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Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination

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BEYOND COMMON SENSE:
A SOCIAL PSYCHOLOGICAL STUDY OF IQBAL'S EFFECT ON CLAIMS OF RACE DISCRIMINATION

Victor D. Quintanilla*

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* J.D., Georgetown University Law Center, 2004. Staff Law Clerk of the United States Court of Appeals for the Seventh Circuit. I dedicate this Article to Mary Murphy. I thank her and the Mind & Identity in Context Lab of the University of Illinois at Chicago, and David Nussbaum, for sharing their insights on the social psychological aspects of this Article. I thank Linda Skitka for her advice on the statistical aspects of this Article. I thank Charles Abernathy, Vicki Jackson, Will Rhee, Zach Clopton, Steven Art, and John Wunderlich for their excellent comments. This Article was presented at the Law & Society Association’s 2011 Annual Meeting. The views expressed in this Article do not reflect those of the United States Court of Appeals for the Seventh Circuit. Errors of thought and expression are solely my own.
"[J]udges are fallible human beings. We need to see that biases and prejudices and conditions of attention affect the judge's reasoning as they do the reasoning of ordinary men . . . The study of human nature in law . . . may not only deepen our knowledge of legal institutions but open an unworked mine of judicial wisdom."

—Jerome Frank, 1930

"[M]an has a propensity to prejudice. This propensity lies in his normal and natural tendency to form generalizations, concepts, categories, whose content represents an oversimplification of his world experience."

—Gordon Allport, 1954

INTRODUCTION

Federal Rule of Civil Procedure 8(a) once operated as a notice pleading rule, requiring plaintiffs to set forth only a “short and plain” statement of their claim. In Bell Atlantic Corp. v. Twombly, and then Ashcroft v. Iqbal, the United States Supreme Court recast Rule 8(a) into a plausibility pleading standard. To survive a motion to dismiss, a complaint must contain sufficient factual matter “to state a claim to relief that is plausible on its face.” Iqbal requires federal courts, when deciding whether a complaint is plausible, to draw on their “judicial experience and common sense.” Courts apply this standard at the commencement of litigation, evaluating the plausibility of claims before discovery—before evidence has been gathered and presented. This highly subjective pleading standard applies to all claims, including claims of discrimination by members of stereotyped groups. In short, under Iqbal, federal courts must grapple at the inception of litigation with deciding whether members of stereotyped groups have pleaded plausible claims of discrimination, relying on their intuitions and common sense, rather than evidence.

The nature of this new pleading standard raises pressing and profound questions about the psychology of judging: Might Iqbal rest on a flawed theory of judgment and decision making? Can judges draw on common sense, rather than evidence, to adjudicate claims of discrimination by members of stereotyped groups without the subtle effect of implicit bias? This Article sheds light on these questions by drawing on social psychological research. From findings in the field of social psychol-

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5. Id. at 1960 (quoting Twombly, 550 U.S. at 570).
6. Id. at 1950.
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ogy, the Article first forms hypotheses and then conducts an empirical legal study that closely examines how federal courts have adjudicated motions to dismiss Black plaintiffs' claims of race discrimination.

Over the past several decades, social psychologists have illuminated natural processes that affect decision making and lead to bias. This science suggests that when judges deliberate without evidence, relying instead on their own "common sense," intuitions, stereotypes, and implicit associations will likely affect their judgment. The phenomenon of aversive racism suggests that implicit bias will influence decision making, particularly when judges decide ambiguous cases. Furthermore, research on lay theories of racism suggests that many judges subscribe to the folk theory that racism is necessarily blatant and that discrimination is largely a problem of the past. Yet prejudice is still prevalent in society and has largely evolved from overt to more subtle forms.

This social psychological research has not been brought to bear in the spirited jurisprudential debate that Iqbal and Twombly have generated. Some commentators maintain that neither Twombly nor Iqbal forge new law under Rule 8(a): both merely make explicit how courts have decided motions to dismiss all along. Others contend that it is too soon to tell whether Iqbal has affected how courts decide motions to dismiss or whether courts will increasingly dismiss civil rights claims. Most scholars who criticize the Iqbal Court assert that Iqbal fashioned a new procedural regime that will curb access to justice and the vindication of civil rights.

Whether Iqbal has led to a heightened pleading regime and what Iqbal means for civil rights litigation, however, become clear only by empirically examining the ways in which courts have interpreted and applied Iqbal. In fact, a first wave of post-Iqbal empirical scholarship has

7. See infra Part II.A.
8. See infra Part II.B.
9. See infra Part II.A.
13. See Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 824 (1935) (“Fundamentally there are only two significant questions in
revealed a broad trend in federal case law: courts are increasingly dismissing civil rights actions. Joining a second wave of scholarship that draws on social science to test Iqbal’s effect in narrow, particular contexts, this Article focuses on the question of how Black plaintiffs who claim race discrimination in the workplace have fared under Iqbal. This Article demonstrates that Iqbal has had an even greater effect on these claims than initial studies suggested.

This Article is part of an undertaking by jurists and legal scholars who promote behavioral realism in the law and naturalized jurisprudence. The undertaking identifies advances in social and cognitive psychology that provide empirically supported models of human nature. It then contrasts those empirically supported models with assumptions of human nature embedded within the law. Often the science and assumptions about human nature collide. As a research paradigm, behavioral realism seeks to understand judicial behavior based on research and

the field of law. One is, ‘How do courts actually decide cases of a given kind? The other is, ‘How ought they to decide cases of a given kind?’ Unless a legal ‘problem’ can be subsumed under one of these forms, it is not a meaningful question and any answer to it must be nonsense.”); cf. ABRAHAM KAPLAN, THE CONDUCT OF INQUIRY: METHODOLOGY FOR BEHAVIORAL SCIENCE 36 (Leonard Broom, ed., Chandler Publications 1964) (“We may call this semantic empiricism. It is the view that to be meaningful at all a proposition must be capable of being brought into relation with experience as a test of its truth. Its meaning, indeed, can be construed only in terms of just such experiences as provide a test.”).


16. See BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 31 (2007) (“Naturalism is a familiar development in recent philosophy: indeed, it would not be wrong to say that it is the distinctive development in philosophy over the last thirty years … [T]raditional philosophical problems are … insoluble by the a priori, armchair methods of the philosopher, and … require, instead, embedding in (or replacement by) suitable empirical theories.”).

17. See, e.g., HUNTINGTON CAIRNS, LAW AND THE SOCIAL SCIENCES (1935) (“The development of the synthesis of law and psychology will be a long and perhaps a tedious process; but it is a process, however much patience it may require, which for the law will yield a fruitful harvest.”); Jerry Kang & Kristin Lane, Seeing Through Colorblindness: Implicit Bias and the Law, 58 UCLA L. REV. 465, 490 (2010); Victor D. Quintanilla, (Mis)Judging Intent: The Fundamental Attribution Error in Federal Securities Law, 7 N.Y.U. J.L. & BUS. 195, 197 (2010); see also Jerome Frank, Law and the Modern Mind, in AMERICAN LEGAL REALISM 205, 311 (William W. Fisher III et al. eds., 1993).
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methods in the fields of social and cognitive psychology in combination with the empirical study of judicial decisions.18

Plausibility pleading is an excellent window through which to examine whether social psychological phenomena are borne out in judicial behavior.19 Iqbal requires courts to draw on their “common sense” when deciding whether claims are sufficiently plausible to withstand dismissal. Implicit in this requirement is the assumption that judges are cold, deductive beings who can draw on common sense without the pull of heuristics, implicit associations, and stereotypes. This Article tests whether this assumption holds in practice.20

Three studies were conducted to examine judicial decision-making motions to dismiss Black plaintiffs’ claims of race discrimination in the workplace.21 A statistical analysis of 208 cases revealed that the folk psychological underpinnings of Iqbal are unsound: implicit bias and lay theories of discrimination appear to affect judicial decision making at the pleading stage. The dismissal rate increased from 20.5% pre-Twombly to 54.6% post-Iqbal for Black plaintiffs’ claims of race discrimination—a 2.66 times increase. For reasons discussed later, most of these claims would have withstood dismissal before Twombly. For Black pro se plaintiffs’ claims, the dismissal rate increased from 32.0% before Twombly to 67.3% under Iqbal, representing a 2.10 times increase. Finally, White and Black judges apply Iqbal differently: White judges dismissed Black plaintiffs’ claims of race discrimination at a higher rate (57.5%) than did Black judges (33.3%).

These substantial discrepancies were not inevitable. In developing the federal common law of pleading, federal courts have leeway to


19. See, e.g., Jeffrey J. Rachlinski, Processing Pleadings and the Psychology of Prejudgment, 60 DEPAUL L. REV. 413, 414 (2011) (“The growing body of research . . . suggests that the new pleading standard . . . will have some unfortunate consequences.”).

20. Cf. Roscoe Pound, Law in Books and Law in Action, 44 AM. U. L. REV. 12, 14-15 (1910) (“[T]here are distinctions between law in the books and law in action . . . today . . . the distinction between legal theory and judicial administration is often a very real and a very deep one.”).

21. See infra Part IV.
exercise their judicial discretion\textsuperscript{22} and could have interpreted \textit{Iqbal} (and can still) to ensure continuity, coherence, and predictability with Rule 8(a) and the Rules Enabling Act.\textsuperscript{23} The Rules Enabling Act requires federal courts to adhere to existing procedural rules that have been subject to notice and comment, approved through the formal rule making process by the Judicial Conference and its committees, and ultimately authorized by the Supreme Court and Congress.\textsuperscript{24} In the past, the Court twice eschewed heightened pleading standards for civil rights claims, rejecting the suggestion that a heightened pleading bar could be imposed by judicial interpretation.\textsuperscript{25} The \textit{Iqbal} Court did not expressly oppose these holdings, and the Court in \textit{Twombly} approved \textit{Swierkiewicz}, which in fact held that a heightened pleading bar shall not apply for claims of discrimination.\textsuperscript{26} Yet federal courts have interpreted \textit{Iqbal} as if the \textit{Iqbal} Court required heightened pleading for claims of discrimination. Many courts have rigorously interpreted \textit{Iqbal}, and the dismissal rate for Black plaintiffs’ claims of employment discrimination has climbed. \textit{That} interpretation and reconstruction of \textit{Iqbal} violates the Rules Enabling Act.\textsuperscript{27} \textit{That} interpretation must be traded for one consistent with Rule 8(a). Under a more sound interpretation, the question is not whether race discrimination happened, but whether race discrimination could have happened in light of the allegations.\textsuperscript{28} Indeed, the Supreme Court’s recent decision in \textit{Skinner v. Switzer} applies this view.\textsuperscript{29} In that case, the Court reaffirmed the vitality of \textit{Swierkiewicz} and held that the critical question was not whether plaintiffs will ultimately prevail on their claims, but whether plaintiffs’ claims are sufficient to cross the Rule 8(a) threshold.\textsuperscript{30}

This Article proceeds in six parts. Part I traces the history of federal pleading standards through time, showing that evolving pleading rules have often correlated with evolving societal attitudes about race and civil rights in American society. Part II introduces the reader to social psychological research on aversive racism, implicit bias, lay theories of racism, and the nature of contemporary prejudice, drawing hypotheses for how

\begin{itemize}
\item \textsuperscript{24} See 28 U.S.C. § 2071(a)–(b); Paul Carrington, Politics and Civil Procedure Rulemaking: Reflections on Experience, 60 Duke L.J. 597, 648 (2010).
\item \textsuperscript{26} See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569 n.14 (2007).
\item \textsuperscript{27} See 28 U.S.C. § 2072(a).
\item \textsuperscript{28} See Starr v. Baca, No. 09–55233, 2011 WL 2988827, at *15 (9th Cir. July 25, 2011); Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010); Boykin v. KeyCorp, 521 F.3d 202, 213 (2d Cir. 2008).
\item \textsuperscript{29} 131 S. Ct. 1289, 1296 (2011).
\item \textsuperscript{30} Id.
\end{itemize}
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Iqbal may affect the behavior of federal courts. Part III offers a brief primer on federal employment discrimination law for those unfamiliar with the jurisprudence. Part IV presents three empirical studies of Iqbal's effect on claims of race discrimination in the workplace. Part V discusses Iqbal's effect on claims of race discrimination, exploring (1) how Iqbal has shifted the McDonnell Douglas-Burdine framework from summary judgment to the pleading stage and (2) how federal courts have reinterpreted elements of the prima facie case. Part VI frames the problem, explores its epistemic and practical consequences, and offers closing remarks and recommendations.

By bringing one problem into view—the increased dismissal rate for Black plaintiffs' claims of race discrimination—this Article hopes to encourage other scholars to investigate how Iqbal has affected claims of discrimination brought by members of stereotyped groups. Further, many of the social psychological and cognitive biases explored in this Article likely occur beyond the civil rights context in other attitudinally charged classes of claims. It is hoped that others will focus on the gap between the unsound assumptions underpinning Iqbal and its actual application across a variety of situations.

I. The Road from Notice Pleading to Plausibility Pleading Under Iqbal

The road from Conley to Iqbal—the expansion and then contraction of pleading practice under the Federal Rules—has correlated with changing societal attitudes toward civil rights in American society. As the federal pleading standard has shifted, so too have common-sense conceptions about race, prejudice, and discrimination over time (for better or for worse), reflecting wide social and economic changes in American society.
which engulf the rest of men, do not turn aside in their course, and pass
the judges by."

A. Expansion—Notice Pleading and Conley

Code pleading, which required litigants to allege precisely the factu-
al bases for their claims, dominated the courts from the nineteenth until
the early twentieth century. Courts dismissed claims for technicalities
and for failing to plead required facts. Judges reviewed pleadings so strict-
ly that if alleged facts later varied in any way from evidence proffered at
trial, they dismissed suits to penalize variance with the pleadings. This
practice resulted in uncertainty, a complex maze of rules, and procedural
traps for unwary litigants. By the late nineteenth century, many consid-
ered the law of pleading too inflexible and rigid.

During the code pleading years, state-imposed inequality rather
than any kind of access to courts was a fact of life for Blacks. In Dred Scott
v. Sanford, the United States Supreme Court ruled that the framers re-
garded Blacks as "a subordinate and inferior class of beings, who . . . had
no rights or privileges but such as those who held the power and the
Government might choose to give them." After the Civil War, many
Blacks lived in a South that stripped them of legal and political rights.
Racism peaked in the period between the end of Reconstruction and
World War I, an era of terror that has been called the "nadir" of the Afri-
can American experience. Blacks were considered the intellectual and

35. See Christopher M. Fairman, The Myth of Notice Pleading, 45 ARIZ. L. REV. 987, 990 (2003); see also CHARLES E. CLARK, CODE PLEADING 22 (3d ed. 1947); Charles E. Clark, Simplified Pleading, in 2 F.R.D. 456, 458–60 (1943) [hereinafter Clark, Simplified Pleading].
38. See Clark, Simplified Pleading, supra note 35, at 456–57.
39. 60 U.S. 393, 417 (1856).
40. See GEORGE M. FREDRICKSON, RACISM: A SHORT HISTORY 81–111 (2002) (discussing the fact that prejudice was not the sole province of the South as, in the North also, many drew on Social Darwinism to justify racism).  
41. Id. at 81 (citing RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO: FROM RUTH-ERFORD B. HAYES TO WOODROW WILSON (1965)).
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moral inferior of Whites, and the education of Blacks was legally forbidden. In the notorious case of Plessy v. Ferguson, the Supreme Court approved the separate—but-equal doctrine and affirmed Jim Crow segregation.

In 1938, in the wake of the New Deal, the Federal Rules of Civil Procedure were enacted. Rejecting the code-based system, the drafters modernized federal practice and rejected technical forms of pleading, requiring courts to construe pleadings liberally. Rule 8 was designed to discourage battles over form in order to provide substantial justice and access to courts. Breaking from the codes of the past, notice pleading allowed claims to be framed in general terms: under Federal Rule of Civil Procedure 8(a)(2), a federal complaint need only provide “a short and plain statement of the claims showing that the pleader is entitled to relief.”

After the New Deal and World War II, many Whites—especially in the North—began to view the Blacks’ plight with sympathy, ushering in the beginnings of improved race relations. At the same time, the National Association for the Advancement of Colored People (NAACP)

42. See James W. Vander Zanden, American Minority Relations 46 (2d ed. 1966) (“During the first two decades of the twentieth century, authorities [using Alfred Binet’s intelligence tests] tended to conclude that Negroes were the intellectual inferiors of [W]hites.”).
44. 163 U.S. 537 (1896).
45. Justice Harlan’s dissent in Plessy was prophetic: “In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case.” 163 U.S. at 559 (Harlan, J. dissenting).
47. Clark, Simplified Pleading, supra note 35, at 458–60; Clark, The New Federal Rules, supra note 46, at 977.
48. Many people began to view segregation as morally wrong. See Fredrickson, supra note 40, at 129 (“Within the United States, there was a growing realization among those concerned with international relations that Jim Crow not only was analogous to Nazi treatment of the Jews and thus morally indefensible but was also contrary to the national interest.”). Moreover, World War II necessitated a breakdown of class, regional, and race lines as all hands were called to deck. See Richard Kluger, Simple Justice 239 (1977) (“Class and regional barriers were being breached everywhere, and in the building and supplying of the most massive and lethal war machine the world had ever seen, the Negro had demonstrated ... that he could amount to a great deal more than the [W]hite man’s burden if America would give him half the chance.”).
adopted a strategy to dismantle segregation through the courts. The NAACP sought to overrule Plessy and the separate-but-equal doctrine. Cases such as Missouri ex rel Gaines v. Canada, Sweatt v. Painter, and McLaurin v. Oklahoma State Regents reflect the NAACP's gains toward that end. In time, however, a growing community began criticizing the liberal ethos of Rule 8. Federal courts began to impose heightened pleading standards in large commercial cases, such as antitrust disputes. Charles Clark, Chief Judge of the Second Circuit Court of Appeals and the principal drafter of the Federal Rules, characterized this retrenchment as a revolt against the Rules. By the early 1950s, this movement gained so much traction that the Ninth Circuit proposed that Rule 8(a) be re-drafted to require plaintiffs to allege "the facts constituting a cause of action." The Advisory Committee ultimately defeated this proposal.

In Brown v. Board of Education, the Warren Court overturned Plessy and held that "in the field of public education the doctrine of 'separate but equal' has no place." In writing that segregation signaled the belief that Blacks were inferior, Justice Warren drew on scientific research showing that segregation subjected Blacks to stigma, with a detrimental psychological effect. Brown reflected a paradigm shift in American society: for the first time, real equality for Blacks was recognized by the United States Supreme Court. After Brown, the NAACP defeated segregation in other areas of public life, including public transportation, public recreation, restaurants, hotels, and the railways.
The Warren Court reaffirmed the liberal ethos of Rule 8 in Conley v. Gibson, a case filed by Black railway workers claiming that their union failed to represent them because of race discrimination. The union filed a motion to dismiss under Rule 12(b)(6), contending that the complaint failed to set forth specific facts to support a claim of discrimination. The Court held that a federal complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Plaintiffs' broad allegations of discrimination withstood dismissal. For years after Conley, federal courts accepted as true all factual allegations contained in the complaint and, in ruling on motions to dismiss, drew all reasonable inferences in favor of plaintiffs.

In the economic expansion of the 1950s and early 1960s, the Warren Court increased access to justice. During this era, Southern courts regularly and blatantly deprived Blacks of procedural protections granted by the Bill of Rights and incorporated against the states through the Fourteenth Amendment. In response, the Supreme Court expanded habeas corpus jurisdiction for criminal defendants who sought federal review of their state court convictions. In Fay v. Noia, the Court held that even where defendants had not complied with a state procedural rule, they would not necessarily be denied access to federal courts in order to press their habeas claims.

By the 1960s, after the Civil Rights movement and post-World War II, many believed that racism was wrong. Congress enacted the Civil

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Boynton v. Virginia, 364 U.S. 454 (1960) (invalidating segregation in bus terminals). Backlash spurred by the progress of Blacks in courts resulted in the mobilization of White Citizens Councils in the South, which fought desegregation and perpetuated the view that Blacks were inferior and interracial mixing was unnatural. See Taylor Branch, Making the Waters 138 (1988); Vander Zanden, American Minority Relations, supra note 42, at 53–54.

61. 355 U.S. 41 (1957). The plaintiffs alleged that they had been "discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of [W]hite employees or to help them with their grievances all because they were Negroes." Id. at 46.

62. Id. at 45–46. The Court later added,

[The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. . . . [A]ll 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.]

Id. at 47 (quoting Fed. R. Civ. P. 8(a)(2)).

63. Motions to dismiss were looked upon with disfavor and thus rarely granted. See David F. Herr, Rogers S. Haydock & Jeffrey W. Stempel, Motion Practice § 9.06[8] (4th ed. 2005).


65. See Sterling Stuckey, Racism, in The Oxford Companion to United States History 644, 645 (Paul S. Boyer ed., 2001); J. Garry Clifford, World War II: Postwar Impact,

As the growth following World War II contracted in the late 1960s and 1970s, many Americans began to feel economic malaise. For many, ambivalence replaced optimism about race relations. Many began to believe that Blacks had come far enough. Given widespread negative attitudes toward further integration and policies such as busing, America witnessed the phenomenon of White flight to suburbs. In reviewing the Nixon Administration’s enforcement of the Fair Housing Act, the U.S. Civil Rights Commission reported, “Present programs often are administered so as to continue rather than reduce racial segregation.”

In the 1960s and 1970s, federal courts witnessed a dramatic rise in court filings, which some characterized as a “litigation boom.” Some scholars and practitioners called for retrenchment of Rule 8 and for heightened pleading bars, and soon federal courts listened. Courts revived fact pleading in numerous quarters, including securities fraud, antitrust, and civil rights litigation.

Eventually, the cases litigating these heightened pleading standards wended their way to the Supreme Court. Twice the Court held that the only proper way to fashion a heightened pleading standard is through the

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68. See generally, Barbara Ehrenreich, *Fear of Falling: The Inner Life of the Middle Class* (1989).

69. See Marcus, *supra* note 46, at 445–47; *Claim or Cause of Action*, *supra* note 56, at 253.

70. See, e.g., Birnbaum v. Trussell, 347 F.2d 86, 90 (2d Cir. 1965); Field et al., *supra* note 36, at 524; Marcus, *supra* note 46, at 445–50. The Second Circuit affirmed dismissal of a Black physician’s race discrimination claim against his employer and union, characterizing notice pleading as merely the general rule and finding that his allegations conclusory and his termination most likely the result of workplace friction. *Id.* at 90. See also Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976) (In reaction to the “increasingly large volume of cases brought under the Civil Rights Act,” a “substantial number” of which were “frivolous or should be litigated in the State courts,” the Third Circuit emphasized the “important public policy” of “weeding out the frivolous and insubstantial cases at an early stage in the litigation” while permitting meritorious claims to go forward).
formal rule-making process envisioned by the Rules Enabling Act. In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, the Court rejected a heightened pleading bar in a civil rights case, finding it “impossible to square” with the “liberal system of notice pleading” set up by the Federal Rules. The Court reaffirmed Conley’s holding 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.” It clarified that enacting a heightened pleading bar would require rewriting Rule 8 or Rule 9 through the formal process for amending the Federal Rules. In *Swierkiewicz v. Sorema*, the Court again held that judicially fashioned heightened pleading standards violate the Rules Enabling Act.

The Rules Enabling Act codifies a formal rule-making process for rules of practice and procedure, including the Federal Rules of Civil Procedure. Under this process, proposed amendments are to be drafted and reviewed by the Judicial Conference and its committees, and the public must be provided notice and an opportunity to comment on proposed changes. After the Judicial Conference agrees to amend the rules, the Supreme Court and Congress must approve any recommendations. The Rules Enabling Act precludes federal courts from altering the federal rules by judicial interpretation.

B. Retrenchment—Plausibility Pleading Under Twombly and Iqbal

In the 1980s and 1990s, the liberal ethos of Rule 8 faded further. Access was first restricted by legislation. In 1995, Congress enacted the Private Securities Litigation Reform Act, altering the structure of private securities class actions. One year later, Congress passed the Antiterrorism

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74. *See* discussion *supra* pp. 10–11.
76. *Id.* at 168 (quoting Conley v. Gibson, 355 U.S. 41, 45 (1957)) (internal quotation marks omitted).
77. Rule 9 applies to specific claims, providing: “a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge and other conditions of a person’s mind may be alleged generally.” *Fed. R. Civ. P.* 9(b).
83. *See* Miller, *supra* note 12, at 11 n.35.
and Effective Death Penalty Act to restrict the availability of habeas corpus relief. 85

Many Americans endorsed the view that prejudice is morally wrong, while simultaneously resisting measures to equalize opportunity for people of color. 86 Several Supreme Court rulings reflect this view. In Missouri v. Jenkins, for example, the Supreme Court held that district courts may not remedy inter-school district segregation by creating magnet programs to attract nonminority students from outside the school district back into inner-city schools. 87 With a bit of finesse, the Court deemed the ordered improvement, aiming to attract nonminority students living in other school districts, to be a forbidden “interdistrict remedy” because there had been no interdistrict violation. 88 En route, the Supreme Court advised federal courts to bear in mind that Brown’s purpose is not “only to remedy the violation to the extent practicable, but also to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.” 89 Jenkins represented a retrenchment of Brown and subsequent desegregation cases: rather than exhorting school districts to eliminate all vestiges of segregation “root and branch,” 90 the Court blocked the efforts of a district court to attract nonminority students back into inner-city schools. 91

Ultimately, calls for litigation reform and, more specifically, to curb complex commercial litigation prompted the Supreme Court to recast Rule 8(a). In Twombly, consumers brought an antitrust action against major telephone monopolies under section 1 of the Sherman Act. 92 The plaintiffs alleged that these companies had conspired to restrain trade by engaging in parallel conduct: by simultaneously refusing to compete among themselves and inhibiting the upstart of potential new rivals. 93 After the district court granted dismissal on the grounds that “conscious parallelism” fails to state a claim under the Sherman Act, the Second Cir-

86. See Mica Pollock, Because of Race: How Americans Debate Harm and Opportunity in Our Schools 175 (2008).
88. Id.
89. Id. at 102.
91. Jenkins, 515 U.S. at 168-69 (Souter, J., dissenting); see Gary Orfield, Susan E.
93. Id. at 550-51.
circuit reversed, concluding that no "plus factor" was required beyond the allegation of parallel conduct.\textsuperscript{94}

The Supreme Court held that the complaint failed to state a claim.\textsuperscript{95} Drawing on substantive antitrust law, the Court concluded that parallelism was insufficient to create an inference of collusion; instead, allegations must suggest that companies agreed to collude.\textsuperscript{96} The Court found that, at the pleading stage, allegations must plausibly suggest an agreement: the "plain statement" of Rule 8(a)(2) requires pleadings to possess enough heft to show that plaintiffs are entitled to relief.\textsuperscript{97} The Court then retired \textit{Conley}, explaining that \textit{Conley}'s "no set of facts" language had been explained away long enough; the phrase "should be best forgotten as an incomplete negative gloss on an accepted pleading standard."\textsuperscript{98} Justice Souter wrote that \textit{Twombly} did not require heightened fact pleading, but simply "enough facts to state a claim to relief that is plausible on its face."\textsuperscript{99}

In dissent, Justice Stevens rebuked the majority’s reinterpretation of Rule 8(a). He offered a eulogy for \textit{Conley} and cited the Court’s many opinions that did not question, explain away, or criticize \textit{Conley}'s "no set of facts" language.\textsuperscript{100} Justice Stevens discerned that \textit{Twombly} might not be cabined to antitrust actions,\textsuperscript{101} a question that was subsequently debated by the legal community.\textsuperscript{102} The Federal Judicial Center and Advisory Committee agreed to research \textit{Twombly}'s effect.\textsuperscript{103}

As Justice Stevens had lamented, the Court extended \textit{Twombly} to all federal actions in \textit{Ashcroft v. Iqbal}.\textsuperscript{104} Iqbal, a Muslim citizen of Pakistan, was arrested after 9/11, deemed of "high interest" to the FBI, and held in a maximum-security prison.\textsuperscript{105} He sued federal officials—including former Attorney General John Ashcroft and Robert Mueller, Director of the FBI—claiming that they had adopted an unconstitutional policy that

\begin{footnotes}
\item[94.] Id. at 553.
\item[95.] Id. at 564.
\item[96.] Id. at 557.
\item[97.] Id.
\item[98.] Id. at 562–63.
\item[99.] Id. at 570. Ultimately, the Court concluded that plaintiffs had not "nudged their claims across the line from conceivable to plausible." Id.
\item[100.] Id. at 577–78 (Stevens, J., dissenting).
\item[101.] Id. at 596–97; accord Robert G. Bone, \textit{Twombly, Pleading Rules, and the Regulation of Court Access}, 94 IOWA L. REV. 873, 881 (noting that federal courts appear to be “in favor of a more general application” of \textit{Twombly}) (2009); Carrington, supra note 24, at 655–56.
\item[104.] 129 S. Ct. 1937 (2009).
\item[105.] Id. at 1943.
\end{footnotes}
subjected him to harsh confinement because of his race, religion, or national origin. These defendants moved to dismiss Iqbal's claim on the ground of qualified immunity, which became the only issue before the Court: whether Iqbal had pleaded enough facts to state a claim that these high-level officials had adopted policies not for a neutral, investigative reason, but instead for the purpose of discriminating on account of race, religion, or national origin.

In its opinion, the Court described a formula\textsuperscript{109} that many courts now use to evaluate pleadings.\textsuperscript{110} First, courts identify and disregard statements that are not entitled to the assumption of truth: legal conclusions instead of factual allegations. If well-pled allegations remain, courts then determine whether the complaint states a claim to relief that is plausible on its face.\textsuperscript{111} Gauging plausibility is a context-specific task that requires the reviewing court to draw on its "judicial experience and common sense."

The Supreme Court then applied this formula. The Court first characterized a number of Iqbal's allegations as conclusory, including his statements that Ashcroft and Muller knew of, condoned, and willfully subjected him to harsh conditions because of his religion and race, which constituted discrimination.\textsuperscript{112} The majority then concluded that Iqbal's remaining allegations had not "nudged [his] claims' of invidious discrimination 'across the line from conceivable to plausible.'"\textsuperscript{113} In dissent, Justice Souter (the author of \textit{Twomby}) criticized the majority for misapplying the decision. He attacked the majority for refusing to read Iqbal's statements in context and for deeming many of Iqbal's allegations to be legal conclusions.\textsuperscript{114}

In sum, federal pleading practice first expanded from code pleading to a notice-based system under \textit{Conley}. The liberal ethos of \textit{Conley} varied with the Supreme Court's belief that federal courts must actively disarm and dismantle segregation. As people's attitudes about race relations in American society began shifting from optimism to ambivalence, the liberal ethos of the rules began to wane as well, with both trends paralleling

\begin{itemize}
\item 106. \textit{Id.} at 1944.
\item 108. \textit{Iqbal}, 129 S. Ct. at 1950–51.
\item 109. \textit{See}, e.g., Francis v. Giacomelli, 588 F.3d 186, 193–94 (4th Cir. 2009).
\item 110. \textit{Iqbal}, 129 S. Ct. at 1950–51. According to the Court, "[t]he plausibility standard is not akin to a 'probability requirement,' but asks for more than a sheer possibility that a defendant has acted unlawfully." \textit{Id.} at 1949 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).
\item 111. \textit{Id.} at 1950.
\item 112. \textit{Id.} at 1951.
\item 113. \textit{Id.} (quoting \textit{Twombly}, 550 U.S. at 570).
\item 114. \textit{Id.} at 1958–61 (Souter, J., dissenting).
\end{itemize}
broad change in American society. Large commercial cases and civil rights cases were increasingly viewed as vexatious. Although the Supreme Court blocked prior attempts to create heightened pleading bars, its rulings in *Tiwombly* and *Iqbal* have led lower courts to interpret *Iqbal* as if a heightened pleading bar has been established. These courts have reconstituted *Iqbal* into a heightened pleading bar for civil rights cases without proceeding through the formal process envisioned by the Rules Enabling Act. The Judicial Conference, the Advisory Committee, and the Federal Judicial Center have not been granted a full opportunity to draw on their collective experience to discuss how a heightened bar may adversely affect claims of discrimination by members of stereotyped groups.115

II. CONTEMPORARY RACIAL BIAS AND OTHER SOCIAL PSYCHOLOGICAL PROCESSES

Having presented a brief history of pleading standards, this Article moves next to an introduction of social psychological research on contemporary racial bias. While blatant racism has waned, prejudice still persists.116 In the past fifty years, the manifestation of prejudice has grown more subtle.117 In comparing surveys conducted in the 1940s and today, majority group members express less hostile racial attitudes toward minority group members,118 and the percentage of Whites who denounce racist views and endorse racial equality has risen.119 Overt prejudice toward minority group members is no longer publicly acceptable.120

Notwithstanding these survey trends, the field of social psychology has shown a continuing divide between words and deeds toward people of color. Many Americans are not free of prejudice and struggle with

117. See id. at 360 (“[Social psychologists] proposed that most [W]hites endorse egalitarian values, but that American culture and their own cognitive biases nonetheless result in antipathy toward [B]lacks and other minorities.”); see also John F Dovidio & Samuel L. Gaertner, Aversive Racism, 36 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1, 2 (2004) [hereinafter Dovidio & Gaertner, Aversive Racism].
their anti-Black attitudes. A duality persists between explicitly endorsed attitudes and behavior toward members of minority groups. Contemporary forms of bias affect the lives of stereotyped groups in significant ways. “Like a virus that has mutated, racism has evolved into different forms that are more difficult not only to recognize but also to combat.” Since contemporary bias is less conscious and more subtle than overt, it is expressed in indirect, often unintentional ways. Rather than antipathy, many now show ambivalence and avoid members of stereotyped groups. Many majority group members exhibit anxiety, disgust, fear, and discomfort toward stigmatized individuals, resulting in decreased helping behavior and cooperation, passive harm, and neglect. In contrast, many exhibit liking and trust toward in-group members, resulting in facilitation and cooperation with other majority group members. The consequences are pernicious: the economic, health, and educational disadvantages of minority groups stem, in part, from contemporary bias.

Social psychologists study intergroup bias as an attitude with three components. First, prejudice refers to the affective or emotional component, representing both the type of emotion linked with the attitude and the extremity of that attitude. Second, stereotypes refer to the cognitive component, the beliefs or thoughts (cognitions) that make up the attitude. Finally, discrimination refers to the behavioral component, that is, actions toward others. While stereotypes can be explicit, operating in


123. See Crocker et al., supra note 122, at 516–21.


127. See Crocker et al., supra note 122, at 516–17; Dovidio & Gaertner, Aversive Racism, supra note 117, at 3.


129. See Elliot Aronson ET AL., SOCIAL PSYCHOLOGY 391 (7th ed. 2010).

130. See Fiske, Stereotyping, supra note 116, at 357.
conscious awareness, prejudiced attitudes are often automatically activated.\textsuperscript{131}

Bias results, in part, from social categorization. Categorization is normal, involuntary, and pervasive:\textsuperscript{132} we routinely and inadvertently categorize other people.\textsuperscript{133} Given the troubled social, cultural, and historical context of race relations in the United States, racial categorization is virtually inescapable.\textsuperscript{134} The problem is that race increases the accessibility of stereotypic associations.\textsuperscript{135} People naturally differentiate others by race, and affect and attitudes relate closely to categories based on race. In other words, bias stems not from psychopathology, but from natural psychological processes.\textsuperscript{136}

The field of social psychology has studied these processes from multiple points of view. Social psychologists have researched the perspectives of majority group members and studied the psychological processes that result in discrimination. Researchers have also studied the perspectives of those who must interpret and draw inferences about whether discrimination occurred.\textsuperscript{137}

\section{A. Aversive Racism}

Aversive racism refers to racial bias among people who openly endorse nonprejudiced beliefs, but whose negative implicit attitudes toward Blacks are expressed in subtle, indirect, and rationalizable ways.\textsuperscript{138} Such racism is presumed to characterize the racial attitudes of most

\textsuperscript{131} See Dovidio, supra note 124, at 838; Fiske, Stereotyping, supra note 116, at 357.

\textsuperscript{132} See Gordon Allport, The Nature of Prejudice 20–27 (1954); Social Cognition, supra note 121, at 38–39; Susan T. Fiske, What We Know Now About Bias and Intergroup Conflict, the Problem of the Century, 11 Current Directions in Psychol. Sci. 123 (2002) [hereinafter Fiske, What We Know About Bias].

\textsuperscript{133} See Social Cognition, supra note 121, at 38–39.

\textsuperscript{134} Allport, supra note 132, at 27 ("[M]an has a propensity to prejudice. This propensity lies in his normal and natural tendency to form generalizations, concepts, categories, whose content represents an oversimplification of his world experience."); see also Social Cognition, supra note 121, at 38–39; Fiske, Stereotyping, supra note 116, at 364–67.

\textsuperscript{135} See Fiske, What We Know About Bias, supra note 132, at 124.

\textsuperscript{136} Cf. Dovidio, supra note 124, at 830 ("[P]rejudice and racism are embedded in people's group identities and in a society's institutions and its culture.").


well-educated Whites in the United States. Aversive racists aspire to be nonprejudiced: they do not discriminate in situations with strong norms against bias when discrimination would be obvious to others and themselves. In these situations, they are “especially motivated to avoid feelings, beliefs, and behaviors that could be associated with” bias. When the correct choice is clear, aversive racists do not discriminate against Blacks.

Yet because aversive racists hold negative associations (such as Black=Bad, Black=Criminal, Black=Untrustworthy) and feelings of uneasiness toward Blacks, bias is expressed in subtle, indirect, and rationalizable ways. Bias happens when the correct choice is unclear and the basis for judgment is ambiguous: when one can rationalize a negative behavior against Blacks on some other factor besides race. In these situations, despite their best intentions, aversive racists may unintentionally harm Blacks. They may express their discomfort with Blacks by expressing in-group favoritism, withholding cooperation from or otherwise excluding Blacks, or evaluating Whites more favorably than Blacks.

To understand this behavior, one must understand the power of context and situations. Since the manifestation of bias is sensitive to norms in the immediate social context, the situation influences whether bias results in harmful behavior and discrimination. When the situation is clear, people behave in unbiased ways; when it is ambiguous, people often behave in ways that harm minorities. Scores of experiments have documented aversive racism. Social psychologists have observed this phenomenon across numerous contexts, including when majority group members withhold helping behavior from Blacks, in emergency interventions, resources allocation decisions, employment selection decisions, and even decision making by mock juries.

The theoretical framework for the empirical studies in this Article are drawn, in particular, from seminal experiments that Dr. John F. Dovidio and his colleagues conducted on aversive racism in employment

139. See Dovidio & Gaertner, Aversive Racism and Selection Decisions, supra note 119, at 315.
140. See Dovidio & Gaertner, Aversive Racism, supra note 117, at 4–7; Dovidio & Gaertner, Aversive Racism and Selection Decisions, supra note 119, at 315.
142. Id. at 7–9.
143. See id. at 7–16.
144. See, e.g., Brewer & Brown, supra note 126, at 560–61; Crocker et al., supra note 122, at 512–16; Cuddy & Fiske, supra note 126, at 633–35.
145. See Dovidio & Gaertner, Aversive Racism, supra note 117, at 7; Dovidio, supra note 124, at 830.
147. See Aberson & Ettlin, supra note 146; Dovidio, supra note 124.
selection decisions. Dovidio and colleagues investigated aversive racism by exploring changes, over a ten-year period, in explicit racial attitudes vis-à-vis hiring recommendations for Black or White candidates. The study tested the hypothesis that although explicit racial attitudes would decline over time, the hiring recommendations for Black candidates with ambiguous job profiles would lag in comparison to similar White candidates. The aversive racism framework correctly predicted the results. While explicit racial attitudes softened over time, and participants favored clearly qualified candidates over clearly unqualified candidates regardless of race, the study revealed that participants recommended Whites who were ambiguously qualified over Blacks who were ambiguously qualified, at a significantly higher rate.

Aversive racism also leads to bias because of the “ultimate attribution error:” the tendency to attribute failures and negative outcomes of stereotyped individuals to their dispositional characteristics (personality traits), rather than to situational influences (e.g., he failed the test because he’s not smart). Yet those same failures by majority group members are often attributed to situational factors, rather than to character flaws (e.g., he failed the test because he was up too late studying). The same error is true for successful outcomes: many tend to attribute success by majority group members to character traits and the success of stereotyped individuals to situational factors (e.g., he passed the test because he is smart versus because he got lucky). This attributional error—giving the benefit of the doubt to majority members in a way not extended to stereotyped individuals—tends to justify in-group favoritism and more favorable outcomes for majority group members.

Social psychologists have also examined how people rationalize their decision making after they are forced to make choices in ambiguous situations. Subjects are not presented with objective criteria; decisions must rely on subjective measures, which are necessarily elastic and allow for rationalization of biased decisions after the fact. For example, when people must select between male and female job candidates for stereotypically male jobs, most tend to automatically select males for the job. In hindsight, people rationalize this preference by shifting the standard for

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149. Thomas F. Pettigrew, The Ultimate Attribution Error: Extending Allport’s Cognitive Analysis of Prejudice, 5 PERSONALITY SOC. PSYCHOL. BULL. 461, 464 (1979). This error is similar to the Fundamental Attribution Error, but more pernicious in that the error unevenly affects members of stigmatized groups based on stereotypes. See id.; Quintanilla, supra note 17, at 221–25.

150. See Aronson et al., supra note 129, at 407.

151. See Crocker et al., supra note 122, at 512–16.

decision making: they will inflate the importance of the criterion that permits their preferred choice to dominate. Although gender and race subtly affect decision making, people rarely acknowledge this influence. Rationalization allows people to mask bias from others and themselves, which allows them to avoid the cognitive dissonance that results from biased decision making.153

The depth and breadth of these psychological phenomena have been shown using multiple techniques and methodologies. Social and cognitive psychologists have deployed increasingly sophisticated technologies to study these biases. Beginning in the mid-1990s, scientists began using a battery of techniques to measure intrinsic attitudes against Blacks.154 Researchers used measures such as the well-known Implicit Association Test (IAT). The IAT is a response latency procedure, which shows that there is a greater association between Blacks and negative attitudes than between Blacks and positive attitudes (Black=Bad versus Black=Good).155 Social psychologists have also examined implicit associations by deploying physiological methods, such as facial electromyography (EMG), galvanic skin response, and cardiovascular reactivity.156 Finally, scientists have examined amygdala brain activation. Using functional magnetic resonance imaging (fMRI) procedures, social psychologists have examined the neuropsychological underpinnings of these processes.157

In sum, the field of social psychology has demonstrated the automatic character of the stereotyping and implicit associations that result in

153. People are motivated to view themselves as impartial and unbiased; therefore, when one perceives that a social category characteristic (e.g., race or gender) has affected a decision, this threatens one's self concept. This dissonance results in the post hoc desire to justify a decision in socially acceptable terms. See id. Interestingly, while many adults thus exhibit a mismatch between their implicit associations about Blacks and their explicit attitudes in favor of racial equality, kindergarteners have no such inconsistency. See Frances Aboud, The Development of Prejudice in Childhood and Adolescence, in On the Nature of Prejudice: Fifty Years After Allport 310, 315 (John F. Dovidio et al. eds., 2005); Andrew Scott Baron & Mahzarin R. Banaji, The Development of Implicit Attitudes: Evidence of Race Evaluations from Ages 6 and 10 and Adulthood, 17 PSYCHOL. SCI. 53, 56 (2006). Five- and six-year-olds’ implicit associations are substantially similar to those of White adults; but because kindergartners have not yet internalized a self-censorship norm against expressing racial bias, they will more easily express a preference for other White children. See id. at 56. By ten years of age, however, most children’s implicit biases no longer match their explicit attitudes. Id.
154. Dovidio, supra note 124, at 838.
155. Id.
bias. Like intuitions, these psychological processes operate spontaneously against members of stigmatized groups. Most Americans' expressed opinions about racial equality stand in sharp contrast with their implicit associations and behavior toward members of stigmatized groups. When situations are clear, people are far less likely to treat others differently based on race. When situations and the criteria for judging others are ambiguous, however, people may spontaneously draw on stereotypes, resulting in bias, and then rationalize their behavior after the fact based on seemingly reasonable factors.\textsuperscript{158}

B. Lay Theories of Racism

While social psychological research has demonstrated that prejudice has morphed into more subtle forms, folk psychology—what most people take for granted as true—says that racists are overt bigots. Research on lay (folk) theories examines how observers interpret episodes of discrimination after the fact: for example, how witnesses perceive whether a minority group member was the victim of racism. Lay theories about racism represent different ways that judges could interpret allegations of discrimination based on race.\textsuperscript{159}

Lay theories, also known as folk psychology, are organized knowledge structures.\textsuperscript{160} People draw on lay theories when making inferences, predictions, explanations, and justifications.\textsuperscript{161} These theories act as channels for feelings, thoughts, and actions for the object of the lay theory. Scientists have focused on two lay theories.\textsuperscript{162} The most dominant one, particularly among majority group members, characterizes racist behavior in overt, blatant terms.\textsuperscript{163} The group that ascribes to this theory tends to believe that discrimination is no longer a modern problem; prototypical racism includes discouraging children from playing with Blacks, favoring White over Black job applicants, or belonging to groups that promote racial bigotry. This group does not view more subtle forms of

\begin{footnotesize}
\begin{enumerate}
\item See generally, Miller, supra note 120, at 102; Fiske, What We Know About Bias, supra note 132, at 125–26.
\item See, e.g., Jerome Bruner, Acts of Meaning 35 (1990) ("All cultures have as one of their most powerful constitutive instruments a folk psychology, a set of more or less connected, more or less normative descriptions about how human beings 'tick,' what our own and other minds are like, what one can expect situated action to be like, what are possible modes of life, how one commits to them . . . .")
\item Sommers & Norton, supra note 159, at 119.
\item Id. at 131.
\end{enumerate}
\end{footnotesize}
prejudice—such as ambivalence, anxiety, and passive harm toward stereotyped individuals—as racism. This group tends to consider mitigating nonracial factors that may account for bias before drawing the inference that racism occurred, unless the evidence of racism is incontrovertible.

The less prevalent lay theory characterizes racist behavior as including both overt and subtle actions. Those who ascribe to this theory tend to include minority and some majority group members who are particularly sensitive to less obvious cues of racism. This group is more likely to view more diverse behavior as exhibiting racism—such as in-group favoritism and ambivalence, discomfort, and passive harm toward Blacks—and sees discrimination as an ongoing problem in American society.

To summarize, there is a divide between the dominant folk theory about racism and the science on how modern racism is manifested. The dominant folk theory implies that racists behave in overt ways, but science shows that prejudice operates in more subtle forms.

Even though natural psychological processes often result in bias, these processes need not inevitably lead to biased decisions. People can override stereotypes and implicit associations when they have both the appropriate evidence before them and the motivation to reflect carefully on information that differentiates one individual from others. In other words, mindful reflection on individuating features is required.

C. Social Psychology Applied to Legal Decision Making

Social psychologists have long studied legal decision making and the cognitive and motivational processes it involves. For instance, they have

164. Id. at 128, 131–32.
165. Id. at 131–32.
166. See id. at 132.
167. Id. at 120 (describing the modern racism scale, an empirical method to measure beliefs associated with subtle forms of racism). People who rank low on the modern racism scale theorize racism more broadly as a set of overt and subtle behaviors. Id.
168. Id. at 128, 131–32.
170. See Fazio & Olson, supra note 156, at 301.
investigated the degree to which the defendant's race shapes jury decision making. In this regard, race matters a great deal in decisions about capital punishment: convicted murderers of White victims are more likely to receive the death sentence than convicted murderers of Black victims. For murderers of White victims, the degree to which defendants appear more stereotypically Black (e.g., a broad nose, thick lips, dark skin) greatly increases the likelihood that they will receive death sentences.

Legal decision making has been examined from a social cognition perspective as well. Research on mock jurors has demonstrated that stereotypes shape the degree to which jurors engage in unbiased processing of evidence. Evidence that corroborates stereotypes receives more attention and is more readily incorporated into legal judgments than stereotype-inconsistent evidence, which is often neglected. Recent research has also demonstrated that judges, like the rest of us, draw on heuristics and stereotypes when making decisions, which may reflect inaccurate inferences and bias. A recent study found that judges may implicitly associate Blacks with negative attitudes and that these associations affect their decision making.

D. Hypotheses Drawn from Social Psychological Research

Having introduced social psychological findings on contemporary racial bias as well as a brief history of the federal pleading standard, this


174. Id.


176. See Guthrie, Rachlinski & Wistrich, supra note 18, at 778 (“[W]e found that each of the five illusions we tested had a significant impact on judicial decision making. Judges, it seems, are human. Like the rest of us, their judgment is affected by cognitive illusions that can produce systematic errors in judgment.”).


178. See Rachlinski et al., Does Unconscious Racial Bias Affect Trial Judges?, supra note 18, at 1209–10 (using the Implicit Association Test to examine judicial decision making and finding a strong White preference among White judges).
study now turns to three hypotheses drawn from social psychological literature in light of recent changes to the federal pleading standard:

(1) Shifting from Conley's notice-pleading standard to Iqbal's plausibility standard, federal courts will increase the dismissal rate for Black plaintiffs' claims of race discrimination.

(2) Despite the lenient construction traditionally given to pro se complaints, federal courts will increase the dismissal rate for Black pro se plaintiffs' claims of race discrimination.

(3) Under Iqbal, White and Black judges will decide motions to dismiss Black plaintiffs' claims of race discrimination differently: White judges will dismiss claims at a higher rate than Black judges.

Aversive bias suggests an overall rise in dismissal rates of Black plaintiffs' claims of discrimination, one greater than the rising base rate of dismissals across all actions. This disparity in rates is due to Iqbal's shift of pleading practice from a notice-based regime toward a regime where courts screen claims based upon their own subjective evaluations and estimates of plausibility. Since evidence is not presented at the pleading stage, federal judges do not have the opportunity to deliberate with individuating information, as is the case at summary judgment. With no evidence, and relying on "common sense," courts are more likely to be influenced by automatic stereotypes and implicit associations about race. Aversive bias predicts uneven treatment in ambiguous cases where the correct choice is unclear. A dismissal rate in these cases that rises more than the base rate across all federal actions would suggest that social psychological processes are affecting decision making.

Research on lay theories also predicts a rise in overall dismissal rates. Racism is perceived as more overt than subtle, yet subtle discrimination is prevalent in American society. Under Conley's liberal pleading standard, plaintiffs would have withstood dismissal if they challenged subtle forms of discrimination. Under Iqbal's more rigorous plausibility standard, however, many federal judges will likely fail to perceive subtle discrimination as plausibly suggesting unlawful discrimination. This research also implies that while White judges tend to perceive discrimination as overt, Black judges tend to perceive discrimination as both overt and subtle. The prediction is that under Iqbal, White and Black judges will decide motions to dismiss in ambiguous cases differently.
III. AN OVERVIEW OF FEDERAL EMPLOYMENT DISCRIMINATION LAW

Part III provides a primer on federal employment discrimination law as background to Part V, which sets forth an empirical analysis of federal courts' adjudication of motions to dismiss Black plaintiffs' claims of race discrimination and harassment brought under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 ("Section 1981").

Title VII prohibits discrimination in the workplace on the basis of race, color, religion, national origin, and sex. When plaintiffs litigate a claim of race discrimination under Title VII, they can assert several types of claims including disparate treatment, disparate impact, and harassment. Most suits claim disparate treatment discrimination. A disparate treatment claim alleges that an employer treated the plaintiff less favorably than others because of the plaintiff's race. The ultimate issue in every disparate treatment case is whether the plaintiff was the victim of intentional discrimination. Unlike disparate treatment claims, disparate impact claims involve employment practices that are facially neutral in their treatment of different groups but that affect one group more harshly than another in practice. Disparate impact claims do not turn on discriminatory intent.

Due to the difficulty of producing a "smoking gun" of intentional discrimination, most plaintiffs offer circumstantial evidence (rather than direct evidence) of disparate treatment discrimination. That is, most plaintiffs provide circumstantial evidence, allowing the court to infer that an employer discriminated against them. This evidence is evaluated under the McDonnell Douglas-Burdine burden-shifting scheme, which allocates the burden of production and an order for presenting proof.

Under the McDonnell Douglas-Burdine framework, plaintiffs must first establish a prima facie case of discrimination—this requirement is


180. See 1 BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 10–90 (ABA Section of Labor and Employment Law ed., 4th ed. 2007).


185. Tex. Dept' of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–56 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); see also Raytheon Co., 540 U.S. at 49 n.3 (interpreting the McDonnell Douglas-Burdine framework); Reeves, 530 U.S. at 142 (same); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 505–12 (1993) (same).
not "intended to be rigid, mechanized . . . ritualistic," or "onerous." It is "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination" at summary judgment. This prima facie case also applies to claims of race-based employment discrimination under Section 1981. To establish a prima facie case of disparate treatment, a plaintiff must prove that (1) she is a member in a protected class, (2) she is qualified for a given job, (3) she was subject to an adverse employment action, and (4) there is a causal connection between the adverse action and the protected characteristic. These legal tests for the prima facie case are flexible and often tailored to different factual circumstances. For example, in cases involving disparate terms and conditions of employment, many courts construe the last element of the prima facie case as requiring plaintiffs to prove that the employer treated similarly situated employees outside her class more favorably.

If a plaintiff proves a prima facie case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. This burden is one of production, not persuasion; it involves "no credibility assessment." If the employer meets

187. Burdine, 450 U.S. at 253.
189. With regard to the prima facie case, Section 1981 mirrors Title VII. See Johnson v. City of Fort Wayne, 91 F.3d 922, 940 (7th Cir. 1996); Randle v. LaSalle Telecomms., Inc., 876 F.2d 563, 568 (7th Cir. 1989); see also Patterson v. McLean Credit Union, 491 U.S. 164 (1989). The present studies analyzed only those Section 1981 decisions where federal courts evaluated the issue of race discrimination or the McDonnell Douglas–Burdine prima facie case as under Title VII.
190. See, e.g., McCoy v. City of Shreveport, 492 F.3d 551, 556–57 (5th Cir. 2007).
191. See 1 LINDEMANN & GROSSMAN, supra note 180, at 14–25.
192. See, e.g., Winsley v. Cook Cnty., 563 F.3d 598, 605 (7th Cir. 2009). In disparate-treatment cases, the last element—whether the employer treated similarly situated people outside of the plaintiff's protected class differently—is often determinative in whether a claim withstands summary judgment. See 1 LINDEMANN & GROSSMAN, supra note 180, at 23. The courts of appeals disagree on how rigorously to apply this final element. See Suzanne B. Goldberg, Discrimination by Comparison, 120 YALE L.J. 743–48 (2001) (explaining that the "similarly-situated" element has in essence become a widely-employed heuristic). Some require plaintiffs to show that "similarly-situated" employees were nearly identical in all or most respects. See, e.g., Perez v. Tex. Dep't of Criminal Justice, 395 F.3d 206, 213 (5th Cir. 2004); Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999). Others hold plaintiffs to a less exacting standard. See, e.g., Rodgers v. U.S. Bank, 417 F.3d 845, 852 (8th Cir. 2005); Ortiz v. Norton, 254 F.3d 889 (10th Cir. 2001).
Beyond Common Sense

this burden, the presumption of intentional discrimination disappears, and the plaintiff is then afforded the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer were mere pretext for discrimination. When deciding whether the defendant’s explanation is pretextual, the trier of fact may consider the evidence that established plaintiff’s prima facie case and any inferences properly drawn from that evidence. The McDonnell Douglas-Burdine framework has been applied to claims of discriminatory hiring, discharge, discipline, promotion, transfer, demotion, retaliation, and other adverse employment actions.

Racial harassment also violates Title VII. To prove harassment, plaintiffs must show that they were subjected to discriminatory intimidation, ridicule, and insults so severe or pervasive it altered the conditions of their employment and created an abusive working environment. The “mere utterance of an . . . epithet which engenders offensive feelings in an employee . . . does not sufficiently affect the conditions of employment to implicate Title VII.” ‘“Talismanic expressions’ of racial animus” are not necessary; rather, “‘code words’” may “‘send[] a clear message and carry[] the distinct tone of racial motivations and implications.’” When determining whether a hostile work environment existed, courts consider the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and its effect on an employee’s work performance.

While these frameworks were designed to adjudicate claims at summary judgment after evidence had been gathered and presented, over time courts began applying these frameworks earlier in the litigation cycle. That is, federal courts began requiring plaintiffs to plead facts to support these frameworks at the pleading stage, a practice eventually addressed by the Supreme Court. In Swierkiewicz v. Sorena N.A., the Court rejected this heightened pleading bar and held that plaintiffs are not required to plead specific facts establishing a prima case of discrimination.

195. Raytheon Co., 540 U.S. at 49–50 n.3; Reeves, 530 U.S. at 143.
196. Reeves, 530 U.S. at 143.
197. See 1 Lindenmann & Grossman, supra note 180, at 12–13.
198. See, e.g., Williams v. ConAgra Poultry Co., 378 F.3d 790, 796 (8th Cir. 2004); Patterson v. Cnty. of Onieda, 375 F.3d 206, 221 (2d Cir. 2004); White v. BFI Waste Servs., LLC, 375 F.3d 288, 298 (4th Cir. 2004).
200. Harris, 510 U.S. at 21 (internal quotation marks omitted); see also Jackson v. Flint Ink N. Am. Corp., 370 F.3d 791, 794–96 (8th Cir. 2004); Ngeunjuntr v. Metro. Life Ins. Co., 146 F.3d 464, 467 (7th Cir. 1998).
201. Galdamez v. Potter, 415 F.3d 1015, 1024 n.6 (9th Cir. 2005) (quoting McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1117 (9th Cir. 2004)).
202. See supra Part I.
Swierkiewicz held that imposing the prima facie case at the pleading stage violates Rule 8(a). Swierkiewicz stands for the proposition that the prima facie case is not a pleading requirement, but rather an evidentiary standard. Nonetheless, after Iqbal many federal courts are once again requiring plaintiffs to plead facts to establish a prima facie case, and granting dismissal when plaintiffs fail to do so.

IV. A STUDY OF IQBAL’S EFFECT ON RACE DISCRIMINATION CLAIMS

A. Methodology

This research was designed to investigate whether Iqbal has increased the dismissal rate for claims of race-based employment discrimination filed by Black plaintiffs. Specifically, three studies examined whether federal district courts are granting an increased percentage of motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). These studies focus on decision making by federal district judges. Iqbal provides them with new discretion to decide whether claims of discrimination are plausible, and these judges exercise this new discretion with a minimal amount of oversight, as evidenced by the fact that only about twenty percent of district court decisions are appealed. Like other empirical studies, this investigation examined the broad question of what effect, if any, Iqbal has had on motions to dismiss filed under Rule 12(b)(6), the means by which defendants challenge the legal sufficiency of claims.

204. Id. at 512.
205. The studies counted decisions by federal district courts only, not those of magistrate judges. All decisions by magistrate judges were excluded from the computations, whether or not those decisions were made by consent of the parties. See, e.g., Cotton v. Cleveland Mun. Sch. Dist., No. 1:08CV1079, 2009 WL 1652145 (N.D. Ohio June 11, 2009). The study did count decisions by federal district courts in which they decided whether to dismiss claims after receiving the report and recommendations of magistrate judges. For example, Walker v. Univ. of Colo. All-White Bd. of Regents, No. 09-cv-01690-PAB, 2010 WL 3259886, at *2 (D. Colo. Aug. 16, 2010) (concluding that plaintiff’s Title VII discrimination claim survived dismissal), accepting in part and rejecting in part No. 09-cv-01690-PAB-MEH, 2010 WL 3259880, at *4 (D. Colo. Mar. 10, 2010) (Hegarty, Mag. J.) (recommending denial of defendant’s motion to dismiss as to the Title VII discrimination claims) was counted as “Deny” because defendant challenged the sufficiency of plaintiff’s Title VII claim, and the district court ultimately denied defendant’s motion to dismiss.
207. See Hatamyar, supra note 14; Hannon, supra note 10.
208. Herr, Haydock & Stempel, supra note 63, § 9.06[A]; see also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1944 (2009) (“Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct.”).
Broad Westlaw searches were designed to retrieve all cases deciding motions to dismiss in employment discrimination cases filed by Black plaintiffs under Title VII or Section 1981. Searches for Title VII claims yielded 263 decisions in the eighteen months before Twombly and 371 decisions in the eighteen-month range after Iqbal. To increase the power of the study, the inquiry included cases deciding Section 1981 claims. A search for relevant Section 1981 claims yielded 338 opinions in the eighteen-month range before Twombly and 495 in the same timeframe after Iqbal. Many of the cases retrieved from Westlaw fell outside the scope of the study and were excluded. Finally, because this investigation focused on claims of race-based discrimination and harassment by Black plaintiffs, the study did not examine retaliation claims or claims based on other protected characteristics (such as gender, national origin, and religion).

The first wave of empirical legal research examined the broad question of whether Iqbal has increased dismissal rates across all federal civil
rights cases or all Title VII cases. Scholars have found different rates of dismissal, but most scholars who have examined federal case law report rates following the same trend: higher rates under Twombly and Iqbal than under Conley. This Article joins other scholars in charting a new direction for empirical legal research, one that closely examines how Iqbal has affected narrow categories of claims. This second wave draws on the notion of “situation types” or “particularized situations,” as articulated by Llewellyn and other Legal Realists. Believing that courts do not apply rules similarly across all conditions, Llewellyn and the Legal Realists maintained that narrow and concrete studies were needed to examine how courts treat particular kinds of situations. This Article tests the hypothesis that Iqbal’s plausibility standard has had a statistically significant effect on Black plaintiffs’ claims of race discrimination and racial harassment in ambiguous cases.

Because “ambiguousness” is a construct that cannot be observed directly, an operational definition is necessary to examine whether social psychological findings translate into judicial decision making. Research

214. Hatamyar, supra note 14, at 630 tbl.D (finding that for all Title VII claims, the dismissal rate rose from 42% percent under Conley, to 54% percent under Twombly, to 53% percent under Iqbal); Hannon, supra note 10, at 1837 tbl.3 (finding that the dismissal rate for all civil rights claims rose from 41.7% under Conley to 52.9% under Twombly); Joseph Seiner, The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases, 2009 U. ILL. L. REV. 1011, 1030 tbl.A (2009) (finding that the dismissal rate rose from 54.5% under Conley to 57.1% under Twombly). The Federal Judicial Center (FJC) recently released a study on Iqbal’s effects, examining orders on multiple federal court CM-ECF dockets rather than federal case law. For motions to dismiss with prejudice, the FJC study found that the dismissal rate has not changed in a statistically significant manner. JOE CECIL ET AL., FEDERAL JUDICIAL CENTER, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), available at http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf. The report also found that motions to dismiss were granted more often post-Iqbal than pre-Twombly across all counseled cases, with the grant rate rising from 66% to 75% (When considering orders granting dismissal with leave to amend and orders granting dismissal with prejudice). Id. at 13. For an in-depth assessment of the FJC’s study, see Lonny Hoffman, Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss (Univ. of Houston Law Ctr., Working Paper No. 1904134, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904134. In contrast to the FJC report, a follow-up test was performed on the claims studied, which revealed that the rising dismissal rate was statistically significant for motions to dismiss Black plaintiffs’ claims of race discrimination granted with prejudice.


217. Operational definitions describe a set of procedures that researchers use “to establish ... the existence ... of the phenomenon[s] described” by the construct. CHAVA FRANKFORT-NACHMIAS & DAVID NACHMIAS, RESEARCH METHODS IN THE SOCIAL SCIENCES 28 (6th ed. 2000); see also SHERRI L. JACKSON, RESEARCH METHODS AND STATISTICS 31 (2003); KAPLAN, supra note 13, at 41.
Beyond Common Sense demonstrates that decision makers exhibit aversive racism in ambiguous situations, but not in unequivocal situations. In particular, Dovidio's seminal study, described in Part II, suggests that when judges must adjudicate the plausibility of ambiguous claims, rather than clearly weak or clearly strong claims, aversive racism may be exhibited.

The present study, therefore, operationalized ambiguousness (and "ambiguous claims") by excluding claims dismissed on technical grounds for failing to comply with the prerequisites of a viable Title VII action. There are two prerequisites for a viable Title VII action: "filing timely charges of employment discrimination with the [EEOC] and . . . receiving and acting upon the Commission's statutory notice of the right to sue." Exhaustion of the EEOC administrative procedures is mandatory. First a plaintiff must file an EEOC charge of discrimination within 300 days of the alleged discriminatory practice. Second, plaintiffs must file suit within ninety days after receiving a right-to-sue letter from the EEOC. The present studies applied these statutory prerequisites when drawing a distinction between unambiguous and ambiguous claims. Unambiguously weak claims were those where plaintiffs failed to file a timely charge of discrimination with the EEOC or failed to sue within ninety days after receiving a right-to-sue letter. Unambiguously weak

218. Aberson & Etline, supra note 146, at 26; Dovidio & Gaertner, Aversive Racism, supra note 117, at 16.
220. Id.
221. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973); 2 LINDEMANN & GROSSMAN, supra note 180, at 1749.
222. 42 U.S.C. § 2000e-5(e)(1) (2006); 2 LINDEMANN & GROSSMAN, supra note 180, at 1750–51. This 300-day timeline applies in deferral states (those having their own state agency that challenges employment discrimination). A 180-day timeline applies in non-deferral states. 42 U.S.C. § 2000e-5(e)(1); 2 LINDEMANN & GROSSMAN, supra note 180, at 1750–51. While Title VII technically requires charging parties to first file their charge of discrimination with a deferral state agency, work sharing agreements between the EEOC and state agencies are prevalent and allow plaintiffs to file a charge with the EEOC first instead. The accrual date for this period is the date on which the adverse employment action is communicated to the plaintiff (or when plaintiff becomes aware of facts giving rise to a claim of discrimination). See Del. State Coll. v. Ricks, 449 U.S. 250, 259 (1980); Beamon v. Marshall & Isley Trust Co., 411 F.3d 854, 860–61 (7th Cir. 2005); Cada v. Baxter Healthcare Corp., 920 F.2d 446, 453 (7th Cir. 1990).
223. 42 U.S.C. § 2000e-5(f)(1). While federal courts might allow for equitable tolling of these limitations periods, they do so only in narrow instances and tend to rigorously apply these deadlines. See, e.g., Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982).
224. The study excluded claims dismissed as untimely. If the defendant moved to dismiss a claim for failure to exhaust EEOC remedies or for untimeliness, and the court granted that motion, then I excluded the decision from consideration. See, e.g., Henderson v. Wal Mart Stores Tex. LLC, No. H-10-0317, 2010 WL 1525551, at *4–8 (S.D. Tex. Apr. 14, 2010) (dismissing Title VII for untimeliness). Since I applied this rule consistently, the study excluded cases that rejected the defendant's motion to dismiss based solely on the
claims also included those (1) where plaintiffs failed to exhaust their remedies, such as where plaintiffs’ claims of race discrimination fell outside the scope of their charges filed with the EEOC; and (2) where plaintiffs sought to hold coworkers liable, rather than an employer, which is outside the scope of Title VII. Since these cases turn on clear rules applied in heuristic fashion, these cases are not ambiguous (i.e., plaintiff either did or did not comply with these heuristic-like rules).

The remaining cases were deemed ambiguous because they required courts to evaluate whether Black plaintiffs had sufficiently pleaded claims of race discrimination or harassment. These cases turned largely on whether plaintiffs had sufficiently pleaded discrimination under Rule 8(a). By operationalizing the concept of “ambiguous” claims in this way, the study examined the narrow category of cases most suitable to test the hypotheses of aversive racism and lay theories. Next, each case was analyzed and the dependent variable was coded according to the three possible outcomes for decisions under Rule 12(b)(6): granted, denied, or granted-in-part/denied-in-part. The research examined the frequency of mistaken grounds that plaintiff’s Title VII claim was untimely. See, e.g., Young v. Kelsey Care Advantage, No. H-09-1925, 2010 WL 1404215 (S.D. Tex. Mar. 31, 2010); Byrd v. Cal. Superior Court, No. C 08-04387 MHP, 2009 WL 2031761, at *3-4 (N.D. Cal. Jul. 8, 2009). Where federal courts rejected an untimeliness argument but also considered a Rule 8 basis for dismissal, the study counted the Rule 8 decision on the claim. See, e.g., Miller v. Eagle Tug Boat Cos., No. 09-0401-CG-C, 2009 WL 4751079 (S.D. Ala. Dec. 8, 2009).

225. The same exclusionary rule was applied here as well. See supra note 224. If defendant moved to dismiss a claim for failure to exhaust remedies with the EEOC, and the court granted that motion, then the study excluded that decision from consideration. See, e.g., Rogers v. ConMed, Inc., No. CCB-09-3397, 2010 WL 3056666 (D. Md. Aug. 3, 2010). Where courts rejected defendants’ exhaustion argument but also considered an argument under Rule 8, the study counted the Rule 8 decision on the claim. See, e.g., Miller, 2009 WL 4751079.

226. Individual employees are not liable under Title VII. See generally Sheridan v. E.I. DuPont de Nemours & Co., 100 F. 3d 1061, 1078 (3d Cir. 1996). The same rules described in notes 224 and 225 were also applied to this basis for dismissal.

227. Heuristic in the sense that these rules at the threshold operate like bright lines, like rules of thumb, providing for parsimonious decision making. See Gigerenzer, supra note 177, at 391-408.

228. See supra Part II.B.

229. The SPSS database is available upon request. Independent variables included: date (pre-Twombly versus post-Iqbal), federal judicial circuit, federal judicial district, pro se status of the plaintiff, and race of the federal district judge. For the dependent variable, the study recorded only rulings on claims of race-based discrimination or harassment challenged by a 12(b)(6) (or 12(c)) motion.

230. The study coded decisions “granted,” “denied,” or “mixed.” This method of coding motions to dismiss rulings was drawn from Professor Hatamyar’s research. Hatamyar, supra note 14, at 596, 601. Rulings were “granted” when a motion to dismiss was granted for all race-based claims that the defendant moved to dismiss under Rule 8. The study coded decisions “denied” when a motion to dismiss was denied for all race-based claims in dispute. The study coded decisions “mixed” when a motion was denied at least in part for race-based claims: the court accepted part, but rejected part, of defendants’
of decisions in each of these three categories eighteen months before Twombly and eighteen months after Iqbal.231

B. Results

This Article presents first the results for the overall change in dismissal rates for Black plaintiffs' claims of race-based employment discrimination, and then the change in dismissal rates for Black plaintiffs who were pro se. Finally, it presents the dismissal rates for cases decided by White versus Black judges under Iqbal. The studies used chi-square tests to examine whether these changes were statistically significant.232

STUDY 1:
HAS IQBAL INCREASED THE DISMISSAL RATE FOR BLACK PLAINTIFFS' CLAIMS OF RACE DISCRIMINATION IN THE WORKPLACE?

The first study tested the prediction that, in light of social psychological phenomena discussed in Part II, federal district courts would grant a larger proportion of motions to dismiss under Iqbal's plausibility standard than under Conley's notice-pleading rule when adjudicating Black plaintiffs' claims of race discrimination in the workplace. Results are presented in Table 1 and Figure 1.
Study 1 shows that in ambiguous cases, federal district courts have increased the dismissal rate for Black plaintiffs' claims of race-based employment discrimination: after *Iqbal*, it is 2.66 times more likely that these claims will be dismissed when challenged as insufficient under Rule 8(a). Federal courts are increasingly concluding that Black plaintiffs have failed to sufficiently plead prima facie cases and plausible claims of discrimina-
tion. The increase in dismissal rates across time was statistically significant.\textsuperscript{233}

**STUDY 2:**

**Has \textit{Iqbal} Increased the Dismissal Rate for Black Pro Se Plaintiffs' Claims of Race Discrimination in the Workplace?**

The second study tested the prediction that federal district courts would grant a higher proportion of motions to dismiss under \textit{Iqbal} than under \textit{Conley} for claims of race-based employment discrimination brought by pro se Black plaintiffs.

**Table 2.**

Percentage of Rulings in Study for Black Pro Se Plaintiffs' Claims

<table>
<thead>
<tr>
<th>Observed Frequency (Expected Frequency)</th>
<th>Percentage in the Study</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Grant</td>
</tr>
<tr>
<td>Conley</td>
<td>8 (13.9)</td>
</tr>
<tr>
<td></td>
<td>32.00%</td>
</tr>
<tr>
<td>\textit{Iqbal}</td>
<td>33 (27.1)</td>
</tr>
<tr>
<td></td>
<td>67.30%</td>
</tr>
<tr>
<td>Total</td>
<td>41</td>
</tr>
<tr>
<td></td>
<td>55.40%</td>
</tr>
</tbody>
</table>

\textsuperscript{233.} Using SPSS, the statistical software package, a chi-squared test was performed. A two-way contingency table analysis was used to evaluate the change in dismissal rates. The two variables were (1) time period when the motion to dismiss was decided with two levels (pre-\textit{Twombly} versus post-\textit{Iqbal}), and (2) decision with three levels (grant, deny, mixed). Time period and decision were found to be significantly related, Pearson $\chi^2$ (2, N = 208) = 28.23, $p = .000$, Cramér's $V = .368$. Follow-up pairwise comparisons were conducted to evaluate the difference among the columns. The Holm's sequential Bonferroni method was used to control for Type I error at the .05 level across all three columns. The only significant pairwise difference was the comparison between grant and deny, which accounted for 26.74 of the Pearson $\chi^2$ and was significant $p = .000$, Cramér's $V = .370$. The proportion of grants (i.e., dismissals) increased across time.
Under *Iqbal*, federal district courts increasingly dismissed Black pro se plaintiffs’ claims of race discrimination in the workplace: it is 2.10 times more likely that these claims will be dismissed. This surge in dismissal rates has occurred despite the Supreme Court’s instruction to construe pro se complaints liberally and to hold pro se filings to a less stringent standard than formal pleadings drafted by lawyers.

**STUDY 3:**
**UNDER *IqBAL*, ARE WHITE AND BLACK JUDGES DECIDING MOTIONS TO DISMISS DIFFERENTLY?**

A third study was conducted to test the prediction that White and Black judges would decide motions to dismiss differently under *Iqbal*. That divergence would be consistent with research on lay theories of dis-

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234. As with Table 1, a chi-squared distribution test was performed. Results indicated that the increase in grant rates (dismissal rates) across time was statistically significant. A two-way contingency table analysis was used to evaluate the changing dismissal rates. Time period and decision were found to be significantly related, Pearson $\chi^2 (2, N=74) = 12.286, p = .002$, Cramér’s $V = .407$. Because two cells (33%) had expected counts of less than 5, a Fisher’s exact test was performed, which confirmed that the omnibus results of the 2 x 3 contingency table were statistically significant, $p = .001$. Follow-up pairwise comparisons were conducted to evaluate the difference among the columns. The Holm’s sequential Bonferroni method was used to control for Type I error at the .05 level across all three columns. The only pairwise difference that was significant was the comparison between grant and deny, which accounted for 10.483 of the Pearson $\chi^2$ and was significant $p = .001$, Cramér’s $V = .384$. For unrepresented Blacks, grants (dismissals) increased across time, and denials decreased across time.

Beyond Common Sense

crimination regarding how judges draw inferences and make probabilistic judgments.

Table 3.

Percentage of Rulings in Study for White Versus Black Judges

<table>
<thead>
<tr>
<th>Observed Frequency (Expected Frequency)</th>
<th>Percentage in the Study</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Grant</td>
</tr>
<tr>
<td>White Judges</td>
<td>65 (61.8)</td>
</tr>
<tr>
<td></td>
<td>57.50%</td>
</tr>
<tr>
<td>Black Judges</td>
<td>5 (8.2)</td>
</tr>
<tr>
<td></td>
<td>33.30%</td>
</tr>
<tr>
<td>Total</td>
<td>70</td>
</tr>
<tr>
<td></td>
<td>54.70%</td>
</tr>
</tbody>
</table>

Pearson $\chi^2 (2, N=128) = 5.028, p=.081$

Figure 3:

Percentage of Rulings in Study for White Versus Black Judges

Study 3 reveals a robust trend in which White judges are dismissing Black plaintiffs' claims of employment discrimination under Iqbal at a higher rate (57.5%) than Black judges (33.3%).\(^{236}\) These results were

marginally significant;\textsuperscript{237} given the limited data, it is unclear whether the lack of clear significance is due to different grant rates or different mixed rates when deciding motions to dismiss.\textsuperscript{238} As discussed later in Part V, the disparity is largely a result of differences in how courts decide whether Blacks have pleaded enough to establish a prima facie case of discrimination or a plausible claim of discrimination.

C. Discussion

These three empirical studies offer a fine-grained examination of \textit{Iqbal}'s effect in a particular context, focusing closely on how courts have adjudicated Black plaintiffs' claims of race discrimination in the workplace. The studies investigate \textit{Iqbal}'s effect in ambiguous cases, those that were not dismissed at the threshold for failing to comply with formal prerequisites for filing suit. In keeping with the first wave of empirical research on \textit{Iqbal}'s effect in federal actions, Studies 1 and 2 demonstrate that dismissal rates have risen overall.\textsuperscript{239} The results of Studies 1 and 2 were statistically significant, and Study 3 revealed a marginally significant trend. These findings are consistent with the social psychological research discussed in Part II. Research on aversive racism and lay theories of racism suggested that under \textit{Iqbal}'s plausibility standard, federal courts would increasingly dismiss Black plaintiffs' claims of race discrimination, particularly in ambiguous cases. Research indicates that judgment and decision making are influenced by stereotypes, implicit associations, and lay theo-

\textsuperscript{237} A two-way contingency table analysis was conducted to evaluate whether the proportions were similar or dissimilar. Judge's race and decisions were found to be marginally significant, Pearson $\chi^2 (2, N=128) = 5.028, p = .081$, \textit{Cramer}'s $V = .198$. Because one cell (16.7%) had expected counts of less than 5, a Fisher's exact test was performed, which confirmed that the frequencies in the table were marginally significant, $p = .063$. Follow-up pairwise comparisons were conducted to evaluate the difference among the columns. The Holm's sequential Bonferroni method was used to control for Type I error at the .05 level across all three columns. The only significant pairwise difference was the comparison between grant and grant/deny, which accounted for 5.079 of the Pearson $\chi^2$ and was significant $p = .024$, \textit{Cramer}'s $V = .252$. The pattern in which White and Black judges are deciding motions to dismiss differently is trending toward statistical significance.

\textsuperscript{238} A two-level logistic regression ("grant" versus "deny" and "grant & deny") with judge's race and plaintiff gender as predictors was conducted using SPSS (controlling also for whether decisions were made after a magistrate judge's recommendation). This analysis revealed a marginally significant effect of judge's race on the grant rate for claims of race discrimination after \textit{Iqbal}, odds ratio = 2.89, Wald = 3.20, $p = .07$. Specifically, White judges were more than twice as likely to grant dismissal as were Black judges. Further, plaintiff gender was a significant predictor of the grant rate, odds ratio = 2.27, Wald = 4.90, $p = .03$. Judges were more than twice as likely to grant dismissal when the plaintiff was a Black female compared to when the plaintiff was a Black male. For an excellent discussion of logistic regression, see \textsc{Barbara G. Tabachnick & Linda S. Fidell}, \textit{Using Multivariate Statistics} 437-504 (5th ed. 2007).

\textsuperscript{239} See Hatamyar, \textit{supra} note 14, at 597–615.
ries of racism, which results in decisions biased toward dismissal. Studies 1 and 2 demonstrate that the dismissal rate for Blacks in employment discrimination cases has risen sharply. What is striking is the magnitude of this effect: Studies 1 and 2 suggest that, for these cases, the dismissal rate increased more sharply than the first wave of studies indicated.240

One threshold question is whether the increased dismissal rate for Black plaintiffs' claims is attributable simply to the rise in the base rate for dismissals across all actions. In this regard, Professor Hatamyar examined 1,039 cases and demonstrated that the increase in dismissal rates across all actions rose from 46% under Conley to 56% under Iqbal, meaning that the base rate for dismissals was 1.21 times higher. Her study demonstrated that for Title VII claims, the dismissal rate rose from 42% under Conley to 53% under Iqbal, 1.26 times the base rate. Had the increase in dismissals merely reflected a rise in the base rate for dismissals across all actions, the increases documented in Studies 1 and 2 would have reflected a similar rise in the base rate. In fact, Study 1 demonstrates that dismissal rates rose even more sharply: 2.66 times for Black plaintiffs' claims of racial discrimination. Figure 4 demonstrates this effect.

240. Id. Under Conley, if Blacks exhausted their claims with the EEOC and timely filed suit, it was relatively certain that they would survive the pleading stage, withstand defendants' motions to dismiss, and be allowed to present their claims at summary judgment. Under Conley, district courts dismissed only 20.5% of those claims. After Iqbal, in counseled cases district courts dismissed 54.6% of those claims, and in pro se cases district courts dismissed 67.3% of those claims. See supra Part IV.B.
If increased dismissal rates were simply attributable to a new pleading rule, White and Black judges would apply that rule similarly. Study 3, however, reports a post-

*Fig. 4: Changing Dismissal Rate in Study Compared to Changing Dismissal Rate for All Claims and Title VII Claims*

If increased dismissal rates were simply attributable to a new pleading rule, White and Black judges would apply that rule similarly. Study 3, however, reports a post-Iqbal trend: Black and White judges are deciding claims of racial discrimination differently at the pleading stage, with White judges more likely to grant dismissal. This emerging pattern is consistent with research on lay theories of discrimination. Some White judges may be attributing the challenges Blacks face in the workplace to stereotypical characteristics, rather than to subtle prejudice. In contrast, many Black judges may be drawing on lay theories that take into account both overt and subtle prejudice. It appears that judging may be influenced by preconceptions about the prevalence of prejudice in American society.


242. These results should be interpreted with caution, however, given the small sample size of decisions in the study adjudicated by Black federal judges. The pattern is trending toward statistical significance and should be revisited once more cases are decided.

V. GENERAL DISCUSSION OF IQBAL’S EFFECT ON CLAIMS OF RACE DISCRIMINATION UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAW

Scholars warned that Twombly and Iqbal would move the pivotal point at which courts screen cases earlier in time from summary judgment to the motion to dismiss, and that this move would be pronounced in employment discrimination cases. The motion to dismiss would, in effect, become the new summary judgment motion. The present research demonstrates that these concerns are well founded. For Black plaintiffs’ claims of race discrimination, many courts are rigorously applying Iqbal as if the Court called for a heightened pleading bar. Iqbal has resulted in elastic pleading standards that are difficult to apply consistently.

In short, Iqbal has created legal uncertainty, which is especially pronounced when adjudicating claims of race discrimination in the workplace. It is unclear whether plaintiffs are now required to plead facts establishing a prima facie case, and if so, how elaborate that showing must be. That is, federal courts have difficulty reconciling Iqbal with Swierkiewicz. As the Ninth Circuit recently lamented, the juxtaposition of Swierkiewicz, on the one hand, and Iqbal, on the other, is “perplexing.”

One line of jurisprudence holds that Swierkiewicz remains good law after Iqbal. The Seventh Circuit has concluded that, given the Court’s

244. Miller, supra note 12, at 15.
245. Thomas, supra note 12, at 18.
246. See In re Text Messaging Antitrust Litig., 630 F.3d 622, 627 (7th Cir. 2010); Boykin v. KeyCorp, 521 F.3d 202, 213 (2d Cir. 2008).
247. See supra Part III.
248. See supra Part III. Federal courts are splintered. See, e.g., Winston v. Clough, 712 F. Supp. 2d 1, 13 n.10 (D.D.C. 2010) (“Swierkiewicz...is still good law”); Dave v. Lanier, 606 F. Supp. 2d 45, 49 (D.D.C. 2009) (“It is not necessary for the plaintiff to plead all elements of his prima facie case in the complaint.”); accord Moore v. Metro. Human Serv. Dist., No. 09-6470, 2010 WL 1462224, at *3 (E.D. La. Apr. 8, 2010) (“The current pleading standards for a Title VII case... reconcile[s] Swierkiewicz, Twombly, and Iqbal.”); Gillman v. Inner City Broad. Corp., No. 08 Civ. 8909 (LAP), 2009 WL 300244, at *3 (S.D.N.Y. Sept. 18, 2009) (“Iqbal was not meant to displace Swierkiewicz’s teachings about pleading standards for employment discrimination claims.”). But see, e.g., Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009) (“Because Conley has been specifically repudiated by both Twombly and Iqbal, so too has Swierkiewicz.”).
explicit decision to reaffirm the validity of Swierkiewicz in Twombly, “in many straightforward cases, it will not be any more difficult today for a plaintiff to meet the pleading burden than it was before the Court’s recent decisions.”

The Second Circuit has also reaffirmed Swierkiewicz, finding that “[t]here is no heightened pleading requirement for civil rights complaints alleging racial animus.”

Similarly, some courts have held that even after Iqbal, the prima facie elements are “an evidentiary standard,” not a “pleading requirement,” particularly in discrimination cases where discovery unearths relevant facts.

Other courts have held that while plaintiffs are not required to plead every element of a prima facie case, they must allege more than conclusory allegations; they must give the defendant “fair notice of what plaintiff[s] claim[s] are and the grounds upon which [they] rest[].” These courts conclude that although Swierkiewicz relied on Conley, Swierkiewicz remains good law even after Conley’s demise.

In contrast, another line of jurisprudence requires plaintiffs to plead facts establishing the prima facie case. For example, in Fowler v. UPMC Shadyside, the Third Circuit held that Swierkiewicz is invalid because it was premised on Conley. Third Circuit courts have held that, while not required to prove elements at the pleading stage, a plaintiff must nonetheless plead facts that “raise a reasonable expectation that discovery will reveal...
evidence of the necessary element[s]." Other courts have concluded that plaintiffs must plead facts for each element of a prima facie case. Fourth Circuit courts have held that while a plaintiff need not plead facts establishing a prima facie case of discrimination, the basic pleading requirement requires plaintiffs to set forth facts sufficient to allege each element of their claim. Finally, at least one Eleventh Circuit court has held that "it is necessary for a plaintiff to plead sufficient factual matter to show that a defendant acted not for a legitimate, non-pretextual reason, 'but for the purpose of discriminating on account of race.'"

Other courts seemed uncertain and divided: plaintiffs need not plead a prima facie case, yet such a showing is still relevant to determining whether a complaint states a claim that is plausible on its face. Yet others cite Swierkiewicz for the ban on heightened pleading, but nonetheless explain that the prima facie standard is a "useful structure" to determine whether plaintiffs have presented a reasonable inference of discrimination.

In light of the Supreme Court's recent decision in Skinner v. Switzer, the Seventh and Second Circuits' approaches are most correct. In Skinner, the Court again reaffirmed the vitality of Swierkiewicz. It is
too early, however, to tell whether federal courts will re-assess the broad-
est constructions of *Iqbal* in light of the Court’s recent decision in *Skinner*.

A. Similarly Situated Employees

Much variance stems from how federal courts decide the last ele-
ment of the prima facie case. Consistent with the science discussed in
Part II, this final element is of marked significance. This section reviews
decisions to show how courts have used the similarly-situated element
under *Iqbal* to dismiss claims that would likely have survived under
*Conley*. Those who hold a lay theory of overt racism view racism as re-
quiring that Blacks be treated bluntly worse than Whites. It appears that
many courts hold this lay theory and apply this element more strictly
under *Iqbal* than under *Conley*: they require greater factual precision in
identifying which White employees were similarly situated, how they
were similarly situated, and how they were treated more favorably.

One line of authority applies this final element strictly. These courts
cite *Swierkiewicz* in passing, but ultimately conclude that Black plaintiffs
have not pleaded enough to show that they were treated differently than
similarly situated Whites. In some cases, plaintiffs pleaded rather generally
that they were treated differently than Whites. In these cases, courts ap-
plied *Iqbal* and characterized the broad allegations as invalid legal
conclusions.66 Other Black plaintiffs pleaded with greater particularity
that named Whites were similarly situated and treated more favorably. Yet
courts granted dismissal after reasoning that these plaintiffs had not plead-
ed enough to show that Whites were sufficiently comparable—that
Whites were employed in similar capacities with similar job histories—
and that discrimination was plausible.67 Some plaintiffs pleaded with
great precision that Whites were similarly situated, but courts granted
dismissal nonetheless, holding that these plaintiffs had not pleaded enough
to show that White coworkers were sufficiently comparable and that dis-
crimination was plausible.68 Remarkably, in some cases, plaintiffs pleaded
that they were terminated and replaced with named Whites, but courts

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Tex. Jul. 9, 2009) (identifying the plaintiff’s statement as “nothing more than a ‘threadbare
recital’... of the fourth element” of the discrimination claim (quoting *Iqbal*, 129 S. Ct. at
1949)).

1956804, at *2 (D. Md. May 14, 2010) (“Based on the allegations in the complaint, it
would be speculative to believe that the Board terminated Ms. DeLoatch’s employment
for any reason aside from her criminal conviction.”).

68. See Keys v. Humana, Inc., No. 3:09-CV-834-S, 2010 WL 2961186, at *3 (W.D.
Ky. Jul. 16, 2010); Duncan v. LaSalle (Mgmt.) Grp., Ltd., No. 09-1574, 2010 WL 276242,
at *3 (D. Minn. Jan. 15, 2010).
characterized these allegations as legal conclusions and insufficient to state a plausible claim. Yet other courts found discrimination implausible when Black plaintiffs pleaded that their employers treated other Blacks in similar discriminatory fashion or that they were terminated and replaced by other Blacks.

Another line of authority, however, applies the final element more leniently. Some courts accept plaintiffs' allegations that unnamed Whites are comparable. These courts explain that plaintiffs "need not go into ... detail regarding the degree to which those employees outside of [their] protected class are 'similarly situated.' This question is fact intensive and best left for a fully developed record at summary judgment. Other courts recognize that at the pleading stage, plaintiffs have not yet conducted discovery on how defendants treated coworkers who were alleged to be comparators. Recognizing that any inference of discrimination would be weak before discovery, these courts reject the requirement that plaintiffs must allege with particularity that similarly situated White employees were treated differently. Others have found that although plaintiffs have not named White employees who were treated more favorably, that failure is not fatal at the pleading stage.

Overall, the exacting approach is a heightened pleading bar and a marked change from how courts decided the final element under Swierkiewicz. Under Conley and Swierkiewicz, federal courts did not require plaintiffs to name in their complaints particular White employees
who were treated more favorably. Some held that complaints survived dismissal as long as they supported an inference that people outside of plaintiffs' protected class were treated differently. Others concluded that the proper role of a complaint was simply to give the defendant fair notice of the plaintiff's claims and the grounds upon which they rest. These courts denied motions to dismiss where plaintiffs had pleaded that adverse action was motivated by racial animus and that at least one non-Black employee was treated more favorably. Finally, others rejected any per se rule that Blacks were required to plead, when terminated, that they were replaced by White employees.

**B. Adverse Action**

Variance also results from the ways in which courts apply the "adverse action" element. Many courts now require greater precision: they dismiss claims on grounds that the plaintiffs failed to plead enough facts to show that they suffered an adverse action. These courts cite Swierkiewicz even as they grant dismissal. Courts held that plaintiffs failed to plausibly plead cognizable adverse actions when grievances stemmed from disparate reprimands, evaluations, promotions, job responsibil-

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278. See, e.g., Fortes v. Boyertown Area Sch. Dist., No. 06-0878, 2006 WL 3043108, at *4 (E.D. Pa. Oct. 20, 2006); Harold v. Barnhart, 450 F. Supp. 2d 544, 561 (E.D. Pa. 2006); Esukpa v. John Eagle Sports City Toyota, No. 3:05-CV-2196-M, 2006 WL 2371329, at *2 (N.D. Tex. Aug. 15, 2006) ("Though plaintiff does not explicitly set forth facts establishing that others outside the protected class were treated more favorably, the Court finds that Plaintiff has met his pleading requirement as described in Swierkiewicz.").


Beyond Common Sense

Other courts apply the adverse action element more leniently, explaining that many of the above-listed job harms may ultimately be insufficient to show discrimination at summary judgment. Nonetheless, these harms are not per se insufficient at the pleading stage. The relevant inquiry instead turns on context and whether the harm had tangible, adverse effects on plaintiffs' employment.

Here, too, the more exacting approach is a heightened pleading bar that departs from prior jurisprudence. Previously, courts often refused to evaluate the substance of the adverse action at the pleading stage. Courts thought this inquiry best left for summary judgment after discovery. Indeed, deciding the issue on the pleadings was thought contrary

288. Holland v. Pilot Travel Ctr., LLC, No. 5:09-CV-262(CAR), 2010 WL 2732047, at *5 (M.D. Ga. Jul. 8, 2010) ("Plaintiff is left with his assertion that Defendant failed to train him in his new position. But Plaintiff fails to allege that any denial of training by Defendant had a material effect on the terms or conditions of his employment.").
290. See Apau v. Printpack Inc., 722 F. Supp. 2d 489, 493 (D. Del. 2010); Law v. Autozone Stores, Inc., No. 4:09CV00017, 2009 WL 4349165, at *2 (W.D.Va. Nov. 25, 2009) ("[The employer] cites a string of cases for the proposition that a written reprimand is insufficient as a matter of law to constitute an adverse employment action. This interpretation of the relevant case law is mistaken. The precedent clarifies that a reprimand is neither automatically sufficient nor per se insufficient to meet that element of the claim.").
293. See, e.g., Muhammad v. Chicago Park Dist., No. 06 C 0308, 2007 WL 1030431, at *5 (N.D. Ill. Mar. 30, 2007) ("It is worth mentioning that every Seventh Circuit case to which the Defendant cited for an example of what constitutes a legally insufficient adverse employment action was an appeal from a summary judgment decision. That is because a district court will not generally inquire into the substance of the alleged adverse employment action on a motion to dismiss pursuant to Rule 12(b)(6)."); Fortes v. Boyertown Area Sch. Dist., No. 06-0878, 2006 WL 3043108, at *4 (E.D. Pa. Oct. 20, 2006) ("Given the procedural posture of this case, Plaintiff’s allegations support an inference of disparate treatment affecting the ‘compensation, terms, conditions, or privileges of employment’ on the basis of race," (quoting Storey v. Burns Int’l Sec. Servs., 390 F.3d 760, 764 (3d Cir. 2004))); Martin v. Nw. Mut. Life Ins. Co., No. 05-C-0209, 2006 WL 897751, at *3 (E.D.Wis. Mar. 31, 2006) ("Summary judgment is the better vehicle for attacking the sufficiency of factual allegations related to adverse actions. After all, [Plaintiff] has not asserted facts in his complaint that would entirely bar recovery.").
294. See Buford v. City of Atlanta, No. 1:06-CV-3089-TWT, 2007 WL 1341115, *4-5 (N.D. Ga. Apr. 30, 2007) ("Plaintiff Buford may be able to offer evidence which would allow a jury to conclude that a reasonable employee in his position would find the
to the rule that adversity is determined by examining the circumstances of each particular case.295

C. Nondiscriminatory Justifications

Less often, courts have granted dismissal on the grounds that plaintiffs had failed to show that the defendant’s plausible nondiscriminatory justifications were pretextual.296 Some courts, however, did hold that the plaintiffs’ failure to plead facts disproving pretext rendered their claims implausible.297 Other courts weighed the employer’s nondiscriminatory justifications against the inference of discrimination, ultimately concluding that plaintiffs had stated plausible claims.298

Most courts, though, hold that considering pretext and weighing alleged nondiscriminatory justifications are not allowed at the pleading stage because plaintiffs are not yet required to anticipate and refute nondiscriminatory reasons for adverse action at that stage.299 Instead, defendants must advance those justifications at summary judgment, and only then must plaintiffs refute them.300 That some jurists now weigh nondiscriminatory reasons at the pleading stage demonstrates that the standards that once governed summary judgment have shifted to the pleading stage.301

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296. See Sojourner v. Cherry, No. 1:09-CV-3460-TWT, 2010 WL 3516830, at *2 (N.D. Ga. Aug. 31, 2010) ("[I]t is necessary for a plaintiff to plead sufficient factual matter to show that [a defendant] acted not for a legitimate, non-pretextual reason, but for the purpose of discriminating on account of race . . . .") (internal quotation marks omitted); Floyd v. U.S. Dep’t of Homeland Sec., No. RDB-09-0735, 2009 WL 3614830, at *7 (D. Md. Oct. 27, 2009) ("Finally, even if [Plaintiff] could establish a prima facie case of discrimination, Defendant has cited legitimate, nondiscriminatory justifications for its decision to suspend [Plaintiff] on two occasions and to ultimately remove her from her position . . . .").


301. See supra Part III.
Most courts deny motions to dismiss claims of racial harassment when plaintiffs plead overt racial animus. As predicted by social psychological research, however, many courts grant motions to dismiss when plaintiffs complain of more subtle forms of harassment.

Many jurists now evaluate claims of racial harassment more rigorously. Many grant dismissal on grounds that harassment was not sufficiently severe or pervasive, even though plaintiffs complained of racial intolerance in the workplace. For example, courts granted dismissal where plaintiffs complained about music that was derogatory toward Blacks and comments about racial stereotypes. These courts often determine that plaintiffs have not pleaded enough to show that harassment was severe or pervasive or that workplaces had become permeated with racial animus. Some characterize harassment as merely workplace friction or blame the plaintiff for strife in the workplace. Others characterize plaintiffs’ allegations of harassment as legal conclusions. When plaintiffs plead facts suggesting overt racial animus, however, most courts deem claims of harassment sufficiently plausible: these courts denied motions to dismiss and found that plaintiffs had provided defendants with fair notice of their claims.


Some jurists believe that claims of harassment withstand dismissal even where harassment is less overt. Some hold that plaintiffs need only plead that they faced harassment that a reasonable employee would find had altered the conditions of employment for the worse and caution against setting the bar too high at the pleading stage. Rather than requiring plaintiffs to prove their case at the pleading stage, some courts hold that plaintiffs survive dismissal if they alleged facts that could be probative of a discriminatory hostile work environment. These courts deny motions to dismiss even when racial harassment is less overt.

Here again, we see a shift in the way courts adjudicate claims at the pleading stage. Under Conley, most jurists held that plaintiffs were not required to plead specific facts to set forth a clear case of harassment; dismissal should only be granted if it appeared beyond doubt that plaintiffs could prove no set of facts that supported their claims of racial harassment. In close cases—those involving less overt forms of harassment—courts evaluated the totality of the circumstances, read complaints in the light most favorable to plaintiffs, and often refused to deem allegations insufficient to state a claim of racial harassment. Courts gave plaintiffs every benefit of the doubt, even where plaintiffs neglected to plead that they had suffered harassment specifically based on race. This lenient application of Rule 8(a) is inconsistent with the more exacting interpretation of Iqbal.

E. Black Pro Se Plaintiffs

The Article now turns to Black pro se plaintiffs' claims and the increased dismissal of those claims. Shortly after Twombly, in Erickson v. Pardus, the Court instructed that pro se complaints must be liberally con-

strued and held to less stringent standards than pleadings drafted by lawyers. Nonetheless, *Iqbal* has had a significant effect on unrepresented Black plaintiffs because, like other pro se plaintiffs, they tend to assert claims in a more broad, general fashion than represented parties; on balance, courts tend to characterize many more of their allegations as legal conclusions. Study 2 demonstrates that courts have increasingly dismissed claims of discrimination brought by Black pro se plaintiffs post-*Iqbal*. The grant rate doubled from 32.0% under *Conley* to 67.3% under *Iqbal*, reflecting that it is 2.10 times more likely that Black pro se plaintiffs’ claims will be dismissed. Federal courts seem to treat *Erickson* as a “paper rule,” one that does not accurately describe or predict judicial behavior.

This disparity, an urgent and systemic problem for federal courts, warrants global review. Many pro se plaintiffs rely on form complaints made available to them by federal courts, but it appears that those forms have not been updated to reflect the heightened pleading requirements now employed by many courts when scrutinizing complaints. Incomplete instructions may lull pro se plaintiffs into pleading claims in a more general fashion than is advisable under current federal jurisprudence. For example, form complaints often instruct pro se plaintiffs to “state... as briefly and clearly as possible, the essential facts of your claim. Describe specifically the conduct that you believe is discriminatory and describe how each defendant is involved in the conduct.” This language may lead those who know nothing of Title VII’s substantive standards and the pleading requirements under *Iqbal* to articulate claims without sufficient precision. For example, the forms neither advise pro se plaintiffs that courts will screen their pleadings for facts setting forth a prima facie case.

320. Unfortunately, the FJC’s recent study on *Iqbal*’s effects excluded all pro se cases, presuming that federal courts would not apply a heightened pleading standard against pro se plaintiffs given their obligation to construe these complaints liberally. CECIL ET AL., supra note 214, at 6. Study 2 suggests that by excluding pro se cases, the FJC’s report may have inadvertently underreported *Iqbal*’s effect overall.
of discrimination, nor encourage pro se plaintiffs to plead that similarly situated comparators were treated differently.

Courts may also employ heuristics when evaluating the plausibility of pro se claims by inferring that pro se claims are less plausible than counseled claims. That a plaintiff is unrepresented may send a subtle cue about the likely merit of his or her claims. In addition, the powerful cultural stereotypes for the subgroup of Blacks who are poor and cannot afford counsel may subtly affect analysis of these pro se plaintiffs’ claims. 32

In sum, Iqbal has resulted in marked legal uncertainty and altered how federal district courts decide Black plaintiffs’ claims of discrimination at the pleading stage. Many courts now screen such complaints more rigorously than in the past, importing into the pleading stage standards once applicable only at summary judgment.

VI. A Once-Invisible Problem Now in View

Some commentators contend that Iqbal makes no new law under Rule 8, poses no issues of access to justice, and simply makes explicit what courts have done all along. Iqbal is business as usual: old wine in a new bottle, they say. 324 Others contend that it is too soon to tell whether Iqbal is having any effect on the adjudication of claims. 325 Still others have been sharply critical of the Supreme Court’s decision, contending that under Iqbal federal courts may well screen out a large percentage of civil rights litigation. 326

Whether federal courts have fashioned a heightened pleading regime under Iqbal is an empirical question: we must move past rhetoric and observe Iqbal’s actual effects on the ground in particular categories of cases. 327 This Article has focused narrowly on the question of how Iqbal has affected Black plaintiffs’ claims of race discrimination in the workplace. From this vantage point, it becomes clear that federal courts have applied Iqbal as if it called for a new pleading regime—one that, in

323. See Cuddy & Fiske, supra note 126, at 638.
325. See, e.g., Noll, supra note 11, at 147 (“Here, as elsewhere, the verdict is still out.”).
326. See, e.g., Suzette M. Malveaux, Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases, 14 LEWIS & CLARK L. REV. 65, 85–106 (2010); Miller, supra note 12, at 20; Schneider, supra note 12, at 532–36; Thomas, supra note 12, at 18.
327. See Cohen, supra note 13, at 824 (“Fundamentally there are only two significant questions in the field of law. One is, ‘How do courts actually decide cases of a given kind?’ The other is, ‘How ought they to decide cases of a given kind?’”); cf. Kaplan, supra note 13, at 36.
practice, is a heightened pleading bar. A first wave of empirical scholarship, conducted most notably by Professor Hatamyar, has shown that federal courts have begun applying *Iqbal* in ways that have increased dismissals across many federal cases. By systematically studying and examining these narrow questions in light of social psychological research, this Article demonstrates that *Iqbal* has had an even greater effect than other studies suggested. The problem is now in view.

Social psychological research on aversive bias suggested this would come to pass. By shifting from a notice-pleading rule to a plausibility pleading standard, unconscious stereotypes and implicit associations are more likely to affect decision making and result in decisions biased toward dismissal. *Iqbal* explicitly requires federal district judges to draw on their “common sense” in determining the plausibility of plaintiffs’ claims, without the benefit of concrete evidence.

Research on lay theories of racism also suggested that courts would increasingly dismiss claims of subtle discrimination. A widely held folk theory among majority group members is that discrimination is no longer a problem for minority group members in American society. Moreover, many hold the lay theory that racism is a psychopathology—that racists act in blatant and overt ways. Meanwhile, many Blacks have a more expansive view of prejudice as encompassing behaviors both overt and subtle.

This Article finds that judges are no exception. Empirical analysis demonstrates that courts have increasingly dismissed claims of discrimination, especially when prejudice appeared less overt, and that White judges are more likely to grant dismissal under *Iqbal* than Black judges.

With the problem in view, it becomes evident that *Iqbal* has resulted in epistemic tension in the law, with philosophical and practical implications. First, the priority placed by the Court on common sense as the gauge of legal validity was critiqued by John Stuart Mill as the *a priori*
fallacy: “A large proportion of all the errors committed in the investigation of the laws of nature, have arisen from the assumption that the most familiar explanation or hypothesis must be the truest.” Law driven by folk theories that have been scientifically disproven is indefensible. Iqbal presumes that unchecked common sense can be applied without the subtle pull of stereotypes and without biased outcomes, a presumption that science has long since disproven, particularly in the discrimination context. Further, Iqbal assumes incorrectly that what many take for granted as “common sense”—the dominant folk theory of race relations in American society—is accurate. Yet common beliefs regarding concepts such as prejudice, race, and discrimination has evolved over time for better or worse, reflecting change in American society. Today, there is a marked duality between many Americans’ characterization of prejudice as blatant and the science demonstrating that manifestations of prejudice have become increasingly subtle.

334. JOHN STUART MILL, A SYSTEM OF LOGIC: RATIOCINATIVE AND INDUCTIVE 526 (8th ed. 1904). Social and cognitive psychologists have examined this fallacy as the availability heuristic and simulation heuristic using Tversky and Kahneman’s heuristics and biases framework. See, e.g., NISBETT & ROSS, supra note 161, at 17–42; Gideon Keren & Karl H. Teigen, Yet Another Look at the Heuristics and Biases Approach, in BLACKWELL HANDBOOK OF JUDGMENT & DECISION MAKING 89, 97 (Derek J. Koehler & Nigel Harvey eds., 2007).


336. See Henri Tajfel, Social Psychology of Intergroup Relations, 33 ANN. REV. PSYCHOL. 1, 21–22 (1982) (“One of the principal features . . . of intergroup behavior and attitudes is [t]he tendency shown by members of an ingroup to consider members of outgroups in a relatively uniform manner, as ‘undifferentiated items in a unified social category.’ . . . Conceptions of outgroups are generated in their social and historical contexts and then transmitted to individual members of groups and widely shared . . . .” (quoting Tajfel, supra note 33, at 243)).

337. Consider how common beliefs about members of stereotyped groups have changed across time. See Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1856) (“[Blacks are] a subordinate and inferior class of beings, who . . . ha[ve] no rights or privileges . . . .”); MILL, supra note 334, at 550 (“What, for example, is to be thought of all the ‘common sense’ maxims for which the following may serve as the universal formula . . . . [N]egroes have never been as civilized as [W]hites sometimes are, therefore it is impossible they should be so.”); VANDER ZANDEN, supra note 42, at 45, 53–54 (“The notion of racial and ethnic superiority and inferiority has had wide currency in the modern age . . . . According to a popular superstition, the offspring of interracial unions inherit most of the bad and few of the good qualities of the parental stocks.”).

338. See supra Part II.
On the practical side, the consequences if *Iqbal*’s pleading standards go uncorrected will be profound for civil rights litigation and the scope of federal nondiscrimination law. Although prejudice persists in American society, federal civil rights law may chiefly reach overt forms of discrimination. Since civil rights law will remedy subtle prejudice only unpredictably, these victims will have no “real right” to be free from subtle prejudice. And with no “real right,” as Wesley Hohfeld long ago observed, majority group members would have the privilege to discriminate against them in subtle forms. Civil rights law would fail to protect the members of stigmatized groups who most need legal protection against modern forms of prejudice.

The problem is not that *Iqbal* calls for federal courts to draw on common sense or past experience. As Justice Holmes famously said, “The life of the law has not been logic: it has been experience.” This Article does not challenge the pragmatic style of adjudication, which often draws on common sense, experience, and reflection. The problem is that *Iqbal* requires judges to draw on their common sense at the very inception of litigation, before evidence has been presented to them. This regime necessarily requires judges to act with minimal foresight and deliberation, based upon intuitions and presuppositions.

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340. Wesley N. Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning* 36–40 (1919). Hohfeld articulated a theory of jural relations that likened the scenario where A has “no right” to stop B from causing harm to A with the scenario where B has the “privilege” to cause A harm. For example, if A has “no right” to stop B from engaging in particular conduct, then B can engage in that activity without legal interference from A. In that sense, B has the “privilege” to perform this conduct (even if B’s conduct inflicts harm on A that is not legally cognizable). See J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. Miami L. Rev. 1119, 1129 (1990) (“Hohfeld’s basic idea [is] that a legal right is a privilege to inflict harm that is either not legally cognizable or is otherwise without legal remedy.”).
341. Further, since American society tolerates as “natural” overt discrimination against some stigmatized groups—for example, in the form of recent anti-immigrant ordinances—some overt discrimination may also remain under- or un-enforced. This issue warrants empirical study another day.
344. See Frank, *supra*, note 343, at 147 (“[A]mong the most important objects which would be subject to [the judge’s] scrutiny as a psychologist would be his own personality so that he might become keenly aware of his own prejudices, biases, antipathies, and the like, not only in connection with attitudes political, economic, moral but with respect to more minute and less easily discoverable preferences and disinclinations.”); Posner, *supra* note 243, at 67 (“Preconceptions play a role in rational thought . . . . [P]reconceptions impound information, though it is not always accurate.”).
Without evidence to evaluate, preconceptions too strongly affect the result. Initial intuitions form but one part of judicial decision making. From judicial experience, we generate working hypotheses that must be further tested and evaluated. Although common sense, a hunch, may suggest that no discrimination occurred in a case, social psychology shows that these hypotheses must be evaluated for their accuracy to avoid implicit stereotypes and associations. This evaluation requires evidence that courts do not possess at the pleading stage. The consequence is a heuristic known as the confirmation bias, the tendency to over-rely on one’s initial hunch or hypothesis. Summary judgment is the proper vehicle for deliberating with evidence, for testing initial hunches and hypotheses against evidence.

Social psychological research, particularly on the MODE model of mental processing, confirms that jurists should not be forced to screen complaints based upon their preconceptions. MODE stands for “motivation and opportunity as determinants of whether the attitude-to-behavior process is primarily spontaneous or deliberate.” Research shows that implicit associations exert more influence on spontaneous than deliberative processes. Spontaneous processes involve, for example, automatic behavior and judgment toward people of color that is subtly influenced by stereotypes and automatic associations about race. In contrast, deliberative processes are more mindful and require individuated evaluation of people of color, which may result in unbiased judgments. Deliberative processing requires effort and reflection: people must be mo-

345. See Nisbett & Ross, supra note 161, at 67 (“[P]rior theories, schemas, perceptual and problem solving sets, and other preconceptions can powerfully influence subjects’ interpretation of ambiguous stimuli. The impact of preconceptions is one of the better demonstrated findings of twentieth-century psychology . . . .”).
346. See John Dewey, Logical Method and Law, 10 CORNELL L.Q. 17, 23–24 (1924).
348. Id. at 203.
349. See Nisbett, supra note 161, at 38 (“Schemas are apt to be overused and misapplied, particularly to the social sphere, and they are apt to be used when other, less rapid and intuitive methods of judgment would fully merit the additional time and effort required.”); McKenzie, supra note 347, at 204 (“If one were to attempt to identify a single problematic aspect of human reasoning that deserves attention above all others, the confirmation bias would have to be among the candidates for consideration . . . .”).
350. See Fazio & Olson, supra note 156, at 301 (describing MODE model of processing, which differentiates deliberate processes from more spontaneous forms of thinking).
352. See Fazio & Olson, supra note 156, at 301–02.
tivated to engage in it. If not, their automatic and implicit associations may give rise to bias. Opportunity, time, and resources (both cognitive and evidentiary) are necessary to deliberate. In short, jurists can override their implicit associations when they have both the appropriate evidence before them and the motivation to reflect carefully on information that differentiates one individual from others.

The United States Supreme Court surely did not intend to curb civil rights enforcement by Blacks. Rather, the *Iqbal* Court drew on an unsound theory of judgment: the assumption that courts could apply the plausibility standard in a deductive and color-blind manner. The Court neglected science demonstrating that judgment and decision making are regularly influenced by unconscious bias and implicit stereotypes and associations about stigmatized groups. Even so, the *Iqbal* Court did not call for a heightened pleading bar, nor did it cast doubt on the validity of Rule 8(a)(2).

The locus of the problem, therefore, is not merely the Court's plausible language in *Iqbal*, but how federal courts have elaborated on and applied that language. In practice, many courts are reconstructing *Iqbal* as if it called for a heightened pleading bar. These courts begin from an erroneous premise. If the Supreme Court had intended to fashion a heightened pleading bar, given the separation-of-powers issues implicated, surely it would have set forth that intent plainly and clearly. The broad reinterpretation of *Iqbal* runs afoul of the Rules Enabling Act, and that interpretation is plainly invalid. The Supreme Court has twice advised that heightened pleading bars cannot be imposed by judicial interpretation.

The dilemma calls for a sense of judicial craft. Federal courts must re-assess their own actions in light of the growing evidence that the dominant interpretation of *Iqbal* has increased the dismissal rate for claims by members of stereotyped groups. Courts must recall that jurisprudence is a craft that must be consistent with reasonable regularity in the law, with leeway afforded within precedent, doctrine, and patterns of cases. From this perspective, the rigorous construction of *Iqbal* must be rejected as a heightened pleading standard that is contrary to the Rules Enabling Act. The Rules Enabling Act requires a formal, federal civil rule-making process with input from the Judicial Conference and the Advisory Committee. These bodies would surely have vetoed a heightened pleading bar having a disparate effect on members of stereotyped groups.

353. See id.
Instead of a rigorous reconstruction of *Iqbal*, courts should interpret *Iqbal* more in line with Rule 8(a)(2) and the Rules Enabling Act. While *Conley* has been retired, Rule 8(a)'s "short and plain statement" rule has not. Indeed, the Supreme Court very recently issued *Skinner v. Switzer*, which is consistent with a more narrow interpretation of *Iqbal*. In that case, the Court ruled that the question under Rule 8(a) is not whether plaintiffs *will ultimately prevail* on their claims, but is instead whether complaints are sufficient to cross the federal court's minimal pleading threshold. This interpretation may avert the effect of stereotypes and implicit bias on judicial decision making at the pleading stage. Federal courts have the means, opportunity, and leeway consistent with a sense of judicial craft, to construe *Iqbal* as not requiring federal courts to rigorously screen complaints for their meritoriousness.

**CONCLUSION**

This Article has shown that, in practice, many courts are applying a heightened pleading bar, resulting in increased dismissals of Black plaintiffs' claims of race discrimination. In many ways, this Article is but the opening chapter, the first step in a wider discussion of *Iqbal*'s effect on Black plaintiffs' claims and on the claims of members of other stereotyped groups. It is likely that the same natural psychological processes that disadvantage Blacks are operating against other stereotyped groups at the pleading stage. Many Americans hold negative implicit associations about others with different social identities, including race, gender, religion, national origin, age, class, disability, sexual orientation, and immigration status. It is unclear how *Iqbal* has affected dismissals for members of other stereotyped groups. Both qualitative and quantitative research is warranted to examine *Iqbal*'s effect in those particularized situations as well. The Federal Judicial Center and the Judicial Conference's Advisory Committee on Civil Rules are encouraged to investigate these empirical questions along with other scholars interested in the connection between social psychological phenomena and law.

*Iqbal*'s pleading standard seems neutral and benign when examined void of context. Yet when courts are tasked with making subjective evalu-
ations about the merits of claims based on common sense and at the inception of litigation without any evidence, natural psychological processes likely result in bias. The problem is especially pronounced when members of stigmatized groups bring claims of discrimination. This issue is profound and should not remain obscured. How we resolve this problem will determine whether all people are afforded authentic and equal access to the courts.