed past the initial stages of the claim.<sup>19</sup> The plausibility standard has unleashed a powerful weapon for

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14 MICHAEL C. SUBIT, TELL ME A GOOD STORY: EMPLOYMENT DISCRIMINATION COMPLAINTS AFTER *Twombly* & *Iqbal*, [https://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2010/annualconference/054.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/annualconference/054.authcheckdam.pdf) (last visited Oct. 10, 2018) (“The allegation of ‘negligence’ consists entirely of ‘on *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.’ An allegation that ‘the defendant negligently drove a vehicle’ is a legal conclusion. A [sic] allegation that ‘the defendant terminated plaintiff because of his national origin’ is not. But in a post-*Iqbal* world, a plaintiff who alleges only the ultimate fact of discrimination runs the risk of having a court label it as a ‘conclusion of law.’”).

15 Title VII—which covers workplaces with fifteen or more employees—makes it unlawful for employers to take an adverse action against workers with respect to race, color, sex, national origin, or religion. 42 U.S.C. § 2000e-2(a) (2012).

16 See J. Scott Pritchard, Comment, *The Hidden Costs of Pleading Plausibility: Examining the Impact of Twombly and Iqbal on Employment Discrimination Complaints and the EEOC’s Litigation and Mediation Efforts*, 83 TEMP. L. REV. 757, 775–76 (2011) (“Often a plaintiff at the initial pleading stage will not have the evidence necessary to plausibly suggest discrimination has taken place without relying on what a court may now freely designate a ‘legal conclusion.’ Because discrimination claims require proof of a subjective state of mind, an assertion of a culpable state of mind, without access to supporting evidence, cannot be anything other than a legal conclusion.”); Lisa L. Heller & Abena P. Sanders, *Post Iqbal Pleading Standards in Discrimination Cases*, LAW360 (Oct. 7, 2009), <https://www.law360.com/articles/123417/post-iqbal-pleading-standards-in-discrimination-cases> (“In the employment discrimination context, the ‘*Twombly/Iqbal*’ standard has proven difficult for plaintiffs, who rely heavily on the discovery process, to meet.”).

17 Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1635 (2011) (“Others point out that, especially for civil rights claims, which typically require intent, the critical information to ascertaining the defendant’s state of mind is necessarily unavailable without discovery.”).

18 See *infra* Part II (discussing application of plausibility standard to employment discrimination claims).

19 See *infra* Part II (discussing application of plausibility standard to employment discrimination claims).

defendants, and many viable workplace claims are now failing to even find their way out of the starting gates.

This Article argues that, when properly interpreted, the plausibility standard should be *irrelevant* for most employment discrimination cases. The standard, which arose well outside the workplace context, was never meant to have been so negatively applied to employment discrimination claims. Indeed, on their face most claims of race, color, sex, national origin, and religious discrimination are at least “plausible.” As this Article will show, the overwhelming weight of social science literature and other research studies reveal a widespread prevalence of discrimination in our society.<sup>20</sup> This discrimination occurs against all protected classes both in and outside of the workplace. While many of the existing studies suggest that the discriminatory intent is implicit rather than overt, the discrimination is nonetheless quite real.<sup>21</sup> An allegation of workplace discrimination, then, coupled with this social science research, should inherently create a *plausible* claim.

Beyond the social science research and other evidence of discriminatory attitudes in our society, it is difficult to ignore the more anecdotal—yet alarming—evidence of discrimination. Numerous instances of systemic discrimination against all protected classes continue to make headlines. There are countless examples of stunningly large judgments against major corporations in workplace discrimination cases.<sup>22</sup> And there are an equally substantial number of large settlements of Title VII claims.<sup>23</sup> Indeed, the U.S. Equal Employment Opportunity Commission (“EEOC”), the governmental agency that enforces Title VII in private sector cases, finds cause to believe that discrimination occurs in the workplace *thousands* of times each year.<sup>24</sup>

Given this widespread successful litigation and considering the scientific research and governmental data in this area, there can be little doubt that any specific claim of discrimination is in itself at least plausible.<sup>25</sup> *Iqbal* and *Twombly* are thus largely irrelevant to Title VII litigation as a practical matter. Prior to these decisions, the vast majority of claims proceeded past the dismiss-

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20 See *infra* Part III (discussing social science research on discrimination); see also Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1058 (2017) (“In the fifty years since Title VII . . . first prohibited employment discrimination . . . societal understanding of how bias perpetuates inequality at work has advanced exponentially. Decades of research . . . in the fields of economics, sociology, social psychology, neuroscience, and more have created a deep body of scientific work on which our current understanding is based.”).

21 See *infra* Part III (discussing discrimination studies).

22 See *infra* Part III (discussing large settlements and judgments in recent discrimination cases).

23 See *infra* Part III.

24 *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2017*, EEOC, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Aug. 18, 2017).

25 *Merriam-Webster* defines “plausible” to mean “superficially fair, reasonable, or valuable but often specious.” *Plausible*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/plausible> (last visited Aug. 18, 2017).

sal stage of the litigation and were allowed to advance to discovery.<sup>26</sup> This same result should still occur even when the plausibility standard is fairly considered.

A little more is needed today than was ten years ago, however, by plaintiffs bringing these claims. Indeed, a victim of employment discrimination should now attach the relevant evidence establishing the existence of discriminatory attitudes and motivations in our society as part of the pleadings.<sup>27</sup> Social science research, the results of similar litigation, and current EEOC data should all be attached to the complaint to further bolster allegations of discriminatory conduct. Such additional documentation will provide plausibility to most claims of workplace misconduct. This information helps support the fact of the pervasive nature of employment discrimination. With the proper support, plaintiffs should be permitted to plead this fact in the complaint, and discrimination should be presumed in most cases.

Similarly, defendants should be given the opportunity to *rebut* this evidence and demonstrate why the facts present the more unusual case where dismissal is appropriate. It may be that there is a continuing pattern of frivolous litigation brought by the plaintiff in the case that would make discovery inappropriate in the matter. Or it may be that there is no proper jurisdiction in the case, or that the administrative requirements have not adequately been satisfied. There are thus numerous legal arguments that can be made to support the dismissal of a Title VII case. An argument that an employer's discriminatory motivations are implausible, however, should be difficult to establish given the overwhelming weight of the evidence in the field.

This Article takes no position on the *likelihood* that a particular claim will ultimately succeed in the courts on its merits. Rather, it argues that too many claims are now being thrown out too early, before the claimant has a fair opportunity to uncover critical information, which is often in the possession of the employer. A typical employment discrimination case should not be rejected simply because the plaintiff has not been given access to relevant documentation. At the end of the day, then, this Article argues that given the undeniable evidence of continued workplace discrimination in our country, the plausibility standard does little to change the viability of a Title VII case at its onset. When examined in this light, we are left with the simple conclusion that most Title VII cases should be permitted to proceed past dismissal, just as they were before *Twombly* and *Iqbal*. These Supreme Court cases on plausibility are largely irrelevant when applied to allegations of

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26 *E.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (holding that a heightened pleading standard for workplace discrimination cases violated Rule 8(a) of the Federal Rules of Civil Procedure); *Leibowitz v. Cornell Univ.*, 445 F.3d 586 (2d Cir. 2006) (*per curiam*) (vacating and remanding the district court's dismissal of workplace discrimination claims); *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) (reversing dismissal "[b]ecause a plaintiff need not set forth the elements of a prima facie case at the initial pleading stage"); *Bennett v. Schmidt*, 153 F.3d 516 (7th Cir. 1998) (vacating and remanding the district court's dismissal of discrimination case).

27 *See infra* Part V (discussing addenda to pleadings).

employment discrimination. Workplace discrimination is a fact, and most Title VII suits are plausible on their face.

This Article proceeds in several parts. In Part I, this Article examines the *Twombly* and *Iqbal* cases, giving particular consideration to their impact on employment discrimination claims. In Part II, this Article examines how the federal courts have rigidly applied the plausibility standard articulated in these cases to Title VII claims. In Part III, this Article draws together substantial evidence of ongoing employment discrimination in our society and in the workplace. The Article closely examines the existing studies of discrimination in each of the protected categories—including race, sex, national origin, and religion. This Part also explores the numerous claims of employment discrimination brought to the EEOC and examines the number of cause findings by this Agency each year based on different protected characteristics. This Article then looks beyond the studies to actual litigation in each of these areas, providing further evidence of the numerous instances of discrimination in the workplace.

Part IV examines how this social science research and other evidence of discrimination can be introduced at the early stages of the litigation. This Part specifically explores how such information may properly be included in a federal civil complaint. Part V identifies a new framework for pleading employment discrimination claims, explaining why any given allegation of workplace discrimination is inherently plausible under the standard articulated by the Supreme Court. This Part navigates the federal rules and Supreme Court caselaw, explaining how the overwhelming evidence of societal discrimination can (and should) be attached to Title VII pleadings. This Part further explains the limited exceptions to my proposed framework. Part VI of this Article situates the proposed framework within the context of the existing scholarship and explains the irrelevancy of both *Twombly* and *Iqbal* when applied to most Title VII cases.

## I. BRIEF HISTORY OF THE PLAUSIBILITY REQUIREMENT

The Supreme Court's interpretation of the pleading requirements in civil cases is well-traveled ground in the academic literature.<sup>28</sup> This Article thus only briefly summarizes the history of the procedural rules and the development of the plausibility standard.<sup>29</sup> The pleading requirements of the Federal Rules of Civil Procedure had remained largely settled for

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28 See, e.g., Jill Curry & Matthew Ward, *Are Twombly & Iqbal Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH L. REV. 827 (2013); Miller, *supra* note 12 (discussing impact of *Twombly* and *Iqbal* on the civil litigation model established by the Federal Rules of Civil Procedure); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010) (addressing *Twombly* and *Iqbal* and pre-*Twombly* authority); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010) (arguing the motion to dismiss is being treated like the new summary judgment motion).

29 For a more developed discussion of these cases, see Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 183–91 (2010).

decades. Rule 8(a) clearly establishes the basic pleading standard in civil cases, requiring only “a short and plain statement of the claim” that is sufficient to give the defendant notice of the allegations.<sup>30</sup> This type of “notice pleading” sets up a minimal pleading requirement under the rules. The standard was more clearly defined years ago in the seminal case of *Conley v. Gibson*.<sup>31</sup>

In *Conley*, the Supreme Court examined whether dismissal of a complaint was proper under Rule 8(a),<sup>32</sup> where African American workers maintained that their union “did nothing to protect them against . . . discriminatory discharges and refused to give them protection comparable to that given white employees.”<sup>33</sup> The plaintiffs further alleged that “the [u]nion had failed in general to represent [black] employees equally and in good faith.”<sup>34</sup> The Supreme Court concluded that these allegations were sufficient, noting that a complaint should not be dismissed unless “*it appears beyond doubt that the plaintiff can prove no set of facts* in support of his claim which would entitle him to relief.”<sup>35</sup> The Court explained that “all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>36</sup> The Court further noted that “[s]uch simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”<sup>37</sup>

The Court examined this notice pleading standard in a workplace discrimination case in *Swierkiewicz v. Sorema N.A.*<sup>38</sup> In *Swierkiewicz*, the Court examined the allegations of a 53-year-old native of Hungary who “had been terminated [by his employer] on account of his national origin in violation of Title VII of the Civil Rights Act of 1964, . . . and on account of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA).”<sup>39</sup> The plaintiff’s “complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination.”<sup>40</sup> The Court found the allegations sufficient, emphasizing the simplified pleading standard that “[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allega-

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30 FED. R. CIV. P. 8(a).

31 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

32 *Id.* at 47.

33 *Id.* at 43.

34 *Id.*

35 *Id.* at 45–46 (emphasis added).

36 *Id.* at 47 (citation omitted).

37 *Id.* at 47–48.

38 534 U.S. 506, 514 (2002).

39 *Id.* at 509 (citations omitted).

40 *Id.* at 514.

tions.”<sup>41</sup> The Supreme Court concluded that “under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case . . . in every employment discrimination case.”<sup>42</sup> The Court thus reversed dismissal, concluding that the complaint gave the defendant “fair notice of what [the plaintiff’s] claims are and the grounds upon which they rest.”<sup>43</sup>

In more recent years, the Court has revisited its analysis from *Conley*. In *Twombly*, the Court considered a civil antitrust case brought under section one of the Sherman Act.<sup>44</sup> The case involved allegations that local telephone companies were conspiring together to negatively impact consumer prices.<sup>45</sup> In the case, the Court examined the “antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act.”<sup>46</sup> The Court abrogated the “no set of facts” language from *Conley*, concluding that this “puzzling” standard must be “forgotten.”<sup>47</sup>

The Court replaced the *Conley* standard with a plausibility analysis.<sup>48</sup> Under the plausibility requirement, a complaint must set forth “enough facts to state a claim to relief that is *plausible* on its face.”<sup>49</sup> The Court noted that the complaint should “raise a right to relief above the speculative level” and include more than “labels and conclusions.”<sup>50</sup> The Court held that the plaintiffs had not “nudged their claims across the line from conceivable to plausible.”<sup>51</sup> There was substantial debate after *Twombly* as to whether this “plausibility” standard applied only to antitrust cases,<sup>52</sup> or whether it should be considered more broadly in all civil litigation. The Supreme Court would resolve this debate in *Ashcroft v. Iqbal*.<sup>53</sup>

In *Iqbal*, the Court considered a *Bivens* action alleging that government officials had violated the plaintiff’s constitutional rights.<sup>54</sup> The complaint

41 *Id.* (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

42 *Id.* at 511.

43 *Id.* at 514.

44 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548 (2007).

45 *Id.* at 550–51.

46 *Id.* at 554–55.

47 *Id.* at 562–63.

48 *Id.* at 557.

49 *Id.* at 570 (emphasis added).

50 *Id.* at 555. The Court stated that “a formulaic recitation of the elements of a cause of action will not do.” *Id.*

51 *Id.* at 570. Applying this plausibility standard to the matter before it, the Court held that “stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.” *Id.* at 556.

52 See Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 101 n.54, 121–22 (2010) [hereinafter Seiner, *Pleading Disability*]; Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 [hereinafter Seiner, *Trouble with Twombly*] (discussing scholarship on issue).

53 556 U.S. 662 (2009).

54 *Id.* The complaint alleged that

petitioners designated Iqbal a person “of high interest” on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments;

included allegations that these officials used race, religion, and/or national origin to create an unlawful policy resulting in unlawful prison conditions.<sup>55</sup> The Court concluded that the plausibility test should apply to “antitrust and discrimination suits alike,”<sup>56</sup> noting that the requirement should be applied to “all civil actions.”<sup>57</sup>

The *Iqbal* Court also helped further define plausibility, noting that a complaint should include “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”<sup>58</sup> Thus, “naked assertions” without “further factual enhancement” are insufficient.<sup>59</sup> The Court rejected the plaintiff’s allegations in the case, concluding that the alleged claims were not moved “from conceivable to plausible.”<sup>60</sup> The Court held that the complaint was too “conclusory” and “extravagantly fanciful.”<sup>61</sup>

## II. APPLYING PLAUSIBILITY TO TITLE VII—THE PROBLEM OF INTENT

Though the *Twombly* and *Iqbal* cases arose outside of the employment context,<sup>62</sup> the plausibility standard has been widely applied to discrimination cases brought under Title VII.<sup>63</sup> Many of the courts applying the standard have required far more from plaintiffs than those courts analyzing the issue prior to *Twombly*.<sup>64</sup> There can be little doubt that after *Iqbal*, some courts have often applied a heightened pleading requirement to employment discrimination cases.

Proving workplace discrimination involves examining a defendant’s mental state, which is notoriously difficult to establish.<sup>65</sup> Pleading discrimi-

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that the FBI, under Mueller’s direction, arrested and detained thousands of Arab Muslim men as part of its September 11 investigation; that petitioners knew of, condoned, and willfully and maliciously agreed to subject Iqbal to harsh conditions of confinement as a matter of policy, solely on account of the prohibited factors and for no legitimate penological interest; and that Ashcroft was the policy’s “principal architect” and Mueller was “instrumental” in its adoption and execution.

*Id.* at 662.

55 *Id.* at 666.

56 *Id.* at 684.

57 *Id.* (quoting FED. R. CIV. P. 1).

58 *Id.* at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

59 *Id.* (quoting *Twombly*, 550 U.S. at 557).

60 *Id.* at 680 (quoting *Twombly*, 550 U.S. at 570).

61 *Id.* at 681. The Court further noted that a plaintiff must assert more in a complaint than the “bare elements” of the claim. *Id.* at 687.

62 There are many recent decisions addressing plaintiffs’ claims under this plausibility standard. See, e.g., *Tate v. SCR Med. Transp.*, 809 F.3d 343, 345 (7th Cir. 2015); *Alja-Iz v. U.S. V.I. Dep’t of Educ.*, 626 F. App’x 44, 46–47 (3d Cir. 2015) (per curiam); *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015).

63 See, e.g., *Seiner, Pleading Disability*, *supra* note 52; *Seiner, Trouble with Twombly*, *supra* note 52.

64 See *Seiner, Trouble with Twombly*, *supra* note 52, at 1031.

65 See Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary’s Honor Center v. Hicks, Pretext, and the “Personality” Excuse*, 18 BERKELEY

natory intent has always been difficult,<sup>66</sup> and the plausibility standard seems to fall particularly harshly on workers claiming employment discrimination.<sup>67</sup> This is likely because plaintiffs in both tort and other civil cases have much better access to the evidence necessary to support their claims than plaintiffs in workplace discrimination cases. Additionally, plaintiffs in employment discrimination cases are required (in most instances) to show *intent*—that their employer discriminated because of a protected characteristic.<sup>68</sup> The intent requirement is particularly difficult to meet in the context of the Supreme Court’s plausibility test.<sup>69</sup> The plaintiff’s membership in a protected class,<sup>70</sup> employment qualifications, and adverse action suffered (all elements of the *prima facie* case) are often quite straightforward to establish.<sup>71</sup> It is the employer’s mental status that is frequently the most difficult issue to prove in a Title VII case.<sup>72</sup>

Information that would help establish an employer’s discriminatory intent is often difficult for workplace victims to access, which often results in employment discrimination claims being “particularly vulnerable to prema-

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J. EMP. & LAB. L. 183, 188 n.17 (1997) (“Complex issues involving state of mind are of course not limited to discrimination cases, but appear in myriad contexts.”).

66 See, e.g., Susan K. Grebeldinger, *How Can a Plaintiff Prove Intentional Employment Discrimination if She Cannot Explore the Relevant Circumstances: The Need for Broad Workforce and Time Parameters in Discovery*, 74 DENV. U. L. REV. 159 (1996).

67 See Seiner, *supra* note 29, at 187.

68 42 U.S.C. § 2000e-2(a) (2012).

69 See, e.g., Mark W. Bennett, Essay, *From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 688 (2012–2013) (stating that employment discrimination cases “almost always turn on delicate factual nuances of intent”); Jason R. Bent, *The Telltale Sign of Discrimination: Probabilities, Information Asymmetries, and the Systemic Disparate Treatment Theory*, 44 U. MICH. J.L. REFORM 797, 842 (2011) (“The critical factual question in most disparate treatment cases is not whether plaintiff suffered an adverse employment action, but rather whether the employer acted with a discriminatory intent.”). This Article does not address disparate impact claims, which do not require a showing of intent.

70 See, e.g., *Opoku v. Brega*, No. 15-cv-2213, 2016 WL 5720807, at \*6 (S.D.N.Y. Sept. 30, 2016) (“Defendants do not dispute that Plaintiff has alleged that he is a member of a protected class.”); *Alston v. Johnson*, 208 F. Supp. 3d 293, 301 (D.D.C. 2016) (“Neither party here disputes that Plaintiff is a member of a protected class.”).

71 See, e.g., *Littlejohn v. City of New York*, 795 F.3d 297, 312 (2d Cir. 2015) (“The parties do not dispute that [plaintiff’s] allegations would be sufficient to establish the first three prongs of a *prima facie* case . . . as the complaint alleges that [plaintiff] . . . suffered an adverse employment action through her demotion.”); *Lewis v. Roosevelt Island Operating Corp.*, 246 F. Supp. 3d 979, 988 (S.D.N.Y. 2017) (“The parties do not dispute that Plaintiff . . . suffered an adverse employment action (his termination).”).

72 Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge’s Perspective*, 57 N.Y.L. SCH. L. REV. 671, 679 (2012–2013) (identifying the ultimate issue in discrimination cases as “whether the plaintiff presented evidence from which a reasonable jury could find that, more likely than not, the employer’s decision was motivated at least in part by discrimination”).

ture dismissal.”<sup>73</sup> In particular, the employer often controls pertinent documents in the case, and the plaintiff may no longer be in a position to access critical evidence.<sup>74</sup> Indeed, a plaintiff may have been demoted, transferred, or fired from their original position, leaving them without access to their personal data. Moreover, even if a plaintiff is able to access information in the employer’s control, employers are “‘rarely so cooperative as to include a notation in the personnel file’ that the firing is for a reason expressly forbidden by law.”<sup>75</sup> For these reasons, discriminatory intent is often established through circumstantial—rather than direct—evidence of bias or animus.<sup>76</sup> And establishing discrimination through circumstantial evidence is inherently a fact-specific and case-specific endeavor. Without “smoking gun” type evidence, the question of whether a plaintiff has provided sufficient proof of an employer’s animus is largely a subjective inquiry.

There are countless ways for victims of employment discrimination to allege circumstantial evidence of a Title VII violation. Statistical data, discriminatory comments, and evidence related to similarly situated coworkers are all common forms of proof.<sup>77</sup> Following the language of *Iqbal*, the courts may also turn to their “judicial experience and common sense”<sup>78</sup> when examining the intent question—particularly for those cases involving primarily circumstantial evidence. Thus, for many workplace claims, the application of the plausibility test could turn on a judge’s beliefs about the existence of

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73 *Woods v. City of Greensboro*, 855 F.3d 639, 652 (4th Cir. 2017); *see also* Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187, 200 (1993) (identifying workplace discrimination claims as a litigation area “in which the defendant is likely to possess an informational advantage”); Suja A. Thomas, Essay, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 222 (noting that “information asymmetries, which favor the defendant, are in place, and a requirement of only notice pleading would permit the plaintiff to proceed fairly onto discovery”).

74 Martin J. Katz, *Gross Disunity*, 114 PENN. ST. L. REV. 857, 881 (2010) (noting that “most of the relevant evidence tends to be under the control of the defendant” and that “[t]his lack of access to evidence makes proving any type of causation difficult”).

75 *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464–65 (2d Cir. 1989) (quoting *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 633, 638 (5th Cir. 1985)); *see also* *Pick v. City of Remsen*, No. C13-4041, 2014 WL 4258738, at \*12 (N.D. Iowa Aug. 27, 2014) (“Today’s employers, even those with only a scintilla of sophistication, will neither admit discriminatory or retaliatory intent, nor leave a well-developed trail demonstrating it.”).

76 *See Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 87 (2d Cir. 2015) (“At the pleadings stage, then, a plaintiff must allege that the employer took adverse action against her at least in part for a discriminatory reason, and she may do so by alleging facts that directly show discrimination or facts that indirectly show discrimination by giving rise to a plausible inference of discrimination.”); *see also* *NLRB v. W. Point Mfg. Co.*, 245 F.2d 783, 786 (5th Cir. 1957) (“[P]roof that a discriminatory purpose was the motivating one is rarely direct, and it may therefore be established from all the circumstances . . . .”); Edwards, *supra* note 1, at 7 (quoting *W. Point Mfg.*, 245 F.2d at 786).

77 *See generally* Tristin K. Green, Comment, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CALIF. L. REV. 983 (1999) (discussing prima facie case of discrimination under Title VII).

78 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

discrimination in our society.<sup>79</sup> Psychological research has suggested that, where judges lack “sufficient individuating information” about a claim (as is often true early in a case), they must rely heavily on their own knowledge, perceptions, and experiences.<sup>80</sup> This “invitation for the exercise of judicial subjectivity” presents obvious problems for workplace plaintiffs, however, if a judge’s views on the prevalence of discrimination in American culture conflicts with the vast majority of existing research.<sup>81</sup>

At the pleading stage, a judge’s existing views could clearly influence whether an employer’s alleged biased comment or other overt act of bias suggest discriminatory intent or is simply “too attenuated” to create such an inference. And other, stronger evidence of discrimination (such as statements made in corporate emails) is often likely to be inaccessible at the pleading stage. Thus, the plausibility test often falls particularly harshly on workplace plaintiffs, given the intent requirement of disparate treatment employment discrimination cases, and many recent workplace plaintiffs have found their cases rejected by the federal courts under this standard.<sup>82</sup> Given the ambiguous and subjective nature of the term “plausibility,” then, whether a workplace discrimination claim will be allowed to proceed will often depend on the judge’s own experience with and perception of employment discrimination. Reasonable minds could certainly differ with respect to many

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79 See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1160 (2012); Elizabeth M. Schneider & Nancy Gertner, “*Only Procedural*”: *Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767, 773 (2012–2013).

80 Kang et al., *supra* note 79, at 1160.

81 Schneider & Gertner, *supra* note 79, at 773.

82 See, e.g., *Blomker v. Jewell*, 831 F.3d 1051, 1054, 1058 (8th Cir. 2016) (holding that “seven incidents of harassment by two different men over a nearly three-year period” are insufficient to establish a plausible harassment claim as allegations spanned over almost a three-year time frame by two different men, the alleged incidents did not involve any “actual touching,” and some of the incidents were not “definitively sexual in nature”); *Cauler v. Lehigh Valley Hosp., Inc.*, 654 F. App’x 69, 72 (3d Cir. 2016) (finding former worker’s allegation that a “substantially younger” person was hired for a job where the employee also applied was insufficient to give rise to an inference of age discrimination against that employee, as use of the term “substantially younger” was “a bare contention” and “a legal conclusion”); *House v. Rexam Beverage Can Co.*, 630 F. App’x 461, 464 (6th Cir. 2015) (finding that an allegation that a worker was fired on the basis of his age, that employer transferred his job duties to substantially younger employees, and treated worker much less favorably than those employees, failed “to provide ‘sufficient factual matter’ . . . to establish an inference of age discrimination”); *McCleary-Evans v. Md. Dep’t of Transp.*, 780 F.3d 582, 588 (4th Cir. 2015) (“[Plaintiff’s] complaint leaves open to speculation the cause for the defendant’s decision to select someone other than her, and the cause that she asks us to infer (*i.e.*, invidious discrimination) is not plausible in light of the ‘obvious alternative explanation’ that the decisionmakers simply judged those hired to be more qualified and better suited for the positions.”); *Mapp v. District of Columbia*, 993 F. Supp. 2d 22, 25–26 (D.D.C. 2013) (finding allegations that sex was a motivating factor in the decision to dismiss worker were insufficient to state a claim, even where plaintiff had asserted that “she was subjected to heightened scrutiny, reporting, and performance standards that were not applied to those male comparators”).

claims, and a more broad-based understanding of the current prevalence of discrimination in our society will better help many judges to evaluate Title VII cases.

### III. SOCIAL SCIENCE AND DISCRIMINATION

Discrimination remains pervasive in our society, both in and out of the workplace. There can be little doubt that overt discrimination has decreased overall since the time Title VII was passed.<sup>83</sup> And the days of *expressly* treating workers in a discriminatory manner are largely (but not completely) gone.<sup>84</sup> Indeed, most employers large enough to be covered by federal antidiscrimination law—which usually requires at least fifteen employees—are sophisticated enough to understand that they cannot act in an overtly discriminatory manner.<sup>85</sup> When discrimination occurs, it is often subtler or even unconscious. It is thus far more difficult to detect this type of conduct and obtain evidence of discrimination in employment cases than when Title VII was first passed.<sup>86</sup>

Many may now—incorrectly—perceive that discrimination is no longer a pervasive problem in our society. Or they may improperly believe that if it does exist, it no longer presents a serious threat to the working environment. This is simply not the case. Indeed, the overwhelming weight of scientific research supports the fact that discrimination in the workplace exists and is pervasive. It regularly occurs on the basis of all protected categories, including race, color, sex, national origin, and religion. The discriminatory treatment of workers thus routinely occurs in our current society. This statement is provable and thus cannot reasonably be contested. Repeated, scientific studies over the course of many years clearly establish the existence of the fact of discrimination. And these studies reveal that it occurs on the basis of every category protected by Title VII.

The problem is that this evidence, and the substantial academic scholarship supporting it, often arises in the literature by nonlegal academics.

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83 See Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 200 (2008) (noting that “great progress has been made since the early 1960s” with respect to discrimination); see also Eden B. King et al., *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCHOL., PUB. POL’Y & L. 54, 70 (2011) (“[T]his research offers quantitative support for scholarly reviews of contemporary discrimination . . . that emphasize the prevalence of subtler forms of discrimination than the overt forms of the past.” (citation omitted)); Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 939 (noting that “it would be difficult to contend that the prevalence of discrimination has not receded”).

84 See generally JOSEPH A. SEINER, *THE SUPREME COURT’S NEW WORKPLACE* 21 (2017) (“[W]hen compared to the 1960s and 1970s, there can be little doubt that times and circumstances have improved.”).

85 See, e.g., *Federal Laws Prohibiting Job Discrimination Questions and Answers*, EEOC, <https://www.eeoc.gov/facts/qanda.html> (last modified Nov. 21, 2009) (addressing Title VII coverage requirements).

86 See King et al., *supra* note 83, at 54.

These numerous studies fail to make any legal headlines, and the divide between science and the law is rarely breached. Most lawyers—and the judiciary itself—remain unaware of the pure fact of discrimination, which is well supported by the existing academic scholarship. This Article seeks to bridge the divide between science and the law. While there is no room here to perform an *exhaustive* review of the substantial (if not overwhelming) evidence in this area, this Part will highlight a number of the more startling studies that currently exist. It will further discuss the numerous verdicts and settlements that have occurred pursuant to Title VII and provide the most recent governmental charge data in this area. When all of this evidence is considered, there can be little doubt as to the ongoing fact of discrimination in the workplace.

This Article will present this evidence in two parts, showing how recent studies, litigation, and EEOC data establish ongoing discrimination in the workplace. In Section III.A, this Article examines two areas that are often discussed together, discrimination on the basis of race<sup>87</sup> and sex. In Section III.B, this Article will look at two other areas that are often coupled together—discrimination on the basis of national origin and religion. This pairing of topics allows this issue to be presented in a much more straightforward way. After reviewing this scientific data, it is clear that discrimination against protected groups is a *fact*. And this fact—when supported by the studies—should be permitted to be pled in a Title VII case of employment discrimination.

#### A. *Race and Sex Discrimination*

Researchers have frequently studied the existence of employment discrimination based on the race and sex of workers. With respect to race-based discrimination specifically, the research shows that racial minorities face many barriers to employment and promotion. Similarly, sex-based studies reveal the uphill battle many women face trying to achieve equality in the workplace.<sup>88</sup> Jury awards in race and sex discrimination claims in recent years demonstrate that those cases reaching trial may be particularly egregious and result in large judgments. Though workplace discrimination often

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87 There is a substantial difference in claims brought on the basis of race and color and there is an abundance of literature that addresses this distinction. See, e.g., *Race/Color Discrimination*, EEOC, [https://www.eeoc.gov/laws/types/race\\_color.cfm](https://www.eeoc.gov/laws/types/race_color.cfm) (last visited Aug. 18, 2017) (providing guidance on race and color discrimination). While this Article does not largely address this distinction, it is an important consideration to note.

88 Sexual harassment, a special subset of gender discrimination claims, has also garnered widespread attention recently. See Sarah Almukhtar et al., *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html>; see also Doug Criss, *The (Incomplete) List of Powerful Men Accused of Sexual Harassment After Harvey Weinstein*, CNN (Nov. 1, 2017), <http://www.cnn.com/2017/10/25/us/list-of-accused-after-weinstein-scandal-trnd/index.html>. The growing amount of evidence in this area suggests that harassment is widespread and pervasive in our society as well.

takes subtle forms, news accounts of explicit discrimination and bias in American culture further illustrate that blatant discrimination still remains prevalent in society and likely influences employment decisions.

Researchers have examined workplace discrimination based on race and sex to determine how discrimination has evolved over time and have studied the types of environments where discrimination remains pervasive. For example, a 2015 study examines how female applicants for a management position in a traditionally male-oriented field were perceived as a better fit for the job when they characterized their strengths through the use of adjectives often associated with male traits.<sup>89</sup> The study used 674 participants to evaluate interviewees of both genders on how likely the applicants would be to succeed in a supervisory engineering position.<sup>90</sup> Male and female interviewees were trained to act in a similar way in a staged and recorded interview.<sup>91</sup> The interviewees answered a number of common interview questions in an identical manner but differed their responses to an inquiry about their strengths by using agentic, communal, or neutral adjectives.<sup>92</sup> Agentic traits are achievement-oriented words often associated with men whereas communal traits are relationship-oriented words often associated with women.<sup>93</sup> Both male and female interviewees were rated more favorably when they used agentic traits to describe their strengths.<sup>94</sup> Women particularly benefited from using these adjectives as participants rated female applicants using agentic traits to be a better fit for the job than other females.<sup>95</sup> Male applicants who used communal traits to characterize themselves were found to be a worse fit for the position.<sup>96</sup> These results show that male and female job applicants are judged differently based on implicit perceptions of the traits applicants use to describe themselves, significantly impacting females applying for management positions in traditionally male-dominated fields.<sup>97</sup>

Research has also shown that males are 25% more likely to get a pay increase when they ask for one.<sup>98</sup> This result “challenges the myth that the gender pay gap is a result of women not asking for more money because they’re less ambitious, more worried about upsetting their boss, or afraid of being seen as too pushy.”<sup>99</sup> Similarly, researchers continue to study the pay

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89 See Jennifer L. Wessel et al., *Should Women Applicants “Man Up” for Traditionally Masculine Fields? Effectiveness of Two Verbal Identity Management Strategies*, 39 *PSYCHOL. WOMEN Q.* 243, 249 (2015).

90 *Id.* at 245–46.

91 *Id.* at 247.

92 *Id.*

93 *Id.* at 243.

94 *Id.* at 249.

95 *Id.*

96 *Id.*

97 See *id.* at 251.

98 Ivana Kottasova, *Women Do Ask for Pay Raises, They Just Don’t Get Them*, CNN MONEY (Sept. 7, 2016), <http://money.cnn.com/2016/09/06/news/women-pay-gap-ask/>.

99 *Id.*

gap between men and women, which persists even when childbirth and education are taken into account.<sup>100</sup> Indeed,

[t]welve years after giving birth for the first time, women are making 33% less per hour than men, according to research by the Institute for Fiscal Studies [(IFS)]. . . . The IFS also found that the pay gap between highly educated women and men has not closed at all in 20 years, and remains stuck at just over 20%.<sup>101</sup>

Another recent study examined the difficulty women have obtaining jobs that require math-based skills.<sup>102</sup> Indeed, experiments have shown “that bad decisions in favor of a male candidate occurred 14% more often than bad decisions in favor of a female candidate, regardless of the scenario.”<sup>103</sup> In addition to entry-level positions, studies further examine the discrimination that exists at the executive level. Where women are just as qualified as men for high-level jobs, for example, “female candidates for a CEO position are 28 percent less likely to be hired.”<sup>104</sup> Indeed, research has found that females are highly underrepresented at Standard & Poor’s (S&P) 500 firms and only “2.5 percent of those executives were female, and just 0.5 percent of CEO or chairperson roles were held by women. . . . As of February 2016, just 20 of the S&P 500 companies are run by women, according to Catalyst, a nonprofit research group that promotes workplace inclusion.”<sup>105</sup>

Sex discrimination has also found its way into academia. One study performed by researchers at Columbia University revealed that prospective doctoral student emails with minority- or female-sounding names received fewer responses from faculty than those with white male-sounding names, varying substantially by discipline with higher prevalence at private institutions that paid more.<sup>106</sup> This type of sex discrimination has been found to exist outside of the workplace context as well. For example, research has demonstrated that car dealerships tend to offer much lower prices on identical cars to white men than to black men and white women.<sup>107</sup>

A well-known (but more dated) study tested for the existence of discrimination in hiring practices at major city orchestras. Researchers Claudia Gol-

100 Ivana Kottasova, *Mothers Still Lag Behind in Pay for Years*, CNN BUS. (Aug. 24, 2016), <http://money.cnn.com/2016/08/23/news/economy/gender-pay-gap-mothers/?iid=EL>.

101 *Id.*

102 Robin Mordfin, *Why Women Find It Harder to Get Math-Based Jobs*, CHI. BOOTH REV. (June 27, 2014), <https://review.chicagobooth.edu/magazine/summer-2014/why-women-find-it-harder-to-get-math-based-jobs>.

103 *Id.*

104 Amy Merrick, *Women Are Equally Qualified, but Rarely Hired*, CHI. BOOTH REV. (May 22, 2016), <https://review.chicagobooth.edu/strategy/2016/article/women-are-equally-qualified-rarely-hired>.

105 *Id.*

106 Katherine L. Milkman et al., *Heterogeneity in Discrimination?: A Field Experiment* (2012) (unpublished manuscript), <https://www8.gsb.columbia.edu/researcharchive/articles/5642>.

107 Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 817 (1991).

din and Cecilia Rouse tested whether or not female musicians were discriminated against in violin auditions.<sup>108</sup> In the 1970s and 1980s, orchestras revised their audition policies and started to use a “screen” barrier to conceal the identity of the candidate from the group evaluating the audition.<sup>109</sup> In order to determine the impact of this approach, Goldin and Rouse reviewed the personnel records of orchestras from 1950 to 1995.<sup>110</sup> They estimated that the screen increased the probability that a female would be advanced out of a preliminary audition round by approximately 50%.<sup>111</sup> Further, this approach increased the likelihood that the female candidate would be selected in the final round of the audition.<sup>112</sup> Goldin and Rouse concluded that “blind” auditions can account for 30% of the increase in the female proportion of new hires.<sup>113</sup> It also possibly explains 25% of the increase in women in orchestras since 1970.<sup>114</sup> These studies are merely illustrative, as there is a tremendous amount of other research that has been done—and is ongoing—in this area.<sup>115</sup>

Studies have further shown the ongoing nature of race discrimination claims. In Professor Dorothy Brown’s article *Fighting Racism in the Twenty-First Century*, for example, she noted that “[p]olls show the skepticism of White

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108 Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000). For an excellent review of this study and a discussion of the importance of social science research in the workplace, see Bornstein, *supra* note 20.

109 Goldin & Rouse, *supra* note 108, at 716.

110 *Id.* at 724.

111 *Id.* at 738.

112 *Id.*

113 *Id.*

114 *Id.*

115 See CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8 (2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf) (“We found that when employees were asked, in surveys using a randomly representative sample (called a ‘probability sample’), if they had experienced ‘sexual harassment,’ without that term being defined in the survey, approximately one in four women (25%) reported experiencing ‘sexual harassment’ in the workplace. This percentage was remarkably consistent across probability surveys. When employees were asked the same question in surveys using convenience samples (in lay terms, a convenience sample is not randomly representative because it uses respondents that are convenient to the researcher (e.g., student volunteers or respondents from one organization)), with sexual harassment not being defined, the rate rose to 50% of women reporting they had been sexually harassed.”); Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RES. CTR. (July 1, 2016), <http://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/> (“[A] 2013 Pew Research Center survey found that about one-in-five women (18%) say they have faced gender discrimination at work, including 12% who say they have earned less than a man doing the same job because of their gender. By comparison, one-in-ten men say they have faced gender-based workplace discrimination, including 3% who say their gender has been a factor in earning lower wages.”).

Americans concerning the continuing existence of racism.”<sup>116</sup> She stated that “[a]lmost two-thirds of Whites are satisfied with society’s treatment of both Blacks and Hispanics, while almost two-thirds of Blacks and slightly more than half of Hispanics are dissatisfied with their treatment.”<sup>117</sup>

In a 2009 study, researchers examining the existence of racial discrimination in low-wage labor markets found that a clear racial hierarchy exists among similarly situated candidates and that minorities often encounter subtle discriminatory practices that disadvantage their employment opportunities.<sup>118</sup> Researchers in the study placed applicants into two groups, and each group included a white male, an African American male, and a Puerto Rican (Latino) male, who were matched by their attractiveness and interpersonal skills.<sup>119</sup> Each applicant used a resume created for the study, which reflected that the applicant possessed a high school education and entry-level work experience.<sup>120</sup> The teams only differed in that the white applicant of one team listed a felony conviction on the employment applications.<sup>121</sup> The team without a felon applicant applied to 171 employers in New York City across a wide range of low paying jobs.<sup>122</sup> The white applicant in this team received a call back or job offer 31% of the time while the Latino applicant received the same only 25.2% of the time and the African American applicant only 15.2% of the time.<sup>123</sup> These results demonstrate that an African American male must search twice as long as a similarly situated white male before being contacted for an interview or offered a position.<sup>124</sup> Results from the group with the white felon applicant were potentially even more alarming, with the white felon receiving a callback or employment offer 17.2% of the time compared with an African American applicant receiving the same only 13% of the time.<sup>125</sup> These results suggest that the disadvantage of being an African American applicant when seeking employment is approximate to the disadvantage of having a felony conviction for an otherwise equally qualified white applicant.<sup>126</sup>

Additionally, the same study demonstrated patterns of discriminatory behavior when researchers examined the applicants’ field notes.<sup>127</sup> Researchers categorized this behavior as either categorical exclusion, shifting

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116 Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1491 (2004).

117 *Id.*

118 See Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 793 (2009).

119 *Id.* at 781.

120 *Id.* at 777, 781.

121 *Id.* at 782.

122 *Id.* at 777, 784.

123 *Id.* at 784.

124 *Id.* at 785.

125 *Id.*

126 *See id.*

127 *Id.* at 786.

standards, or race-coded job channeling.<sup>128</sup> Categorical exclusion revealed automatic rejection of an applicant based exclusively on race, which tended to occur where there was little direct contact between the applicant and the hiring employer.<sup>129</sup> Shifting standards described a process by which employers changed the importance of job qualifications based on the applicant's race.<sup>130</sup> For example, a white applicant with no relevant experience was given the benefit of the doubt, while an equally qualified African American applicant was simply rejected.<sup>131</sup> Race-coded job channeling occurred when employers would steer minority applicants into positions with less frequent consumer contact and higher levels of physical labor.<sup>132</sup> In these instances, the Latino applicants were channeled down five times and the African American applicants were channeled down nine times.<sup>133</sup> However, the white applicants were channeled down only once (the felon applicant) and were channeled up six times.<sup>134</sup> Researchers suggested that job channeling may result from the employers' own assumptions about an applicant's race or on the customers' expectations.<sup>135</sup> The frequency at which this type of discriminatory behaviors occurred strongly suggests discrimination across the workplace, and real-life applicants with fewer skills and less experience than those presented by the study may face even stronger forms of discrimination.<sup>136</sup>

Several other social science studies have shown the pervasive nature of discrimination in the hiring practices of employers. For example, a study by the National Bureau of Economic Research evaluated the potential employment impact of having a name that is associated with either whites or African Americans.<sup>137</sup> In the study, economists Marianne Bertrand and Sendhil Mullainathan responded to help wanted ads for jobs in sales, administrative support, clerical services, and customer services in the *Boston Globe* and *Chicago Tribune* newspapers.<sup>138</sup> Bertrand and Mullainathan selected names that were associated with African Americans or whites.<sup>139</sup> The names were then randomly assigned to resumes and submitted to the employers.<sup>140</sup> For some job postings, the resume would include a name associated with whites, and in other postings that same resume may include a name associated with African

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128 *Id.* at 786–87.

129 *Id.* at 787.

130 *Id.*

131 *Id.* at 789.

132 *Id.* at 787.

133 *Id.* at 791.

134 *Id.*

135 *Id.*

136 *See id.* at 793.

137 Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003), <http://www.nber.org/papers/w9873.pdf>.

138 *Id.* at 2.

139 *Id.*

140 *Id.*

Americans.<sup>141</sup> Bertrand and Mullainathan then kept track of how many callbacks each resume received.<sup>142</sup> Their study demonstrated that resumes with white-sounding names received 50% more callbacks than those with black-sounding names, resulting in their conclusion of the presence of discrimination in hiring.<sup>143</sup>

A 2007 examination of discrimination claims filed in Ohio demonstrated similar forms of discrimination against minorities and females.<sup>144</sup> The study examined 6162 sex-based and 9013 race-based discrimination cases where investigators found probable cause or a favorable settlement for the charging party was reached over a fifteen-year period in helping to determine and define the role of social closure in workplace discrimination.<sup>145</sup> Social closure is defined as “the process by which collectivities seek to maximize advantage by restricting access and privileges to others.”<sup>146</sup> The case files focused on five types of injuries: exclusion, expulsion, promotion, demotion, and harassment.<sup>147</sup> Researchers concluded that discrimination claims based on race most often arose from differing enforcement of rules, subjective soft-skill evaluation, and racial hierarchy maintenance.<sup>148</sup> Victims of sex discrimination were most often affected by characterizations based on gender appropriateness, presumptions of dependability related to pregnancy, and harassment.<sup>149</sup> The study theorized that employers discriminate only where the organization and policies allow them the flexibility to do so.<sup>150</sup> The results of this study of actual discrimination thus enhances the more empirically based studies discussed earlier.

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141 *Id.*

142 *Id.*

143 *Id.* at 2–3; *see also* Marc Bendick, Jr. et al., *Measuring Employment Discrimination Through Controlled Experiments*, 23 REV. BLACK POL. ECON. 25 (1994) (finding black employment applicants in the Washington D.C. area were treated worse than equally qualified white applicants more than one-fifth of the time); Ana P. Nunes & Brad Seligman, *Treatment of Caucasian and African-American Applicants by San Francisco Bay Area Employment Agencies: Results of a Study Utilizing “Testers”* (July 1999) (unpublished manuscript). *But see* Alexia Elejalde-Ruiz, *Hiring Bias Study: Resumes with Black, White, Hispanic Names Treated the Same*, CHI. TRIBUNE (May 4, 2016), <http://www.chicagotribune.com/business/ct-bias-hiring-0504-biz-20160503-story.html> (explaining economists at the University of Missouri applied the resume analysis to Hispanic, white, and black applicants and found no statistically significant differences across race, ethnic, or gender groups).

144 *See generally* Vincent J. Roscigno et al., *Social Closure and Processes of Race/Sex Employment Discrimination*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 16 (2007).

145 *Id.* at 18. The time frame was limited to 1988 through 2003, and all allegations were filed in Ohio. *Id.*

146 *Id.* at 21.

147 *Id.* at 27.

148 *Id.* at 28.

149 *Id.* at 34.

150 *Id.* at 45–46; *see also* Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCHOL. 553 (2005) (finding study participants more likely to act on explicit and implicit bias in environment that promoted discrimination).

Other research has revealed race discrimination in varying areas of the economy. For example, one study demonstrated that “[w]hite drivers were tipped 61% more than black drivers . . . and 64% more than . . . ‘other minority’ drivers.”<sup>151</sup> Moreover, other studies have shown that apartment application emails written by those with African American– and Arab-sounding names received far fewer positive responses than those with white-sounding names.<sup>152</sup> And another study found that tenant applications by Asian American males and females resulted in the highest number of landlord responses, while those applications by African American males and females resulted in the least.<sup>153</sup> Discrimination can even be seen in the emerging technology sector, as research demonstrates that Airbnb applicants with African American–sounding names were 16% less likely to be accepted than those with white-sounding names.<sup>154</sup>

Although more open, overt discrimination may no longer present as great of a threat now when compared to past decades, discrimination is still pervasive in society and often occurs much more subtly. For example, the Baltimore County Council considered legislation that would prevent landlords from discriminating against renters based on the nature of a renter’s income.<sup>155</sup> Other jurisdictions, including Washington, D.C., Chicago, Philadelphia, Seattle, and San Francisco, all have similar laws in place.<sup>156</sup> Without these laws, landlords could discriminate against certain protected groups, including blacks or single mothers who pay their rent with vouchers.<sup>157</sup> Other practices that may have a disproportionate impact on minorities and women still remain in use, such as the use of credit records or arrest history to screen job applicants.<sup>158</sup> The evidence of these practices, along with the statistics and surveys outlined above demonstrate that discrimination is still quite pervasive in today’s society, and is a challenge for individuals both

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151 Ian Ayres et al., Essay, *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613, 1627 (2005). The “other minority” drivers identified by the research included those of Arab and Indian backgrounds. *Id.* at 1623 n.33.

152 See Adrian G. Carpusor & William E. Loges, *Rental Discrimination and Ethnicity in Names*, 36 J. APPLIED SOC. PSYCHOL. 934, 934 (2006).

153 See Michelle E. Feldman & Allyson J. Weseley, *Which Name Unlocks the Door? The Effect of Tenant Race/Ethnicity on Landlord Response*, 43 J. APPLIED SOC. PSYCHOL. E416, E416 (2013); see also Andrew Hanson & Zackary Hawley, *Do Landlords Discriminate in the Rental Housing Market? Evidence from an Internet Field Experiment in US Cities*, 70 J. URB. ECON. 99, 99 (2011) (statistically significant discrimination against those with African American–sounding names in rental housing market).

154 Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J. 1, 1 (2017).

155 See Emily Badger, *A Pervasive Form of Housing Discrimination That’s Still Legal*, WASH. POST (Aug. 3, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/08/03/a-pervasive-form-of-housing-discrimination-thats-still-legal/?utm\\_term=.75ceb1ec8023](https://www.washingtonpost.com/news/wonk/wp/2016/08/03/a-pervasive-form-of-housing-discrimination-thats-still-legal/?utm_term=.75ceb1ec8023).

156 *Id.*

157 See *id.*

158 See Donna Ballman, *Does Discrimination Still Exist? Of Course It Does*, HUFFINGTON POST (Aug. 29, 2011, 10:30 AM), [http://www.huffingtonpost.com/red-room/donna-ballman-does-discri\\_b\\_939853.html](http://www.huffingtonpost.com/red-room/donna-ballman-does-discri_b_939853.html).

inside and outside of the workplace. Though some may no longer see discrimination as an ongoing problem, the scientific research proves otherwise.

Additional studies show that white applicants tend to receive longer job interviews than minorities, and that they are also treated in a friendlier fashion.<sup>159</sup> Studies have shown the added stress that this type of discrimination can bring to the lives of minority workers. For example, “[w]hile 66% of the women scientists . . . studied (including white women) reported having to provide more evidence of competence than men, 77% of black women said they experienced that. ‘Black women often feel like they can’t make a single mistake . . . . They would lose all credibility.’”<sup>160</sup> There can be no real debate over the types of stress associated with discrimination. This sampling of studies is only a representative example of the enormous amount of helpful research that is going on in this important area.<sup>161</sup>

A review of EEOC charge data shows that employment discrimination claims for both race and sex remained fairly steady from 1997 until 2006 when both types of claims increased significantly in the total number of charges filed with the Agency.<sup>162</sup> The EEOC has released an analysis of the

159 See Tanzina Vega, *Working While Brown: What Discrimination Looks Like Now*, CNN Bus. (Nov. 25, 2015), <http://money.cnn.com/2015/11/25/news/economy/racial-discrimination-work/>.

160 *Id.* (quoting University of California Hastings College of Law Professor Joan Williams).

161 See FELDBLUM & LIPNIC, *supra* note 115, at 12 (“In another survey based on a convenience sample measuring racial and ethnic harassment, researchers found that 70% of the respondents reported experiencing some form of verbal harassment and 45% reported experiencing exclusionary behaviors. In addition, 69% of respondents reported *witnessing* at least one ethnically-harassing behavior in the last two years at work and 36% of respondents who reported that they had not experienced direct harassment indicated that they had knowledge about the harassment of other co-workers.” (footnotes omitted)); Patten, *supra* note 115 (“A new Pew Research Center report . . . finds that roughly two-thirds (64%) of blacks say black people in the U.S. are generally treated less fairly than whites in the workplace; just 22% of whites and 38% of Hispanics agree. About two-in-ten black adults (21%) and 16% of Hispanics say that in the past year they have been treated unfairly in hiring, pay or promotion because of their race or ethnicity; just 4% of white adults say the same.” (citation omitted)).

162 See *Race-Based Charges (Charges Filed with EEOC) FY 1997–FY 2017*, EEOC, <https://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm> (last visited June 27, 2017) [hereinafter *Race-Based Charges*]; *Sex-Based Charges (Charges Filed with EEOC) FY 1997–FY 2017*, EEOC, <https://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm> (last visited June 27, 2017) [hereinafter *Sex-Based Charges*]. This data does not include charges filed with state or local fair employment practice agencies. See *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2017*, EEOC, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Aug. 18, 2017) [hereinafter *Charge Statistics*]. As discussed earlier in this Section, this Article focuses primarily on race rather than color discrimination. It is worth noting, however, that during fiscal year 2016, the EEOC received 3102 charges of color discrimination. See Press Release, Equal Emp’t Opportunity Comm’n, EEOC Releases Fiscal Year 2016 Enforcement and Litigation Data (Jan. 18, 2017), <https://www1.eeoc.gov/eeoc/newsroom/release/1-18-17a.cfm> [hereinafter *Press Release*]. These charges reflect 3.4% of all charges filed, and cause to believe discrimination occurred was found by the

91,503 charges of employment discrimination filed with the Agency during fiscal year 2016.<sup>163</sup> Overall, the government resolved many of the charges and obtained over \$482 million for victims of discrimination in private, federal and state and local government workplaces.<sup>164</sup> During the fiscal year 2016, the EEOC received 32,309 charges of race discrimination.<sup>165</sup> These charges represent 35.3% of all charges filed.<sup>166</sup> Reasonable cause to believe that discrimination occurred was found by the EEOC with respect to 709 of these charges.<sup>167</sup> During the same fiscal year, the Agency also received 26,934 charges of sex discrimination,<sup>168</sup> reflecting 29.4% of all charges filed.<sup>169</sup> Reasonable cause was found by the EEOC with respect to 937 of these charges.<sup>170</sup>

There have also been a substantial number of large verdicts and settlements in the litigation brought in discrimination cases. For example, an African American worker accepted a \$5 million punitive damages award, reduced from the approximately \$24 million in punitive damages awarded by the jury, in a racial discrimination suit where the worker demonstrated that he was paid less than his white coworkers, denied training and promotions in favor of white employees, and subjected to racial slurs and graffiti at work.<sup>171</sup> Moreover, a female firefighter received an award of more than \$1.7 million for a sexual harassment claim where she successfully established that her complaints of sexual harassment were not properly investigated and instead was instructed by her supervisor not to follow the policy for reporting sexual harassment.<sup>172</sup> These cases represent only a small sampling of the often-breathtaking awards in the gender<sup>173</sup> and racial discrimination area.<sup>174</sup>

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Agency as to fifty-three of these charges. See *Color-Based Charges (Charges Filed with EEOC) FY 1997–FY 2017*, EEOC, <https://www.eeoc.gov/eeoc/statistics/enforcement/color.cfm> (last visited Oct. 28, 2018).

163 See *Press Release*, *supra* note 162.

164 *Id.*

165 See *id.*

166 *Id.*

167 See *Race-Based Charges*, *supra* note 162.

168 See *Press Release*, *supra* note 162.

169 *Id.*

170 See *Sex-Based Charges*, *supra* note 162.

171 Jury Verdict Summary, *Turley v. ISG Lackawanna, Inc.*, No. 1:06-cv-00794, 2012 Jury Verdicts LEXIS 19219 (W.D.N.Y. Jan. 31, 2012).

172 Jury Verdict Summary, *Sterud v. Orange Township*, No. 10-cv-001314, 2013 Jury Verdicts LEXIS 4151 (Ohio Ct. C.P. Franklin Cty. May 13, 2013).

173 Jury Verdict Summary, *McPadden v. Wal-Mart Stores East, L.P.*, No. 1:14-cv-00475, 2016 Jury Verdicts LEXIS 391 (D.N.H. Jan. 27, 2016) (“New Hampshire Federal Jury Awards \$31.2 Million To Wal-Mart Pharmacist In Her Action For Gender Discrimination And Wrongful Termination.”); Jury Verdict Summary, *EEOC v. Moreno Farms*, No. 1:14-cv-23181, 2015 Jury Verdicts LEXIS 6908 (S.D. Fla. Sept 10, 2015) (“Florida Federal Jury Awards Five Female Farm Workers \$17.4 Million In Compensatory And Punitive Damages For Hostile Work Environment, Including Sexual Assaults, And Retaliation.”); Jury Verdict Summary, *Rennenger v. Manley Toy Direct LLC*, No. 4:10-cv-00400, 2015 Jury Verdicts LEXIS 7326 (S.D. Iowa Aug. 5, 2015) (“Iowa Federal Jury Awards Over \$11 Million To

### B. *National Origin and Religious Discrimination*

Researchers have also closely studied employment discrimination based on the religion and national origin of current and prospective employees. Much of the more recent research has looked at discrimination against Muslims in the workplace. Discrimination against this group increased substantially following the September 11, 2001 terrorist attacks in the United States and discrimination charges with the EEOC rose quickly after this tragic event.<sup>175</sup> The research has shown that workplace discrimination based on religion and national origin is often subtle in nature.

While many workplace discrimination claims are frequently settled under confidential terms, there have nonetheless been a number of substantial verdicts in this area that have resulted in awards in excess of seven figures. These high-profile claims involve blatant and extreme discrimination. As discussed in greater detail below, many of these national origin discrimination verdicts also include at least one other claim against the defendant.

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Female Customer Service Representative On Her Sexual Harassment Claims Against Toy Company.”); Jury Verdict Summary, *United States v. Am. Honda Fin. Corp.*, No. 2:15-cv-05264, 2015 Jury Verdicts LEXIS 4884 (C.D. Cal. July 14, 2015) (“Honda’s Finance Division Agrees To Pay \$24 Million And Make Changes To Lending Policies That Discriminated Against Minorities To Settle Equal Credit Opportunity Act Violation Suit Filed By Federal Government In California Federal Court.”); Jury Verdict Summary, *Robertson v. Hunter Panels LLC*, No. 2:13-cv-01047, 2015 Jury Verdicts LEXIS 2892 (W.D. Pa. May 18, 2015) (jury awarded \$13,420,000 and found the “[employers] discriminated against [the employee] because of her gender, that they subjected her to a hostile work environment because of her gender, and that they unlawfully retaliated against her when they terminated her employment”); Jury Verdict Summary, *Juarez v. AutoZone Stores, Inc.*, No. 3:08-cv-00417, 2014 Jury Verdicts LEXIS 12142 (S.D. Cal. Nov. 17, 2014) (the jury awarded approximately \$185,872,720 where the employer AutoZone discriminated against female manager); Jury Verdict Summary, *EEOC v. Four Amigos Travel, Inc.*, No. 8:11-cv-1163, 2013 Jury Verdicts LEXIS 6186 (M.D. Fla. Apr. 30, 2013) (jury awarded \$20.3 million in employment case).

174 Verdict and Settlement Summary, *EEOC v. Lawler Foods, Inc.*, No. 4:14-cv-03588, 2016 WL 2748677 (S.D. Tex. Apr. 26, 2016) (race and national origin discrimination lawsuit resulting in \$1,042,000 settlement); Verdict and Settlement Summary, *Houser v. Pritzker*, No. 1:10-cv-03105, 2016 WL 3970831 (S.D.N.Y. Apr. 20, 2016) (workplace suit resulting in \$15 million settlement); Verdict and Settlement Summary, *EEOC v. Hillshire Brands Co.*, No. 2:15-cv-1347, 2015 WL 9851919 (Dist. Ct. Tex. Dec. 22, 2015) (race discrimination, racial harassment, and retaliation case resulting in \$4 million settlement); Verdict and Settlement Summary, *EEOC v. Dart Energy Corp.*, No. 2:13-cv-00198, 2014 WL 7365946 (D. Wyo. Sept. 9, 2014) (national origin and race discrimination retaliation case resulting in \$1.2 million settlement); Verdict and Settlement Summary, *EEOC v. Glob. Horizons, Inc.*, No. 11-cv-00257, 2014 WL 7910524 (D. Haw. June 3, 2014) (case alleging racial and national origin discrimination, harassment, and retaliation resulting in \$2.4 million settlement).

175 See generally Cassandra M. Gandara, *Post-9/11 Backlash Discrimination in the Workplace: Employers Beware of Potential Double Recovery*, 7 HOUS. BUS. & TAX L.J. 169, 173, 174 (2006) (noting that, post-9/11, employers are concerned about liability through agency principles for supporting terrorism after the passage of the PATRIOT Act, which creates pressures for all employers to fully investigate current and prospective employees).

Numerous studies have closely reviewed the continued and persistent nature of religious and national origin discrimination, perhaps in part as a response to the notable increase in EEOC charges filed in this area. One well known empirical study, *It's All in the Name*,<sup>176</sup> revealed that Arab males must send, on average, 2.79 resumes for every one resume sent by white males to receive an equal number of callbacks for a job interview.<sup>177</sup> Sociologists sent two sets of identical resumes to employment openings found on the internet: one set with traditionally white-associated names and one set with traditionally Arab-associated names.<sup>178</sup> White-associated names were selected from the census report and Arab-associated names were chosen from a baby book.<sup>179</sup> The different sets of names were then tested for their respective attributions.<sup>180</sup> The positions applied to were chosen specifically because Arab males were overrepresented in those fields.<sup>181</sup> Additionally, the researchers addressed any fluency concerns by representing all applicants as having a degree and six years of work experience.<sup>182</sup> Researchers categorized responses in one of three ways: (1) equal treatment, meaning both resumes were either called or not called; (2) white favored, meaning the white resume received a response while the Arab resume failed to receive a response; and (3) Arab favored, meaning the Arab resume received a response while the white resume did not.<sup>183</sup> Resumes were treated the same 89.38% of the time, usually with neither resume receiving any response at all.<sup>184</sup> However, white-favored responses consisted of 7.23% of responses while Arab-favored responses consisted of only 2.63% of responses.<sup>185</sup> As the only difference between the resumes was the names of the applicants, these results demonstrate discrimination based on religion and/or national origin associated only with the applicant's name.<sup>186</sup>

This type of name/association discrimination is a clear violation of Title VII.<sup>187</sup> And the results from *It's All in the Name*<sup>188</sup> strongly suggest the ongoing prevalence of this form of discrimination.<sup>189</sup> Other studies further illus-

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176 Daniel Widner & Stephen Chicoine, *It's All in the Name: Employment Discrimination Against Arab Americans*, 4 Soc. F. 806 (2011).

177 *Id.* at 815.

178 *Id.* at 809.

179 *Id.* at 812.

180 *Id.* at 813.

181 *Id.* at 811.

182 *Id.*

183 *Id.* at 815.

184 *Id.* at 815–16 (referencing the “customer service manager” applications).

185 *Id.* at 816.

186 *Id.*

187 See Samorn Selim, Note, *What Does Your Name Say About You? The Eighth Circuit Undercuts Name Association Discrimination Claims in EEOC v. Trans States Airlines*, 28 BERKELEY J. EMP. & LAB. L. 607, 614 (2007) (noting that the Ninth Circuit has approved name discrimination in § 1981 cases).

188 Widner & Chicoine, *supra* note 176.

189 See *id.* at 814–18; see also Ishra Solieman, Note, *Born Osama: Muslim-American Employment Discrimination*, 51 ARIZ. L. REV. 1069, 1069–70 (2009) (explaining that a well-educated

trate that discriminatory practices on the basis of religion and national origin are a regular occurrence in our society.<sup>190</sup>

A 2014 study examined green card applications and concluded that certain geographic areas were either more or less likely to be approved than a control group based on their national origin when the reviewer had only limited employment data.<sup>191</sup> In *House of Green Cards*, researchers reviewed 198,442 green card applications filed between June 2008 and September 2011, examining potential disparities in approval status based on national origin.<sup>192</sup> The applicants came from 190 different nations and applied as either “professionals with advanced degrees” or “skilled workers, professionals, and unskilled workers.”<sup>193</sup> The study divided these applications into one of seven geographic regions: Africa, Asia, Australia and Oceania, Canada, Europe, Latin America, and the Middle East.<sup>194</sup> Workers processing the applications (“Processors”) did not have access to sex or race information but were aware of the applicants’ names.<sup>195</sup> This data was not made available to the researchers,<sup>196</sup> who further controlled for individual-level factors that may have impacted approval rates.<sup>197</sup> Canadian applicants were used as the control group for the analysis, given their similarity to American workers seeking similar employment.<sup>198</sup> The applications were identified as nonaudited and audited.<sup>199</sup> Nonaudited applications were those where limited information was supplied to the Processors and comprised 87% of those used in the research.<sup>200</sup> Audited applications were randomly selected, except in a few instances, and received a higher level of review by Processors.<sup>201</sup>

After controlling for individual level factors, a review of the nonaudited applications demonstrated significant statistical difference between approval rates of applicants based on citizenship.<sup>202</sup> The results showed that applicants from Asia were 13.3% more likely than the control group to be approved for green cards whereas applicants from Latin America were 23%

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and qualified applicant with an Arab- and Muslim-associated name received notably better response to his resume after substituting the associated name with only his initial).

190 See generally Sonia Ghumman et al., *Religious Discrimination in the Workplace: A Review and Examination of Current and Future Trends*, 28 J. BUS. & PSYCHOL. 439, 440 (2013).

191 See Ben A. Rissing & Emilio J. Castilla, *House of Green Cards: Statistical or Preference-Based Inequality in the Employment of Foreign Nationals*, 79 AM. SOC. REV. 1226, 1240 (2014).

192 *Id.* at 1228, 1232.

193 *Id.* at 1233–34.

194 *Id.* at 1234.

195 *Id.* at 1237.

196 *Id.*

197 *Id.* at 1240.

198 *Id.* at 1234.

199 *Id.* at 1237.

200 *Id.* at 1234.

201 *Id.*

202 *Id.* at 1240.

less likely than the control group to be approved.<sup>203</sup> African and Middle Eastern applicants also had a statistically significant difference compared to the control group—and were 21.1% less likely and 16.9% less likely to be approved, respectively.<sup>204</sup> Interestingly, the review of the audited applications showed no statistically significant difference in approval rates based on citizenship.<sup>205</sup> The only exceptions were those applicants from Japan and South Korea, possibly as a result of existing bias and stereotypes about the work ethic of these groups.<sup>206</sup> These results suggest that a more detailed review is likely to result in fairer results, as was seen with the audited applications.<sup>207</sup> Interviews with select Processors confirmed that national origin was involved in the approval of applications.<sup>208</sup> One Processor stated that applicants from nations that are “friendly” with the United States were more likely to be approved than those from countries that are less “friendly,” specifically identifying Middle Eastern nations.<sup>209</sup> Another Processor indicated that his approach was “instinctive, kind of wanting to protect other Americans.”<sup>210</sup>

Several other studies reveal ongoing discrimination in this area. For example, research suggests that employers were even looking into the protected bases of potential workers as part of the hiring process. One study concluded that employers who analyze job applicants’ social media information return calls to Muslim applicants at a rate 13% lower than to Christian applicants.<sup>211</sup> Other research determined that the resumes of Arab applicants received significantly lower job ratings than equally qualified white applicants, using the degree of Arab identification based on organizational affiliations.<sup>212</sup> And other studies showed that wearing a hijab negatively correlated with purported job availability, permission to complete job applications, and job callbacks.<sup>213</sup> Still other studies showed that Hispanic work applicants received fewer job offers than Anglo applicants in major metropolitan areas.<sup>214</sup>

Additional research demonstrates the impact of a job applicant’s name with respect to national origin and religion, finding that Arab job applicants

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203 *Id.*

204 *Id.*

205 *Id.* at 1243.

206 *Id.* at 1246.

207 *Id.* at 1240.

208 *See id.* at 1247.

209 *Id.*

210 *Id.*

211 Alessandro Acquisti & Christina M. Fong, An Experiment in Hiring Discrimination via Online Social Networks (Mar. 12, 2016) (unpublished manuscript), <https://ssrn.com/abstract=2031979>.

212 Eva Derous et al., *Hiring Discrimination Against Arab Minorities: Interactions Between Prejudice and Job Characteristics*, 22 HUMAN PERFORMANCE 297, 312 (2009).

213 Sonia Ghumman & Ann Marie Ryan, *Not Welcome Here: Discrimination Towards Women Who Wear the Muslim Headscarf*, 66 HUMAN RELATIONS 671, 688 (2013).

214 Genevieve M. Kenney & Douglas A. Wissoker, *An Analysis of the Correlates of Discrimination Facing Young Hispanic Job-Seekers*, 84 AMERICAN ECONOMIC REVIEW 674, 682 (1994).

received fewer callbacks than white job applicants, particularly for management-level positions.<sup>215</sup> And other research determined that applicants with resumes that suggested a Muslim religious identity received the lowest number of responses of any group from employers in the New England region.<sup>216</sup> This type of discrimination exists in academia as well. One study showed that emails sent to white faculty concerning graduate training by individuals with Chinese-sounding names led to a lower response rate and subsequent agreements than almost identical emails that included Chinese individuals adopting Anglo-sounding names.<sup>217</sup>

Similar to the findings of racial discrimination discussed in Section III.A, discrimination on the basis of national origin and religion also pervades the housing sector. One study established that Arab Americans posting housing ads in Los Angeles, New York City, Detroit, and Houston received substantially fewer positive responses than whites.<sup>218</sup> Another study established that Hispanics portrayed as recent immigrants received far fewer positive responses to rental requests than Hispanics who presented themselves as more fully assimilated into American culture.<sup>219</sup> These studies are simply representative of a much larger problem. A significant amount of other research further demonstrates the continued prevalence of discrimination on the basis of national origin<sup>220</sup> and religion.<sup>221</sup>

As discussed above, following 9/11, the number of religious discrimination and national origin discrimination claims filed with the EEOC has grown

215 Widner & Chicoine, *supra* note 176, at 818.

216 Bradley R.E. Wright et al., *Religious Affiliation and Hiring Discrimination in New England: A Field Experiment*, 34 RES. SOC. STRATIFICATION & MOBILITY 111, 119, 119 tbl.1 (2013).

217 Xian Zhao & Monica Biernat, "Welcome to the U.S." But "Change Your Name"? *Adopting Anglo Names and Discrimination*, 70 J. EXPERIMENTAL SOC. PSYCHOL. 59, 65 (2017).

218 S. Michael Gaddis & Raj Ghoshal, *Arab American Housing Discrimination, Ethnic Competition, and the Contact Hypothesis*, 660 ANNALS AM. ACAD. POL. & SOC. SCI. 282, 290 fig.1 (2015).

219 Andrew Hanson & Michael Santas, *Field Experiment Tests for Discrimination Against Hispanics in the U.S. Rental Housing Market*, 81 S. ECON. J. 135, 136–37 (2014).

220 For example, from 1998 to 2007, the Discrimination Research Center (DRC) engaged in research to examine the impact of ethnic names in the hiring process at temporary agencies located in California. See Sandra R. McCandless & Khoa Ngo, Sonnenschein Nath & Rosenthal, *Employment Discrimination on the Basis of National Origin and Religion in the Post-9/11 Era 5* (July 2008) (unpublished manuscript), <http://apps.americanbar.org/labor/lel-aba-annual/2008/pdf/McCandless.pdf>. The research demonstrated that resumes with traditionally South Asian- or Arab-sounding names received the lowest response in five of seven California areas. *Id.* at 6; see also Bendick et al., *supra* note 143 (concluding that African American employment applicants in the Washington D.C. region were treated less favorably than equally qualified white applicants more than one-fifth of the time).

221 Both scholars and the existing research have addressed the rise in religious discrimination following the tragic events of 9/11. See Ghumman et al., *supra* note 190, at 447 (noting multiple factors that have contributed to increased level of religious discrimination in the United States).

substantially.<sup>222</sup> Many scholars argue that societal tensions after these events spilled into the working environment, which was “particularly to the detriment of people from a Middle Eastern or Arabic background.”<sup>223</sup>

EEOC charge statistics reveal that workplace discrimination claims based on national origin and religion<sup>224</sup> have increased almost every year since 2001, with all years after 2001 higher than those before 2001.<sup>225</sup> During fiscal year 2016, the EEOC received 9840 charges of national origin discrimination,<sup>226</sup> representing 10.8% of all charges filed.<sup>227</sup> Reasonable cause to believe that discrimination occurred was found by the EEOC with respect to 321 of these charges.<sup>228</sup> During the same year, the EEOC received 3825 charges of religious discrimination.<sup>229</sup> These charges represent 4.2% of all charges filed,<sup>230</sup> and reasonable cause to believe that discrimination occurred was found by the EEOC with respect to 121 of these charges.<sup>231</sup>

Many jury awards in these cases have received widespread attention. For example, a jury awarded a Missouri worker \$5.1 million in a hostile environment claim based on harassment she encountered after converting to

222 See Gandara, *supra* note 175, at 172–73 (stating that prior to 9/11, the highest number of charges filed with the EEOC based on national origin discrimination in a single year was 7792 in fiscal year 2000, while over 9000 national origin charges were filed with the Agency in fiscal year 2002 alone).

223 McCandless & Ngo, *supra* note 220, at 2. Employment discrimination claims based on national origin and religion increased notably after 9/11, with these claims increasing by 17% and 35%, respectively, between 2001 and 2007. *Id.* at 2 & nn.1–2.

224 Religious discrimination claims have risen sharply when compared to other categories protected by Title VII. See Ghumman et al., *supra* note 190, at 440 (noting that between 2000 and 2010, religious discrimination claims increased by 96% over the course of the decade in comparison to race (24% increase), sex (15%), and national origin (45%)). In addition, “the EEOC has consistently been able to obtain millions of dollars from employers for religion-based discrimination claims.” Gandara, *supra* note 175, at 187 (noting that the amount of monetary benefits recovered by the EEOC in 2001 from religious discrimination claims increased more than 907% when compared to claims from 1992).

225 See *Charge Statistics*, *supra* note 162. See generally Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 112–13 (2007) (discussing settlement rate of discrimination charges and stating that approximately 70% of charges with the Agency may end in settlement).

226 See *Press Release*, *supra* note 162.

227 *Id.*

228 *National Origin-Based Charges (Charges Filed with EEOC) FY 1997–FY 2017*, EEOC, <https://www.eeoc.gov/eeoc/statistics/enforcement/origin.cfm> (last visited Nov. 6, 2018).

229 See *Charge Statistics*, *supra* note 162.

230 See *id.*

231 *Religion-Based Charges (Charges Filed with EEOC) FY 1997–FY 2017*, EEOC, <https://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm> (last visited Nov. 6, 2018). In light of these increases, former EEOC Chair Jenny Yang stated: “Despite the progress that has been made, we continue to see discrimination in both overt and subtle forms. The ongoing challenge of combating employment discrimination is what makes EEOC’s work as important as ever.” See *Press Release*, *supra* note 162.

Islam.<sup>232</sup> Similarly, a federal jury in California found for a female employee whose coworkers and supervisors made many negative remarks about her ethnicity.<sup>233</sup> The jury awarded her over \$182.6 million.<sup>234</sup> Similarly, a jury awarded a worker who was a Jehovah's Witness \$1.37 million after her employer, the Community Development Commission of the County of Los Angeles, required that she participate in activities that she believed were contrary to her religion.<sup>235</sup> And a Michigan jury awarded a Muslim employee \$1.185 million for harassment he encountered after the 9/11 terrorist attacks and for the employer's failure to make accommodations that would permit the worker to exercise freedom of religion.<sup>236</sup> This sampling of cases represents only a handful of the large verdicts based on national origin<sup>237</sup> and religious<sup>238</sup> discrimination in the workplace.

The empirical research illustrating the prevalence of employment discrimination based on religion and national origin, combined with the large awards given to plaintiffs in these types of claims, demonstrates the adversity

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232 Jury Verdict Summary, *Bashir v. Sw. Bell Tel. Co.*, No. 1016-cv-38690, 2015 Dolan Media Jury Verdicts LEXIS 11123 (Mo. Cir. Ct. May 13, 2012) (employee referred to as "one of those bomb people" and as wearing that "hat thing").

233 Jury Verdict Summary, *Chopourian v. Catholic Healthcare W.*, No. 2:09-cv-2972, 2012 Jury Verdicts LEXIS 2486 (E.D. Cal. Feb. 29, 2012).

234 *Id.*

235 Jury Verdict Summary, *Mayo v. Cmty. Dev. Comm'n of L.A.*, No. BC486184, 2014 Jury Verdicts LEXIS 10547 (Cal. Super. Ct. Nov. 6, 2014).

236 Jury Verdict Summary, *Aboubaker v. County of Washtenaw*, No. 2:11-cv-13001, 2014 Nat. Jury Verdict Review LEXIS 28 (E.D. Mich. Feb. 27, 2014) (denying Muslim worker ability to attend religious ceremonies and passing him over for promotion).

237 *See, e.g.*, Verdict and Settlement Summary, *Miranda v. Alaska Longline, LLC*, No. 2:15-cv-00148, 2017 WL 1900361 (W.D. Wash. Feb. 28, 2017) (national origin discrimination case resulting in \$1,850,000 settlement); Jury Verdict Summary, *Al-Habash v. Raytheon Co.*, No. 4:1-cv-450, 2016 Jury Verdicts LEXIS 10326 (E.D. Tex. Nov. 4, 2016) (federal jury awarded Muslim American worker over \$800,000 for national origin discrimination and retaliation claim); Verdict and Settlement Summary, *Paspuel v. Pro Star Trucking*, No. 2:14-cv-00910, 2016 WL 2751000 (D. Utah Mar. 21, 2016) (plaintiffs were harassed about their legal status in the United States, given less desirable shifts and tasks, and forced to perform tasks with unsafe equipment, and awarded \$1,455,004); Verdict and Settlement Summary, *EEOC v. Vail Run Resort Cmty. Ass'n*, No. 1:15-cv-01592, 2016 WL 917681 (D. Colo. Feb. 10, 2016) (national origin discrimination case resulting in \$1,000,000 settlement).

238 Jury Verdict Summary, *Nichols v. Ill. Dep't of Transp. & Cent. Mgmt. Sys.*, No. 1:12-cv-01789, 2016 Jury Verdicts LEXIS 9764 (N.D. Ill. Sept. 29, 2016) (failure to accommodate religion and unlawful termination and retaliation claims resulted in \$1,500,000 jury award); Jury Verdict Summary, *Saleh vs. Pretty Girl, Inc.*, No. 09-cv-1769, 2014 NY Jury Verdicts Review LEXIS 310 (E.D.N.Y. June 6, 2014) (case alleging national origin and religious discrimination resulting in \$4,715,000 verdict, including \$2,555,000 in punitive damages); *Aboubaker*, 2014 Nat. Jury Verdict Review LEXIS 28 (case alleging employment discrimination on basis of religion, race, and national origin resulting in \$1,185,520 jury award). The Fourth Circuit upheld a \$590,000 jury verdict against a company for forcing worker to retire because it would not accommodate his religious beliefs. *See EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 137, 140 (4th Cir. 2017).

still faced by these groups in the workplace. The social science research and EEOC data clearly illustrate that national origin and religious discrimination are both quite prevalent in the workplace. This Section has provided a review of some of the important research in this area. Scientific studies, EEOC data, and recent litigation results all support the undeniable fact of existing workplace discrimination. The information presented here is non-exhaustive, but a more thorough analysis would only bolster this conclusion. And, like any other fact, the existence of workplace discrimination should be permitted to be pled in a Title VII complaint of workplace discrimination. The following Parts will explain how pleading the fact of discrimination can be properly achieved under the Federal Rules of Civil Procedure. This discussion begins with an analysis of how to attach this type of information to the complaint.

#### IV. ATTACHMENT TO THE PLEADINGS

As detailed above, the fact of discrimination is well supported in the scientific literature, the EEOC data, and the litigation statistics. While such indisputable evidence exists, this information has failed to make its way into the public's collective knowledge. Indeed, the opposite approach—that discrimination is largely a vestige of the past—appears to be the more popular view of the courts and general public, as evidenced by the rate at which Title VII claims are being rejected in the judicial system.<sup>239</sup>

The more precise legal question, then, is how this type of background social science information and data should be introduced into an employment discrimination proceeding to prevent otherwise valid Title VII claims from being unnecessarily dismissed. Fortunately, the answer is relatively straightforward and will be discussed at length in Part V. The fact of discrimination should be pled in the complaint, and the supporting social science data and other evidence should be attached to the pleadings. The Federal Rules of Civil Procedure generally permit such attachments, though the courts vary on their willingness to consider this type of information under these same rules.

It is helpful to understand how attaching documents to a civil complaint—and more particularly to a Title VII pleading—works in practice before fully addressing the approach proposed by this Article. This Part thus discusses the procedural rules under federal law for attaching documents to a pleading. The Federal Rules of Civil Procedure would generally permit Title VII litigants to attach social science research as an exhibit where that research is expressly referenced in the text of the complaint itself. The courts disagree on the types of exhibits that are permitted under the federal rules, and more precisely there is disagreement with respect to what constitutes a “written instrument” under Rule 10(c).<sup>240</sup> This rule provides: “A statement in a pleading may be adopted by reference elsewhere in the same

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239 See *Charge Statistics*, *supra* note 162.

240 See *infra* notes 229–38 and accompanying text.

pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.”<sup>241</sup>

Generally speaking, then, for any attachments to be permissible under this rule the plaintiff must expressly reference the exhibit in the complaint itself and the attachment should further be central to the allegations involved.<sup>242</sup> Where permitted by the courts and federal rules, exhibits that are incorporated by reference in the complaint can properly be considered in a dismissal proceeding.<sup>243</sup> Indeed, if there are discrepancies between the attachments and the complaint itself, the court is free to accord greater weight to the exhibit where appropriate.<sup>244</sup> Notably, where the attachment is not considered a “written instrument” under Rule 10(c), a dismissal motion will be converted into a summary judgment motion.<sup>245</sup> When this occurs, the courts can consider a broader range of information, including information beyond the pleading itself.<sup>246</sup> It is further possible that a court in these circumstances may conclude that it has insufficient information with respect to the motion, and allow the matter to proceed to discovery.<sup>247</sup>

There is—unfortunately—widespread disagreement over the precise definition of “written instrument” under the rules. Typically, contractual-type documents fall within this definition.<sup>248</sup> Outside of this, however, substantial disagreement exists as to what constitutes a “written instrument” and decisions on this question are often jurisdiction and fact specific.<sup>249</sup> Broadly speaking, then, “documents attached to the pleadings become part of the pleadings and may be considered on a motion to dismiss . . . without converting a motion to dismiss into one for summary judgment.”<sup>250</sup> As with any

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241 FED. R. CIV. P. 10(c).

242 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1327, at 442, 453 (3d ed. 2004); *see also* I. Meyer Pincus & Assocs. v. Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991).

243 *See* WRIGHT & MILLER, *supra* note 242.

244 *See* Forrest v. Universal Sav. Bank, F.A., 507 F.3d 540, 542 (7th Cir. 2007) (citing Massey v. Merrill Lynch & Co., 464 F.3d 642, 645 (7th Cir. 2006)).

245 FED. R. CIV. P. 12(d); *see also* Brokers’ Choice of Am., Inc. v. NBC Universal, Inc., 861 F.3d 1081, 1103 (10th Cir. 2017) (quoting Alexander v. Oklahoma, 382 F.3d 1206, 1214 (10th Cir. 2004)).

246 *See* FED. R. CIV. P. 12(d).

247 *See id.* at 56(d).

248 Smith v. Hogan, 794 F.3d 249, 254 (2d Cir. 2015) (citing Rose v. Bartle, 871 F.2d 331, 339 n.3 (3d Cir. 1989)).

249 *See, e.g., id.* at 254 (adopting the Third Circuit’s decision in *Rose*, 871 F.2d 331, that an affidavit is not a written instrument); Perkins v. Silverstein, 939 F.2d 463, 467 n.2 (7th Cir. 1991) (deciding that newspaper articles attached to a complaint were not “written instruments” under Rule 10(c)); EEOC v. Prof’l Freezing Servs., LLC, 15 F. Supp. 3d 783, 785 n.1 (N.D. Ill. 2013) (deciding that EEOC charge attached to complaint was not central to the claim). *But see, e.g.,* Bogie v. Rosenberg, 705 F.3d 603, 608, 612 (7th Cir. 2013) (allowing a video to be included as part of the pleadings).

250 Commercial Money Ctr., Inc. v. Ill. Union Ins. Co., 508 F.3d 327, 335–36 (6th Cir. 2007) (citing Jackson v. City of Columbus, 194 F.3d 737, 745 (6th Cir. 1999)). The district court generally must convert a motion to dismiss into a motion for summary judgment if it

procedural issue, litigants should further be advised to look to a court or jurisdiction's local rules for more specific and precise guidelines in this area.<sup>251</sup> Some jurisdictions may specifically provide additional guidance on the issue of attaching exhibits to a federal complaint.

Confusing the issue somewhat further, there is additional disagreement as to the types of exhibits that may be attached to an *employment* matter.<sup>252</sup> Though there is far from unanimity on this question, many federal courts have allowed litigants to include exhibits to the complaint in cases involving workplace disputes. One recent federal court decision is illustrative of this view. In that case, the court considered an EEOC charge that was attached to the complaint as an exhibit and referenced it as part of its analysis.<sup>253</sup> In another recent case, a federal court permitted the plaintiff to attach an EEOC charge in response to a dismissal motion, stating that it was central to the claim because “the underlying allegations are violations of Title VII discrimination.”<sup>254</sup>

In yet another recent decision, the EEOC attempted to include its own compliance manual as an attachment to the complaint and (more to the point of this Article) cited to social science research in the pleadings. The U.S. Court of Appeals for the Eleventh Circuit held that the compliance manual was allowed at least some deference as “[t]he rulings, interpretations, and opinions’ of an agency charged with enforcing a particular statute . . . ‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.’”<sup>255</sup> As to the social science infor-

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considers materials outside the complaint. FED. R. CIV. P. 12(d). However, the court may consider a document attached to a motion to dismiss without converting the motion into one for summary judgment if the attached document is (1) central to the plaintiff's claim and (2) undisputed. *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002). A document need not be physically attached to a pleading to be incorporated by reference into it; if the document's contents are alleged in a complaint and no party questions those contents, the court may consider such a document provided it meets the centrality requirements. See *Harris v. Ivax Corp.*, 182 F.3d 799, 802 n.2. (11th Cir. 1999).

251 See, e.g., U.S. DIST. COURT FOR THE D.C., RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, LCvR 5.1(e), at 22 (stating that litigants may only attach to the pleadings information essential to the determination of the case); see also COMMENCING A FEDERAL LAWSUIT: DRAFTING THE COMPLAINT, PRACTICAL LAW PRACTICE NOTE 5-506-8600 (West 2019).

252 E.g., *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018 (11th Cir. 2016); *Davis v. City of Atlanta*, No. 1:16-cv-2037, 2017 WL 1376856, at \*2 (N.D. Ga. Mar. 2, 2017), *adopted by* 2017 WL 1354848 (N.D. Ga. Apr. 13, 2017); *Arnold v. UPS, Inc.*, No. 7:11-cv-00118, 2012 WL 1035441, at \*1 (M.D. Ga. Mar. 27, 2012).

253 *Davis*, 2017 WL 1376856, at \*2 (citing Complaint at 5, *Davis*, 2017 WL 1376856 (No. 1:16-cv-2037)). “Within 180 days of the knowledge of the occurrence of the acts of which she complains, Plaintiff filed a written charge with the [EEOC] by notice dated February 18, 2015. (Attached as Exhibit ‘A’).” Complaint at 5, *supra*.

254 *Arnold*, 2012 WL 1035441, at \*1.

255 *Catastrophe Mgmt. Sols.*, 852 F.3d at 1031 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). While affording the manual some deference, the court was nonetheless clear that the manual was not controlling in the case. *Id.*

mation included in the complaint with respect to race, the court concluded that some of this information constituted “legal conclusions about the concept of race.”<sup>256</sup> When defining “race,” the court did look to social science research and other cases.<sup>257</sup>

In conclusion, Federal Rule of Civil Procedure 10(c) permits litigants to attach “written instruments” to a complaint if certain requirements are satisfied. While the rule is clear that such attachments are permissible, the precise terms of the rule have resulted in confusion in the rule’s application. Nonetheless, there are a number of federal court decisions that have taken a very permissible, flexible approach to Rule 10(c) when applied to employment discrimination cases. It may ultimately take some time for *all* courts to become comfortable with the approach advocated here. Nonetheless, including the types of attachments suggested in Part V of this Article will go a long way toward educating the judiciary on this issue.

## V. A NEW FRAMEWORK

As discussed throughout this Article, the plausibility standard has been applied to employment discrimination claims in a particularly rigid way. This has given rise to an increase in the rate at which Title VII claims are being dismissed. And through a more anecdotal review, it is clear that some courts are using the standard to reject otherwise viable claims that should be permitted to proceed. The question arises, then, as to how litigants can use the fact of discrimination to circumvent this unfortunate (and unwarranted) trend.

The answer is straightforward—the fact of discrimination in the workplace *should be pled* in the Title VII complaint itself. By pleading the ongoing fact of workplace discrimination, most Title VII claims will be seen as “plausible” from their onset. How precisely to plead this fact is a more difficult inquiry. This Part establishes a four-part framework for pleading the fact of discrimination. This framework helps detail how litigants can help push their claims from “conceivable” to “plausible,”<sup>258</sup> and what defendants can do to respond to such allegations.

This four-part framework applies exclusively to Title VII cases and may be properly applied to any claim arising under this statute. This Part will analyze each of the elements of this four-part framework, which is summarized here:

1. The complaint should detail the fact of workplace discrimination and the protected class at issue.
2. The fact of discrimination should specify the particular type of adverse action involved.
3. The complaint should attach relevant social science evidence, EEOC data, and litigation statistics.

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<sup>256</sup> *Id.* at 1022.

<sup>257</sup> *See id.* at 1026–28.

<sup>258</sup> *See generally* Ashcroft v. Iqbal, 556 U.S. 662, 680–84 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

4. The defendant should be given the opportunity to properly rebut this fact.

Each of these elements is addressed in more detail below. It is important to note from the outset, however, that this proposed framework is intended only as a guide and should not be applied rigidly. The courts should take a flexible approach to applying this model to the facts of a particular case and modify the test as appropriate.

#### A. *Alleging the Fact of Employment Discrimination*

The first element of the proposed framework is perhaps the most straightforward and easiest to apply. In any Title VII complaint alleging discrimination on the basis of race, color, sex, national origin, or religion, the plaintiff should assert that (1) discrimination remains pervasive in our society; and (2) discrimination on the basis of the protected class at issue in the case further remains a problem in the workplace.

For example, an employee who believes that she has been treated unfairly because she is black should specify that such wrongful conduct on the basis of race remains an ongoing problem in the employment setting. Every day in workplaces across the country, workers are discriminated against because they are black. This factual statement should be clearly articulated in the complaint and asserted in a way that most precisely identifies the protected category at issue in the case.

#### B. *Specifying the Adverse Action at Issue*

The second element of the proposed framework is also straightforward. The complaint should further allege the specific adverse action at issue. For example, was the plaintiff fired, demoted, discharged, or otherwise disciplined as a result of her protected characteristic? Under the basic framework created by the Supreme Court for Title VII claims, plaintiffs must establish that something sufficiently adverse happened to them to obtain protection under the statute.<sup>259</sup> While the lower courts largely disagree as to how adverse the conduct must be for coverage,<sup>260</sup> the plaintiff should clearly allege in the complaint that some adverse action has occurred. It may also be that there are multiple adverse actions, which occurred in the same case or on the basis of the same set of facts.

Given the large number of studies in this area, it is often possible to support an allegation of discrimination on the basis of a particular adverse action with this scientific research. Thus, for example, as discussed earlier,

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<sup>259</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (requiring a complainant in a Title VII trial to demonstrate “that, despite his qualifications, he was rejected”).

<sup>260</sup> See generally Peter Siegelman, *The Compromised Worker and the Limits of Employment Discrimination Law* 34 (Aug. 23, 2014) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2485927](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2485927) (discussing adverse treatment of employees).

there are studies showing the often-blatant racial discrimination, which occurs on the basis of hiring in our society.<sup>261</sup> A plaintiff may, therefore, properly allege not only that race discrimination is a fact in the workplace, but that hiring discrimination on the basis of race is a fact as well.

### C. *Attachments to the Complaint*

As specified in Part IV,<sup>262</sup> many federal courts routinely consider attachments that are made to a civil complaint. More precisely, the courts often take notice of attachments in workplace discrimination cases. To comply with this element of the proposed framework, then, plaintiffs should identify the social science evidence, EEOC data, and litigation statistics that most closely align with the allegations at issue, and that most clearly support the fact of workplace discrimination.

This is likely the most difficult element of the proposed framework to satisfy. Recent governmental charge data is inexpensive to gather and easy to identify.<sup>263</sup> Litigation statistics and social science data, however, may be more difficult to uncover. This is particularly true as plaintiffs should attempt to attach the studies and data that are most closely aligned to the protected class, geographical area, and adverse action in question. While this information undoubtedly exists, it can be more difficult to identify.

This Article attempts to uncover some of the more well-known and startling studies of discrimination on the basis of each protected category. It further brings together some of the more recent charge statistics and litigation data available. While this information is convincing on the fact of discrimination in our society generally, plaintiffs should make every effort to uncover data and statistics that are more precise to the case at hand. In this way, public interest groups, plaintiff-side firms, and civil rights groups should work together to build a database with this information to make it more easily accessible. Such groups commonly work together on many issues and developing a means of identifying this critical information could build on these existing relationships. The first three elements of the proposed framework are thus relatively straightforward. In asserting a Title VII claim, a plaintiff should allege in the complaint the fact that discrimination persists with respect to the precise adverse action and protected category at issue. To support this fact, the plaintiff should attach the most recent studies, statistical evidence, and charge data available.

Before turning to the last element of this framework—the defendant’s possible defense—it can be instructive to illustrate this test through a more concrete example. One of the more common areas of discrimination that currently exists is religious bias. Let us assume, for example, that a Muslim

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261 See *supra* Part III (addressing social science evidence on racial discrimination).

262 See *supra* Part IV (discussing how information on discrimination can be attached to complaint).

263 See generally U.S. EQUAL EMP. OPPORTUNITY COMM’N, [www.eeoc.gov](http://www.eeoc.gov) (last visited Aug. 18, 2017) (providing charge information).

individual in the New England, Massachusetts area applies for a job at a Fortune 500 company for which he is well qualified. Let us assume further that the applicant is rejected for the position and believes that religious discrimination is the reason. In the individual's civil complaint, the plaintiff should allege any facts that support the claim, as well as any facts that allow the court to flesh out the *prima facie* case of discrimination. With respect to the framework discussed in this Article, the plaintiff should further allege that:

Discrimination on the basis of religion is a fact in both this country generally and in the New England, Massachusetts area more specifically. Discrimination on the basis of hiring and religion is an unfortunate, and regular occurrence, as supported by the existing social science research, governmental charge data, and litigation in this area. [See attachment to the complaint.]

In the attachment to the complaint, the plaintiff would include the numerous studies already discussed in this Article on religious discrimination.<sup>264</sup> More precisely, the plaintiff could attach the study identified in this Article that addresses discrimination on the basis of hiring and religious affiliation in the New England area.<sup>265</sup> The plaintiff could further attach the charge data with respect to religion claims, showing the dramatic increase in EEOC charges, and noting that the Commission received close to 10,000 claims last year alone.<sup>266</sup> Finally, the plaintiff could include any recent cases that are directly on point, such as those million-dollar discrimination awards discussed in Section III.B.<sup>267</sup>

Again, the framework proposed here is intended to be relatively easy to follow as well as straightforward to apply. Litigants can comply with these requirements through the addition of a couple of short sentences in the complaint. The more difficult inquiry for plaintiffs will be to determine what should properly be attached to the allegations. Though there will always be numerous litigation data, EEOC information, and scientific research to support just about any discrimination claim, the goal for the litigant should be to tailor the attachments as closely as possible to the particular case at hand. This would include information derived from similar adverse actions and geographical areas, as well as any other similarities that can be achieved to help support the fact of workplace discrimination.

When properly alleged as a fact, workplace discrimination must be taken as true under the Federal Rules of Civil Procedure. Factual allegations in the complaint should thus be considered as truthful assertions and treated appropriately. When properly alleging discrimination as a fact—and by supporting that fact through attachments to the complaint—a court should be bound to treat discrimination as wrongful conduct that regularly occurs in our society.

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264 See *supra* Part III.

265 See Wright et al., *supra* note 216.

266 See *supra* Section III.B.

267 See *supra* Section III.B.

#### D. Defendant's Opportunity to Respond

The framework proposed here would not be complete without providing an opportunity for defendants to respond to the allegations. This will typically occur in either an answer or a motion to dismiss brought by the defendant. Almost all claims of discrimination will be plausible on their face, but there will also be numerous instances where the allegations should not be allowed to proceed. For example, the claim may not assert a basic Title VII case, there may be obvious reasons on the face of the complaint as to why the allegation should not be permitted, or there may simply be frivolous allegations involved by a plaintiff submitting repeated unsupported claims.

Similarly, the plaintiff may not have properly satisfied the administrative requirements or the court may lack proper jurisdiction to hear the dispute. Defendants should, therefore, have the opportunity to make clear to the court why the plaintiff's claims are not plausible on their face, and why this is *the more unusual instance* where discovery should not be permitted. Defendants successfully demonstrated pre-*Twombly* why many claims should be dismissed, and defendants should similarly be afforded this opportunity now as well.

### VI. IMPLICATIONS OF PROPOSED APPROACH

The framework proposed here has a number of implications associated with it. As already noted, the framework is straightforward and requires only that plaintiffs allege the fact of discrimination, the adverse action at issue, and include any relevant attachments to the complaint. The defendant should then be given an opportunity to show why this is the unusual case where the fact of workplace discrimination should be disregarded.

One of the primary benefits of this approach would be to allow plaintiffs to bolster their claims of workplace discrimination. Given the Supreme Court's stated prohibition in *Iqbal* against conclusory statements in the complaint,<sup>268</sup> asserting and supporting the fact of workplace discrimination, as well as the adverse action at issue, would help to push a plaintiff's claims from conceivable to plausible.<sup>269</sup> Most Title VII claimants, then, through proper research and support in the complaint, would be able to properly allege more than "naked assertions" or simply the "bare elements" of a claim.<sup>270</sup> Very few, if any, allegations of employment discrimination would be considered as "extravagantly fanciful."<sup>271</sup>

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268 *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

269 *See generally id.* at 684; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

270 *Iqbal*, 556 U.S. at 678 ("Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" (alteration in original) (quoting *Twombly*, 550 U.S. at 557)); *id.* at 687 (Souter, J., dissenting) ("And Rule 8 does not empower respondent to plead the bare elements of his cause of action . . . ." (citing *FED. R. CIV. P.* 8)).

271 *See id.* at 681.

In this way, then, the vast majority of workplace claims would properly survive a dismissal motion. As noted earlier, this would simply mark a return to the pre-*Twombly* treatment of cases in this area. As shown by the scientific research cited throughout this Article, the governmental statistics, and the numerous high-judgment verdicts and settlements in discrimination cases, there can be little doubt that discrimination is more than a vestige of the past. Discrimination in the workplace continues to occur and is a fact. Given this reality, a plaintiff who alleges that she has been individually discriminated against in the workplace should be given the benefit of a “reasonable inference” that she has suffered improper treatment.<sup>272</sup>

The vast majority of discrimination claims, then, should satisfy the plausibility standard articulated by the Supreme Court. Given how often and widespread workplace discrimination currently is, any individual claim should be considered plausible in the absence of the defendant’s proper demonstration to the contrary. Any particular workplace claim, through proper support, should be considered as more than simply conceivable.

This Article does not argue that discrimination *actually occurs* in every case. Indeed, even the EEOC only finds cause to believe that discrimination occurs in a small percentage of the charges it receives.<sup>273</sup> However, the Supreme Court’s plausibility standard does not require uncontroverted proof that discrimination actually occurred—such a requirement would fly in the face of the Federal Rules of Civil Procedure, which provide only for notice pleading. The plausibility requirement is exactly that—a requirement that a claim has plausibly occurred. Given the thousands of instances of workplace discrimination that occur each year, and the supporting data and information, any individual claim of discrimination should be treated as plausible on its face unless the employer demonstrates otherwise.

For the most part, then, *Twombly* and *Iqbal* are largely irrelevant when applied to Title VII cases. Because discrimination is so prevalent in our society, any particular instance and allegation of discrimination should be seen as plausible.<sup>274</sup> In practical terms, this means that the standard articulated in *Twombly* (and refined by *Iqbal*) is largely irrelevant for Title VII cases. Given the context of a national workplace that continues to foster discriminatory attitudes and conduct, any individual’s allegations of discrimination would be inherently reasonable. *Twombly* and *Iqbal*, then, really only impact employment discrimination claims at the margins.

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272 *Id.* at 678 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” (citing *Twombly*, 550 U.S. at 556)).

273 *See supra* note 162.

274 *See, e.g., Sullivan, supra* note 17, at 1674 (“As applied to the plausible pleading context, the question is not whether, at some stage in the process, a court may look to its own sources, including the judge’s own life experiences to find legislative facts; rather, it is whether at the pleading stage a plaintiff may require the court to accept as true the plaintiff’s allegations in this regard. . . . Pleading along the[se] lines . . . makes any discrimination claim more plausible, perhaps plausible enough to move to the discovery stage.”).

This is not to say that the Supreme Court decisions are inapplicable to workplace claims. These decisions are binding in all civil cases, as *Iqbal* makes clear.<sup>275</sup> Rather, given that these decisions require plaintiffs to plausibly show that discrimination has occurred, the vast majority of plaintiffs will have already crossed this threshold by simply alleging discriminatory conduct in the workplace. And again, as discussed earlier, this means that cases arising in the employment context should be viewed through a pre-*Twombly* lens.

Perhaps the best demonstration of the pre-*Twombly* standard was articulated by Judge Frank Easterbrook in *Bennett v. Schmidt*,<sup>276</sup> where the judge famously stated that “I was turned down for a job because of my race” was a sufficient factual statement to survive dismissal in an employment discrimination case.<sup>277</sup> This “Easterbrook standard” was the approach largely followed by the lower courts prior to the plausibility standard, and in light of the scientific research on the existence of discrimination in the workplace; there is little reason to deviate from the Easterbrook standard now. A complaint that alleges the basic facts of discrimination (such as that under the Easterbrook standard), combined with relevant social science studies on the topic, EEOC data, and litigation statistics, should be sufficient to allow the case to go to discovery and survive dismissal.

It should be emphasized that the Easterbrook standard is not one that supports a case necessarily going to trial. Indeed, cases are routinely thrown out after discovery has taken place and following a motion for summary judgment. Many cases are dropped before this point in the proceedings, and many other cases settle. Only a very small fraction of employment discrimination claims actually find their way to a jury.<sup>278</sup> Given the overwhelming weight of the evidence on the existence of discrimination in the workplace generally, as well as the inherent difficulty plaintiffs face when trying to uncover evidence of wrongful intent, most claims should be permitted to proceed past the nascent stages of the litigation and into discovery. It is simply unfair to restrict plaintiffs from access to the basic information in the case, particularly where most claims are plausible on their face.

An additional benefit of the approach advocated for here is that it will help educate the judiciary on this topic. By attaching the relevant social science data, EEOC information, and litigation statistics to the complaint, judges will have the opportunity to take notice of the discrimination which is still occurring in specific geographic areas across the country, on every protected basis. Members of the judiciary are not typically experts on Title VII, and often likely do not follow the scientific research involving ongoing discrimination in the workplace. The framework proposed here, which suggests that plaintiffs attach such information to the complaint, will allow many in

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275 See *Iqbal*, 556 U.S. at 684 (citing FED. R. CIV. P. 1).

276 153 F.3d 516 (7th Cir. 1998).

277 *Id.* at 518; see also *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1115 (D.C. Cir. 2000) (quoting and applying Judge Easterbrook’s standard).

278 See generally Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735 (2008).

the judiciary to see for the first time how discriminatory attitudes in the workplace continue to persist. And, as these pleadings and documents are publicly filed, it will also allow the public at large to be educated on these important issues.

A final benefit of this approach is that it will return the caselaw to the pre-*Twombly* standard, thus allowing plaintiffs the opportunity to access critical information on the question of intent. As discussed earlier, the difficulty of establishing discriminatory intent when much of the supporting documentation remains in the employer's control can often be an insurmountable hurdle.<sup>279</sup> As most cases will proceed to discovery under this approach, then, it will help allow plaintiffs access to those documents and statements that will reveal the employer's true motivations for taking the adverse action. The model proposed here thus allows the courts to get at the truth of what actually occurred.

Perhaps the biggest drawback of the proposed framework advocated for here is the possibility that the "floodgates of litigation" will be opened and numerous claims with no basis will be permitted to proceed in federal court. While a fair concern, this potential drawback is specifically addressed by the model proposed in this Article. As explained earlier, there will be a number of Title VII cases that are not plausible for one reason or another. The proposed framework does provide a mechanism for addressing such claims. Cases that on their face make no sense, fail to plead the basic cause of action, or demonstrate repeated frivolous litigation are but a few examples of instances where claims should not be permitted to proceed.<sup>280</sup> Any reasonable framework, then, should take into account the possibility that discovery may not be appropriate in a particular instance. A defendant must have the opportunity in a motion to dismiss to explain why this is the unusual case where discrimination is not—at a minimum—plausible on its face in a Title VII claim. Under the model proposed here, such claims with no sufficient factual support should be thrown out. These types of claims would not have advanced into discovery pre-*Twombly*, and they should not be allowed to proceed now either.

Though discussed in prior Parts, it is also worth noting here that another possible drawback of the proposed approach is simply its practicality. Courts have taken varying approaches to allowing attachments to a complaint, and many courts might be reluctant to consider social science research when

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279 See *supra* Part II (discussing intent in Title VII cases).

280 See Sullivan, *supra* note 17, at 1674–75 ("There are, of course, potential objections to this view. Presumably, it would allow any plaintiff to claim any kind of legislative fact to avoid dismissal for failure to state a claim. This, however, is true in the plausible pleading regime. . . . Similarly, a plaintiff might allege a legislative fact that the court might have to accept as true, but which would result in Rule 11 sanctions if the fact were not reasonably based. In the discrimination context, however, there could be no doubt about the reasonableness, indeed the truth, of the allegation that social science research finds discriminatory attitudes and, indeed, discriminatory actions very common." (footnotes omitted)).

determining whether a workplace claim is plausible.<sup>281</sup> In my view of the Federal Rules, this type of evidence should be permitted as it goes to the heart of the question of plausibility. It thus may take time for all courts to fully accept and adopt this approach, but for education purposes alone these types of attachments are both relevant and central to workplace claims.<sup>282</sup>

At the end of the day, the approach suggested here stresses the irrelevancy of the *Twombly* and *Iqbal* plausibility standard for Title VII claims. A return to the pre-*Twombly* standard simply makes sense given the difficulty of accessing the relevant information in these cases and the overwhelming evidence that discrimination continues to persist. Ultimately, the Supreme Court will have to address the appropriate standard in employment discrimination cases. In the meantime, the pre-*Twombly* Easterbrook-type approach makes the most sense, and the framework proposed here will allow the courts to properly evaluate Title VII claims under this standard.

It is also important to place the framework proposed here in the context of the broader academic scholarship. Many scholars have already discussed the enormous challenges that face workplace litigants in the wake of the plausibility standard. For example, Angela Herring has properly highlighted the lack of access most workplace plaintiffs have to critical information early in the case necessary to establish discriminatory intent.<sup>283</sup> And Professor Benjamin Spencer has further argued that “to the extent *Twombly* permits courts to dismiss claims for failing to be supported by factual allegations that the plaintiff is not in a position to know, that seems unfair.”<sup>284</sup>

Some scholars have already addressed the importance of social science data in the discrimination context. For example, Professor Charles Sullivan discussed the possible relevance of this data with respect to the plausibility pleading requirement in workplace discrimination cases.<sup>285</sup> Sullivan identified different possible approaches workplace plaintiffs can use to comply with the plausibility requirement.<sup>286</sup> As part of this analysis, Sullivan specifically raised the idea of referencing social science research and attaching expert reports.<sup>287</sup> He argued that a plaintiff could “simply plead[ ] this social sci-

281 See *supra* Part IV (discussing differing approaches of courts with respect to attaching documents to a complaint).

282 See *supra* Part IV (addressing standard for attaching documents to complaint).

283 Angela K. Herring, Note, *Untangling the Twombly-McDonnell Knot: The Substantive Impact of Procedural Rules in Title VII Cases*, 86 N.Y.U. L. REV. 1083, 1084 (2011).

284 A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 How. L.J. 99, 160 (2008). And, Professor Suja Thomas noted that “[d]iscovery may be very important to plaintiffs who may not know the exact parameters of the discrimination that occurred; for example, wages are not publicized in most workplaces.” Thomas, *supra* note 73, at 221.

285 Sullivan, *supra* note 17, at 1662–63. Professor Stephanie Bornstein has also published very persuasive work on the importance of social science research in the context of the workplace. See generally Bornstein, *supra* note 20.

286 Sullivan, *supra* note 17, at 1640.

287 *Id.* at 1662–64.

ence as a fact, thereby requiring the court to take that fact as true.”<sup>288</sup> Sullivan further proposed that a plaintiff may plead “legislative facts” through expert reports that could satisfy the plausibility standard.<sup>289</sup> In his article, Sullivan maintained that whether a workplace claim satisfies the plausibility standard can turn on a judge’s general views on the existence of discrimination in employment.<sup>290</sup> He did note concerns with this approach, however, as the true issue for resolution “is not whether it is plausible to believe there is discrimination in American society but rather whether it is plausible to believe this defendant discriminated against this plaintiff.”<sup>291</sup>

This Article builds off of this earlier work of Sullivan, demonstrating the need to plead this type of social science research to establish discrimination. The Article takes the next step of showing how the courts have rejected otherwise viable employment discrimination claims on the basis of the plausibility standard. This Article also gathers and synthesizes the important research, EEOC data, and litigation statistics in this area. And it proposes a new framework that will allow both litigants and the courts to evaluate whether specific claims of discrimination should be allowed to proceed. Given the widespread nature of discrimination in almost every geographic area and on the basis of every protected class, pleading this type of information should be sufficient to at least give rise to a plausible claim.

Similarly, Professor Michael Zimmer addressed plausibility and background assumptions with respect to discrimination claims.<sup>292</sup> Zimmer discussed how social science (and statistical evidence) can be used to change the existing assumptions of the judiciary.<sup>293</sup> Zimmer reasoned that, “the existence of implicit bias is one important way to understand the persistence of discrimination” and “[t]hat demonstration should be useful in pleading cases to satisfy the *Iqbal* plausibility standard in response to motions to dismiss antidiscrimination complaints.”<sup>294</sup>

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288 *Id.* at 1663.

Legislative fact-finding is reached by a kind of judicial notice, but not the very constrained variety applicable to notice of adjudicative facts. The Advisory Committee for the Federal Rules of Evidence explicitly acknowledged a wide range of judicial power in this regard: the court should be able to “find” legislative facts in the same way it finds domestic law, which basically includes all written or published sources, whether or not referenced by the parties. Indeed, because judges can look to their own life experiences, they are not limited to written material. . . . [and] parties may attempt to influence such findings by evidence and citations.

*Id.* at 1673 (footnotes omitted).

289 *See id.* at 1673–75.

290 *Id.* at 1674.

291 *Id.* at 1675 (emphasis omitted).

292 Michael J. Zimmer, *Title VII’s Last Hurrah: Can Discrimination Be Plausibly Pled?*, 2014 U. CHI. LEGAL F. 19, 80–91.

293 *Id.* at 80, 89.

294 *Id.* at 88. “The research showing the persistence of discrimination and how implicit bias is a cause of that persistence would be used to inform the ‘judicial experience and

Similar to Sullivan and Zimmer, and as discussed in greater detail above, this Article argues social science research (and other evidence of discrimination) can provide a critical educational function for the public and the judiciary.<sup>295</sup> Most federal judges have not specialized in this very unique and individualized area of the law and they may simply be unaware of the overwhelming amount of research that exists. By including this information in the complaint, it can help to educate the judiciary and even change perceptions as to the ongoing nature of much workplace discrimination. By making the judiciary aware of this research, then, it can change perceptions as well as a court's view on the likelihood that a particular discrimination claim will succeed. When a court becomes aware of the bias that continues to persist in today's workplace, any individual claim of employment discrimination inherently seems much more plausible.<sup>296</sup>

This Article thus builds off of the foundation created by much of the superb data and scholarship already existing in this field, suggesting a new way of analyzing "plausibility" for employment discrimination claims. There can be little doubt—after reviewing the relevant data and research—that discrimination is a fact. Facts can—and should—be properly pled in a complaint. This Article offers one workable approach to bringing these types of workplace allegations.

#### CONCLUSION

When considering the social science evidence presented in this Article, there can be little doubt that employment discrimination is a fact in our society. This fact is further supported by the EEOC data addressed in this Article, and by specific examples of successful Title VII litigation. As a fact, workplace discrimination can properly be alleged in a Title VII complaint.

Through the framework proposed here, most employment discrimination plaintiffs should survive a motion to dismiss. The lower courts have

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common sense' of the judge in determining whether the facts set forth in the complaint plausibly plead discrimination." *Id.* at 89.

<sup>295</sup> Sullivan specifically discussed the educational role of this research, stating that [l]egislative facts are found by the courts in lawmaking by drawing on, for lack of a better word, common-sense notions of how the world works . . . [essentially] baseline assumptions. The parallel between legislative facts and *Iqbal's* view that evaluating pleadings is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense" is obvious. And a mechanism that allows parties to educate judges would seem to blunt at least some of the criticisms of *Twombly/Iqbal*.

Sullivan, *supra* note 17, at 1672–73 (footnotes omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

<sup>296</sup> Others have also addressed the importance of social science research in the judicial context. See generally Gregory Mitchell et al., *Beyond Context: Social Facts as Case-Specific Evidence*, 60 EMORY L.J. 1109 (2011); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877 (1988); Alicia Luke, Note, *Employment Discrimination Litigation: Social Science Evidence and a Solution for the Problem of Presumptions*, 29 TEMP. J. SCI. TECH. & ENVTL. L. 75 (2010).

applied *Twombly* and *Iqbal* far too rigidly, leading to a heightened pleading standard for workplace claims. Given the evidence showing the prevalent nature of workplace discrimination in our society, most individual allegations of employer misconduct are plausible on their face. The model offered in this Article thus demonstrates how these Supreme Court decisions are largely irrelevant for Title VII cases, and clearly establishes that most employment discrimination plaintiffs should be permitted access to discovery in these matters.

The fact of workplace discrimination can simply no longer be ignored, and such discrimination should now be presumed in most cases.