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

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Judges 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, Law and the Modern Mind 146 (1930).

Man 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.


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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,1 and then Ashcroft v. Iqbal,2 the United States Supreme Court recast Rule 8(a) into a plausibility pleading standard. To survive a motion to dismiss, a complaint must now contain sufficient factual matter “to state a claim to relief that is plausible on its face.”3 Iqbal requires federal courts, when deciding whether a complaint is plausible, to draw on their “judicial experience and common sense.”4 Courts apply this standard at the commencement of litigation, evaluating the plausibility of a claim 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 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...

* J.D., Georgetown University Law Center, 2004. Staff Law Clerk of the United States Court of Appeals for the Seventh Circuit. I dedicate this article to Mary Murphy. I thank her and the Mind & Identity in Context Lab of the University of Illinois at Chicago, and David Nussbaum, for sharing their insights on the social psychological aspects of this article. I thank Linda Skitka for her advice on the statistical aspects of this article. I thank Charles Abernathy, Vicki Jackson, Will Rhee, Zach Clopton, Steven Art, and John Wunderlich for their excellent comments. This article was presented at the Law & Society Association’s 2011 Annual Meeting. The views expressed in this article do not reflect those of the United States Court of Appeals for the Seventh Circuit. Errors of thought and expression are solely my own.

4. Id. at 1950.
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 the field of social psychology, the article first forms hypotheses and then conducts an empirical legal study, which 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.5 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.6 Yet prejudice is still prevalent in society and has largely evolved from overt to subtle forms.7

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.8 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.9 Most scholars who criticize the Iqbal Court assert that Iqbal

5. See infra Part II.A.
6. See infra Part II.B.
7. See infra Part II.A.
fashioned a new procedural regime that will curb access to justice and the vindication of civil rights.10

Whether Iqbal has led to a heightened pleading regime and what Iqbal means for civil rights litigation, however, becomes clear only by empirically examining the ways in which courts have interpreted and applied Iqbal.11 In fact, a first wave of post-Iqbal empirical scholarship has revealed a broad trend in federal case law: courts are increasingly dismissing civil rights actions.12 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 a 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 law13 and naturalized


11. 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 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 (Transaction Publishers 4th prtg. 2009) (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.”).


13. The concept of behavioral realism as used in this article was introduced at a symposium in July 2006 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);
jurisprudence. The undertaking identifies advances in social and cognitive psychology that provide empirically supported models of human nature. It then contrasts those empirically supported models with assumptions of human nature embedded within the law. Often the science and assumptions about human nature collide. As a research paradigm, behavioral realism seeks to understand judicial behavior based on research and methods in the fields of social and cognitive psychology in combination with the empirical study of judicial decisions.

Plausibility pleading is an excellent window through which to examine whether social psychological phenomena are borne out in


14. 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.”).

15. 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).

judicial behavior.\textsuperscript{17} \textit{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.\textsuperscript{18}

Three studies were conducted to examine judicial decision-making on motions to dismiss Black plaintiffs’ claims of race discrimination in the workplace.\textsuperscript{19} A statistical analysis of 208 cases revealed that the folk psychological underpinnings of \textit{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-\textit{Twombly} to 54.6% under \textit{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 \textit{Twombly}. For Black pro se plaintiffs’ claims, the dismissal rate increased from 32.0% before \textit{Twombly} to 67.3% under \textit{Iqbal}, representing a 2.10 times increase. Finally, White and Black judges apply \textit{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 exercise their judicial discretion\textsuperscript{20} and could have interpreted \textit{Iqbal} (and can still) to ensure continuity, coherence, and predictability with Rule 8(a) and the Rules Enabling Act.\textsuperscript{21} 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

\begin{itemize}
\item \textsuperscript{17} See, e.g., Jeffrey J. Rachlinski, \textit{Processing Pleadings and the Psychology of Prejudgment}, 60 \textit{DePaul L. Rev.} 413, 414 (2011) (“The growing body of research . . . suggests that the new pleading standard . . . will have some unfortunate consequences.”).
\item \textsuperscript{18} See Roscoe Pound, \textit{Law in Books and Law in Action}, 44 \textit{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.”).
\item \textsuperscript{19} See infra Part IV.
\end{itemize}
In the past, the Court has twice eschewed heightened pleading standards for civil rights claims, rejecting the suggestion that a heightened pleading bar could be imposed by judicial interpretation. 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. 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. That interpretation must be traded for one consistent with Rule 8(a), one that does not result in increased dismissals of claims of race 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. That interpretation must be traded for one consistent with Rule 8(a), one that does not result in increased dismissals of claims of race discrimination. 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.

Indeed, the Supreme Court’s recent decision in Skinner v. Switzer applies this view. 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 their complaints are sufficient to cross the Rule 8(a) threshold.

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 associations, lay theories of racism, and the nature of contemporary prejudice, drawing hypotheses for how 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

25. See infra p. 118.
26. See infra p. 118.
29. Id.
(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 scholars to investigate how Iqbal has affected claims of discrimination brought by other members of stereotyped groups. Further, the social psychological and cognitive biases explored in this article likely apply beyond the civil rights context to other attitudinally charged classes of claims. It is hoped that others will focus on the gap between the unsound assumptions underpinning Iqbal and its actual application across a variety of situations.

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

The road from Conley to Iqbal—the expansion and then contraction of pleading practice under the Federal Rules—has correlated with changing societal attitudes toward civil rights in American society. As the federal pleading standard has shifted, so too have common sense conceptions about race, prejudice, and discrimination over time (for better or for worse), reflecting wide social and economic changes in American society. As Justice Cardozo famously observed, “[t]he great


31. 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 10, at 111; Schneider, supra note 10, at 551; A. Benjamin Spencer, Plausibility Pleading, 49 B.C. L. Rev. 431, 431 (2008); Thomas, supra note 10, 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. Carrington, supra note 22, at 655-56; Miller, supra note 10, at 14-15.

tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.”

A. Expansion—Notice Pleading and Conley

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

During the code pleading years, state-imposed inequality rather than any kind of access to courts was a fact of life for Blacks. In Dred Scott v. 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.” After the Civil War, many Blacks lived in a South that stripped them of legal and political rights. Racism peaked in the period between the

34. 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].
37. See Clark, Simplified Pleading, supra note 34, at 456-57.
38. 60 U.S. 393, 417 (1856).
39. 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).
end of Reconstruction and World War I, an era of terror that has been
called the “nadir” of the African-American experience.40 Blacks were
considered the intellectual and moral inferior of Whites,41 and the
education of Blacks was legally forbidden.42 In the notorious case of
Plessy v. Ferguson,43 the Supreme Court approved the separate-but-equal
doctrine and affirmed Jim Crow segregation.44

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.45 Rule 8 was designed
to discourage battles over form in order to provide substantial
justice and access to courts.46 Breaking from the codes of the past,
otice 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

40. Id. at 81 (citing Rayford W. Logan, The Betrayal of the
Negro: From Rutherford B. Hayes to Woodrow Wilson (1965)).
41. See James W. Vander Zanden, American Minority Relations 45
(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.”).
education of Negroes was forbidden in some states.”).
43. 163 U.S. 537 (1896).
44. 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).
1938-1958, 58 Colum. L. Rev. 435, 447-452 (1958) [hereinafter Clark,
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 10,
at 41; A. Benjamin Spencer, Plausibility Pleading, 49 B.C. L. Rev.
46. Clark, Simplified Pleading, supra note 34, at 458-60;
Clark, The New Federal Rules, supra note 45, at 977.
the beginnings of improved race relations.\footnote{Many people began to view segregation as morally wrong. See Fredrickson, supra note 39, 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 white man’s burden if America would give him half the chance.”).} At the same time, the National Association for the Advancement of Colored People (NAACP) adopted a strategy to dismantle segregation through the courts.\footnote{See Friedman, supra note 32, at 37.} The NAACP sought to overrule Plessy and the separate-but-equal doctrine.\footnote{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 47, at 133–35.} Cases such as Missouri ex rel Gaines v. Canada,\footnote{305 U.S. 337 (1938) (providing in-state legal education to Whites but not Blacks violates equal protection).} Sweatt v. Painter,\footnote{339 U.S. 629 (1950) (new Texas law school for Blacks not substantially equal education to University of Texas Law School).} and McLaurin v. Oklahoma State Regents\footnote{339 U.S. 637 (1950) (requiring Black doctoral student to sit apart from White colleagues violates equal protection).} reflect the NAACP’s gains toward that end. In time, however, a growing community began criticizing the liberal ethos of Rule 8.\footnote{See Charles E. Clark, Special Pleading in the “Big Case,” 21 F.R.D. 45, 49 (1957); Marcus, supra note 45, at 445.} 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.\footnote{See Clark, supra note 53, at 49; Marcus, supra note 45, at 445.} By the early 1950s, this movement gained so much traction that the Ninth Circuit proposed that Rule 8(a) be redrafted so as to require
plaintiffs to allege “the facts constituting a cause of action.” The Advisory Committee ultimately defeated this proposal.56

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.”57 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.58 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.59

The Warren Court reaffirmed the liberal ethos of Rule 8 in Conley v. Gibson,60 a case filed by Black railway workers claiming that their union failed to represent them because of race discrimination.61 The union filed a motion to dismiss under Rule 12(b)(6) and contended 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

58. Id. at 494.
59. 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); Boynton v. Virginia, 364 U.S. 454 (1960) (invalidating segregation in bus terminals). Backlash spurred by the progress Blacks were making in courts included the mobilization of White Citizens Councils in the South, which fought desegregation and perpetuated the views that Blacks were inferior and interracial mixing was unnatural. See Taylor Branch, Parting the Waters: America in the King Years 1954–63, at 138 (1988); Vander Zanden, American Minority Relations, supra note 41, at 45.
60. 355 U.S. 41 (1957).
61. 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 white employees or to help them with their grievances all because they were Negroes.” Id. at 46.
that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Plaintiffs’ broad allegations of discrimination withstood dismissal. For years after Conley, federal courts accepted as true all factual allegations contained in the complaint and, in ruling on motions to dismiss, drew all reasonable inferences in favor of the plaintiffs.

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

By the 1960’s, after the Civil Rights movement and post-World War II, many believed that racism was wrong. Congress enacted the Civil Rights Act of 1964 to outlaw discrimination in employment, education, and public accommodation and to broaden access to justice for minorities. In Loving v. Virginia, the Warren Court then struck down a Virginia statute that criminalized interracial marriages.

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).


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

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

Eventually, the cases litigating these heightened pleading standards wended their way to the Supreme Court. Twice the Court held that the only proper way to fashion a heightened pleading standard is through the formal rule-making process envisioned by the Rules Enabling Act. In Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, the Court rejected a heightened pleading bar in a civil rights case, finding it “impossible to square” with the “liberal
system of ‘notice pleading’ set up by the Federal Rules.” 75 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.76 It clarified that enacting a heightened pleading bar would require rewriting Rule 8 or Rule 9 77 through the formal process for amending the Federal Rules.78 In Swierkiewicz v. Sorema, the Court again held that judicially fashioned heightened pleading standards violated the Rules Enabling Act.79

The Rules Enabling Act codifies a formal rulemaking process for rules of practice and procedure, including the federal rules of civil procedure.80 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.81 After the Judicial Conference has agreed to amend the federal rules of civil procedure, then the Supreme Court and Congress must approve any recommendations. The Rules Enabling Act precludes federal courts from altering the federal rules by judicial interpretation.82

B. Retrenchment—Plausibility Pleading Under Twombly and Iqbal

In the 1980’s and 1990’s, the liberal ethos of Rule 8 faded further. Access was first restricted by legislation.83 In 1995, Congress enacted the Private Securities Litigation Reform Act, altering the structure of private securities class actions.84 One year

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76. Id. at 168 (quoting Conley v. Gibson, 355 U.S. 41, 45 (1957)) (internal quotation marks omitted).
77. Rule 9 applies to special 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.
83. See Miller, supra note 10, at 11 n.35.
later, Congress passed the Antiterrorism and Effective Death Penalty Act to restrict the availability of habeas corpus relief.85

Many Americans endorsed the view that prejudice is morally wrong, while simultaneously resisting measures to equalize opportunity for people of color.86 Several Supreme Court rulings reflect this view. In Missouri v. Jenkins, for example, the Supreme Court held that district courts may not remedy inter-school district segregation by creating magnet programs that attract nonminority students from outside the school district back into inner city schools.87 With a bit of finesse, the Court held that district courts were forbidden from aiming to improve inner-city schools for the purpose of attracting non-minority students back into inner-city schools, deeming this end a forbidden “interdistrict remedy.” 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.”88 Jenkins represented a retrenchment of Brown and subsequent desegregation cases: rather than exhorting school districts to eliminate all vestiges of segregation “root and branch,”89 the Court blocked the efforts of a district court to attract nonminority students back into inner-city schools.90

Ultimately, calls to reform the practice of litigation 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 § 1 of the Sherman Act.91 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.92 After the district court granted dismissal on the grounds that “conscious parallelism” fails to state a claim under the Sherman Act, the Second Circuit reversed, concluding

86. See Mica Pollock, Because of Race: How Americans Debate Harm and Opportunity in Our Schools 175 (2008).
88. Id. at 102.
92. Id. at 550-51.
that no “plus factor” was required beyond the allegation of parallel conduct.93

The Supreme Court held that the complaint failed to state a claim.94 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.95 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.96 The Court then overruled 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.”97 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.”98

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.99 Justice Stevens discerned that Twombly might not be cabined to antitrust actions,100 a question that was subsequently debated by the legal community.101 The Federal Judicial Center and Advisory Committee agreed to research Twombly’s effect.102

As Justice Stevens had lamented, the Court extended Twombly to all federal actions in Ashcroft v. Iqbal.103 Iqbal, a Muslim citizen of

93. Id. at 553.
94. Id. at 564.
95. Id. at 557.
96. Id.
97. Id. at 562-63.
98. Id. at 570. Ultimately, the Court concluded that plaintiffs had not “nudged their claims across the line from conceivable to plausible.” Id.
99. Id. at 577-78 (Stevens, J., dissenting).
100. 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 22, at 655-56.
Pakistan, was arrested after 9/11, deemed of "high interest" to the 
FBI, and held in a maximum-security prison.\footnote{Id. at 1943.} 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 subjected him to harsh confinement 
because of his race, religion, or national origin.\footnote{Id. at 1944.} 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.\footnote{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).}

In its opinion, the Court described a formula\footnote{Iqbal, 129 S. Ct. at 1950-51.} that many courts 
now use to evaluate pleadings.\footnote{Id. at 1944.} 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.\footnote{Id. at 1942.} Answering this question is a 
context-specific task that requires the reviewing court to draw on its 
"judicial experience and common sense."\footnote{Id. at 1943.}

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 Mueller knew of, condoned, and 
willfully subjected him to harsh conditions because of his religion 
and race, which constituted discrimination.\footnote{Id. at 1951.} The majority then 
concluded that Iqbal’s remaining allegations had not “‘nudged [his] 
claims’ of invidious discrimination ‘across the line from conceivable 
to plausible.’”\footnote{Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 
(2007)).} In dissent, Justice Souter (the author of \textsc{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 legal conclusions.\footnote{113. Id. at 1958-61 (Souter, J., dissenting).}

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 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 had 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.\footnote{114. See Mohawk Indus. v. Carpenter, 130 S. Ct. 599, 609 (2009).}

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.\footnote{115. 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) (“On the cusp of the twenty-first century, stereotyping, prejudice, and discrimination have not abated.”).} In the past fifty years, the manifestation of prejudice has grown more subtle.\footnote{116. 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).} In comparing surveys conducted in the 1940’s and today, majority group members express less hostile racial attitudes toward minority group members,\footnote{117. See Howard Schuman et al., Racial Attitudes in America: Trends and Interpretations 103-21 (1997).} and the percentage of Whites who denounce racist views and endorse racial equality has
Overt prejudice toward minority group members is no longer publicly acceptable.\textsuperscript{119} 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 their anti-Black attitudes.\textsuperscript{120} A duality persists between explicitly endorsed attitudes and behavior toward members of minority groups.\textsuperscript{121} Contemporary forms of bias affect the lives of stereotyped groups in significant ways.\textsuperscript{122} “Like a virus that has mutated, racism has evolved into different forms that are more difficult not only to recognize but also to combat.”\textsuperscript{123} 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.\textsuperscript{124} Many majority group members exhibit anxiety, disgust, fear, and discomfort toward stigmatized individuals, resulting in decreased helping behavior and cooperation, passive harm, and neglect.\textsuperscript{125} In contrast, many exhibit liking and trust toward in-group members, resulting in facilitation and cooperation with other majority group members.\textsuperscript{126} The consequences

\begin{thebibliography}{99}
\bibitem{120} See Fiske, supra note 115, 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).
\bibitem{121} 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, supra note 116, at 7-10.
\bibitem{122} See Crocker et al., supra note 121, at 516-21.
\bibitem{124} See Crocker et al., supra note 121, at 512-13.
\bibitem{126} See Crocker et al., supra note 121, at 516-17; Dovidio & Gaertner, supra note 116, at 3.
\end{thebibliography}
are pernicious: the economic, health, and educational disadvantages of minority groups stem, in part, from contemporary bias.127

Social psychologists study intergroup bias as an attitude that has three components.128 Prejudice refers to the affective or emotional component, representing both the type of emotion linked with the attitude and the extremity of that attitude. Stereotypes refer to the cognitive component, the beliefs or thoughts (cognitions) that make up the attitude. And discrimination refers to the behavioral component, that is, actions toward others.129 While stereotypes can be explicit, operating in conscious awareness, prejudiced attitudes are often automatically activated.130

Bias results, in part, from social categorization. Categorization is normal, involuntary, and pervasive:131 we routinely and inadvertently categorize other people.132 Given the troubled social, cultural, and historical context of race relations in the United States, racial categorization is virtually inescapable.133 The problem is that race increases the accessibility of stereotypic associations.134 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.135

129. See Fiske, supra note 115, at 357.
130. See Dovidio, supra note 123, at 838; Fiske, supra note 115, at 357.
132. See Fiske, supra note 120, at 38-39.
133. Allport, supra note 131, 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 Fiske, supra note 120, at 38-39; Fiske, supra note 115, at 364-67.
134. See Fiske, supra note 131, at 124.
135. Cf. Dovidio, supra note 123, at 830 (“[P]rejudice and racism are embedded in people’s group identities and in a society’s institutions and its culture.”).
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.\(^{136}\)

### A. Aversive Racism

Aversive racism refers to racial bias among people who openly and explicitly endorse nonprejudiced beliefs, but whose negative implicit attitudes toward Blacks are expressed in subtle, indirect, and rationalizable ways.\(^{137}\) Such racism is presumed to characterize the racial attitudes of most well-educated Whites in the United States.\(^{138}\) 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.\(^{139}\) In these situations, they are “especially motivated to avoid feelings, beliefs, and behaviors that could be associated with” bias.\(^{140}\) When the correct choice is clear, aversive racists do not discriminate against Blacks.\(^{141}\)

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.\(^{142}\) 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.\textsuperscript{143}

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,\textsuperscript{144} 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.\textsuperscript{145} Social psychologists have demonstrated the phenomenon with helping behavior toward Blacks, emergency intervention, allocation of resources, employment selection decisions, and even decision making by mock juries.\textsuperscript{146}

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 selection decisions.\textsuperscript{147} 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 job qualified at a significantly higher rate.

\textsuperscript{143} See, e.g., Brewer & Brown, \textit{supra} note 125, at 560-61; Crocker et al., \textit{supra} note 121, at 512-16; Cuddy & Fiske, \textit{supra} note 125, at 633-35.

\textsuperscript{144} See Dovidio & Gaertner, \textit{supra} note 116, at 7; Dovidio, \textit{supra} note 123, at 830.

\textsuperscript{145} See, e.g., Christopher L. Aberson & Tara E. Ettlin, \textit{The Aversive Racism Paradigm and Responses: Meta-Analytic Evidence of Two Types of Favoritism, 17 Soc. Just. Res. 26} (2004); Dovidio, \textit{supra} note 123.

\textsuperscript{146} See Aberson & Ettlin, \textit{supra} note 145; Dovidio, \textit{supra} note 123.

\textsuperscript{147} See Dovidio & Gaertner, \textit{supra} note 118, at 315.
Aversive racism also leads to bias because of the “ultimate attribution error”: the tendency to attribute failures and negative outcomes of stereotyped individuals to their dispositional characteristics (personality traits), rather than to situational influences (e.g., he failed the test because he’s not smart). Yet those same failures by majority group members are often attributed to situational factors, rather than to character flaws (e.g., he failed the test because he was up too late studying). The same error is true for successful outcomes: many tend to attribute success by majority group members to character traits and the success of stereotyped individuals to situational factors (e.g., he passed the test because he is smart versus because he got lucky). This attributional error—giving the benefit of the doubt to majority members in a way not extended to stereotyped individuals—tends to justify in-group favoritism and more favorable outcomes for majority group members.

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


149. See Aronson et al., supra note 128, at 407.

150. See Crocker et al., supra note 121, at 512-16.


152. People are motivated to view themselves as impartial and unbiased; therefore, when one perceives that a social category characteristic (e.g., race or gender) has affected a decision, this threatens one’s self concept. This dissonance results in the post hoc desire to justify a decision in socially acceptable terms. See id. Interestingly, while many adults thus exhibit a mismatch between their implicit associations about Blacks and their explicit attitudes in favor of racial equality, kindergarteners have no such inconsistency.
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-1990’s, scientists began using a battery of techniques to measure intrinsic attitudes against Blacks.\textsuperscript{153} 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).\textsuperscript{154} Social psychologists have also examined implicit associations by deploying physiological methods, such as facial electromyography (EMG), galvanic skin response, and cardiovascular reactivity.\textsuperscript{155} Finally, scientists have examined amygdala brain activation. Using functional magnetic resonance imaging (fMRI) procedures, social psychologists have examined the neuropsychological underpinnings of these processes.\textsuperscript{156}

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

\textsuperscript{153} Dovidio, supra note 123, at 838.
\textsuperscript{154} Id.
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.157

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.158

Lay theories, also known as folk psychology, are organized knowledge structures.159 People draw on lay theories when making inferences, predictions, explanations, and justifications.160 These theories act as channels for feelings, thoughts, and actions for the object of the lay theory. Scientists have focused on two lay theories.161 The most dominant one, particularly among majority group members, characterizes racist behavior in overt, blatant terms.162 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 prejudice—such as ambivalence, anxiety, and passive harm toward

157. See generally, Miller, supra note 119, at 102; Fiske, supra note 131, at 125-26.
159. 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 . . . .”).
162. Id. at 131.
stereotyped individuals—as racism. This group tends to consider mitigating nonracial factors that may account for bias before drawing the inference that racism occurred, unless the evidence of racism is incontrovertible.

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

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

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

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163. Id. at 128, 131-32.
164. Id. at 131-32.
165. See id. at 132.
166. 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.
167. Id. at 128, 131-132.
169. See Fazio & Olson, supra note 155, at 301.
C. Social Psychology Applied to Legal Decision-Making

Social psychologists have long studied legal decision-making and the cognitive and motivational processes it involves. 170 For instance, they have investigated the degree to which the defendant’s race shapes jury decision-making.171 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.172 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.173

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.174 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,175 which may reflect inaccurate inferences and bias.176 A
recent study found that judges may implicitly associate Blacks with negative attitudes and that these associations affect their decision-making.\textsuperscript{177}

\textit{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 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. 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

\textsuperscript{177} See Rachlinski et al., Does Unconscious Racial Bias, supra note 16, at 1209-10 (using the Implicit Association Test to examine judicial decision-making and finding a strong white preference among White judges).
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 would 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

This Part 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.178 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.179

A disparate treatment claim alleges that an employer treated the plaintiff less favorably than others because of the plaintiff’s race.180 The ultimate issue in every disparate treatment case is whether the plaintiff was the victim of intentional discrimination.181 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.182

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.183 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.184

Under the McDonnell Douglas-Burdine framework, plaintiffs must first establish a prima facie case of discrimination—this requirement is not “intended to be rigid, mechanized, [ ] ritualistic,”185 or “onerous.”186 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.187 This prima facie case also applies to claims of race-based employment discrimination under Section 1981.188 To establish a prima facie case of disparate treatment, a plaintiff must prove that she (1) is a member in a protected class, (2) is qualified for a given job, (3) was subject to an adverse employment action, and (4) that there is a causal

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183. See Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (discussing direct versus circumstantial evidence under Title VII); 1 Lindemann & Grossman, supra note 179, at 10-30 (same).
184. 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).
186. Burdine, 450 U.S. at 253.
188. 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.
connection between the adverse action and protected characteristic. These legal tests for the prima facie case are flexible and often tailored to different factual circumstances. For example, in cases involving disparate terms and conditions of employment, many courts construe the last element of the prima facie as requiring plaintiffs to prove that the employer treated similarly situated employees outside her class more favorably.

If a plaintiff proves a prima facie case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. This burden is one of production, not persuasion; it involves “no credibility assessment.” If the employer meets this burden, the presumption of intentional discrimination disappears, and the plaintiff is then afforded the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer were mere pretext for discrimination. When deciding whether the defendant’s explanation is pretextual, the trier of fact may consider the evidence that established plaintiff’s prima facie case and any inferences properly drawn from that evidence. The McDonnell Douglas-Burdine framework has been applied to claims of discriminatory hiring, discharge,

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189. See, e.g., McCoy v. City of Shreveport, 492 F.3d 551, 556-57 (5th Cir. 2007).
190. See 1 Lindemann & Grossman, supra note 179, at 14-25.
191. 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—often decides whether a claim withstands summary judgment. See 1 Lindemann & Grossman, supra note 179, at 23. The courts of appeals divide 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).
194. Raytheon Co., 540 U.S. at 49-50 n.3; Reeves, 530 U.S. at 143.
195. Reeves, 530 U.S. at 143.
discipline, promotion, transfer, demotion, retaliation, and other adverse employment actions.\textsuperscript{196}

Racial harassment also violates Title VII.\textsuperscript{197} 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.\textsuperscript{198} The “mere utterance of an . . . epithet which endangers offensive feelings in an employee . . . does not sufficiently affect the conditions of employment to implicate Title VII.”\textsuperscript{199} No “‘talismanic expressions’ of racial animus’ are necessary”; rather, charged words may send a “‘clear message and carry[] the distinct tone of racial motivations and implications.’”\textsuperscript{200} 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.\textsuperscript{201} That is, federal courts began requiring plaintiffs to plead facts to support these frameworks at the pleading stage, a practice that wound its way to 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 facie case of discrimination.\textsuperscript{202} Swierkiewicz held that imposing the prima facie case at the pleading stage violates Rule 8(a).\textsuperscript{203} 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

\textsuperscript{196} See 1 Lindemann & Grossman, supra note 179, at 12-13.

\textsuperscript{197} See 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).


\textsuperscript{199} 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).

\textsuperscript{200} 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)).

\textsuperscript{201} See supra Part I.

\textsuperscript{202} 534 U.S. 506, 511-13 (2002).

\textsuperscript{203} Id. at 512.
IV. A Study of Iqbal’s Effect on Race Discrimination Claims

A. Methodology

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

204. 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 counted decisions by federal district courts in which they decided whether to dismiss claims after receiving the report and recommendations of magistrate judges. See, for example, Walker v. University of Colorado Board of Regents, 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), accepted in part and rejected in part by 2010 WL 3259886, at *2 (D. Colo. Aug. 16, 2010) (concluding that plaintiff’s Title VII discrimination claim survived dismissal), which 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 Hatamyar, supra note 12; Hannon, supra note 8.

207. Herr, Haydock & Stempel, supra note 63, at § 9.06[A]; see also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1944 (2009) (“Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct.”).
Broad Westlaw searches were designed to retrieve all cases deciding motions to dismiss in employment discrimination cases filed by Black plaintiffs under Title VII or Section 1981. Searches for Title VII claims yielded 263 decisions in the eighteen months before Twombly and 371 in the eighteen-month range after Iqbal. To increase the power of the study, the inquiry included cases deciding Section 1981 claims. A search for relevant Section 1981 claims yielded 338 opinions in the eighteen-month range before Twombly and 495 in the same timeframe after Iqbal. Many of the cases retrieved from Westlaw fell outside the scope of the study and were excluded. Finally, because this investigation focused on claims of race-based

208. All cases were obtained via the Westlaw federal district court database (DCT). Many decisions were not published in the West Reporters and were 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).

209. The database of cases is available upon request.

210. 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.”).

211. 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 188 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, *1 (N.D. Tex. Jul. 9, 2009) (granting dismissal of Title VII and Section 1981 claims under McDonnell Douglas framework).
discrimination and harassment by Black plaintiffs, the study did not examine retaliation claims or claims based on other protected characteristics (such as gender, national origin, and religion).

The first wave of empirical legal research examined the broad question of whether Iqbal has increased dismissal rates across all federal civil rights cases or all Title VII cases. Scholars have found different rates of dismissal, but most scholars who have examined federal case law report rates following the same trend: higher rates under Twombly and Iqbal than under Conley. This article joins other scholars in charting a new direction for empirical legal research, one that closely examines how Iqbal has affected narrow categories of


213. Hatamyar, supra note 12, 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 8, at 1837 tbl.1.3 (finding that the dismissal rate for all civil rights claims rose from 41.7% under Conley to 52.9% under Twombly); Joseph Seiner, The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases, 2009 U. Ill. L. Rev. 1011, 1030 tbl.A (2009) (finding that the dismissal rate rose from 54.5% under Conley to 57.1% under Twombly). The Federal Judicial Center (FJC) recently released a study on Iqbal’s effects, examining orders on multiple federal court CM-ECF dockets rather than federal case law. For motions to dismiss with prejudice, the FJC study found that the dismissal rate has not changed in a statistically significant manner. Joe Cecil et al., Federal Judicial Center, Motion to Dismiss for Failure to State a Claim After Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules (2011), available at http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf. The report also found that motions to dismiss were granted more often post-Iqbal than pre-Twombly across all counseled cases, with the grant rate rising from 66% to 75% (when considering orders granting dismissal with leave to amend and orders granting dismissal with prejudice). Id. at 13. For an in-depth assessment of the FJC’s study, see Lonny Hoffman, Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss (Univ. of Houston Law Ctr., Working Paper No. 1904134), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904134. In contrast to the FJC report, a follow-up test was performed on the claims studied, which revealed that the rising dismissal rate was statistically significant for motions to dismiss Black plaintiffs’ claims of race discrimination granted with prejudice.
claims. This second wave draws on the notion of “situation types” or “particularized situations,” as articulated by Llewellyn and other Legal Realists.214 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.215 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.216 Research demonstrates that decision makers exhibit aversive racism in ambiguous situations,217 but not in clearly weak situations.218 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.219

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.”220 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


215. See, e.g., Leiter, supra note 14, 28-30; Llewellyn, supra note 214, at 457-60.

216. Operational definitions describe a set of procedures that researchers use “to establish . . . the existence . . . of the phenomena[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 11, at 41.


219. Id.

practice. Second, plaintiffs must file suit within 90 days after receiving a right-to-sue letter from the EEOC. The present studies applied these statutory prerequisites when drawing a distinction between unambiguous and ambiguous claims. Unambiguously weak claims were those where plaintiffs failed to file a timely charge of discrimination with the EEOC or failed to sue within 90 days after receiving a right-to-sue letter. Unambiguously weak claims also included those where (1) plaintiffs failed to exhaust their remedies, such as where plaintiffs’ claims of race discrimination fell outside the scope of their charges filed with the EEOC; and (2) plaintiffs

221. 42 U.S.C. § 2000e-5(e)(1) (2006); 2 Lindemann & Grossman, supra note 220, 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 220, 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).

222. 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).

223. 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 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).

224. The same exclusionary rule was applied here as well. See supra note 223. If defendant moved to dismiss a claim for failure to exhaust remedies with the EEOC, and the court granted that motion,
sought to hold coworkers liable, rather than an employer, which is outside the scope of Title VII. Since these cases turn on clear rules applied in heuristic fashion, these cases are not ambiguous (i.e., plaintiff either did or did not comply with these heuristic-like rules).

The remaining cases were deemed ambiguous because they required courts to evaluate whether Black plaintiffs had sufficiently pleaded claims of race discrimination or harassment. These cases turned largely on whether plaintiffs had sufficiently pleaded discrimination under Rule 8(a). By operationalizing the concept of “ambiguous” claims in this way, the study examined the narrow category of cases most suitable to test the hypotheses of aversive racism and lay theories. Next, each case was analyzed and the dependent variable was coded according to the three possible outcomes for decisions under Rule 12(b)(6): granted, denied, or granted-in-part/denied-in-part. The 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.

225. 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 223 and 224 were also applied to this basis for dismissal.

226. 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 176, at 391-408.

227. See supra Part II.B.

228. 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.

229. 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 12, 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’ argument under Rule 8, and in turn allowed at least one race-based claim to withstand dismissal.
research examined the frequency of decisions in each of these three categories eighteen months before Twombly and eighteen months after Iqbal. 230

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 cases decided by White versus Black judges under Iqbal. The studies used chi-square tests to examine whether these changes were statistically significant. 231

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.

230. 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.

231. 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 210, at 359–61; Jackson, supra note 216, 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 216, 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 210, at 377.
Table 1:
Percentage of Rulings in Study for Black Plaintiffs’ Claims of Race Discrimination in the Workplace

Observed Frequency (Expected Frequency)

<table>
<thead>
<tr>
<th>Percentage in the Study</th>
<th>Grant</th>
<th>Deny</th>
<th>Mixed</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conley</td>
<td>16 (32.6)</td>
<td>59 (40.5)</td>
<td>3 (4.9)</td>
<td>78</td>
</tr>
<tr>
<td>Iqbal</td>
<td>71 (54.4)</td>
<td>49 (67.5)</td>
<td>10 (8.1)</td>
<td>130</td>
</tr>
<tr>
<td>Total</td>
<td>87</td>
<td>108</td>
<td>13</td>
<td>208</td>
</tr>
</tbody>
</table>

Pearson $X^2$ (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 discrimination. The increase in dismissal rates across time was statistically significant.232

232. Using SPSS, the statistical software package, a chi-squared test was performed. A two-way contingency table analysis was used to
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)

<table>
<thead>
<tr>
<th></th>
<th>Grant</th>
<th>Deny</th>
<th>Mixed</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conley</td>
<td>8 (13.9)</td>
<td>17 (10.1)</td>
<td>0 (1.0)</td>
<td>25</td>
</tr>
<tr>
<td>Iqbal</td>
<td>33 (27.1)</td>
<td>13 (19.9)</td>
<td>3 (2.0)</td>
<td>49</td>
</tr>
<tr>
<td>Total</td>
<td>41</td>
<td>30</td>
<td>3</td>
<td>74</td>
</tr>
</tbody>
</table>

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

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 $X^2$ (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 $X^2$ 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.233 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.234

233. 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.

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 discrimination regarding how judges draw inferences and make probabilistic judgments.

Table 3.
Percentage of Rulings in Study for White Versus Black Judges

<table>
<thead>
<tr>
<th></th>
<th>Grant</th>
<th>Deny</th>
<th>Mixed</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>White Judges</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>65 (61.8)</td>
<td>41 (42.4)</td>
<td>7 (8.8)</td>
<td>113</td>
</tr>
<tr>
<td></td>
<td>57.5%</td>
<td>36.3%</td>
<td>6.2%</td>
<td></td>
</tr>
<tr>
<td>Black Judges</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>5 (8.2)</td>
<td>7 (5.6)</td>
<td>3 (1.2)</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>33.3%</td>
<td>46.7%</td>
<td>20.0%</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>70</td>
<td>48</td>
<td>10</td>
<td>128</td>
</tr>
</tbody>
</table>

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

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%). These results were marginally significant; 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. As discussed infra 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

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236. 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.

237. 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 than 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).
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. 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 theories 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.

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 1039 cases and demonstrated that the increase in dismissal rates across all actions rose from forty-six percent under Conley to fifty-six percent under Iqbal, meaning that the base rate for dismissals rose by 1.21 times across all actions. Her study demonstrated that for Title VII claims, the dismissal rate rose from forty-two percent under Conley to fifty-three percent 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.

238. See Hatamyar, supra note 12, at 597–615.
239. 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’ motion 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, with White judges more likely to grant dismissal. This emerging pattern is consistent with research on lay theories of discrimination. Some White judges may be attributing the challenges Blacks face in the workplace to stereotypical characteristics, rather than to subtle prejudice. In contrast, many Black judges may be drawing on lay theories that take into account both overt and subtle prejudice. It appears that judging may be influenced by preconceptions about the prevalence of prejudice in American society.

V. General Discussion of Iqbal’s Effect on Claims of Race Discrimination Under Federal Employment Discrimination Law

Scholars warned that after Twombly and Iqbal, the pivotal point at which courts would screen cases would move earlier in time from


241. 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.

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

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

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

243. Miller, supra note 10, at 15.
244. Thomas, supra note 10, at 18.
245. 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).
246. See supra Part III.
Court’s 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.” The Second Circuit has also reaffirmed Swierkiewicz: “There is no heightened pleading requirement for civil rights complaints alleging racial animus.” Similarly, some courts have held that even after Iqbal, the prima facie elements are “an evidentiary standard,” not a “pleading requirement,” particularly in discrimination cases where discovery uncovers relevant facts. Other courts have held that while plaintiffs are not required to plead every element of a prima facie case, they must allege more than conclusory allegations; however, they need only give the defendant “fair notice of what plaintiff[s’] claim[s] are and the grounds upon which [they] rest[].” These courts conclude that although Swierkiewicz relied on Conley, Swierkiewicz remains good law even after Conley’s demise.

In contrast, another line of jurisprudence requires plaintiffs to plead facts establishing the prima facie case. For example, in Fowler v. UPMC Shadyside, the Third Circuit held that Swierkiewicz is invalid

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250. See Swanson, 614 F.3d at 404.
251. 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).
because it was premised on Conley. Third Circuit courts have held that, while not required to prove elements at the pleading stage, a plaintiff must nonetheless plead facts that “raise a reasonable expectation that discovery will reveal evidence of the necessary element[s].” Other courts have concluded that plaintiffs must plead facts for each element of a prima facie case. Fourth Circuit courts have held that while a plaintiff need not plead facts establishing a prima facie case of discrimination, the basic pleading requirement requires plaintiffs to set forth facts sufficient to allege each element of their claim. Finally, at least one Eleventh Circuit court has held that “it is necessary for a plaintiff to ‘plead sufficient factual matter to show that’ a defendant acted not for a legitimate, non-pretextual reason, ‘but for the purpose of discriminating on account of race . . . .’”

Other courts seemed uncertain and divided: plaintiffs need not plead a prima facie case, yet such a showing is still relevant to determining whether a complaint states a claim that is plausible on

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256. 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).


258. 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).


its face. Yet others cite Swierkiewicz for the ban on heightened pleading, but nonetheless explain that the prima facie standard is a “useful structure” to determine whether plaintiffs have presented a reasonable inference of discrimination.

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

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263. 131 S. Ct. 1289 (2011).

264. 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 his legal argument.” (emphasis added) (internal quotation marks omitted) (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002))).
the broad allegations as invalid legal conclusions. 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. 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. Remarkably, in some cases, plaintiffs pleaded that they were terminated and replaced with named Whites, but courts characterized these allegations as legal conclusions and insufficient to state a plausible claim. Yet other courts found discrimination implausible when Black plaintiffs pleaded that employers treated other Blacks in similar discriminatory fashion or that they were terminated and replaced by other Blacks.

Another line of authority, however, applies the final element more leniently. Some courts accept plaintiffs’ allegations that unnamed Whites are comparable. These courts explain that plaintiffs

265. 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)).


“need not go into . . . detail regarding the degree to which those employees outside of his protected class are 'similarly situated.'”

This question is fact intensive and best left for a fully developed record at summary judgment. Other courts recognize that at the pleading stage, plaintiffs have not yet conducted discovery on how defendants treated coworkers who were alleged to be comparators. Recognizing that any inference of discrimination would be weak before discovery, these courts reject the requirement that plaintiffs must allege with particularity that similarly situated White employees were treated differently. Others have found that although plaintiffs have not named White employees who were treated more favorably, that failure is not fatal at the pleading stage.

Overall, the exacting approach is a heightened pleading bar and a marked change from how courts decided the final element under Swierkiewicz. Under Conley and Swierkiewicz, federal courts did not require plaintiffs to name in their complaints particular White employees who were treated more favorably. Some held that complaints survived dismissal as long as they supported an inference that people outside of plaintiffs’ protected class were treated differently. Others concluded that the proper role of a complaint was simply to give the defendant fair notice of the plaintiff’s claims and the grounds upon which they rest. These courts denied motions to dismiss

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277. 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.”).
where plaintiffs had pleaded that adverse action was motivated by racial animus and that at least one non-Black employee was treated more favorably.\textsuperscript{279} Finally, others rejected any \textit{per se} rule that Blacks were required to plead, when terminated, that they were replaced by White employees.\textsuperscript{280}

\textit{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.\textsuperscript{281} These courts cite \textit{Swierkiewicz} even as they grant dismissal. Courts held that plaintiffs failed to plausibly plead cognizable adverse actions when grievances stemmed from disparate reprimands,\textsuperscript{282} evaluations,\textsuperscript{283} promotions,\textsuperscript{284} job responsibilities,\textsuperscript{285} dismissals from work,\textsuperscript{286} denials of training,\textsuperscript{287} and lost supervisory opportunities and discretionary bonuses.\textsuperscript{288}

\begin{itemize}
\item \textsuperscript{282} Easter v. Geithner, No. 1:10 CV 48, 2010 WL 4628564, at *4 (N.D. Ohio Oct. 18, 2010).
\item \textsuperscript{284} Floyd, 2009 WL 3614830, at *6.
\item \textsuperscript{287} 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.").
\item \textsuperscript{288} Floyd, 2009 WL 3614830, at *6.
\end{itemize}
Other courts apply the adverse action element more leniently, explaining that many of the above-listed job harms may ultimately be insufficient to show discrimination at summary judgment. Nonetheless, these harms are not per se insufficient at the pleading stage. The relevant inquiry instead turns on context and whether the harm had tangible, adverse effects on plaintiffs’ employment.

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

289. 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, 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.”); 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.”).

pleadings was thought contrary to the rule that adversity is
determined by examining the circumstances of each particular case.\footnote{294}

\section*{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.\footnote{295} Some courts,
however, did hold that the plaintiffs’ failure to plead facts showing
pretext rendered their claims implausible.\footnote{296} Other courts weighed the
employer’s nondiscriminatory justifications against the inference of
discrimination, ultimately concluding that plaintiffs had stated
plausible claims.\footnote{297}

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.\footnote{298} Instead, defendants must advance those justifications at
summary judgment, and only then must plaintiffs refute them.\footnote{299} That
some jurists now weigh nondiscriminatory reasons at the pleading stage

\footnote{294. See Buford, 2007 WL 1341115, at *4–5.}
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 . . . .").}
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.}
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
Ctr., No. 08 Civ. 9656(DAB), 2010 WL 1379794, at *5 (S.D.N.Y. Mar. 31,
2010).}
\footnote{299. See Keyes, 2010 WL 4054500, at *6; Angrand, 2010 WL
1644132, at *4; Washington, 2010 WL 1417000, at *4.}
demonstrates that the standards that once governed summary judgment have shifted forward to the pleading stage.300

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.301 For example, courts granted dismissal although plaintiffs complained about music that was derogatory toward Blacks302 and comments about racial stereotypes.303 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.304 Some characterize harassment as merely workplace friction or blamed the plaintiff for strife in the workplace.305 Others characterize plaintiffs’ allegations of harassment as legal conclusions.306 When plaintiffs plead facts suggesting overt racial animus, however, most courts deem claims of harassment

300. See supra Part III.
sufficiently plausible these courts denied motions to dismiss and found that plaintiffs had provided defendants with fair notice of their claims.

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

Here again, we see a shift in the way courts adjudicate claims at the pleading stage. Under Conley, most jurists held that plaintiffs were not required to plead specific facts to set forth a clear case of harassment; dismissal should only be granted if it appeared beyond doubt that plaintiffs could prove no set of facts that supported their claims of racial harassment. In close cases—those involving less overt forms of harassment—courts evaluated the totality of the circumstances, read complaints in the light most favorable to plaintiffs, and often refused to deem allegations insufficient to state a claim of racial harassment. Courts gave plaintiffs every


310. Id.


benefit of the doubt, even where plaintiffs neglected to plead that they had suffered harassment specifically based on race. This lenient application of Rule 8(a) is inconsistent with the more exacting interpretation of Iqbal.

E. Black Pro Se Plaintiffs

The article now turns to Black pro se plaintiffs’ claims and the increased dismissal of those claims. Shortly after Twombly, in Erickson v. Pardus, the Court instructed that pro se complaints must be liberally construed and held to less stringent standards than pleadings drafted by lawyers. 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. Study 2 demonstrates that post-Iqbal courts have increasingly dismissed claims of discrimination brought by Black pro se plaintiffs. The grant rate doubled from 32.0% under Conley to 67.3% under Iqbal, reflecting that it is 2.10 times more likely that their claims will be dismissed. Federal courts seem to treat Erickson as a “paper rule”: one that does not accurately describe or predict judicial behavior.

This disparity, an urgent and systemic problem for federal courts, warrants global review. Many pro se plaintiffs rely on form complaints made available to them by federal courts, but it appears


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 213, at 6. Study 2 suggests that by excluding pro se cases, the FJC’s report may have inadvertently underreported Iqbal’s effect overall.
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.321 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.”322 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 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 to federal courts 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.323

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

VI. A Once-Invisible Problem Now in View

Some commentators contend that Iqbal makes no new law under Rule 8, poses no issues of access to justice, and simply makes explicit what courts have done all along. Iqbal is business as usual: old wine in a new bottle, they say.324 Others contend that it is too soon to
tell whether Iqbal is having any effect on the adjudication of claims. 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.

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. 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 practice, is a heightened pleading bar. A first wave of empirical scholarship, conducted most notably by Professor Hatamyar, has shown that federal courts have begun applying Iqbal in a way that has increased dismissals across many federal cases. By systematically studying and examining these narrow questions in light of social psychological research, this article demonstrates that Iqbal has had an even greater effect than other studies suggested. The problem is now in view.

Social psychological research on aversive bias suggested this would come to pass. By shifting from a notice-pleading rule to a plausibility pleading standard, unconscious stereotypes and implicit associations are more likely to affect decision making and result in dismissals.325 Still others have been sharply critical of the Supreme Court’s decision, contending that under Iqbal federal courts may well screen out a large percentage of civil rights litigation.326 Whether federal courts have fashioned a heightened pleading regime under Iqbal is an empirical question: we must move past rhetoric and observe Iqbal’s actual effects on the ground in particular categories of cases.327 This article has focused narrowly on the question of how Iqbal has affected Black plaintiffs claims of race discrimination in the workplace. From this vantage point, it becomes clear that federal courts have applied Iqbal as if it called for a new pleading regime—one that, in practice, is a heightened pleading bar.328 A first wave of empirical scholarship, conducted most notably by Professor Hatamyar, has shown that federal courts have begun applying Iqbal in a way that has increased dismissals across many federal cases.329 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.

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325. See, e.g., Noll, supra note 9, 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 10, at 20; Schneider, supra note 10, at 532-36; Thomas, supra note 10, at 18.
327. See Cohen, supra note 11, 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 11, at 36.
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 12; see also Hannon, supra note 8; Seiner, supra note 213.
decisions biased toward dismissal. Iqbal explicitly requires federal district judges to draw on their “common sense” in determining the plausibility of plaintiffs’ claims, without the benefit of concrete evidence.

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

This article finds that judges are no exception to this research. The empirical analysis demonstrated that courts increasingly dismiss claims of discrimination, especially when prejudice appeared less overt, and that White judges are more likely to grant dismissal under Iqbal than Black judges.

With the problem in view, it becomes evident that Iqbal has resulted in epistemic tension in the law, with philosophical and practical implications. First, the priority placed by the Court on common sense as the gauge of legal validity was critiqued by John Stuart Mill as the a priori fallacy: “A large proportion of all the errors committed in the investigation of the laws of nature, have arisen from the assumption that the most familiar explanation or hypothesis must be the truest.” And law driven by folk theories that

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.
have been scientifically disproven is indefensible. Iqbal presumes that unchecked common sense can be applied without the subtle pull of stereotypes and without biased outcomes, a presumption that science has long since disproven particularly in the discrimination context. Further, Iqbal assumes incorrectly that what many take for granted as “common sense”—the dominant folk theory of race relations in American society—is accurate. Yet common beliefs regarding concepts such as prejudice, race, and discrimination has evolved over time for better or worse, reflecting change in American society. Today, there is a marked duality between many Americans’ characterization of prejudice as blatant and the science demonstrating that manifestations of prejudice have become increasingly subtle.


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 . . . .”).

337. Consider how common beliefs about members of stereotyped groups has 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 whites sometimes are, therefore it is impossible they should be so.”);

Vander Zanden, supra note 41, at 45-53 (“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.339 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.340 Civil rights law would fail to protect the members of stigmatized groups who most need legal protection against modern forms of prejudice.341

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.”342 This article does not challenge the pragmatic style of adjudication, which often draws on common sense, experience, and reflection.343 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.344

339. See Llewellyn, supra note 214, at 447-49.
340. See Wesley N. Hohfeld, Fundamental Legal Concepts as Applied in Judicial Reasoning 36-40 (1919). Hohfeld articulated a theory of jural relations that likened the scenario where A has “no right” to stop B from causing harm to A with the scenario where B has the “privilege” to cause A harm. For example, if A has “no right” to stop B from engaging in particular conduct, then B can engage in that activity without legal interference from A. In that sense, B has the “privilege” to perform this conduct (even if B’s conduct inflicts harm on A that is not legally cognizable). See J.M. Balkin, The Hohfeldian Approach to Law and Semiotics, 44 U. Miami L. Rev. 1119, 1129 (1990) (“Hohfeld's basic idea [is] that a legal right is a privilege to inflict harm that is either not legally cognizable or is otherwise without legal remedy.”).
341. Further, since American society tolerates as “natural” overt discrimination against some stigmatized groups—for example, in the form of recent anti-immigrant ordinances—some overt discrimination may also remain under- or unenforced. This issue warrants empirical study another day.
342. O.W. Holmes, Jr., The Common Law 1 (1881).
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
Without evidence to evaluate, preconceptions too strongly affect the result.\textsuperscript{345} Initial intuitions form but one part of judicial decision-making. From judicial experience, we generate working hypotheses that must be further tested and evaluated.\textsuperscript{346} 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.\textsuperscript{347} This evaluation requires evidence that courts do not possess at the pleading stage. The consequence is a heuristic known as the confirmation bias,\textsuperscript{348} the tendency to over-rely on one’s initial hunch or hypothesis.\textsuperscript{349} 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,\textsuperscript{350} 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-

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\textsuperscript{345} See Nisbett \& Ross, supra note 160, at 67 ("Prior 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 . . . .").

\textsuperscript{346} See John Dewey, Logical Method and Law, 10 Cornell L.Q. 17, 23–24 (1924).


\textsuperscript{348} Id. at 203.

\textsuperscript{349} See Nisbett, supra note 160, 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.").

\textsuperscript{350} See Fazio \& Olson, supra note 155, at 301 (describing MODE model of processing, which differentiates deliberate processes from more spontaneous forms of thinking).
to-behavior process is primarily spontaneous or deliberate.” 351  

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. 352 Deliberative processing requires effort and reflection: people must be motivated to engage in it. If not, their automatic and implicit associations may give rise to bias. As to opportunity, time and the resources (both cognitive and evidentiary) are necessary to deliberate. 353 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 the interpretation is plainly invalid. The Supreme Court has twice advised that heightened pleading bars cannot be imposed by judicial interpretation. 354


352. See Fazio, supra note 155, at 301-02.

353. See id.

The dilemma calls for a sense of judicial craft. Federal courts must reassess 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.\(^{355}\) 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 rulemaking 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.

In place 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*,\(^{356}\) 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.\(^{357}\) 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.


\(^{356}\) 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 35, at § 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.*
CONCLUSION

In sum, 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. 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, 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 evaluations about the merit of claims, based on common sense and at the inception of litigation without evidence, natural psychological processes likely result in bias. The problem is especially pronounced when members of stereotyped 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.