

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

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*"[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<sup>1</sup>

*"[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<sup>2</sup>

## 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*,<sup>3</sup> and then *Ashcroft v. Iqbal*,<sup>4</sup> 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."<sup>5</sup> *Iqbal* requires federal courts, when deciding whether a complaint is plausible, to draw on their "judicial experience and common sense."<sup>6</sup> 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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1. JEROME FRANK, *LAW AND THE MODERN MIND* 145–46 (1930).
  2. GORDON ALLPORT, *THE NATURE OF PREJUDICE* 27 (1954).
  3. 550 U.S. 544 (2007).
  4. 129 S. Ct. 1937 (2009).
  5. *Id.* at 1960 (quoting *Twombly*, 550 U.S. at 570).
  6. *Id.* at 1950.

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.<sup>7</sup> 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.<sup>8</sup> Yet prejudice is still prevalent in society and has largely evolved from overt to more subtle forms.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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*.<sup>13</sup> 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.

10. See *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 194 (2009) (statement of Gregory G. Garre, Partner, Latham & Watkins LLP); Michael R. Huston, Note, *Pleading With Congress to Resist the Urge to Overrule Twombly and Iqbal*, 109 MICH. L. REV. 415, 427–37 (2010) (Part II, "Business as Usual"); see also Kendall W. Hannon, Note, *Much Ado About Twombly?: A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1835–38 (2008).

11. See David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 146 (2010).

12. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 20–23 (2010); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 532–36 (2010); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 34–38 (2010).

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.<sup>14</sup> 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<sup>15</sup> and naturalized jurisprudence.<sup>16</sup> 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.<sup>17</sup> As a research paradigm, behavioral realism seeks to understand judicial behavior based on research and

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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.").

14. See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553 (2010); Hannon, *supra* note 10.

15. The concept of behavioral realism as used in this Article was introduced at a July 2006 symposium discussing how advances in social and cognitive psychology lend new perspective to jurisprudence under federal nondiscrimination laws and the Equal Protection Clause. After the symposium, jurists and social and cognitive psychologists produced several noteworthy articles: Christine Jolls & Cass Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Linda H. Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006); Linda H. Krieger, *Behavioral Realism in Law: Reframing the Discussion About Social Science's Place in Antidiscrimination Law and Policy*, in BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 383 (Eugene Borgida & Susan T. Fiske eds., 2008).

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).

methods in the fields of social and cognitive psychology in combination with the empirical study of judicial decisions.<sup>18</sup>

Plausibility pleading is an excellent window through which to examine whether social psychological phenomena are borne out in judicial behavior.<sup>19</sup> *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.<sup>20</sup>

Three studies were conducted to examine judicial decision-making motions to dismiss Black plaintiffs’ claims of race discrimination in the workplace.<sup>21</sup> 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

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18. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 778 (2001); Jeffrey J. Rachlinski, *Heuristics, Biases, and Governance*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 567, 567–74 (Derek J. Koehler & Nigel Harvey eds., 2007) [hereinafter Rachlinski, *Heuristics*]; Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) [hereinafter Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*]; see also Howard Erlanger et al., *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 337 (2005); Stewart Macaulay, *The New Versus the Old Legal Realism: “Things Ain’t What They Used to Be,”* 2005 WIS. L. REV. 365, 385–87 (2005); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 831 (2008).

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) (“[There 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<sup>22</sup> and *could* have interpreted *Iqbal* (and can still) to ensure continuity, coherence, and predictability with Rule 8(a) and the Rules Enabling Act.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> The *Iqbal* Court did not expressly oppose these holdings, and the Court in *Twombly* approved *Swierkiewicz*, which in fact held that a heightened pleading bar shall not apply for claims of discrimination.<sup>26</sup> Yet federal courts have interpreted *Iqbal* as if the *Iqbal* Court required heightened pleading for claims of discrimination. Many courts have rigorously interpreted *Iqbal*, and the dismissal rate for Black plaintiffs' claims of employment discrimination has climbed. *That* interpretation and reconstruction of *Iqbal* violates the Rules Enabling Act.<sup>27</sup> *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.<sup>28</sup> Indeed, the Supreme Court's recent decision in *Skinner v. Switzer* applies this view.<sup>29</sup> In that case, the Court reaffirmed the vitality of *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.<sup>30</sup>

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

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22. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 70–71 (Oxford Univ. Press 2008) (1930); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 213–35 (1960).

23. See Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2006).

24. See 28 U.S.C. § 2071(a)–(b); Paul Carrington, *Politics and Civil Procedure Rule-making: Reflections on Experience*, 60 DUKE L.J. 597, 648 (2010).

25. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 163, 168–69 (1993).

26. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007).

27. See 28 U.S.C. § 2072(a).

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).

29. 131 S. Ct. 1289, 1296 (2011).

30. *Id.*

*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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> As Justice Cardozo famously observed, “[t]he great tides and currents

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31. See Lawrence Baum, *Motivation and Judicial Behavior: Expanding the Scope of the Inquiry*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING* 3, 16–19 (David Klein & Gregory Mitchell eds., 2010).

32. Others have written deftly about how the Court's new jurisprudence has imperiled the enforcement of legal rights. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 840–47 (2010); Miller, *supra* note 12, at 111; Schneider, *supra* note 12, at 551; A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008); Thomas, *supra* note 12, at 18. Arthur Miller, Paul Carrington, and others have discussed how the changing nature of private litigation, with its increasing cost and complexity, has led special interests to curb access to the courts. *E.g.* Carrington, *supra* note 24, at 655–56; Miller, *supra* note 12, at 14–15.

33. See LAWRENCE M. FRIEDMAN, *LAW IN AMERICA* 37, 140–41 (2002); John Higham, *Coda: Three Reconstructions*, in *CIVIL RIGHTS AND SOCIAL WRONGS: BLACK-WHITE RELATIONS SINCE WORLD WAR II* 179, 179–89 (John Higham ed., 1997); see also HENRI TAJFEL, *HUMAN GROUPS & SOCIAL CATEGORIES: STUDIES IN SOCIAL PSYCHOLOGY* 223–27 (1981) (discussing an alternative approach to the social psychology of intergroup relations).

which engulf the rest of men, do not turn aside in their course, and pass the judges by.”<sup>34</sup>

### A. Expansion—Notice Pleading and Conley

Code pleading, which required litigants to allege precisely the factual bases for their claims, dominated the courts from the nineteenth until the early twentieth century.<sup>35</sup> Courts dismissed claims for technicalities and for failing to plead required facts. Judges reviewed pleadings so strictly that if alleged facts later varied in any way from evidence proffered at trial, they dismissed suits to penalize variance with the pleadings.<sup>36</sup> This practice resulted in uncertainty, a complex maze of rules, and procedural traps for unwary litigants.<sup>37</sup> By the late nineteenth century, many considered the law of pleading too inflexible and rigid.<sup>38</sup>

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. Sandford*, the United States Supreme Court ruled that the framers regarded 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.”<sup>39</sup> After the Civil War, many Blacks lived in a South that stripped them of legal and political rights.<sup>40</sup> 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 African American experience.<sup>41</sup> Blacks were considered the intellectual and

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34. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

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 (2d ed. 1947); Charles E. Clark, *Simplified Pleading*, in 2 F.R.D. 456, 458–60 (1943) [hereinafter Clark, *Simplified Pleading*].

36. See RICHARD H. FIELD ET AL., *CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE* 502–507, 520–21 (7th ed. 1997); BENJAMIN J. SHIPMAN, *HANDBOOK OF COMMON-LAW PLEADING* 515–16 (3d ed. 1923); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1202 (3d ed. 2004).

37. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 574 (2007) (Stevens J., dissenting); FIELD ET AL., *supra* note 36, at 512–13; Roscoe Pound, *The Etiquette of Justice*, in 3 PROCEEDINGS OF THE NEBRASKA STATE BAR ASSOCIATION 231, 237–48 (1906–1909); Stephen N. Subrin, *How Equity Conquered Common Law*, 135 U. PA. L. REV. 909, 940 (1987); see also WRIGHT & MILLER, *supra* note 36, at § 1216; Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 417 (1921).

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 RUTHERFORD B. HAYES TO WOODROW WILSON* (1965)).



moral inferior of Whites,<sup>42</sup> and the education of Blacks was legally forbidden.<sup>43</sup> In the notorious case of *Plessy v. Ferguson*,<sup>44</sup> the Supreme Court approved the separate-but-equal doctrine and affirmed Jim Crow segregation.<sup>45</sup>

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.<sup>46</sup> Rule 8 was designed to discourage battles over form in order to provide substantial justice and access to courts.<sup>47</sup> 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.<sup>48</sup> 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.”).

43. *Brown v. Bd. of Educ.*, 347 U.S. 483, 490 (1954) (“[A]ny education of Negroes was forbidden in some states.”).

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).

46. See Charles E. Clark, *The Federal Rules of Civil Procedure 1938–1958*, 58 COLUM. L. REV. 435, 447–52 (1958) [hereinafter Clark, *The Federal Rules*]; Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) [hereinafter Clark, *The New Federal Rules*]; Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986); Miller, *supra* note 12, at 41; A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 434 (2008).

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.<sup>49</sup> The NAACP sought to overrule *Plessy* and the separate-but-equal doctrine.<sup>50</sup> Cases such as *Missouri ex rel Gaines v. Canada*,<sup>51</sup> *Sweatt v. Painter*,<sup>52</sup> and *McLaurin v. Oklahoma State Regents*<sup>53</sup> reflect the NAACP's gains toward that end. In time, however, a growing community began criticizing the liberal ethos of Rule 8.<sup>54</sup> 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.<sup>55</sup> 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."<sup>56</sup> The Advisory Committee ultimately defeated this proposal.<sup>57</sup>

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."<sup>58</sup> 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.<sup>59</sup> *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.<sup>60</sup>

49. See FRIEDMAN, *supra* note 33, at 37.

50. Nathan Maragold, a protégé of Felix Frankfurter, authored a report for the NAACP that proposed a series of lawsuits "boldly challeng[ing] the constitutional validity" of underfunded Black schools as a violation of the Equal Protection Clause. KLUGER, *supra* note 48, at 133-35.

51. 305 U.S. 337 (1938) (providing in-state legal education to Whites but not Blacks violates equal protection).

52. 339 U.S. 629 (1950) (new Texas law school for Blacks not substantially equal education to University of Texas Law School).

53. 339 U.S. 637 (1950) (requiring Black doctoral student to sit apart from White colleagues violates equal protection).

54. See Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 49 (1957); Marcus, *supra* note 46, at 445.

55. See Clark, *supra* note 54, at 49; Marcus, *supra* note 46, at 445.

56. See *Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253, 253 (1952).

57. See ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 18-19 (1955).

58. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

59. *Id.* at 494.

60. See, e.g., *Watson v. City of Memphis*, 373 U.S. 526 (1963) (invalidating segregation in public parks, playgrounds, and other recreational facilities); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (invalidating segregation in all publicly operated facilities);

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.<sup>61</sup> 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.”<sup>62</sup> 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.<sup>63</sup>

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.<sup>64</sup>

By the 1960s, after the Civil Rights movement and post-World War II, many believed that racism was wrong.<sup>65</sup> 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, PARTING 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,

[T]he 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[B] (4th ed. 2005).

64. 372 U.S. 391, 398–99 (1963).

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*,

Rights Act of 1964 to outlaw discrimination in employment, education, and public accommodation and to broaden access to justice for minorities.<sup>66</sup> In *Loving v. Virginia*, the Warren Court struck down a Virginia statute that criminalized interracial marriages.<sup>67</sup>

As the growth following World War II contracted in the late 1960s and 1970s, many Americans began to feel economic malaise.<sup>68</sup> 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.<sup>69</sup> 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."<sup>70</sup>

In the 1960s and 1970s, federal courts witnessed a dramatic rise in court filings, which some characterized as a "litigation boom."<sup>71</sup> Some scholars and practitioners called for retrenchment of Rule 8 and for heightened pleading bars,<sup>72</sup> and soon federal courts listened. Courts revived fact pleading in numerous quarters, including securities fraud, antitrust, and civil rights litigation.<sup>73</sup>

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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in THE OXFORD COMPANION TO UNITED STATES HISTORY 849, 850 (Paul S. Boyer ed., 2001).

66. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.); DANIEL M. BERMAN, A BILL BECOMES A LAW: CONGRESS ENACTS CIVIL RIGHTS LEGISLATION (2d ed. 1966); NICK KOTZ, JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING JR., AND THE LAWS THAT CHANGED AMERICA (2005); ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964 (1990).

67. 388 U.S. 1 (1967).

68. See generally, BARBARA EHRENREICH, FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS (1989).

69. See KLUGER, *supra* note 48, at 765-78.

70. *Id.* at 764 (internal quotation marks omitted).

71. See Marcus, *supra* note 46, at 445.

72. See *id.* at 445-47; *Claim or Cause of Action*, *supra* note 56, at 253.

73. 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 "weed[ing] 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.<sup>74</sup> 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.”<sup>75</sup> 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.”<sup>76</sup> It clarified that enacting a heightened pleading bar would require rewriting Rule 8 or Rule 9<sup>77</sup> through the formal process for amending the Federal Rules.<sup>78</sup> In *Swierkiewicz v. Sorema*, the Court again held that judicially fashioned heightened pleading standards violate the Rules Enabling Act.<sup>79</sup>

The Rules Enabling Act codifies a formal rule-making process for rules of practice and procedure, including the Federal Rules of Civil Procedure.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup>

### 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.<sup>83</sup> In 1995, Congress enacted the Private Securities Litigation Reform Act, altering the structure of private securities class actions.<sup>84</sup> One year later, Congress passed the Antiterrorism

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74. See discussion *supra* pp. 10–11.

75. *Leatherman v. Tarrant Cnty. Narcotics Intelligency & Coordination Unit*, 507 U.S. 163, 168 (1993).

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).

78. *Leatherman*, 507 U.S. at 168–69.

79. 534 U.S. 506, 515 (2002).

80. See Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2006); Carrington, *supra* note 24, at 648.

81. See 28 U.S.C. § 2071(b).

82. See 28 U.S.C. § 2071(c)(2); *Swierkiewicz*, 534 U.S. at 515; *Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 48 (1994); *Leatherman*, 507 U.S. at 168.

83. See *Miller*, *supra* note 12, at 11 n.35.

84. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

and Effective Death Penalty Act to restrict the availability of habeas corpus relief.<sup>85</sup>

Many Americans endorsed the view that prejudice is morally wrong, while simultaneously resisting measures to equalize opportunity for people of color.<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup> 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.”<sup>89</sup> *Jenkins* represented a retrenchment of *Brown* and subsequent desegregation cases: rather than exhorting school districts to eliminate all vestiges of segregation “root and branch,”<sup>90</sup> the Court blocked the efforts of a district court to attract nonminority students back into inner-city schools.<sup>91</sup>

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.<sup>92</sup> 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.<sup>93</sup> After the district court granted dismissal on the grounds that “conscious parallelism” fails to state a claim under the Sherman Act, the Second Cir-

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85. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

86. See MICA POLLOCK, *BECAUSE OF RACE: HOW AMERICANS DEBATE HARM AND OPPORTUNITY IN OUR SCHOOLS* 175 (2008).

87. 515 U.S. 70, 89–102 (1995).

88. *Id.*

89. *Id.* at 102.

90. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 438 (1968).

91. *Jenkins*, 515 U.S. at 168–69 (Souter, J., dissenting); see GARY ORFIELD, SUSAN E. EATON & THE HARVARD PROJECT ON SCHOOL DESEGREGATION, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION*, at xix (1996) (“Today, *Brown’s* vision is being abandoned . . . . [P]olitical and legal forces have converged to dismantle one of our greatest constitutional victories.”).

92. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553–54 (2007).

93. *Id.* at 550–51.

cuit reversed, concluding that no “plus factor” was required beyond the allegation of parallel conduct.<sup>94</sup>

The Supreme Court held that the complaint failed to state a claim.<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup> The Court then retired *Conley*, explaining that *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.”<sup>98</sup> Justice Souter wrote that *Twombly* did not require heightened fact pleading, but simply “enough facts to state a claim to relief that is plausible on its face.”<sup>99</sup>

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

As Justice Stevens had lamented, the Court extended *Twombly* to all federal actions in *Ashcroft v. Iqbal*.<sup>104</sup> 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.<sup>105</sup> 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

94. *Id.* at 553.

95. *Id.* at 564.

96. *Id.* at 557.

97. *Id.*

98. *Id.* at 562–63.

99. *Id.* at 570. Ultimately, the Court concluded that plaintiffs had not “nudged their claims across the line from conceivable to plausible.” *Id.*

100. *Id.* at 577–78 (Stevens, J., dissenting).

101. *Id.* at 596–97; accord Robert G. Bone, *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 *Twombly*) (2009); Carrington, *supra* note 24, at 655–56.

102. See, e.g., Ettie Ward, *The After-Shocks of Twombly: Will We “Notice” Pleading Changes?*, 82 ST. JOHN’S L. REV. 893, 910–18 (2008).

103. Nathan Sellers, Note, *Defending the Formal Federal Civil Rulemaking Process: Why the Court Should Not Amend Procedural Rules Through Judicial Interpretation*, 42 LOY. U. CHI. L.J. 327, 357–58 (2011).

104. 129 S. Ct. 1937 (2009).

105. *Id.* at 1943.

subjected him to harsh confinement because of his race, religion, or national origin.<sup>106</sup> 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.<sup>107</sup>

In its opinion, the Court described a formula<sup>108</sup> that many courts now use to evaluate pleadings.<sup>109</sup> 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.<sup>110</sup> Gauging plausibility is a context-specific task that requires the reviewing court to draw on its "judicial experience and common sense."<sup>111</sup>

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.<sup>112</sup> The majority then concluded that Iqbal's remaining allegations had not "'nudged [his] claims' of invidious discrimination 'across the line from conceivable to plausible.'"<sup>113</sup> In dissent, Justice Souter (the author of *Twombly*) 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.<sup>114</sup>

In sum, federal pleading practice first expanded from code pleading to a notice-based system under *Conley*. The liberal ethos of *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

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106. *Id.* at 1944.

107. *Id.* at 1942; see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (recognizing a private action for damages against federal officials who violate constitutional rights).

108. *Iqbal*, 129 S. Ct. at 1950–51.

109. See, e.g., *Francis v. Giacomelli*, 588 F.3d 186, 193–94 (4th Cir. 2009).

110. *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." *Id.* at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

111. *Id.* at 1950.

112. *Id.* at 1951.

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

114. *Id.* at 1958–61 (Souter, J., dissenting).



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 *Twombly* 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.<sup>115</sup>

## 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.<sup>116</sup> In the past fifty years, the manifestation of prejudice has grown more subtle.<sup>117</sup> In comparing surveys conducted in the 1940s and today, majority group members express less hostile racial attitudes toward minority group members,<sup>118</sup> and the percentage of Whites who denounce racist views and endorse racial equality has risen.<sup>119</sup> Overt prejudice toward minority group members is no longer publicly acceptable.<sup>120</sup>

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

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115. See *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 609 (2009).

116. Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 357, 357 (Daniel T. Gilbert et al. eds., 4th ed. 1998) [hereinafter Fiske, *Stereotyping*] (“On the cusp of the twenty-first century, stereotyping, prejudice, and discrimination have not abated.”).

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*].

118. See HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 103–21 (1997).

119. See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 *PSYCHOL. SCI.* 315 (2000) [hereinafter Dovidio & Gaertner, *Aversive Racism and Selection Decisions*].

120. See DALE T. MILLER, *SOCIAL PSYCHOLOGY: EXPRESSING AND CENSORING THE SELF* 89–106 (2006).

their anti-Black attitudes.<sup>121</sup> A duality persists between explicitly endorsed attitudes and behavior toward members of minority groups.<sup>122</sup> Contemporary forms of bias affect the lives of stereotyped groups in significant ways.<sup>123</sup> “Like a virus that has mutated, racism has evolved into different forms that are more difficult not only to recognize but also to combat.”<sup>124</sup> 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.<sup>125</sup> Many majority group members exhibit anxiety, disgust, fear, and discomfort toward stigmatized individuals, resulting in decreased helping behavior and cooperation, passive harm, and neglect.<sup>126</sup> In contrast, many exhibit liking and trust toward in-group members, resulting in facilitation and cooperation with other majority group members.<sup>127</sup> The consequences are pernicious: the economic, health, and educational disadvantages of minority groups stem, in part, from contemporary bias.<sup>128</sup>

Social psychologists study intergroup bias as an attitude with three components.<sup>129</sup> 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.<sup>130</sup> While stereotypes can be explicit, operating in

121. See Fiske, *Stereotyping*, *supra* note 116, at 359–60; Susan T. Fiske, *Social Cognition and the Normality of Prejudgment*, in *ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT* 36, 38–40 (John F. Dovidio et al. eds., 2005) [hereinafter Fiske, *Social Cognition*].

122. See Jennifer Crocker et al., *Social Stigma*, in *2 THE HANDBOOK OF SOCIAL PSYCHOLOGY* 504, 513–16 (Daniel T. Gilbert et al. eds., 4th ed. 1998); Dovidio & Gaertner, *Aversive Racism*, *supra* note 117, at 7–10.

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

124. John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. Soc. ISSUES 829, 837 (2001) (quoting John F. Dovidio & Sam L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, in *CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE* 2, 25 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998)).

125. See Crocker et al., *supra* note 122, at 512–13.

126. See, e.g., Marilynn B. Brewer & Rupert J. Brown, *Intergroup Relations*, in *2 THE HANDBOOK OF SOCIAL PSYCHOLOGY* 554, 575 (Daniel T. Gilbert et al. eds., 4th ed. 1998); Crocker et al., *supra* note 122, at 512–16; Amy J.C. Cuddy & Susan T. Fiske, *The BIAS Map: Behaviors from Intergroup Affect and Stereotypes*, 92 J. PERSONALITY & SOC. PSYCHOL. 631, 633–35 (2007).

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

128. See Rebecca M. Blank, *An Overview of Trends in Social and Economic Well-Being, by Race*, in *AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES* 21–39 (Niel J. Smelser et al. eds., 2001); Crocker et al., *supra* note 122, at 516–17.

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.<sup>131</sup>

Bias results, in part, from social categorization. Categorization is normal, involuntary, and pervasive:<sup>132</sup> we routinely and inadvertently categorize other people.<sup>133</sup> Given the troubled social, cultural, and historical context of race relations in the United States, racial categorization is virtually inescapable.<sup>134</sup> The problem is that race increases the accessibility of stereotypic associations.<sup>135</sup> 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.<sup>136</sup>

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.<sup>137</sup>

#### 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.<sup>138</sup> Such racism is presumed to characterize the racial attitudes of most

131. See Dovidio, *supra* note 124, at 838; Fiske, *Stereotyping*, *supra* note 116, at 357.

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*].

133. See *Social Cognition*, *supra* note 121, at 38–39.

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.

135. See Fiske, *What We Know About Bias*, *supra* note 132, at 124.

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.”).

137. Claude Steele and colleagues have also researched the target’s perspective (the stigmatized group member) when investigating the phenomena of stereotype threat. See Claude Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 *J. PERSONALITY & SOC. PSYCHOL.* 797 (1995). I leave the immense legal significance of stereotype threat and situational cues for another day. See Mary C. Murphy, Claude M. Steele, & James J. Gross, *Signaling Threat: How Situational Cues Affect Women in Math, Science, and Engineering Studies*, 18 *PSYCHOL. SCI.* 879 (2007).

138. See SAMUEL L. GAERTNER & JOHN F. DOVIDIO, *REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL* 13–31 (2000); Dovidio & Gaertner, *Aversive Racism*, *supra* note 117, at 7; Fiske, *Stereotyping*, *supra* note 116, at 359–60.

well-educated Whites in the United States.<sup>139</sup> 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.<sup>140</sup> In these situations, they are “especially motivated to avoid feelings, beliefs, and behaviors that could be associated with” bias.<sup>141</sup> When the correct choice is clear, aversive racists do not discriminate against Blacks.<sup>142</sup>

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.<sup>143</sup> 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.<sup>144</sup>

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,<sup>145</sup> 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.<sup>146</sup> 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.<sup>147</sup>

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

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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.

141. Dovidio & Gaertner, *Aversive Racism*, *supra* note 117, at 7.

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.

146. See, e.g., Christopher L. Aberson & Tara E. Ettl, *The Aversive Racism Paradigm and Responses: Meta-Analytic Evidence of Two Types of Favoritism*, 17 SOC. JUST. RES. 26 (2004); Dovidio, *supra* note 124.

147. See Aberson & Ettl, *supra* note 146; Dovidio, *supra* note 124.

selection decisions.<sup>148</sup> 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:”<sup>149</sup> 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).<sup>150</sup> 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.<sup>151</sup>

Social psychologists have also examined how people rationalize their decision making after they are forced to make choices in ambiguous situations.<sup>152</sup> 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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148. See Dovidio & Gaertner, *Aversive Racism and Selection Decisions*, *supra* note 119, at 315.

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.

152. See Michael I. Norton et al., *Casualty and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817 (2004).

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.<sup>153</sup>

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.<sup>154</sup> 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).<sup>155</sup> Social psychologists have also examined implicit associations by deploying physiological methods, such as facial electromyography (EMG), galvanic skin response, and cardiovascular reactivity.<sup>156</sup> Finally, scientists have examined amygdala brain activation. Using functional magnetic resonance imaging (fMRI) procedures, social psychologists have examined the neuropsychological underpinnings of these processes.<sup>157</sup>

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

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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. 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.*

156. *See* Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 *ANN. REV. PSYCHOL.* 297, 300-01 (2003).

157. *See* David M. Amodio & Matthew D. Lieberman, *Pictures in Our Heads: Contributions of fMRI to the Study of Prejudice and Stereotyping*, in *HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION* 347 (Todd D. Nelson ed., 2010); Jennifer L. Eberhardt, *Imaging Race*, 60 *AM. PSYCHOL.* 181 (2005); A.J. Hart et al., *Differential Response in the Human Amygdala to Racial Outgroup vs Ingroup Face Stimuli*, 11 *NEUROREPORT* 2351 (2000).

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.<sup>158</sup>

### 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.<sup>159</sup>

Lay theories, also known as folk psychology, are organized knowledge structures.<sup>160</sup> People draw on lay theories when making inferences, predictions, explanations, and justifications.<sup>161</sup> These theories act as channels for feelings, thoughts, and actions for the object of the lay theory. Scientists have focused on two lay theories.<sup>162</sup> The most dominant one, particularly among majority group members, characterizes racist behavior in overt, blatant terms.<sup>163</sup> 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

158. See generally, MILLER, *supra* note 120, at 102; Fiske, *What We Know About Bias*, *supra* note 132, at 125–26.

159. See C. Daryl Cameron et al., *Do Theories of Implicit Race Bias Change Moral Judgments?*, 23 SOC. JUST. RES. 272 (2010); Samuel R. Sommers & Michael I. Norton, *Lay Theories About White Racists: What Constitutes Racism (and What Doesn't)*, 9 GROUP PROCESSES & INTERGROUP REL. 117, 131–32 (2006).

160. 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 . . .”).

161. See, e.g., RICHARD E. NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 4–6 (1980).

162. Sommers & Norton, *supra* note 159, at 119.

163. *Id.* at 131.

prejudice—such as ambivalence, anxiety, and passive harm toward stereotyped individuals—as racism.<sup>164</sup> 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.<sup>165</sup>

The less prevalent lay theory characterizes racist behavior as including both overt and subtle actions.<sup>166</sup> 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.<sup>167</sup> 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.<sup>168</sup>

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.<sup>169</sup> In other words, mindful reflection on individuating features is required.<sup>170</sup>

### C. Social Psychology Applied to Legal Decision Making

Social psychologists have long studied legal decision making and the cognitive and motivational processes it involves.<sup>171</sup> For instance, they have

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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.

169. *See* Fazio & Olson, *supra* note 156, at 301; *see also* Galen V. Bodenhausen & C. Neil Macrae, *The Self-Regulation of Intergroup Perception: Mechanisms and Consequences of Stereotype Suppression*, in *STEREOTYPES AND STEREOTYPING* 227, 227–75 (Macrae et al. eds., 1996); Betram Garwonski & Galen V. Bodenhausen, *Associative and Propositional Processes in Evaluation: An Integrative Review of Implicit and Explicit Attitude Change*, 132 *PSYCHOL. BULL.* 692, 694–95 (2006).

170. *See* Fazio & Olson, *supra* note 156, at 301.

171. *See* Phoebe C. Ellsworth & Robert Mauro, *Psychology and Law*, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 684, 698–99 (Daniel T. Gilbert et al. eds., 4th ed. 1998). Political scientists have also conducted excellent studies on the effect of sex and race on judging. *See, e.g.*, Christina Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 *AM. J. ON POL. SCI.* 389 (2010).



investigated the degree to which the defendant's race shapes jury decision making.<sup>172</sup> 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.<sup>173</sup> 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.<sup>174</sup>

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.<sup>175</sup> 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,<sup>176</sup> which may reflect inaccurate inferences and bias.<sup>177</sup> A recent study found that judges may implicitly associate Blacks with negative attitudes and that these associations affect their decision making.<sup>178</sup>

#### 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

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172. See, e.g., Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilty and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000); Karl L. Wuensch et al., *Racial Bias in Decisions Made by Mock Jurors Evaluating a Case of Sexual Harassment*, 142 J. SOC. PSYCHOL. 587 (2002).

173. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006).

174. *Id.*

175. See Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotype Use*, 55 J. PERSONALITY & SOC. PSYCHOL. 726, 728 (1988).

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.").

177. See *id.*; Quintanilla, *supra* note 17, at 198–200; Rachlinski, *Heuristics*, *supra* note 18, at 568–71; see also Gerd Gigerenzer, *Heuristics*, in HEURISTICS AND THE LAW 17, 17–21 (Gerd Gigerenzer & Christopher Engel eds., 2006); Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 129, 130 (Daniel Kahneman et al. eds., 1982); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 209 (1973).

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.<sup>179</sup> 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.<sup>180</sup>

A disparate treatment claim alleges that an employer treated the plaintiff less favorably than others because of the plaintiff's race.<sup>181</sup> The ultimate issue in every disparate treatment case is whether the plaintiff was the victim of intentional discrimination.<sup>182</sup> 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.<sup>183</sup>

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.<sup>184</sup> 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.<sup>185</sup>

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

179. 42 U.S.C. § 2000e (2006). Title VII also prohibits retaliation against employees who oppose discrimination or participate in Title VII processes. 42 U.S.C. § 2000e-3(a) (2006). This empirical study did not examine Black plaintiffs' claims of retaliation.

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

181. See § 2000e-2(a) (2006); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (quoting *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).

182. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000).

183. See *Raytheon Co.*, 540 U.S. at 52–53 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 645–46 (1989)).

184. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (discussing direct versus circumstantial evidence under Title VII); 1 LINDEMANN & GROSSMAN, *supra* note 180, at 10–30 (same).

185. *Tex. Dep't 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,”<sup>186</sup> or “onerous.”<sup>187</sup> 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.<sup>188</sup> This *prima facie* case also applies to claims of race-based employment discrimination under Section 1981.<sup>189</sup> 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.<sup>190</sup> These legal tests for the *prima facie* case are flexible and often tailored to different factual circumstances.<sup>191</sup> 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.<sup>192</sup>

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.<sup>193</sup> This burden is one of production, not persuasion; it involves “no credibility assessment.”<sup>194</sup> If the employer meets

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186. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

187. *Burdine*, 450 U.S. at 253.

188. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Furnco Constr.*, 438 U.S. at 577); see also *Swierkiewicz*, 534 U.S. at 510–11.

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).

193. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49 n.3 (2003).

194. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (quoting *St. Mary’s Honor Ct. v. Hicks*, 509 U.S. 502, 509 (1993)) (internal quotation marks omitted).

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.<sup>195</sup> 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.<sup>196</sup> The *McDonnell Douglas-Burdine* framework has been applied to claims of discriminatory hiring, discharge, discipline, promotion, transfer, demotion, retaliation, and other adverse employment actions.<sup>197</sup>

Racial harassment also violates Title VII.<sup>198</sup> 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.<sup>199</sup> 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."<sup>200</sup> "'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.'"<sup>201</sup> 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.<sup>202</sup> 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. Sorema 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.<sup>203</sup>

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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 LINDEMANN & 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).

199. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993).

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.

203. 534 U.S. 506, 511–13 (2002).

*Swierkiewicz* held that imposing the prima facie case at the pleading stage violates Rule 8(a).<sup>204</sup> *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.<sup>205</sup> *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.<sup>206</sup> 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),<sup>207</sup> the means by which defendants challenge the legal sufficiency of claims.<sup>208</sup>

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.

206. *See* C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 3, 8 (1996).

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<sup>209</sup> were designed to retrieve all cases deciding motions to dismiss in employment discrimination cases filed by Black plaintiffs under Title VII or Section 1981.<sup>210</sup> 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,<sup>211</sup> the inquiry included cases deciding Section 1981 claims.<sup>212</sup> 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).<sup>213</sup>

The first wave of empirical legal research examined the broad question of whether *Iqbal* has increased dismissal rates across all federal civil

209. All cases were obtained via the Westlaw federal district court database (DCT). Many decisions were not published in the West Reporters and are available only electronically. Other decisions unavailable on commercial databases were not examined. The study, therefore, does not seek to establish the absolute rate of dismissals in all decisions, or to measure the absolute number of Rule 12(b)(6) motions decided before and after *Iqbal*. The study remains significant, however, because jurists and advocates do not form impressions about what the law is from inaccessible law; if a disparate effect is demonstrated in available law, that effect will have practical significance for how jurists and advocates handle cases. See, e.g., Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 604 (2004); Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, at 985, 988–94; Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 777 n.113 (2003).

210. The database of cases is available upon request.

211. See ARTHUR ARON ET AL., STATISTICS FOR THE BEHAVIORAL AND SOCIAL SCIENCES 210, 225–27 (4th ed. 2008) (“The statistical power of a research study is the probability that the study will produce a statistically significant result if the research hypothesis is true.”).

212. Some plaintiffs choose to file claims of discrimination under Section 1981 rather than Title VII. Because federal district courts use the same test for intentional discrimination under Title VII and Section 1981, see *supra* note 189 and accompanying text, Section 1981 cases were included in the study, e.g., *Dorsey v. Ga. Dep’t of State Rd. & Tollway Auth.* SRTA, No. 1:09-CV-1182-TWT, 2009 WL 2477565, at \*6 (N.D. Ga. Aug. 10, 2009). Some plaintiffs advanced claims under both Title VII and Section 1981; since courts evaluate the question of intentional discrimination similarly under both provisions, the study counted only the disposition for the Title VII claim to avoid double counting. E.g., *Hanks v. Shinseki*, No. 3:08-CV-1594-G, 2009 WL 2002917, at \*1 (N.D. Tex. Jul. 9, 2009) (granting dismissal of Title VII and Section 1981 claims under *McDonnell Douglas* framework).

213. The study also included claims filed by the Equal Employment Opportunity Commission (EEOC), in which the EEOC sued on behalf of Black employees. See, e.g., *EEOC v. Scrub, Inc.*, No. 09 C 4228, 2009 WL 3458530, at \*3 (N.D. Ill. Oct. 26, 2009) (“The complaint sufficiently states disparate treatment and disparate impact claims under Title VII.”).

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*.<sup>214</sup> 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.<sup>215</sup> 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.<sup>216</sup> 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.<sup>217</sup> Research

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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](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/so13/papers.cfm?abstract\\_id=1904134](http://papers.ssrn.com/so13/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*.

215. See, e.g., LEITER, *supra* note 16, at 28–30; Karl N. Llewellyn, *A Realistic Jurisprudence: The Next Step*, 30 COLUM. L. REV. 431, 457–60 (1930).

216. See, e.g., LEITER, *supra* note 16, 28–30; Llewellyn, *supra* note 215, at 457–60.

217. Operational definitions describe a set of procedures that researchers use “to establish . . . the existence . . . of the phenomenon[a] 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.



demonstrates that decision makers exhibit aversive racism in ambiguous situations,<sup>218</sup> but not in unequivocal situations.<sup>219</sup> 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.<sup>220</sup>

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."<sup>221</sup> 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.<sup>222</sup> Second, plaintiffs must file suit within ninety days after receiving a right-to-sue letter from the EEOC.<sup>223</sup> 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.<sup>224</sup> Unambiguously weak

218. Aberson & Ettlne, *supra* note 146, at 26; Dovidio & Gaertner, *Aversive Racism*, *supra* note 117, at 16.

219. Dovidio & Gaertner, *Aversive Racism and Selection Decisions*, *supra* note 119, at 317–18.

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;<sup>225</sup> and (2) where plaintiffs sought to hold coworkers liable, rather than an employer, which is outside the scope of Title VII.<sup>226</sup> 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).<sup>227</sup>

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.<sup>228</sup> Next, each case was analyzed<sup>229</sup> 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.<sup>230</sup> The research examined the frequency

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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-B, 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*.<sup>231</sup>

### 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.<sup>232</sup>

#### 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.

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argument under Rule 8, and in turn allowed at least one race-based claim to withstand dismissal.

231. Because *Twombly* was decided on May 21, 2007, the 18-month range for pre-*Twombly* decisions was from October 15, 2005, to May 20, 2007. *Iqbal* was decided on May 18, 2009. To allow federal courts to sufficiently disseminate and synthesize *Iqbal*, I began the range on June 1, 2009; therefore, the 18-month range for post-*Iqbal* decisions was from June 1, 2009, to December 1, 2010.

232. A chi-square test is a hypothesis-testing procedure used when the variable of interest is a nominal variable. See ARON ET AL., *supra* note 211, at 359–61; JACKSON, *supra* note 217, at 183–85. The chi-square test is used to determine “whether the difference between observed . . . and expected frequencies . . . is statistically significant.” FRANKFORT-NACHMIAS & NACHMIAS, *supra* note 217, at 450. *Cramér's V* coefficient is an effect-size measure for a chi-square test for independence used with a contingency table that is larger than 2 x 2. For the contingency tables of this study (*df*=1), a *Cramér's V* coefficient of .10 indicates a small effect size, .30 is medium, and .50 is large. See ARON ET AL., *supra* note 211, at 377.

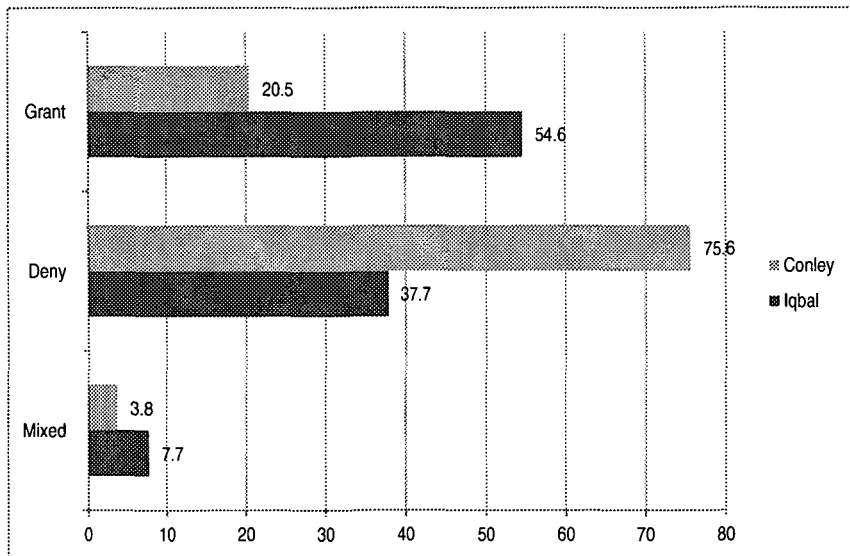
TABLE 1:  
PERCENTAGE OF RULINGS IN STUDY FOR BLACK PLAINTIFFS' CLAIMS  
OF RACE DISCRIMINATION IN THE WORKPLACE

OBSERVED FREQUENCY (EXPECTED FREQUENCY)  
PERCENTAGE IN THE STUDY

	Grant	Deny	Mixed	Total
Conley	16 (32.6) 20.50%	59 (40.5) 75.60%	3 (4.9) 3.80%	78
Iqbal	71 (54.4) 54.60%	49 (67.5) 37.70%	10 (8.1) 7.70%	130
Total	87 41.80%	108 51.90%	13 6.30%	208

Pearson  $\chi^2$  (2, N=208) = 28.23,  $p < .000$

FIGURE 1.  
PERCENTAGE OF RULINGS IN STUDY FOR BLACK PLAINTIFFS' CLAIMS



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.<sup>233</sup>

STUDY 2:  
HAS *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 *Iqbal* than under *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  
OBSERVED FREQUENCY (EXPECTED FREQUENCY)

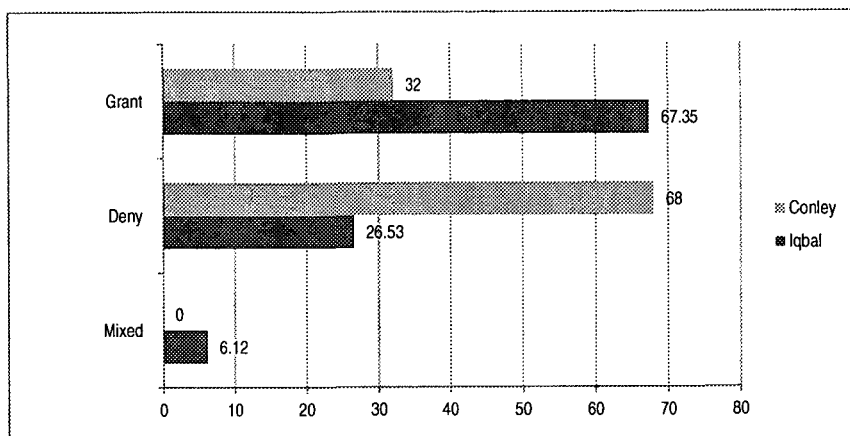
PERCENTAGE IN THE STUDY

	Grant	Deny	Mixed	Total
<b>Conley</b>	8 (13.9) 32.00%	17 (10.1) 68.00%	0 (1.0) 0.00%	25
<b>Iqbal</b>	33 (27.1) 67.30%	13 (19.9.) 26.50%	3 (2.0) 6.10%	49
<b>Total</b>	41 55.40%	30 40.50%	3 4.10%	74

Pearson  $\chi^2$  (2,  $N=74$ ) = 12.286,  $p=.002$

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-*Twombly* versus post-*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.

FIGURE 2.  
PERCENTAGE OF RULINGS IN STUDY FOR BLACK PRO SE PLAINTIFFS' CLAIMS



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.<sup>234</sup> 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.<sup>235</sup>

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-

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.

235. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

crimination regarding how judges draw inferences and make probabilistic judgments.

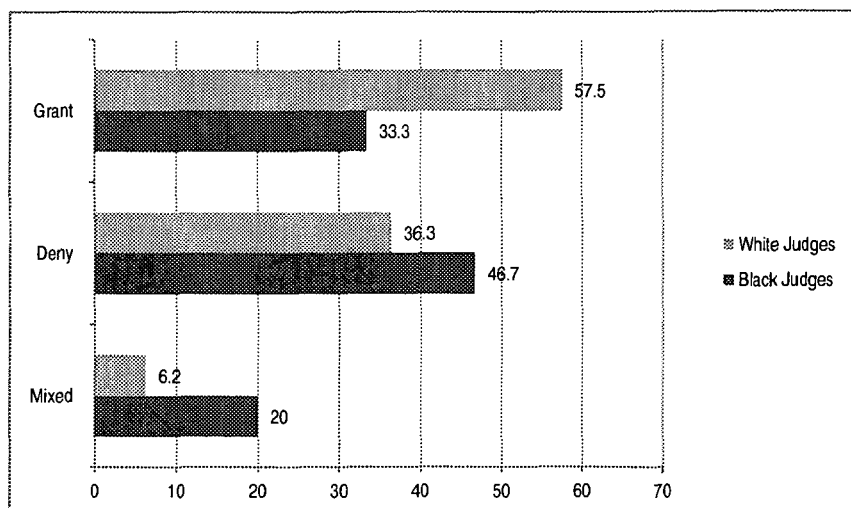
TABLE 3.  
PERCENTAGE OF RULINGS IN STUDY FOR WHITE VERSUS BLACK JUDGES  
OBSERVED FREQUENCY (EXPECTED FREQUENCY)

PERCENTAGE IN THE STUDY

	Grant	Deny	Mixed	Total
White Judges	65 (61.8) 57.50%	41 (42.4) 36.30%	7 (8.8) 6.20%	113
Black Judges	5 (8.2) 33.30%	7 (5.6.) 46.7%	3 (1.2) 20.0%	15
Total	70 54.70%	48 37.50%	10 7.80%	128

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%).<sup>236</sup> These results were

236. For data on the demographics of federal judges, see *Judges of the United States Courts*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Feb. 16, 2011).

marginally significant;<sup>237</sup> 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.<sup>238</sup> 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 *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 *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 *Iqbal's* effect in federal actions, Studies 1 and 2 demonstrate that dismissal rates have risen overall.<sup>239</sup> 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 *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-

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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,  $p = .081$ , *Cramér'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  $p = .024$ , *Cramér's V* = .252. The pattern in which White and Black judges are deciding motions to dismiss differently is trending toward statistical significance.

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 *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 BARBARA G. TABACHNICK & LINDA S. FIDELL, *USING MULTIVARIATE STATISTICS* 437–504 (5th ed. 2007).

239. See Hatamyar, *supra* note 14, at 597–615.



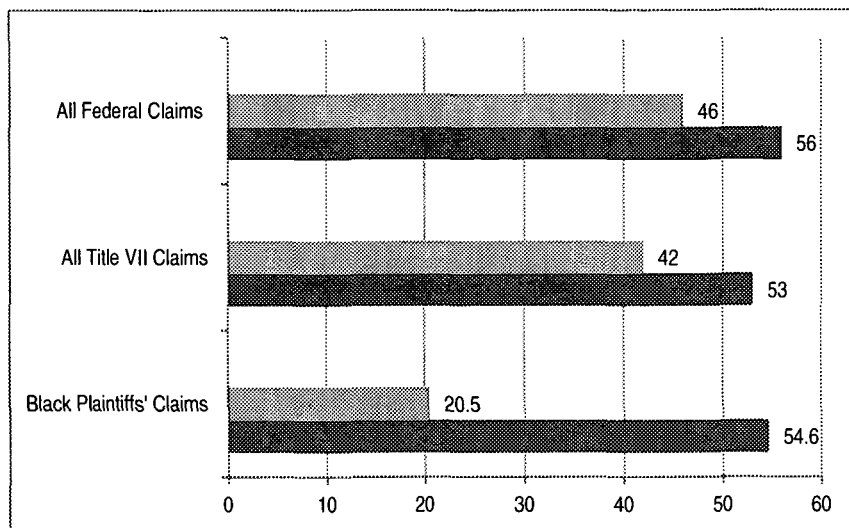
ries of racism, which results in decisions biased toward dismissal. Studies 1 and 2 demonstrate that the dismissal rate for Blacks in employment discrimination cases has risen sharply. What is striking is the magnitude of this effect: Studies 1 and 2 suggest that, for these cases, the dismissal rate increased more sharply than the first wave of studies indicated.<sup>240</sup>

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.

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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.

FIGURE 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,<sup>241</sup> with White judges more likely to grant dismissal.<sup>242</sup> 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.<sup>243</sup>

241. Scholars have identified differences in how Black and White judges granted motions for summary judgment for claims of race harassment in decisions that predated *Twombly*. See, e.g., Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009).

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.

243. See RICHARD A. POSNER, *HOW JUDGES THINK* 65–68 (2008).

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,<sup>244</sup> and that this move would be pronounced in employment discrimination cases. The motion to dismiss would, in effect, become the new summary judgment motion.<sup>245</sup> 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,<sup>246</sup> 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.<sup>247</sup> That is, federal courts have difficulty reconciling *Iqbal* with *Swierkiewicz*.<sup>248</sup> As the Ninth Circuit recently lamented, the juxtaposition of *Swierkiewicz*, on the one hand, and *Iqbal*, on the other, is "perplexing."<sup>249</sup>

One line of jurisprudence holds that *Swierkiewicz* remains good law after *Iqbal*.<sup>250</sup> 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) ("[T]he 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) ("[B]ecause *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*.").

249. See *Starr v. Baca*, No. 09-55233, 2011 WL 2988827, at \*13 (9th Cir. July 25, 2011).

250. See *EEOC v. Propak Logistics, Inc.*, No. 1:09-cv-311, 2010 WL 3081339, at \*4-5 (W.D.N.C. Aug. 6, 2010); *Swanson v. Citibank, N.A.*, No. 10-1122, 2010 WL 2977297, at \*3-4 (7th Cir. July 30, 2010) (affirming the "validity" of *Swierkiewicz*); *Rouse v. Berry*, 680 F. Supp. 2d 233, 236 (D.D.C. 2010) (disavowing any retreat from *Swierkiewicz*, at least "[i]n the context of a fairly straightforward employment discrimination com-

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 th[e] [pleading] burden than it was before the Court’s recent decisions.”<sup>251</sup> The Second Circuit has also reaffirmed *Swierkiewicz*, finding that “[t]here is no heightened pleading requirement for civil rights complaints alleging racial animus.”<sup>252</sup> 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.<sup>253</sup> 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;<sup>254</sup> they must give the defendant “fair notice of what plaintiff[s] claim[s] [are] and the grounds upon which [they] rest[].”<sup>255</sup> These courts conclude that although *Swierkiewicz* relied on *Conley*, *Swierkiewicz* remains good law even after *Conley*’s demise.<sup>256</sup>

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*.<sup>257</sup> 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

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plaint”); *EEOC v. Scrub, Inc.*, No. 09 C 4228, 2009 WL 3458530, at \*2 (N.D. Ill. Oct. 26, 2009); *EEOC v. Universal Brixius, LLC*, 264 F.R.D. 514, 515–17 (E.D. Wis. 2009); *Gillman*, 2009 WL 3003244, at \*3.

251. *Swanson*, 614 F.3d at 404.

252. *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008); *see also* *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010).

253. *See, e.g.,* *Bryant v. Pepco*, 730 F.Supp. 2d 25, 28 (D.D.C. 2010) (collecting cases).

254. *See* *Keyes v. Wayne State Univ.*, No. 10-12087, 2010 WL 4054500, at \*5 (E.D. Mich. Oct. 5, 2010) (“Plaintiff is not required to make out a prima facie case in her Complaint.”); *Apau v. Printpack Inc.*, 722 F.Supp. 2d 489, 492 (D. Del. 2010); *Myles v. A & L, Inc.*, No. 08-CV-205C, 2009 WL 4892098, at \*3 (W.D.N.Y. Dec. 11, 2009).

255. *Nyame v. Bronx Lebanon Hosp. Ctr.*, No. 08 Civ. 9656(DAB), 2010 WL 1379794, at \*5 (S.D.N.Y. March 31, 2010); *see also* *Mayale-Eke v. Merrill Lynch*, 754 F.Supp. 2d 372, 377 (D.R.I. 2010) (“[A] complaint need not establish a prima facie case of employment discrimination to survive a motion to dismiss, but the claim must be facially plausible and must give fair notice to the defendants of the basis for the claim.”); *Martin v. ReliaStar Life Ins. Co.*, 710 F.Supp. 2d 875, 887 (D. Minn. 2010) (“[A] complaint in an employment discrimination lawsuit need not contain specific facts establishing a prima facie case of discrimination.”).

256. *See, e.g.,* *Drew v. Plaza Constr. Corp.*, 688 F.Supp. 2d 270, 275 (S.D.N.Y. 2010).

257. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009). Another Third Circuit panel questioned *Fowler*’s analysis of *Swierkiewicz* and dismissed it as dicta. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 319 n.17 (3d Cir. 2010). The Third Circuit later held that *Twombly* does not enact a heightened pleading standard. *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 98 (3d Cir. 2010).

evidence of the necessary element[s].”<sup>258</sup> Other courts have concluded that plaintiffs must plead facts for each element of a prima facie case.<sup>259</sup> 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.<sup>260</sup> 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.’”<sup>261</sup>

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.<sup>262</sup> 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.<sup>263</sup>

In light of the Supreme Court’s recent decision in *Skinner v. Switzer*,<sup>264</sup> the Seventh and Second Circuits’ approaches are most correct. In *Skinner*, the Court again reaffirmed the vitality of *Swierkiewicz*.<sup>265</sup> It is

258. *Cameau v. Mount Airy No. 1 LLC*, No. 3:10-CV-1249, 2010 WL 5093083, at \*3 (M.D. Pa. Dec. 7, 2010) (internal quotation marks omitted); *see also* *Davis v. City of Newark*, No. 09-1032, 2010 WL 3636243, at \*4 (D.N.J. Sept. 10, 2010); *Crittendon v. Grove*, No. 09-246, 2010 WL 2723215, at \*2 (W.D. Pa. July 8, 2010).

259. *See* *Curry v. Philip Morris USA, Inc.*, No. 3:08cv609, 2010 WL 431692, at \*2 (W.D.N.C. 2010). The Eleventh Circuit has held that, after *Iqbal*, civil rights complaints must contain “either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.” *Randall v. Scott*, 610 F.3d 701, 707 n.2 (11th Cir. 2010) (internal quotation marks omitted).

260. *See* *King v. United Way of Cent. Carolinas, Inc.*, No. 3:09cv164, 2010 WL 1958128, at \*5 (W.D.N.C. May 14, 2010); *Law v. Autozone Stores, Inc.*, No. 4:09cv00017, 2009 WL 4349165, at \*2 (W.D. Va. Nov. 25, 2009); *cf.* *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (“[E]ven though ‘Rule 8 marks a notable and generous departure from the hyper-technical code pleading regime of a prior era, it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.’” (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009))).

261. *Sojourner v. Cherry*, No. 1:09-CV-3460-TWT, 2010 WL 3516830, at \*2 (N.D. Ga. Aug. 31, 2010) (quoting *Iqbal*, 129 S. Ct. at 1949–50).

262. *See* *King*, 2010 WL 1958128, at \*5 (W.D.N.C. 2010); *Chacko v. Worldwide Flight Servs., Inc.*, No. 08-CV-2363 (NGG)(JO), 2010 WL 424025, at \*3 (E.D.N.Y. Feb. 3, 2010); *Orozco v. City of Murfreesboro*, No. 3:09-cv-00752, 2009 WL 4042586, at \*3 (M.D. Tenn. Nov. 19, 2009).

263. *See* *Apau v. Printpack Inc.*, 722 F. Supp. 2d 489, 492 (D. Del. 2010).

264. 131 S. Ct. 1289 (2011).

265. *Id.* at 1296 (“[T]he question below was not whether [plaintiff] will ultimately prevail on his . . . claim . . . but whether his complaint was sufficient to cross the federal court’s threshold . . . . Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible ‘short and plain’ statement of the plaintiff’s claim, not an exposition of

too early, however, to tell whether federal courts will re-assess the broadest 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 element 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 requiring that Blacks be treated blatantly 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 applied *Iqbal* and characterized the broad allegations as invalid legal conclusions.<sup>266</sup> 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 pleaded enough to show that Whites were sufficiently comparable—that Whites were employed in similar capacities with similar job histories—and that discrimination was plausible.<sup>267</sup> 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 discrimination was plausible.<sup>268</sup> Remarkably, in some cases, plaintiffs pleaded that they were terminated and replaced with named Whites, but courts

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his legal argument.” (emphasis added) (internal quotation marks omitted) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002))).

266. See *Hanks v. Shinseki*, No. 3:08-CV-1594-G, 2009 WL 2002917, at \*3 (N.D. 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)).

267. See *DeLoatch v. Harford Cnty. Bd. of Educ.*, No. CCV-09-3125, 2010 WL 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.”).

268. 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.<sup>269</sup> Yet other courts found discrimination implausible when Black plaintiffs pleaded that their employers treated other Blacks in similar discriminatory fashion<sup>270</sup> or that they were terminated and replaced by other Blacks.<sup>271</sup>

Another line of authority, however, applies the final element more leniently. Some courts accept plaintiffs' allegations that unnamed Whites are comparable.<sup>272</sup> 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.'"<sup>273</sup> This question is fact intensive and best left for a fully developed record at summary judgment.<sup>274</sup> 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.<sup>275</sup> 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.<sup>276</sup> 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.<sup>277</sup>

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

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269. See *Curry v. Philip Morris USA, Inc.*, No. 3:08cv609, 2010 WL 431692, at \*3 (W.D.N.C. Feb. 4, 2010); *Wilkins v. Bozzuto & Assocs., Inc.*, No. 09-2581, 2009 WL 4756381, at \*2 (E.D. Pa. Dec. 10, 2009).

270. See *Oates v. Jackson Cnty. Sheriff's Office*, No. 5:09cv303, 2010 WL 785657, at \*2 (N.D. Fla. Mar. 4, 2010).

271. See *Welch v. Illini Heritage Rehab & Health Care*, No. 10-2023, 2010 WL 2364205, at \*4 (C.D. Ill. May 18, 2010).

272. See, e.g., *Williams v. Finck & Assocs.*, No. 2:09CV63MLM, 2010 WL 1992242, at \*6 (E.D. Mo. May 18, 2010); *Dunlap v. Denison Indep. Sch. Dist.*, No. 4:09cv234, 2010 WL 1189561, at \*3 (E.D. Tex. Mar. 25, 2010); *Miller v. Eagle Tug Boat Co.*, No. 09-0401-CG-B, 2009 WL 4751079, at \*5 (S.D. Ala. Dec. 8, 2009).

273. *Young v. Spectrum Assocs., Inc.*, No. 3:10-cv-223, 2010 WL 3025232, at \*3 (D. Conn. July 30, 2010).

274. *Sims v. Court of Common Pleas*, No. 2:10-cv-151, 2010 WL 3896428, at \*4 (W.D. Pa. Sept. 30, 2010).

275. See, e.g., *Apau v. Printpack Inc.*, 722 F. Supp. 2d 489, 493-94 (D. Del. 2010).

276. Before discovery, it is difficult to plead facts showing how an employer treated coworkers more favorably. See, e.g., *Peterson v. Long Island R.R.*, No. 10 Civ. 480(ILG), 2010 WL 2671717, at \*4 (E.D.N.Y. June 30, 2010); *Robinson v. Westinghouse Air Brake Techs. Corp.*, No. 3:09-CV-00202-LHR-VPC, 2010 WL 1416892, at \*4 (D. Nev. Apr. 1, 2010).

277. See, e.g., *Keyes v. Wayne State Univ.*, No. 10-12087, 2010 WL 4054500, at \*6 (E.D. Mich. Oct. 5, 2010).

who were treated more favorably.<sup>278</sup> Some held that complaints survived dismissal as long as they supported an inference that people outside of plaintiffs' protected class were treated differently.<sup>279</sup> 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.<sup>280</sup> Finally, others rejected any per se rule that Blacks were required to plead, when terminated, that they were replaced by White employees.<sup>281</sup>

### 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.<sup>282</sup> 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,<sup>283</sup> evaluations,<sup>284</sup> promotions,<sup>285</sup> job responsibil-

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*.").

279. See, e.g., *Fortes*, 2006 WL 3043108, at \*4; *Harold*, 450 F. Supp. 2d at 561; *Robins v. Moore*, No. Civ.A. 4:05CV104, 2006 WL 1520573, at \*5 (E.D. Va. May 31, 2006); *Mitchell v. N.J. Lottery*, No. 04-486 (MLC), 2006 WL 1344092, at \*5 (D.N.J. May 15, 2006).

280. See *Cobb v. Marshall*, 481 F. Supp. 2d 1248, 1257 (M.D. Ala. 2007); *Prophete v. Ed Mitchell, Inc.*, No. 3:05-cv912(WWE), 2006 WL 1668024, at \*1 (D. Conn. June 15, 2006); *Branchedor v. 2900 Twelfth St. N., LLC*, No. 2:05-cv-398-FtM-99SPC, 2006 WL 2092261, at \*1 (M.D. Fla. July 26, 2006).

281. See *Gantt v. City of Forsyth*, No. 5:06-CV-400(WDO), 2007 WL 842148, at \*1 (M.D. Ga. Mar. 16, 2007).

282. See *Russell v. Shop 'N Save Warehouse Foods, Inc.*, No. 4:09cv1695 TCM, 2010 WL 1462086, at \*3 (E.D. Mo. Apr. 13, 2010); *Hardeman v. United States*, 682 F. Supp. 2d 947, 954 (E.D. Ark. 2010); *Hutchinson v. Holder*, 668 F. Supp. 2d 201, 215 (D.D.C. 2009); *Floyd v. U.S. Dep't of Homeland Sec.*, No. RDB-09-0735, 2009 WL 3614830, at \*7 (D. Md. Oct. 27, 2009).

283. *Easter v. Geithner*, No. 1:10 CV 48, 2010 WL 4628564, at \*4 (N.D. Ohio Oct. 18, 2010).

284. *Wormack v. Shinseki*, No. 2:09-cv-916, 2010 WL 4052189, at \*5 (W.D. Pa. Oct. 14, 2010).

285. *Floyd*, 2009 WL 3614830, at \*6.



ities,<sup>286</sup> dismissals from work,<sup>287</sup> denials of training,<sup>288</sup> and lost supervisory opportunities and discretionary bonuses.<sup>289</sup>

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.<sup>290</sup> Nonetheless, these harms are not per se insufficient at the pleading stage.<sup>291</sup> The relevant inquiry instead turns on context and whether the harm had tangible, adverse effects on plaintiffs' employment.<sup>292</sup>

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.<sup>293</sup> Courts thought this inquiry best left for summary judgment after discovery.<sup>294</sup> Indeed, deciding the issue on the pleadings was thought contrary

286. *Mangum v. United Parcel Servs.*, No. 3:09-CV-385-D, 2009 WL 4823018, at \*2 (N.D. Tex. Dec. 14, 2009).

287. *Collins v. Vaughan Reg'l Med. Ctr.*, No. 10-0161-CG-M, 2010 WL 3724771, at \*5 (S.D. Ala. Aug. 24, 2010).

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.").

289. *Floyd*, 2009 WL 3614830, at \*6.

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.").

291. *See Law*, 2009 WL 4349165, at \*2.

292. *See Moore v. Contra Costa Coll. Dist.*, No. C 09-4781 MEJ, 2010 WL 3385037, at \*4 (N.D. Cal. Aug. 26, 2010); *Law*, 2009 WL 4349165, at \*2.

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.<sup>295</sup>

### 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.<sup>296</sup> Some courts, however, did hold that the plaintiffs' failure to plead facts disproving pretext rendered their claims implausible.<sup>297</sup> Other courts weighed the employer's nondiscriminatory justifications against the inference of discrimination, ultimately concluding that plaintiffs had stated plausible claims.<sup>298</sup>

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.<sup>299</sup> Instead, defendants must advance those justifications at summary judgment, and only then must plaintiffs refute them.<sup>300</sup> 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.<sup>301</sup>

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reassignment . . . to be a materially adverse employment action."); *Kriesch v. Johanns* 468 F. Supp. 2d 183, 189 (D.D.C. 2007); *Martin*, 2006 WL 897751, at \*3.

295. See *Buford*, 2007 WL 1341115, at \*4–5.

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 . . .").

297. See *Welch v. Illini Heritage Rehab & Health Care*, No. 10-2023, 2010 WL 2364205, at \*5 (C.D. Ill. May 18, 2010); *Mitchell v. Project Renewal*, No. 09 Civ.1958(CM), 2010 WL 481348, at \*3 (S.D.N.Y. Feb. 1, 2010); *Floyd*, 2009 WL 3614830, at \*7.

298. See *Mayale-Eke v. Merrill Lynch*, 754 F. Supp. 2d 372, 382–83 (D.R.I. 2010).

299. See *Keyes v. Wayne State Univ.*, No. 10-12087, 2010 WL 4054500, at \*6 (E.D. Mich. Oct. 5, 2010); *Angrand v. Paragon Vill.*, No. 09-1118 (FLW), 2010 WL 1644132, at \*4 (D.N.J. Apr. 22, 2010); *Washington v. Univ. of Ill. at Chicago*, No. 09 C 5691, 2010 WL 1417000, at \*4 (N.D. Ill. Apr. 2, 2010); *Nyame v. Bronx Lebanon Hosp. Ctr.*, No. 08 Civ. 9656(DAB), 2010 WL 1379794, at \*5 (S.D.N.Y. Mar. 31, 2010).

300. See *Keyes*, 2010 WL 4054500, at \*6; *Angrand*, 2010 WL 1644132, at \*4; *Washington*, 2010 WL 1417000, at \*4.

301. See *supra* Part III.

*D. Racial Harassment*

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.<sup>302</sup> For example, courts granted dismissal where plaintiffs complained about music that was derogatory toward Blacks<sup>303</sup> and comments about racial stereotypes.<sup>304</sup> 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.<sup>305</sup> Some characterize harassment as merely workplace friction or blame the plaintiff for strife in the workplace.<sup>306</sup> Others characterize plaintiffs' allegations of harassment as legal conclusions.<sup>307</sup> When plaintiffs plead facts suggesting overt racial animus, however, most courts deem claims of harassment sufficiently plausible:<sup>308</sup> these courts denied motions to dismiss and found that plaintiffs had provided defendants with fair notice of their claims.<sup>309</sup>

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302. See, e.g., *Everett v. Liberty Healthcare Sys., LLC*, No. 09-0683, 2009 WL 4456290, at \*3 (W.D. La. Dec. 1, 2009); *Mock v. Lockheed Martin Corp.*, No. DKC 09-1370, 2009 WL 3297243, at \*4 (D. Md. Oct. 8, 2009); *Stewart v. Moccasin Bend Mental Hosp.*, No. 1:07-cv-305, 2009 WL 2913953, at \*5 (E.D. Tenn. Sept. 8, 2009); *Hurth v. Bradman Lake Grp. Ltd.*, No. 3:08 CV 370-MR-DSC, 2009 WL 2497993, at \*9 (W.D.N.C. Aug. 14, 2009); *Dorsey v. Ga. Dep't of State Rd. & Tollway Auth. SRTA*, No. 1:09-CV-1182-TWT, 2009 WL 2477565, at \*7 (N.D. Ga. Aug. 10, 2009).

303. See *Hurth*, 2009 WL 2497993, at \*9.

304. See *Dorsey*, 2009 WL 2477565, at \*7.

305. See *Collins v. Vaughan Reg'l Med. Ctr.*, No. 10-0161-CG-M, 2010 WL 3724771, at \*3 (S.D. Ala. Aug. 24, 2010); *Nurriddin v. Bolden*, 674 F. Supp. 2d 64, 93-94 (D.D.C. 2009).

306. See *Richardson v. Suffolk Bus Corp.*, No. 09-CV-3586 (JFB)(ARL), 2010 WL 2606266, at \*9 (E.D.N.Y. June 22, 2010); *Springs v. Mayer Brown, LLP*, No. 3:09cv352, 2010 WL 2347946, at \*5 (W.D.N.C. June 9, 2010); *Cheatam v. Blanda*, No. 1:08-CV-299, 2010 WL 2209217, at \*4 (E.D. Tex. Apr. 23, 2010); *Floyd v. U.S. Dep't of Homeland Sec.*, No. RDB-09-0735, 2009 WL 3614830, at \*8 (D. Md. Oct. 27, 2009).

307. See *Doe v. Sizewise Rentals, LLC*, No. 09-3409 (JLL), 2010 WL 4861138, at \*6 (D.N.J. Nov. 22, 2010); *Blackston v. N.J. Transit Corp.*, No. 10-878, 2010 WL 4259603, at \*6 (E.D. Pa. Oct. 27, 2010); *Greater Indianapolis Chapter of the NAACP v. Ballard*, 721 F. Supp. 2d 925, 940 (S.D. Ind. 2010).

308. See *Norman v. Rolling Hills Hosp., LLC*, No. 3:10-0500, 2010 WL 2901881, at \*4 (M.D. Tenn. July 22, 2010); *Williams v. Finck & Assocs.*, No. 2:09CV63MLM, 2010 WL 1992242, at \*4 (E.D. Mo. May 18, 2010); *Robinson v. Westinghouse Air Brake Techs. Corp.*, No. 3:09-CV-00202-LHR-VPC, 2010 WL 1416892, at \*4 (D. Nev. Apr. 1, 2010).

309. See, e.g., *Colquitt v. Xerox Corp.*, No. 05-CV-6405, 2010 WL 3943734, at \*4 (W.D.N.Y. Oct. 7, 2010).

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.<sup>310</sup> 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.<sup>311</sup> These courts deny motions to dismiss even when racial harassment is less overt.<sup>312</sup>

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;<sup>313</sup> 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.<sup>314</sup> 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.<sup>315</sup> Courts gave plaintiffs every benefit of the doubt, even where plaintiffs neglected to plead that they had suffered harassment specifically based on race.<sup>316</sup> 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-

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310. See, e.g., *Platt v. Univ. of Mich.*, No. 2:09-CV-10886, 2010 WL 1286487, at \*15 (E.D. Mich. Mar. 3, 2010).

311. See *Winston v. Clough*, 712 F. Supp. 2d 1, 13 (D.D.C. 2010); *Robinson*, 2010 WL 1416892, at \*4.

312. See *Drew v. Plaza Constr. Corp.*, 688 F. Supp. 2d 270, 280 (S.D.N.Y. 2010).

313. See, e.g., *Peterson v. Cal. Dep't of Corr. & Rehab.*, 451 F. Supp. 2d 1092, 1111 (E.D. Cal. 2006).

314. See e.g., *Dunn v. Wash. Corr. Inst.*, No. 05-4145-ILRL-SS, 2006 WL 3791976, at \*2 (E.D. La. Dec. 21, 2006); *Kilpatrick-Ray v. Alminde*, No. 06-1889, 2006 WL 3420300, at \*2 (E.D. Pa. Nov. 27, 2006).

315. See *Kriesch v. Johanns*, 468 F. Supp. 2d 183, 188 (D.D.C. 2007); *Ahanotu v. Mass. Tpk. Auth.*, 466 F. Supp. 2d 378, 394 (D. Mass. 2006); *Garrett v. U.S. Dep't of Veterans Affairs*, No. 05 CV 1164 JLL, 2006 WL 2627962, at \*6 (D.N.J. Sep. 13, 2006); *Antwine v. Daimler-Chrysler Servs. of N. Am. LLC*, No. 05-2426-CM, 2006 WL 1083993, at \*2 (D. Kan. Apr. 24, 2006); *Williams v. Chertoff*, No. Civ. 05-211(RCL), 2005 WL 3200794, at \*3 (D.D.C. Nov. 1, 2005).

316. See *Satchel v. Sch. Bd. of Hillsborough Cnty.*, No. 8:05-CV-2239-T-24 TBM, 2006 WL 2474261, at \*4 (M.D. Fla. Aug. 25, 2006).

strued and held to less stringent standards than pleadings drafted by lawyers.<sup>317</sup> Nevertheless, *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.<sup>318</sup> 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.<sup>319</sup>

This disparity, an urgent and systemic problem for federal courts, warrants global review.<sup>320</sup> 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.<sup>321</sup> 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."<sup>322</sup> 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

317. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

318. See, e.g., *Carroll-Hall v. Arc of Balt.*, No. RDB-10-00873, 2010 WL 3781887, at \*4 (D. Md. Sep. 22, 2010); *Holland v. Pilot Travel Ctrs., LLC*, No. 5:09-CV-262 (CAR), 2010 WL 2732047, at \*5 (M.D. Ga. July 8, 2010); *Curry v. Philip Morris USA, Inc.*, No. 3:08cv609, 2010 WL 431692, at \*3 (W.D.N.C. Feb. 4, 2010); *Enadeghe v. Ryla Teleservices, Inc.*, No. 1:08-CV-3551-TWT, 2010 WL 481210, at \*7 (N.D. Ga. Feb. 3, 2010); *Perrymond v. Lockheed Martin Corp.*, No. 1:09-CV-1936-TWT, 2010 WL 987218, at \*11 (N.D. Ga. Feb. 3, 2010); *Stewart v. Moccasin Bend Mental Hosp.*, No. 1:07-cv-305, 2009 WL 2913953, at \*6 (E.D. Tenn. Sep. 8, 2009).

319. See Llewellyn, *supra* note 215, at 447-48.

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.

321. See *Mock v. Lockheed Martin Corp.*, No. DKC 09-1370, 2009 WL 3297243, at \*4 (D. Md. Oct. 8, 2009); *Carroll-Hall*, 2010 WL 3781887, at \*4; *Clyburn v. LGC Assocs.*, No. 4:10CV191-DJS, 2010 WL 2518467, at \*3 (E.D. Mo. June 14, 2010).

322. *Clyburn*, 2010 WL 2518467, at \*2 (citing Title VII Employment Discrimination Complaint, available at <http://www.moed.uscourts.gov/sites/default/files/moed-0035.pdf> (last visited Aug. 28, 2011) (standard complaint form for the Eastern District of Missouri)).

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.<sup>323</sup>

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.<sup>324</sup> Others contend that it is too soon to tell whether *Iqbal* is having any effect on the adjudication of claims.<sup>325</sup> 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.<sup>326</sup>

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.<sup>327</sup> 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.

324. See, e.g., *Has the Supreme Court Limited Americans' Access to Courts?*, *supra* note 10; Michael R. Huston, Note, *Pleading with Congress to Resist the Urge to Overrule Twombly and Iqbal*, 109 MICH. L. REV. 415, 428 (2010).

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.<sup>328</sup> 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.<sup>329</sup> 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.<sup>330</sup> 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.<sup>331</sup> 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,<sup>332</sup> and that White judges are more likely to grant dismissal under *Iqbal* than Black judges.<sup>333</sup>

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*

328. That is, the basic operations that federal district courts now perform when reviewing and evaluating plaintiffs’ claims of discrimination have changed, which has resulted in a heightened pleading bar. To understand what *Iqbal* means in any meaningful sense, we must look not merely to the Supreme Court’s opinion itself (or what commentators say about it), but to the different operations that federal courts actually perform in light of *Iqbal* and their ultimate effect. See *supra* Part IV.A.

329. Hatamyar, *supra* note 14; see also Hannon, *supra* note 10; Seiner, *supra* note 214.

330. See *supra* Part II.B.

331. See *supra* Part II.B.

332. This finding is consistent with a recent empirical study, which found that many courts tend not to view microaggressions and subtle forms of discrimination—alleged among some Black plaintiffs’ claims—as cognizable under Title VII. Eden B. King et al., *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCHOL. PUB. POL’Y & L. 54, 69 (2011) (“[O]ur findings seem to indicate a disconnect between the experiences of targets of discrimination and the legal system in which recourse is sought.”).

333. See Study 3 *supra* Part IV.B.

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."<sup>334</sup> Law driven by folk theories that have been scientifically disproven is indefensible.<sup>335</sup> *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.<sup>336</sup> Yet common beliefs regarding concepts such as prejudice, race, and discrimination has evolved over time for better or worse, reflecting change in American society.<sup>337</sup> 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.<sup>338</sup>

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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).

335. See BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 73 (1924); LEITER, *supra* note 16, at 31 ("[T]raditional philosophical problems are . . . insoluble by the *a priori*, arm-chair methods of the philosopher, and . . . require, instead, embedding in (or replacement by) suitable empirical theories."); POSNER, *supra* note 243, at 230–37; W.V. QUINE, *Naturalism; or, Living Within One's Means*, in *QUINTESSENCE: BASIC READINGS FROM THE PHILOSOPHY OF W.V. QUINE* 275 (Robert F. Gibson, Jr. ed., 1969); Christine Jolls & Cass Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 972 (2006) ("[I]n formulating and interpreting legal rules, legislatures and courts should pay close attention to the best available evidence about people's actual behavior—an approach . . . term[ed] 'behavioral realism.'"); Krieger & Fiske, *supra* note 15, at 1000.

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] the 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.<sup>339</sup> 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.<sup>340</sup> Civil rights law would fail to protect the members of stigmatized groups who most need legal protection against modern forms of prejudice.<sup>341</sup>

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."<sup>342</sup> This Article does not challenge the pragmatic style of adjudication, which often draws on common sense, experience, and reflection.<sup>343</sup> 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.<sup>344</sup>

339. See Llewellyn, *supra* note 215, at 447–49.

340. WESLEY N. HOFELD, 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.

342. O.W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

343. See Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the Hunch in Judicial Decision*, 14 CORNELL L.Q. 274, 279 (1929); JEROME FRANK, *LAW AND THE MODERN MIND* 102–07 (1930).

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.<sup>345</sup> Initial intuitions form but one part of judicial decision making. From judicial experience, we generate working hypotheses that must be further tested and evaluated.<sup>346</sup> 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.<sup>347</sup> This evaluation requires evidence that courts do not possess at the pleading stage. The consequence is a heuristic known as the confirmation bias,<sup>348</sup> the tendency to over-rely on one's initial hunch or hypothesis.<sup>349</sup> 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,<sup>350</sup> 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."<sup>351</sup> 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.<sup>352</sup> Deliberative processing requires effort and reflection: people must be mo-

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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).

347. See Craig R. M. McKenzie, *Hypothesis Testing and Evaluation*, in BLACKWELL HANDBOOK OF JUDGMENT & DECISION MAKING 200 (Derek J. Koehler & Nigel Harvey eds., 2007).

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).

351. *Id.*; see also B. Keith Payne & Brandon D. Stewart, *Automatic and Controlled Components of Social Cognition: A Process Dissociation Approach*, in SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 293, 296-309 (John A. Bargh ed., 2007).

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.<sup>353</sup> 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 pliable 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.<sup>354</sup>

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.<sup>355</sup> 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.

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353. See *id.*

354. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

355. See LLEWELLYN, *THE BRAMBLE BUSH*, *supra* note 22, at 70–71, 172–77; LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 22, at 213–35; POSNER, *supra* note 243, at 230–65.

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*,<sup>356</sup> 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.<sup>357</sup> 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-

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356. 131 S. Ct. 1289 (2011).

357. Also consistent with this view is the Seventh Circuit's decision in *Swanson v. CitiBank*, 614 F.3d 400 (7th Cir. 2010). There, in making sense of *Twombly* and *Iqbal*, the Seventh Circuit explained that "a basic objective of the rules is to avoid cases turning on technicalities and to require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the pleading's claim and a general indication of the type of litigation that is involved." *Id.* at 404 (quoting 5 WRIGHT & MILLER, *supra* note 36, § 1215). As in *Switzer*, *Swanson* held that the question is not whether race discrimination *did* happen, but whether it *could have* happened in light of the allegations. *Id.*

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.

