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PROCESSING PLEADINGS AND THE PSYCHOLOGY OF PREJUDGMENT

Jeffrey J. Rachlinski*

INTRODUCTION

Systems of civil pleading inevitably strike a balance between open access to the courts and the costs of the civil justice system.¹ Adding complexity to the pleading process raises the costs of bringing a lawsuit, but easy access to the courts and the discovery process can be costly to defendants. Much of the ongoing debate about the wisdom of the Supreme Court's decisions in *Ashcroft v. Iqbal*² and *Bell Atlantic Corp. v. Twombly*³ arises because the Court appears to have struck a new balance between plaintiff access and litigation cost.⁴ Notice pleading allows a plaintiff to use the tools of discovery to investigate a claim fully before facing a dispositive motion to dismiss. The new pleading requirements force plaintiffs to articulate a plausible basis for their claims, even before they can use discovery to investigate them. As the Court proclaimed, "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss."⁵ Determining whether a claim is plausible without discovery expresses enormous faith in the "experience and common sense" of the federal judiciary.⁶

In articulating the new system of heightened pleading, the Supreme Court might have saddled federal judges with a job that they cannot reasonably be expected to perform. The new pleading standard that the Court has articulated forces judges to rely on their first impressions of a lawsuit. Judges must imagine the course of the lawsuit without knowing what facts discovery will uncover. Maintaining a fair and just system requires that judges fill in the blank spaces of the lawsuit

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1. See Jeffrey Rachlinski, *Why Heightened Pleading—Why Now?*, 114 PENN. ST. L. REV. 1247, 1248 (2009) ("All systems of civil pleading must . . . strike a balance between open access to the courts and the costs of the civil justice system.").

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

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

4. See Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 64 (2010) ("The reason why the Supreme Court has pushed this change seems fairly obvious: the Court is concerned with high discovery costs.").

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

6. *Id.* at 1940 (citing *Twombly*, 550 U.S. at 556).

consistently across judges and cases. Federal judges, however, like all decision makers, have limited cognitive abilities. Forming reliable first impressions might well exceed the cognitive abilities that judges possess.

In this Article, I review some of the evidence that I, along with some of my colleagues, have produced on judicial decision making to assess whether judges truly possess the kind of judgment that they need to implement the new pleading standard with rigor and reliability. In brief, I believe that they do not. Although federal judges are well-trained, highly experienced professionals, the task of judging cases on their pleadings in a way that does not depend on unreliable factors that are easily subject to manipulation by the litigants is likely unfounded.

“A timid judge . . . is . . . a lawless judge.”⁷ Judges must act with some measure of confidence in their own judgment. But the Court now requires federal judges to act with a degree of confidence that might not be justified. Judges must now assess cases with little more than the pleadings, their own sense of how the world functions, and a guess as to how a case might proceed. The growing body of research on cognitive psychology and trial judges suggests that the new pleading standard that this creates will have some unfortunate consequences. *Iqbal*'s requirement that judges decide at least some cases on the pleadings alone encourages judges to rely too heavily on their intuition, elevates the importance of potentially misleading pleading practices, and encourages overconfidence among judges.

II. THE NEW PLEADING SYSTEM ENCOURAGES EXCESSIVE RELIANCE ON JUDICIAL INTUITION

Understanding how judges will process cases under *Iqbal* and *Twombly* requires understanding how judges make decisions. In a series of papers, Chris Guthrie, Andrew Wistrich, and I have developed a model of how judges make decisions that arises from the research on judgment and choice in ordinary adults.⁸ This research suggests that

7. *Wilkerson v. McCarthy*, 336 U.S. 53, 65 (1949) (“A timid judge, like a biased judge, is intrinsically a lawless judge.”).

8. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) [hereinafter Guthrie, Rachlinski & Wistrich, *Blinking*]; Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) [hereinafter Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*]; Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477 (2009) [hereinafter Wistrich, Guthrie & Rachlinski, *Hidden Judiciary*]; Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disre-*

people tend to rely on two (somewhat) distinct systems of reasoning: an intuitive system and a deliberative system.⁹

The intuitive system of judgment consists of cognitive processes that produce rapid, confident judgments.¹⁰ These processes are “automatic, heuristic-based, and relatively undemanding of computational capacity.”¹¹ The intuitive system is sometimes called “System 1,” because it is thought to be the primary way that the human brain processes information.¹² The intuitive system is essential for situations that require extremely rapid responses, such as reactions to danger. Slow, careful deliberation did not save any of our ancestors from being eaten by predators—intuition did. As such, the intuitive system produces judgments that “occur spontaneously and do not require or consume much attention.”¹³ The intuitive system is also heavily laden with emotional content.¹⁴ Intuition produces confident judgments meant to inspire quick action.

But the human brain also includes cognitive processes that can produce careful, logical, and reasoned judgments.¹⁵ These deliberative processes are the ones that allow us to do mathematics and to reason deductively.¹⁶ The deliberative system is sometimes called “System 2,” because it does its work after System 1.¹⁷ Unlike intuitive processes, deliberation requires cognitive effort.¹⁸ Deliberations are also under great cognitive control and operate at a conscious level.¹⁹

garding, 153 U. PA. L. REV. 1251 (2005) [hereinafter Wistrich, Guthrie & Rachlinski, *Inadmissible Information*].

9. See Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 8, at 6–9 (reviewing dual process models of decision making).

10. See Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 49, 49 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

11. Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?*, in *HEURISTICS AND BIASES*, *supra* note 10, at 421, 436.

12. See Kahneman & Frederick, *supra* note 10, at 51 (“System 1 is more primitive than System 2.”).

13. Shane Frederick, *Cognitive Reflection and Decision Making*, 19 J. ECON. PERSP. 25, 26 (2005).

14. See Seymour Epstein & Rosemary Pacini, *Some Basic Issues Regarding Dual-Process Theories from the Perspective of Cognitive-Experiential Self-Theory*, in *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY* 462, 469 (Shelly Chaiken & Yaacov Trope eds., 1999) (“[T]he experiential system is emotionally driven.”).

15. See Frederick, *supra* note 13, at 26 (describing a deliberative system as consisting of the “execution of learned rules”).

16. See Kahneman & Frederick, *supra* note 10, at 49 (describing a cognitive system that is “deliberate, rule-governed, effortful, and slow”).

17. See Stanovich & West, *supra* note 11, at 439 (describing the function of System 2 as necessary to “override some of the automatic contextualization provided by System 1”).

18. See *id.*

19. See *id.*

These two systems of reasoning bear surprising resemblance to two fundamental schools of thought about judges: realism and formalism. Legal realists argue that judges develop hunches about how they will decide cases and then reasoning follows.²⁰ This argument is closely analogous to the arguments advanced by psychologist Jonathan Haidt, who contends that many kinds of decisions are nothing more than rationalizations for intuitive judgments.²¹ Formalists, however, contend that judges are applying rules in a mechanical fashion.²² Chief Justice John Roberts's description of judges as doing no more than calling balls and strikes also reflects this position.²³ The research on trial judges suggests that both of these positions might be correct, although each is also incomplete.²⁴ Judges have hunches about cases, but then check these hunches against legal rules, deductive logic, and deliberation.²⁵

To understand the nature of the problem with making judgments too early, it is important to recognize that the intuitive system can be surprisingly accurate. Malcolm Gladwell's book, *Blink*, illustrates the point well with a powerful anecdote about the authenticity of an ancient Greek statue purchased by the Getty Museum in Los Angeles.²⁶ Gladwell describes how minerals experts who studied the statue confirmed its antiquity, while one art expert after another doubted its provenance.²⁷ The art experts often could not quite articulate why they thought that the statue was a fraud, but they just *knew*, somehow.²⁸ Even without being able to say why, and even though discern-

20. See Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 285 (1929).

21. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 815 (2001) ("[T]he reasoning process constructs post hoc justifications, yet we experience the illusion of objective reasoning . . .").

22. See Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1145-46 (1999) (describing legal formalism as a "descriptive theory of adjudication according to which (1) the law is rationally determinate, and (2) judging is mechanical. It follows, moreover, from (1), that (3) legal reasoning is *autonomous*, since the class of *legal* reasons suffices to justify a unique outcome; no recourse to non-legal reasons is demanded or required.").

23. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) ("Judges are like umpires. Umpires don't make the rules, they apply them.").

24. See Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 8, at 3 ("[N]either the formalists nor the realists accurately describe the way judges make decisions, but . . . key insights from each form the core of a more accurate model.").

25. See *id.* ("[J]udges generally make intuitive decisions but sometimes override their intuition with deliberation.").

26. MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 3-8 (2005) (recounting the story).

27. See *id.* at 4-7.

28. See *id.* at 5-6.

ing the statue's authenticity was a complex process, experts could tell it was a fake within a few seconds.²⁹ This ability to make rapid, accurate judgments is not limited to experts. A recent line of work in social psychology demonstrates that in some circumstances, people can make surprisingly accurate assessments of people's personalities after observing mere seconds of exposure.³⁰ Snap judgments can be erroneous but they are not always inaccurate.

Despite being surprisingly accurate at times, intuitive judgments have several basic problems as foundations for judicial decisions. First, the intuitive system is faster than the deliberative system. The judgments it produces enter the mind before deliberation. Intuition can influence the deliberative process to the point where deliberation is nothing more than window dressing. Second, intuitive systems can operate at an unconscious level. The influence of intuition might thus remain unnoticed and unexamined. Hence, if intuition is having an undesirable effect on judgment, decision makers might be powerless to combat its influence. Third, the deliberative system requires effort. Relying on intuition poses little cognitive effort, whereas overriding intuitive judgments requires some cognitive work. Because the intuitive system produces confident judgments, decision makers might fail to recognize the need to undertake the cognitive effort needed to override their first impressions.

Nobel Prize-winning psychologist Daniel Kahneman and economist Shane Frederick explain the interplay between intuition and deliberation well: "System 1 quickly proposes intuitive answers to judgment problems as they arise, and System 2 monitors the quality of these proposals, which it may endorse, correct, or override. The judgments that are eventually expressed are called *intuitive* if they retain the hypothesized initial proposal without much modification."³¹ To make good judgments, trial judges must consider carefully whether to suppress the instinct about a case that their intuitive system produces.³²

But perhaps judges already know this. Judges are highly experienced lawyers who have spent their careers reasoning by analogy and parsing legal rules. By disposition or training, they might naturally rely more on deliberation than intuition. To assess this, my colleagues

29. *See id.* at 8.

30. Peter Borkeu et al., *Thin Slices of Behavior as Cues of Personality and Intelligence*, 86 J. PERSONALITY & SOC. PSYCHOL. 599, 599-600 (2004) ("[I]t has become clear that very short observations by strangers may be sufficient to obtain statistically significant . . . agreement for judgments of personality.").

31. Kahneman & Frederick, *supra* note 10, at 51.

32. *See* Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 8, at 43 ("[C]ogent legal judgments call for deliberation.").

and I have administered the “Cognitive Reflection Test” (CRT) to judges to assess whether they naturally rely on intuitive judgment.³³ Economist Shane Frederick developed the CRT as a simple demonstration of the dual-processing model.³⁴ The CRT is a three-item test designed to distinguish intuitive from deliberative processing. More precisely, the CRT measures “cognitive reflection,” which Frederick describes as “the ability or disposition to resist reporting the response that first comes to mind.”³⁵ The CRT appears in its entirety in Figure 1 below:

FIGURE 1: COGNITIVE REFLECTION TEST

- (1) A bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost?
_____cents
- (2) If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets?
_____minutes
- (3) In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake?
_____days

Each of the three items in the CRT is designed to trigger an inaccurate intuitive response. On the first question, the use of the \$1.10 and \$1.00 as cues triggers the simple response of ten cents. If the ball costs ten cents, however, and the bat costs one dollar more, the bat must cost \$1.10. Adding those two figures together, the total cost of the bat and ball would be \$1.20, not \$1.10. The correct answer is five cents—the ball costs five cents, the bat costs \$1.05, and together they cost \$1.10. Similarly, the repetition of the number five three times and then the number one hundred twice triggers the intuitive response of one hundred in the second question. The answer is five, however, as the one hundred machines each produces a widget five minutes later. The use of the word “half” in the third problem triggers the idea that the right answer is half of forty-eight, or twenty-four. But this is not right, because if the patch of lily pads doubles each day and covers the entire lake on the forty-eighth day, it must cover half the lake the day

33. *Id.* at 13–19 (reporting results).

34. *See* Frederick, *supra* note 13, at 26–28 (describing the CRT).

35. *Id.* at 35.

before. The key to answering correctly lies with knowing to suppress the intuitive answer.³⁶

The CRT illustrates the tension between the intuitive and deliberative systems in three ways. First, although the questions are easy, most people get most of them wrong. Across a number of studies, Frederick found that people answer an average of 1.24 of the three items correctly.³⁷ Second, the intuitive answers (10 cents, 100 minutes, and 24 days) are the wrong answers that people most often select.³⁸ Third, people who choose intuitive answers rate the questions as easier than those who get the questions correct. For example, in one study, people who chose the intuitive answer on the bat-and-ball problem predicted that 92% of people would solve the problem correctly, while people who responded correctly predicted that only 62% of people would do so.³⁹

Although Frederick's results demonstrate a widespread misplaced reliance on intuitive judgment, some groups do well on the CRT. MIT students scored an average of 2.18 on the CRT.⁴⁰ Whether by predilection or by training, MIT students have learned to resist the intuitive response for problems of this sort. If judges are also so inclined, then perhaps concern about prejudgment is misplaced. Through years of experience with legal reasoning and detailed rules that sometimes lack intuitive foundations, perhaps judges have become like the MIT students and naturally suppress intuitive judgment.

In a series of studies, however, my colleagues and I have found that judges perform much like others on the CRT. In a study of 252 Florida trial judges, for example, we found that judges scored an average of 1.23 out of a possible 3.00 on the CRT.⁴¹ In another study, administrative law judges scored somewhat higher (1.33),⁴² and a group of appellate judges at an ABA program scored much better (1.79).⁴³ But most judges produce results on the CRT that are within the range of most college students at highly selective universities.⁴⁴ These results

36. *Id.* at 27 (“[T]heir solution is easily understood when explained, yet reaching the correct answer often requires the suppression of an erroneous answer that springs ‘impulsively’ to mind.”).

37. *Id.* at 28–29.

38. *Id.* at 27.

39. *Id.*

40. *Id.* at 29.

41. Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 8, at 14.

42. Guthrie, Rachlinski & Wistrich, *Hidden Judiciary*, *supra* note 8, at 1499.

43. These data have not previously been reported. They were collected from a group of ninety-nine judges in attendance at the annual American Bar Association Appellate Judges Conference in Orlando, Florida on November 19, 2009.

44. Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 8, at 15 tbl. 2.

suggest that the judges performed comparably to other well-educated adults. But judges do not suppress intuition in the way that MIT students do.

Although the CRT is obviously not a test of legal reasoning, we have found that results on the CRT correlate with reasoning in at least some legal contexts. The principal example of this is that judges who perform well on the CRT tend to do well on an evidential inference problem that we have presented to numerous judges. Our problem is based on the classic English case, *Byrne v. Boadle*:⁴⁵

The plaintiff was passing by a warehouse owned by the defendant when he was struck by a barrel, resulting in severe injuries. At the time, the barrel was in the final stages of being hoisted from the ground and loaded into the warehouse. The defendant's employees are not sure how the barrel broke loose and fell, but they agree that either the barrel was negligently secured or the rope was faulty. Government safety inspectors conducted an investigation of the warehouse and determined that in this warehouse: (1) when barrels are negligently secured, there is a 90% chance that they will break loose; (2) when barrels are safely secured, they break loose only 1% of the time; (3) workers negligently secure barrels only 1 in 1,000 times.⁴⁶

We then asked, "Given these facts, how likely is it that the barrel that hit the plaintiff fell due to the negligence of one of the workers?"⁴⁷ The materials then asked the judges to answer by choosing one of four probability ranges: 0–25%, 26–50%, 51–75%, or 76–100%.

When presented with a problem like this one, most judges rely on their intuition—the accident sounds like it was the product of negligence, so intuition would suggest negligence must have caused it. Among a group of federal judges, only about 41% answered it correctly by selecting the low range as the actual probability that the accident was the result of negligence.⁴⁸ Many of the judges treated the 90% figure as the likelihood that the accident was the product of negligence, thereby converting the true meaning of the 90% statistic (the likelihood of injury given negligence) into its inverse (the likelihood of negligence given injury). A deductive approach reveals that the actual probability that the defendant was negligent is only 8.3%.⁴⁹

45. *Byrne v. Boadle*, (1863) 159 Eng. Rep. 299 (Ex. Ch.).

46. Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*, *supra* note 8, at 808.

47. *Id.*

48. *Id.* at 809.

49. Because the defendant is negligent .1% of the time and is 90% likely to cause an injury under these circumstances, the probability that a victim would be injured by the defendant's negligence is .09% (and the probability that the defendant is negligent but causes no injury is .01%). Because the defendant is not negligent 99.9% of the time and is 1% likely to cause an

Much like the CRT results, the most common wrong answer (also selected by roughly 40% of the judges) was the intuitive response that the accident was more than 75% likely to have been the product of negligence.⁵⁰

Iqbal represents a call for judges to rely on their intuition. Deciding a case on the pleadings requires that judges make an assessment of what they think is plausible based on an extremely limited set of information. Doing so begs them to fill in the gaps and estimate what would be learned with discovery using their best guess, based on intuition and experience. Intuition is a powerful tool. But psychologists have time and again demonstrated that it can be easily led astray. Slow, careful, deliberative processes are the key to sound judgment, not snap intuition.

To be sure, a judgment on the pleadings is not the same as a judgment on the CRT. *Iqbal* does not require judges to make snap decisions with little time to deliberate. But judging on the pleadings does require judges to make some guesses about how the case will proceed and to rely on their intuition more so than a judgment later in the case might require. And *Iqbal* encourages judges to rely on their experience and intuitive abilities. The dual-process models of judgment suggest that this is a mistake. Left to their own devices (as in the CRT), most people will rely too heavily on their intuition. To the extent that *Iqbal* further encourages intuition, it is probably an unfortunate change.

III. HOW THE NEW PLEADING SYSTEM CAN FACILITATE FAULTY JUDGMENT

Whatever else the new pleading system accomplishes, it encourages lawyers to attend more carefully to their pleadings. Plaintiffs must worry that their complaints will not survive a motion to dismiss, and defendants can use their answers to set up such a motion. In our research on judges, we have found several examples of contextual manipulations that can change how judges think about cases. While these manipulations can become difficult for lawyers to use in strategic and misleading ways as the case proceeds to trial, they will be more available at the time of the pleadings. This Part provides two

injury under these circumstances, the probability that on any given occasion a victim would be injured even though the defendant took reasonable care is 0.999% (and the probability that the defendant is not negligent and causes no injury is 98.901%). As a result, the conditional probability that the defendant is negligent given that the plaintiff is injured equals .090% divided by 1.089%, or 8.3%.

50. Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*, *supra* note 8, at 809.

such examples of cognitive processes we have found that can be used to tinker with pleadings in ways that might affect how judges fill in the gaps to assess plausibility: anchoring and assessment of inadmissible evidence.

A. Anchoring

When making numeric estimates, people commonly rely on numeric starting points and adjust from them.⁵¹ This is a perfectly reasonable strategy, as numeric starting points often provide useful information as to the correct numeric value. For example, when determining what one might pay for a new car, the sticker price at the dealership can provide a good starting estimate. But because people generally do not adjust sufficiently,⁵² anchors can unduly influence intuitions about value. Higher-priced items might draw the price paid up, whether or not the higher price reflects better quality.⁵³ Even irrelevant or absurd anchors can affect judgment.⁵⁴ In the legal context, mock jury studies have shown that plaintiffs' requests for damage awards can have large effects on how jurors think about a case.⁵⁵ Plaintiffs can thus use the intuitive processes that anchoring produces to change how juries think about cases.

But what about judges? In a series of studies, we have found that anchors influence judges. In one study, we demonstrated that a demand made at a settlement conference anchored judges' assessments of the appropriate amount of damages to award.⁵⁶ We asked judges to assign an appropriate compensatory damage award for a vignette describing a civil case.⁵⁷ The facts indicate that the plaintiff had suffered injuries in a car accident caused by a negligent truck driver:

Imagine that you are presiding over an automobile accident case in which the parties have agreed to a bench trial. The plaintiff is a 31-year-old male schoolteacher and the defendant is a large package-delivery service. The plaintiff was sideswiped by a truck driven erratically by one of the defendant's drivers. As a result of the acci-

51. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128 (1974) (explaining anchoring).

52. See *id.*

53. See DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 30 (rev. ed. 2009) ("Anchoring influences all kinds of purchases.").

54. See *id.* at 28–30 (describing how MIT students' decisions as to how much to bid for a consumer item were influenced by their social security numbers).

55. See Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*, *supra* note 8, at 789–90 (reviewing mock jury studies).

56. Wistrich, Guthrie & Rachlinski, *Inadmissible Information*, *supra* note 8, at 1288–91 (describing the study and results).

57. See *id.* at 1289.

dent, the plaintiff broke three ribs and severely injured his right arm. He spent a week in the hospital, and missed six weeks of work. The injuries to his right arm were so severe as to require amputation. (He was right-handed.)⁵⁸

Half of the judges (in the control group) read that the plaintiff's lawyer had told them at the settlement conference that the plaintiff "was intent upon collecting a significant monetary payment."⁵⁹ The other judges (the anchor group) learned that the plaintiff's lawyer had demanded \$10 million.⁶⁰ The \$10 million anchor influenced the judges.⁶¹ Judges in the control group awarded a mean amount of \$808,000 and a median amount of \$700,000, while judges in the anchor group awarded a much larger mean of \$2,210,000 and median of \$1 million.⁶²

A related study using nearly identical materials showed that anchors can reduce how much a case seems worth to judges as well. As compared to a control condition identical to that above, a condition in which judges were told that the plaintiff was willing to settle for \$175,000 produced much lower average awards.⁶³ In all versions, we reminded the judges that the discussions during settlement do not constitute admissible evidence; judges know that they should ignore this information. And yet the anchors changed how they thought about the case.

In another study, we tested whether an anchor that arose in a motion to dismiss would also affect judges' damage awards.⁶⁴ In this study, the judges assessed a similar fact pattern to that described above.⁶⁵ We asked half of the judges to make a compensatory damage award.⁶⁶ We asked the other half the same question, but only after they had to rule on a motion to dismiss the case for failing to meet the jurisdictional minimum of \$75,000 (the case was in federal court, and the judges were federal judges).⁶⁷ All but two of the judges dismissed the motion, as the damages easily exceeded \$75,000.⁶⁸ Nonetheless, the \$75,000 jurisdictional minimum affected judges.⁶⁹ Those judges

58. *Id.* at 1332.

59. *Id.*

60. *Id.*

61. *Id.* at 1289.

62. *Id.* at 1290, tbl. 3.

63. *See id.* at 1288–90.

64. *See Guthrie, Rachlinski & Wistrich, Inside the Judicial Mind, supra* note 8, at 790–92 (describing the study).

65. *See id.* at 790.

66. *Id.* at 790–91.

67. *See id.* at 791.

68. *Id.*

69. *Id.* at 792.

who had not ruled on the motion awarded the plaintiff an average of \$1,249,000 (and a median of \$1 million), while those judges who ruled on the motion to dismiss awarded the plaintiff an average of \$882,000 (and a median of \$882,000).⁷⁰

In another study, we demonstrated that an anchor can influence judges even when it is a completely implausible source of information.⁷¹ In that study, we presented judges with a case of racial discrimination in the workplace, in which the only available damages arose from the emotional distress of the discrimination.⁷² The plaintiff, a Mexican immigrant, had been fired from her job after complaining that her supervisor repeatedly used a series of racial epithets meant to humiliate her in front of her co-workers and even her daughter.⁷³ The materials indicated that the plaintiff quickly obtained another job and hence her damages were limited to an emotional distress claim.⁷⁴ In the control condition, which exposed judges to no numeric estimate of any kind for the award, judges provided a median award of \$6,250.⁷⁵ In another version, however, we added a single sentence indicating that the plaintiff testified that she had seen a “court TV Show” in which a plaintiff received a \$415,300 award in a case similar to hers, and the median award rose to \$50,000.⁷⁶

These studies suggest that numeric anchors have a powerful influence on judges’ judgment. The last study in particular shows how anchors can completely change judges’ perspectives on a case. For many judges in that study, the anchor converted a case that seemed to be worth little or nothing into a serious, five-figure claim. This effect occurs even though the anchor bears no relation to the magnitude of the claim even when the judges know that they are supposed to ignore the anchor. These studies show that anchors can both increase and decrease the perceived value of a case.

As the case proceeds, the effect of anchors likely diminishes for two reasons. First, factual inquiries will uncover a multitude of different numeric values that are relevant to the case. Judges will have several estimates of the case’s value, diminishing the potential for any single anchor to influence their judgment. Second, it becomes difficult for either party to present implausible anchors without risking being pe-

70. *Id.* at 791–92.

71. See Guthrie, Rachlinski & Wistrich, *Hidden Judiciary*, *supra* note 8, at 1501–06 (describing the study).

72. See *id.* at 1502–03.

73. *Id.* at 1502.

74. See *id.* at 1502–03.

75. See *id.* at 1504, tbl. 2a.

76. *Id.* at 1503–04.

nalized for doing so. Even though extreme anchors affect judges, a lawyer who presents an implausible anchor risks harming his or her credibility with the court and maybe even risks a Rule 11 sanction. But at the pleadings stage, the prayer for relief presents a nearly boundless opportunity for a plaintiff to try to influence the judge with an anchor. As the case proceeds, the amount that the plaintiff requests in a complaint will have a diminishing influence. But because the new pleading system allows for judgment on the pleadings, more gamesmanship might occur at the pleadings stage. Anchoring represents one mechanism litigants can use to try to influence how judges will react to a motion to dismiss at the pleadings stage.

B. Judges' Reactions to Inadmissible Evidence

The new pleading system requires that lawyers plead claims that seem plausible, but one way of making claims seem plausible is to refer to inadmissible testimony. In a series of studies, we have found that judges are vulnerable to the influence of evidence that they consider inadmissible.⁷⁷ That is, even when judges rule testimony to be inadmissible, they nevertheless might be influenced by it. This is not surprising, given the cognitive difficulties with such tasks. Even learning something that turns out later not to be true creates beliefs and inferences that persist.⁷⁸ But the influence of inadmissible information affords litigants an opportunity to craft pleadings in a way that influences how judges think about their case.

One of our studies illustrates the point well. We tested whether judges can disregard a prior criminal conviction that is presumptively inadmissible under the rules of evidence.⁷⁹ Rule 609 of the Federal Rules and some state rules impose various limits on the admissibility of prior criminal convictions.⁸⁰ When more than ten years have elapsed since the completion of a sentence resulting from a conviction, the evidence of the conviction is inadmissible unless “the probative value of the conviction [is] supported by specific facts and circumstances [and] substantially outweighs its prejudicial effect.”⁸¹ This “time limit” rule is an intrinsic exclusionary rule that limits the admissibility of the prior criminal conviction on the grounds that it might prejudice the fact finder.

77. See Wistrich, Guthrie & Rachlinski, *Inadmissible Information*, *supra* note 8, at 1251.

78. See *id.* at 1267–70 (reviewing the literature on belief perseverance).

79. See *id.* at 1305–07 (describing the study).

80. FED. R. EVID. 609. We studied this in the federal system and in Arizona, which has the identical rule. ARIZ. R. EVID. 609(b).

81. FED. R. EVID. 609.

To assess whether judges might be influenced by evidence of a prior criminal conviction, we created and administered a scenario entitled "Assessment of Pain and Suffering Damages."⁸² In this scenario, the participating judges are told that they are presiding in a bench trial in which the only issue is the appropriate damage award for pain and suffering. The case is a products liability suit filed by an individual plaintiff against a lawnmower manufacturer (for a group of judges in Arizona) or a snowblower manufacturer (for a group of judges in Minnesota).⁸³ The materials describe the plaintiff as a single, thirty-five-year-old automobile mechanic who was badly injured while operating the piece of machinery.⁸⁴ The defendant admits that the injury was caused by a manufacturing defect and disputes only the appropriate amount of pain-and-suffering damages.⁸⁵ The materials describe the injury as involving a serious injury to the plaintiff's arm.⁸⁶ The materials state that the injured arm does not need to be amputated but is likely to remain useless.⁸⁷ The materials describe the pain in some detail and ask the judges for an appropriate damage award.⁸⁸ Half of the judges, however, must first rule on the admissibility of a past conviction.⁸⁹ The plaintiff "had been convicted of swindling schemes in which he obtained the life savings of elderly retirees by falsely promising them exorbitant rates of return, and then using their money to pay his living expenses."⁹⁰ The materials note that the plaintiff's most recent conviction had been fourteen years ago and that he had spent two years in prison.⁹¹

The judges who ruled that the prior criminal convictions were not admissible awarded an average of 12% less in pain and suffering damages than did those judges who were not exposed to the plaintiff's criminal history.⁹² Specifically, judges who had not learned of the criminal conviction awarded an average of \$778,000, whereas judges who ruled that the criminal history was not admissible awarded an average of \$685,000.⁹³

82. See Wistrich, Guthrie & Rachlinski, *Inadmissible Information*, *supra* note 8, at 1305-06 (describing the vignette), 1338-39 (presenting the full scenario).

83. *Id.* at 1305.

84. *Id.*

85. *Id.*

86. *See id.*

87. *Id.*

88. *See id.* at 1305-06.

89. *See id.* at 1306.

90. *Id.*

91. *Id.*

92. *Id.*

93. *See id.* at 1307, tbl. 4.

In other studies, we found that judges were vulnerable to the influence of inadmissible evidence in a wide array of settings. Specifically, judges were unable to ignore the following: inadmissible anchors revealed during settlement discussions (as noted above in the discussion of anchoring),⁹⁴ information revealed during a privileged conversation between an attorney and a client that badly undermined a plaintiff's case,⁹⁵ the past sexual history of a victim in a date-rape case,⁹⁶ and evidence rendered inadmissible due to a plea agreement.⁹⁷

As with anchoring, inadmissible evidence begins to have less influence as the case proceeds. Lawyers must rely only on evidence that can be admissible at trial to support or oppose summary judgment. At trial itself, a jury might never be exposed to the inadmissible testimony. But rules of evidence do not apply to the pleadings stage. Both a plaintiff and a defendant are free to put in facts that will never influence a decision maker at trial. Our studies suggest that this kind of evidence is apt to influence judges' assessments of a case.

C. *Judicial Overconfidence*

The procedure *Iqbal* mandates assumes a degree of humility in judges that likely exists in no professional decision maker. Imagine a judge reads a complaint and quickly develops an intuition that the storyline the plaintiff articulates is unlikely to be true. Before dismissing the case, the judge must be sure that the storyline is not just unlikely, but implausible. In effect, the judge must weigh the degree of confidence she has in her own beliefs about how the case will proceed. The idea that pleadings are only meant to provide notice precludes making this assessment, but *Iqbal* demands it. Judges—like most adults—are not well calibrated and humble about their predictions. Rather, they are highly confident in their abilities.

Psychologists have found that people tend to make judgments about themselves, their abilities, and their beliefs that are “egocentric” or “self-serving.” People routinely estimate, for example, that they are well above average on characteristics that are important to them, like their health, the likely duration of their marriages, their driving ability, and so forth.⁹⁸

94. See *id.* at 1288–91.

95. See *id.* at 1296–98.

96. See *id.* at 1300–02.

97. See *id.* at 1309–11.

98. See Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*, *supra* note 8, at 811–13 (reviewing the research on egocentric biases).

We have repeatedly found that judges make similarly egocentric assessments of their own abilities. In one demonstration of this effect, we asked judges to compare themselves to their peers on three dimensions: their ability to assess the credibility of a witness, their ability to avoid bias, and their ability to facilitate settlements.⁹⁹ With regard to each, we asked the judges to place themselves in one of four quartiles: the top 25%, the next 25%, the next-to-last 25%, and the bottom 25%.¹⁰⁰ The judges provided incredibly self-serving interpretations of their skills.¹⁰¹ With regard to assessing the credibility of witnesses, nearly 85% of the judges placed themselves in the top half and not a single judge placed herself in the bottom quartile.¹⁰² Similarly, 87% stated that they were better than the median judge at facilitating settlements.¹⁰³ And as to their capacity for avoiding bias in judging, all but one judge in our group (a whopping 97.2%) indicated they were better than the median judge.¹⁰⁴ A similar study of federal magistrate judges showed that 87% rated themselves as less likely to be overturned on appeal than the median judge.¹⁰⁵ Judges, like most professionals, believe that they perform better at their job than their peers.

Egocentric beliefs about abilities are actually a positive, on the whole. Evidence of egocentric judgments shows that judges care about the work that they do and try hard to perform their jobs well. But it also holds dangers. Overconfidence in judgment can lead judges to believe that they have more ability to predict the course of a lawsuit than is actually the case.

The literature on overconfidence is replete with studies showing that people overstate their ability to predict the future. Unfortunately, *Iqbal* encourages this overconfidence. It feeds into the natural tendency judges and other professionals will have to make overconfident judgments.

IV. CONCLUSION

Notice pleading and open discovery delay judgment. That is one of the features that makes it so costly and likely one of the features that induced the Supreme Court to direct the lower courts to scrutinize

99. Guthrie, Rachlinski & Wistrich, *Hidden Judiciary*, *supra* note 8, at 1518–20.

100. *Id.*

101. *Id.* at 1519.

102. *Id.*

103. *Id.*

104. *Id.*

105. Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*, *supra* note 8, at 813–14. See also Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 983 (1994).

pleadings. But pleadings are much more like the kind of hypothetical questions that we have administered to judges than are summary judgment motions. Our materials are fiction, written to see if judges will use misleading decision-making strategies like relying excessively on intuition. Pleadings are not supposed to be fiction, of course, and penalties exist for listing factual allegations that are simply false. But pleading is an art. Inadmissible testimony and numeric anchors of all kinds are fair game. Notice pleading slows judgment and reduces the influences of tricks and gamesmanship lawyers can play (at least relative to judgment on the pleadings). The move to heightened pleading and plausibility assessments, by contrast, feeds the overconfidence and vulnerabilities that judges have when making intuitive misjudgments.

