

# Critical Race Empiricism: A New Means to Measure Civil Procedure

Victor D. Quintanilla\*

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*One of the first things one learns as a social psychologist is that everyone is capable of bias. We simply are not, and cannot be, all knowing and completely objective. Our understandings and views of the world are partial, and reflect the circumstances of our particular lives. This is where a discipline like science comes in. . . . [I]t extends what we can see and understand, while constraining bias.*

—Claude M. Steele<sup>1</sup>

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\* Associate Professor of Law, Indiana University, Maurer School of Law. I am grateful to Jerry Kang, Kevin Brown, Jeannine Bell, Deborah Widiss, Tim Lovelace, and Will Rhee for providing helpful comments on this Article.

1. CLAUDE M. STEELE, WHISTLING VIVALDI AND OTHER CLUES TO HOW STEREOTYPES AFFECT US 13–14 (2010).

## INTRODUCTION

This symposium<sup>2</sup> addresses whether critical race theory (CRT) may benefit from a more robust engagement with empirical methods: Might empirical methods, drawn from a range of social science disciplines, be marshaled to explore the insights and advance the lessons of CRT?<sup>3</sup> Over the past decade, a growing body of interdisciplinary research has shown the value and versatility of applying empirical methods to explore questions posed by CRT. This union of CRT and empirical methods has been aptly named “critical race empiricism.”<sup>4</sup> While the harvest of interdisciplinary research is vast, this Article emphasizes a growing body of scholarship, known as “behavioral realism,”<sup>5</sup> and a promising intersection of law and social psychology that explores implicit bias throughout the law. Moreover, the Article examines how critical race empiricism—and law and social psychology, in particular—can be harnessed to study the claims of CRT.

In this Article, I first discuss why social psychology offers a fertile source for both theory and methods to explore CRT. Drawing on social-psychological theory and methods, I then conduct an empirical legal study of judicial decision making under the U.S. Supreme Court’s new, highly subjective pleading standard.<sup>6</sup> Although one of my previous projects yielded similar findings,<sup>7</sup> I have updated my empirical legal analysis in three ways. First, I have extended the time horizon from eighteen months to twenty-four months, increasing the sample size of cases I

2. This symposium would not have been possible without sustained effort by many committed scholars. I wish to thank, in particular, Osagie Obasogie, Joan Williams, Laura Gómez, Devon Carbado, and Mario Barnes, who have assembled workshops at UC Davis and UC Irvine, where critical race theorists and empiricists have engaged each other’s scholarship. These conversations continued at the Law & Society Association’s 2012 annual meeting.

3. Several seminal collections of critical race theory offer insightful background. *See, e.g.*, CRITICAL RACE THEORY: AN INTRODUCTION (Richard Delgado & Jean Stefancic eds., 2001); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002).

4. *See* Devon W. Carbado, *Afterword: Critical What What?*, 43 CONN. L. REV. 1593, 1638 (2011).

5. Behavioral realism is a far-reaching means of inquiry, which bears an impulse of naturalism, that explores gaps between a scientific consensus and untested folk wisdom incorporated and subsumed into law. The scientific consensus may arise in a variety of social science disciplines, including evolutionary biology, behavioral genetics, and psychology. “Behavioral realism” as used in this Article emerged from a symposium in July 2006 discussing how advances in social and cognitive sciences offer new jurisprudential perspectives. *See generally* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010). After the symposium, jurists and social psychologists produced several noteworthy articles. *See* BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM (Eugene Borgida & Susan T. Fiske eds., 2008); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006). For an additional discussion, see Victor D. Quintanilla, *Beyond Common Sense: A Social-Psychological Study of Iqbal’s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011).

6. *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

7. *See* Quintanilla, *supra* note 5, at 30–42.

analyze, and thereby increasing the power of my study.<sup>8</sup> Second, I now compare and contrast how White and Black judges apply both the old and new pleading standards. This comparison offers a baseline to evaluate whether the new pleading standard produces differences in how White and Black judges decide motions to dismiss Black plaintiffs' claims of race discrimination.<sup>9</sup> Third, to assess whether the race of federal judges predicts how they apply the new pleading standard, I conducted multiple and sequential regressions, which pitted judges' race against their political ideology.<sup>10</sup>

This enhanced empirical legal study supports the conclusion that the new pleading standard serves as a context for aversive racism, implicit bias, and lay theories of racism to operate against stereotyped-group members who assert claims of discrimination. Under notice pleading, White and Black judges decided discrimination claims similarly; yet under plausibility pleading, White and Black judges decided these claims differently. White judges were much more likely to dismiss the claims of stereotyped-group members, even after controlling for political ideology. This strongly suggests that, because plausibility pleading requires judges to draw on their "judicial experience and common sense,"<sup>11</sup> federal judges are drawing on their lay theories of discrimination, their priors, their schemas, and their stereotypes when judging the plausibility of discrimination claims. These findings also suggest that implicit bias is operating against Black plaintiffs. This empirical study is but one of many means to harness empirical methods to explore CRT. The study, moreover, illustrates how infusing CRT with empirical legal methods illuminates implicit bias in legal decision making and the process by which race and law interact.

CRT is an intellectual movement that challenges how race and racial hierarchies are constructed and represented in legal culture and society.<sup>12</sup> CRT scholars examine the relationships between race, racism, law, and power<sup>13</sup> and advance a normative framework that critiques the social and legal status quo.<sup>14</sup> As a descriptive matter, CRT scholars tend to agree on a cluster of claims about how race, racism, and law operate in American society. Many of these claims are empirical in nature.<sup>15</sup> By calling these core claims "empirical," I mean that they connect with concrete experience.<sup>16</sup> Chief among these core claims is that racism

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8. *See infra* Part II.A.

9. *See infra* Part II.B.

10. *See infra* Part II.B.

11. *Iqbal*, 556 U.S. at 679.

12. *See* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 3, at xiii (providing an excellent compilation of early articles that relate to CRT).

13. *See generally* CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); Carbedo, *supra* note 4, at 1607–15.

14. *See generally* CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 12.

15. I thank Devon Carbedo for sharing his reflections on this point at the Law & Society Association's June 2012 annual meeting.

16. *See* ABRAHAM KAPLAN, THE CONDUCT OF INQUIRY: METHODOLOGY FOR

persists in American society and that racism is a pressing problem, notwithstanding the prevailing rhetoric that Americans are colorblind.<sup>17</sup> In short, racism and discrimination are common and ordinary, not aberrational.<sup>18</sup> A second claim is that race and racism are socially constructed—products of law, social thought, social institutions, and social interactions<sup>19</sup>—rather than fixed biological categories.<sup>20</sup> A third claim is that whiteness confers latitude, leeway, and privilege<sup>21</sup> on majority-group members not bestowed on stereotyped-group members. A final empirical claim is the intersectionality thesis—that identities compound and are potentially conflicting, that no person has a single unitary identity.<sup>22</sup> Although these claims are empirical in nature, CRT scholars have tended to draw upon legal storytelling and narrative analysis,<sup>23</sup> often leaving empirical legal methods unexplored, though this appears to be changing.<sup>24</sup> Through narrative and storytelling, communities of color voice authentic accounts from their own perspectives and experiences. As Margaret Montoya sagely noted, racialized stories provide new metaphors, nuances, inspirations, and common images, and play a role in healing and transformation.<sup>25</sup> Even so, discovering and dismantling bias

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BEHAVIORAL SCIENCE (2d ed. 1998). By grounding empiricism on concrete experience, I distinguish the inquiry from sensationalism and a priori rationalism.

[This] emancipates us from the supposed need of always harking back to what has already been given, something had by alleged direct or immediate knowledge in the past, for the test of value of ideas. A definition of the nature of ideas in terms of operations to be performed and the test of the validity of the ideas by the *consequences* of these operations establishes connectivity with concrete experience.

4 JOHN DEWEY, *THE LATER WORKS, 1925–1953*, at 92 (Jo Ann Boydston ed., 1984).

17. See *CRITICAL RACE THEORY: AN INTRODUCTION*, *supra* note 3, at 7; Gary Peller, *Race Consciousness*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra* note 3, at 127.

18. See *CRITICAL RACE THEORY: AN INTRODUCTION*, *supra* note 3, at 7; Gary Peller, *Race Consciousness*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra* note 3, at 127.

19. See *CRITICAL RACE THEORY: AN INTRODUCTION*, *supra* note 3, at 7–8; Carbado, *supra* note 4, at 1610.

20. See *DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY* (Hazel Rose Markus & Paula M.L. Moya eds., 2010); Carbado, *supra* note 4, at 1609.

21. See Carbado, *supra* note 4, at 1637; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1724 (1993).

22. See *CRITICAL RACE THEORY: AN INTRODUCTION*, *supra* note 3, at 10; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–45 (1991).

23. See *CRITICAL RACE THEORY: THE CUTTING EDGE*, *supra* note 13, at 42–93; *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY*, *supra* note 3, at 243–302.

24. See, e.g., Laura E. Gómez, *Looking for Race in All the Wrong Places*, 46 LAW & SOC'Y REV. 221, 234–41 (2012); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1797–1801 (2003) (reviewing *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (2002)).

25. See Margaret E. Montoya, *Celebrating Racialized Legal Narratives*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY*, *supra* note 3, at 243.

throughout the law will require that we harness a range of epistemological tools, and empirical methods hold great potential to help us in this endeavor.

Ever dynamic, CRT has evolved over time.<sup>26</sup> While CRT scholars tend to agree on the cluster of claims I have described, CRT inquiry does not exalt a single method nor require a particular method per se.<sup>27</sup> Indeed, CRT inquiry has borrowed concepts, laws, data, models, theories, methods, and explanations from neighboring social science disciplines for its inquiries and investigations.<sup>28</sup> This symposium, for example, bridges a range of social science disciplines and reveals how interdisciplinary methods—empirical, experimental, qualitative, and quantitative—can be harnessed to enrich CRT.<sup>29</sup> Like other contributors to this symposium, I believe that empirical methods have yielded, and will continue to yield, a harvest of new insights for CRT. In short, the revival of empirical methods within the legal academy more generally poses a rare opportunity for CRT.<sup>30</sup> New technologies and sophisticated empirical methods now enable scholars to critically examine race, racism, stereotyping, prejudice, and discrimination as social processes powerfully shaped by contexts and situations.<sup>31</sup>

I concur with Devon Carbado's proposal: "[T]he time is ripe for 'Critical Race Empiricism.'"<sup>32</sup> Indeed, critical race empiricism shares common ground with behavioral realism, a process of inquiry that is underway and that has begun dismantling the fiction of colorblindness. Behavioral realism harnesses a naturalizing epistemology to critique colorblindness as inconsistent with what

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26. See Carbado, *supra* note 4, at 1601–07; see also Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* 49 UCLA L. REV. 1343, 1365–69 (2002); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship,* 84 DENV. U. L. REV. 329, 331 (2006).

27. See Carbado, *supra* note 4, at 1636.

28. See KAPLAN, *supra* note 16, at 4 ("[T]he domain of truth has no fixed boundaries within it. . . . Some of the most exciting encounters in the history of science are those between workers in what appear to be quite distinct fields who are suddenly brought face to face as a result of their independent investigations. The autonomy of inquiry is in no way incompatible with the mature dependency of the several sciences on one another."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 STAN. L. REV. 317, 328–44 (1987).

29. See Laura E. Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory* (2004), reprinted in RACE, LAW AND SOCIETY 465, 468–69 (Ian Haney López ed., 2007); Osagie K. Obasogie, *Race in Law and Society: A Critique,* in RACE, LAW AND SOCIETY, *supra*, at 445, 446–47; Gregory Scott Parks, *Toward a Critical Race Realism,* 17 CORNELL J.L. & PUB. POL'Y 683, 685 (2007).

30. See Howard Erlanger et al., *Foreword: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 339–45; Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WIS. L. REV. 365, 385–403; Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism,* 6 ANN. REV. L. & SOC. SCI. 555, 556–63 (2010).

31. While there are many such studies, I highlight two recent articles: Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation,* 45 LAW & SOC'Y REV. 991 (2011); Jean Braucher et al., *Race, Attorney Influence, and Bankruptcy Chapter Choice,* 9 J. EMPIRICAL LEGAL STUD. 393 (2012).

32. Carbado, *supra* note 4, at 1638.

science has revealed about human behavior and modern prejudice.<sup>33</sup> In so doing, behavioral realism shows that implicit bias and unconscious racism have ramifications and must be addressed across the law.<sup>34</sup> This form of empiricism has mobilized social-psychological theories and methods to show that the prevailing antidiscrimination model, which focuses chiefly on intent, is underinclusive, as it fails to address implicit bias and legal institutions that produce implicit bias.<sup>35</sup> Where the naturalistic impulse of behavioral realism is harnessed to explore empirical questions posed by CRT, critical race empiricism emerges. Critical race empiricism enables scholars to explore how antidiscrimination law brings into being, rather than dismantles, racial discrimination.<sup>36</sup> By addressing primarily intentional racism, antidiscrimination law grants majority-group members the privilege to discriminate against stereotyped-group members in subtle and indirect ways. Further, as Laura Gómez contends, empirical methods allow socio-legal scholars to broaden the inquiry, moving beyond studying race as an independent variable and enabling scholars to study race and racism as dependent variables.<sup>37</sup> With ingenuity, new technologies and sophisticated empirical methods would enable scholars to study how law shapes race, racism, and racial ideologies.<sup>38</sup> So too, empirical methods can be harnessed to reveal how law changes over time due to race, racism, and racial ideologies.<sup>39</sup>

Over the past fifty years, social psychologists have developed theory and methods that can be marshaled to conduct critical race empiricism. Since the 1950s and Gordon Allport's celebrated text *The Nature of Prejudice*, the field of social psychology has investigated stereotypes, prejudice, discrimination, and the mechanisms underlying these societal ills.<sup>40</sup> This Article focuses, in particular, on two of these mechanisms: aversive racism and lay theories of discrimination. Aversive racism differs from the blatant, "old-fashioned" racism; aversive racism

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33. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, in NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 15, 31 (2007); W.V. QUINE, *Naturalism; or, Living Within One's Means*, in QUINTESSENCE: BASIC READINGS FROM THE PHILOSOPHY OF W.V. QUINE 275 (Robert F. Gibson, Jr. ed., 1969); Krieger & Fiske, *supra* note 5, at 1001.

34. See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking and Misremembering*, 57 DUKE L.J. 345, 406–21 (2007).

35. See Kang & Lane, *supra* note 5, at 490–503.

36. See *id.*; Krieger & Fiske, *supra* note 5, at 1029–52; Obasogie, *supra* note 29, at 461–63; Quintanilla, *supra* note 5.

37. See Gómez, *supra* note 24, at 231; Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. 487, 488, 499 (2010) [hereinafter Gómez, *Understanding Law*].

38. See Gómez, *supra* note 24, at 236–41; Gómez, *Understanding Law*, *supra* note 37, at 499–501.

39. See Gómez, *supra* note 24, at 225–26; Gómez, *Understanding Law*, *supra* note 37, at 491–99; Obasogie, *supra* note 29, at 461–63.

40. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1979); see also John Harding et al., *Prejudice and Ethnic Relations*, in 5 THE HANDBOOK OF SOCIAL PSYCHOLOGY 1 (Gardner Lindzey & Elliot Aronson eds., 2d ed. 1969).

is more indirect, subtle, and difficult to detect.<sup>41</sup> Aversive racists support racial equality in theory and believe themselves to be nonprejudiced, but at the same time they hold negative, implicit attitudes and beliefs toward members of stereotyped groups.<sup>42</sup> The aversive racism framework predicts that implicit bias emerges in ambiguous circumstances and situations—when, for example, people apply highly subjective rules and malleable decision criteria.<sup>43</sup> Lay theories of racism illuminate how and why people decide whether discrimination occurred.<sup>44</sup> Lay theories are organized knowledge structures, like schemas, that direct behavior, judgments, and evaluations.<sup>45</sup>

While studies examining procedural rules and court practices have proliferated,<sup>46</sup> critical race empiricism contributes a missing dimension, providing voice to claimants who are adversely affected by procedural rules and rule reforms. In its early history, the Civil Rules Advisory Committee seldom drew on empirical evidence when evaluating procedural rules.<sup>47</sup> Now, however, the Advisory Committee regularly consults with the Federal Judicial Center (FJC) and coordinates with private research organizations to examine the effect of rules and proposed rules.<sup>48</sup> Rule reformers and social scientists now routinely employ

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41. John F. Dovidio, Samuel L. Gaertner, and their colleagues have interrogated this phenomenon. See John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829, 833–35, 838 (2001); John F. Dovidio & Samuel L. Gaertner, *New Directions in Aversive Racism Research: Persistence and Pervasiveness*, 53 NEB. SYMP. ON MOTIVATION 43, 44–45 (2008).

42. See Dovidio, *supra* note 41, at 835.

43. See Dovidio & Gaertner, *supra* note 41, at 45–46.

44. Sam R. Sommers, Michael I. Norton, and their colleagues have examined this phenomenon. See Sam R. Sommers & Michael I. Norton, *Lay Theories About White Racists: What Constitutes Racism (and What Doesn't)*, 9 GROUP PROCESSES & INTERGROUP REL. 117, 118, 126–31 (2006); Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857 (1991).

45. Sommers & Norton, *supra* note 44, at 118.

46. See Will Rhee, *Evidence-Based Federal Civil Rulemaking: A New Contemporaneous Case Coding Rule*, 33 PACE L. REV. 1, 21–30 (2012); Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1141–87 (2002).

47. Rhee, *supra* note 46, at 17–21; see also Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 334–35 (1991); Maurice Rosenberg, *The Impact of Procedure-Impact Studies in the Administration of Justice*, 51 LAW & CONTEMP. PROBS. 13, 13 (1988) (“Empirical research on the functioning of procedural rules has had a slowly growing impact on the litigation process. . . . Regrettably, the examples of such impacts have not been numerous.”).

48. The FJC is an agency of the judicial branch of the federal government created by Congress in 1967 to, among other purposes, “conduct research and study of the operation of the courts of the United States, and to stimulate and coordinate such research and study on the part of other public and private persons and agencies.” 28 U.S.C. § 620(b)(1) (2006). Congress also authorized the FJC, if “consistent with the performance of the other functions set forth in this section, to provide staff, research, and planning assistance to the Judicial Conference of the United States and its committees.” *Id.* § 620(b)(4); see also Frank Easterbrook, *A Self-Study of Federal Judicial Rulemaking: A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679, 685 (1995); Russell R. Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 LAW & CONTEMP. PROBS. 31 (1988); Willging, *supra* note 46, at 1124–25.

empirical methods to evaluate procedural rules.<sup>49</sup> Rule reformers have studied cost and delay, the adversarial nature of lawyering, the burdens of discovery, the uniformity and neutrality of rules, and differences among case management devices.<sup>50</sup> But few have closely examined how rule regimes affect the litigation prospects of stereotyped-group members or the degree to which the formulation of rules serves as a context for implicit bias.<sup>51</sup> The process concerns of critical race empiricism differ from those studied by many researchers: critical race empiricism would both directly investigate whether procedural rules adversely affect claimants of stereotyped groups and interrogate whether proposed regimes permit implicit bias to shape decisions.

This Article illustrates how critical race empiricism can be harnessed to evaluate procedural rules by examining the U.S. Supreme Court's recent shift in pleading standards from notice pleading under *Conley v. Gibson*<sup>52</sup> to plausibility pleading in *Ashcroft v. Iqbal*.<sup>53</sup> Others have offered excellent discussions of *Bell Atlantic Corp. v. Twombly*<sup>54</sup> and *Ashcroft v. Iqbal*.<sup>55</sup> Given their illuminating discussions, I offer only a brief introduction here. Federal Rule of Civil Procedure 8(a) once operated as a minimal notice-pleading rule, requiring plaintiffs to set forth a "short and plain" statement of their claim.<sup>56</sup> In *Twombly*<sup>57</sup> and then in

49. See Erlanger et al., *supra* note 30; Macaulay, *supra* note 30.

50. See Rhee, *supra* note 46, at 21–30; Willging, *supra* note 46, at 1141–87.

51. See Carrie Menkel-Meadow & Bryant Garth, *Civil Procedure and Courts*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 679 (Peter Cane & Herbert M. Kritzer eds., 2d ed. 2012); see, e.g., Ellen Berrey et al., *Situated Justice: Plaintiffs' and Defendants' Perceptions of Fairness in Employment Discrimination Cases*, 46 LAW & SOC'Y REV. 1 (2010); Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2008); Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313 (2012).

52. See *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957).

53. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). For a non-empirical investigation of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Iqbal* from a critical race theorist, see Roy L. Brooks, *Conley and Twombly: A Critical Race Theory Perspective*, 52 HOW. L.J. 31 (2008).

54. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); see Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. BRIEF 135, 142 (2007); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008).

55. *Iqbal*, 556 U.S. 662; see Stephen Burbank, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 404–08 (2011); Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 654–58 (2010); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 831–50 (2010); 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, 78–106 (2010); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 20–23 (2010); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 532–36 (2010); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 34–38 (2010); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 175–83 (2010).

56. See FED. R. CIV. P. 8(a).

57. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

*Iqbal*,<sup>58</sup> the U.S. Supreme Court recast Rule 8(a) into a plausibility standard, adding considerable heft to the pleading requirement of Rule 8(a). In order to survive a motion to dismiss, a complaint must now contain sufficient factual matter to state a claim that is *plausible* on its face. Problematically, *Iqbal* requires federal courts, when deciding whether a complaint is plausible, to draw upon their “judicial experience and commonsense.”<sup>59</sup> Federal courts apply this pleading standard at the inception of litigation, before evidence has been gathered during discovery. This highly subjective pleading standard applies to all claims, including claims of discrimination alleged by members of stereotyped groups.

The Supreme Court unilaterally recast Rule 8(a), and its actions are wrought with difficulty and problems.<sup>60</sup> Critical race empiricists would be especially concerned that, under *Iqbal*, federal courts must grapple, at the inception of litigation, with deciding whether stereotyped-group members have pleaded plausible claims of discrimination, relying on little more than their intuition. *Iqbal* requires judges to draw on their “judicial experience and common sense”<sup>61</sup> and, hence, tasks them with relying on their pre-expectations, priors, and schemas. Yet judges, like all other people, use heuristics and have systematic biases when making social judgments.<sup>62</sup> For example, implicit bias may operate when federal courts make highly subjective decisions based on malleable criteria.<sup>63</sup> CRT

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58. *Id.* at 679.

59. *Id.*

60. Scholars have critiqued the Supreme Court’s unilateral change in federal pleading rules on several fronts, including that it has usurped the Rules Enabling Act process. See Clermont & Yeazell, *supra* note 55, at 850 (destabilizing the test for pleading sufficiency, for lodging too much discretion in judges, and for early termination of cases on the merits without a jury trial); see also A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 26–36 (2009); Carrington, *supra* note 55, at 656–57. Others have argued that heightened pleading would adversely affect civil rights claimants. See, e.g., Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613 (2010).

61. *Iqbal*, 556 U.S. at 679.

62. See John C. Anderson et al., *Evaluation of Auditor Decisions: Hindsight Bias Effects and the Expectation Gap*, 14 J. ECON. PSYCHOL. 711, 725–27 (1993) (reporting a study of judges that tested for hindsight bias); Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U.L.Q. 979, 982–89 (1994) (reporting the results of a study of the incidence of egocentric bias among bankruptcy judges and lawyers); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 778 (2001) (“[W]e found that each of the five illusions we tested had a significant impact on judicial decision making. Judges, it seems, are human. Like the rest of us, their judgment is affected by cognitive illusions that can produce systematic errors in judgment.”); Stephen Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Juries in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994) (reporting results of experiment suggesting that judges and jurors may be similarly influenced by exposure to potentially biasing information); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26 (1999) (reporting results of a study of judges’ biases); Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 776, 786 (1999) (studying the factors that contribute to judges’ assessments of the severity of injuries and judges’ awards for damages).

63. See Chew & Kelley, *supra* note 51, at 1136, 1155–58; Michael I. Norton et al., *Casualty and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817, 819–22 (2004); cf. Dan M. Kahan et al., “They Saw A Protest”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 853

scholars should, therefore, harness empirical methods to investigate the effect of this new pleading regime on claimants of stereotyped groups.

Empirical scholars and the FJC<sup>64</sup> have studied whether the new pleading standard has increased the dismissal rate under Rule 12(b)(6).<sup>65</sup> These studies have used different methods, which have led to mixed results, yet several have concluded that the dismissal rate has increased for civil rights claims.<sup>66</sup> These studies, however, have not narrowly examined discrimination claims brought by stereotyped-group members or how judges from different racial groups have applied these standards.<sup>67</sup> I examined these very issues in a prior study and using an eighteen-month time horizon showed both that the dismissal rate has increased rather sharply for Black plaintiffs' claims of race discrimination and that White and Black judges are applying the new pleading rule differently.<sup>68</sup> This Article makes a further contribution by extending the time horizon to twenty-four months, comparing how White and Black judges decided claims under both the old and new pleading regimes, and by conducting regressions to discern whether a judge's race predicts how she decides under the new, highly subjective pleading standard. In short, this Article compares and contrasts two rule regimes—the old notice-pleading regime, which afforded little room for subjective decision making, and the new plausibility-pleading regime—to evaluate whether the new pleading standard allows implicit bias and lay theories to operate against members of stereotyped groups.

## I. SOCIAL PSYCHOLOGICAL THEORY

Within the field of social psychology, the study of prejudice has progressed in three waves.<sup>69</sup> In the first wave, extending from the 1920s through the 1950s, psychologists studied prejudice chiefly as a psychopathology. They conceived

(2012) (when subjective decision making intersects with cultural cognition, the effect may be even more pronounced).

64. See JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf).

65. See *id.*; Raymond Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment And Housing Discrimination Litigation*, 100 KY. L.J. 235, 262–77 (2011); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 603–67 (2010); Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 612–26 (2012).

66. See Brescia, *supra* note 65, at 262–77; Moore, *supra* note 65, at 622–24.

67. *But see* Quintanilla, *supra* note 5, at 30–42.

68. See *id.*

69. See Dovidio, *supra* note 41, at 830–33. In presenting this brief history of the field's study of racial prejudice, I draw a distinction between the history of studying the causes and consequences of racial prejudice and the history of psychologizing racial differences. For an excellent account of the latter history, see generally AM. PSYCHOL. ASS'N, *DEFINING DIFFERENCE: RACE AND RACISM IN THE HISTORY OF PSYCHOLOGY* (Andrew S. Winston ed., 2004).

racism as a dangerous and abnormal deviation from normal tendencies, rather than a disruption in normal thinking.<sup>70</sup> The second wave conceptualized prejudice from a different paradigm—prejudice was viewed as widespread and rooted in normal rather than abnormal thought processes.<sup>71</sup> Gordon Allport summarized the views of this second wave:

*How Widespread Is Prejudice?* Research suggests that perhaps 80 percent of the American people harbor ethnic prejudice of some type and in some appreciable degree. . . .

. . . .

. . . With the aid of aversive categories [many] avoid the painful task of dealing with individuals as individuals. Prejudice is thus an economical mode of thought, and is widely embraced for this very reason.<sup>72</sup>

Focus shifted from prejudice as a psychopathology to how normal socialization processes support prejudice and aid in its transmission.<sup>73</sup> Prejudice, stereotyping, and discrimination were conceptualized as the result of processes—social cognition and social categorization—cognitive processes associated with classifying social information.<sup>74</sup> Beginning in the 1990s, the third wave emphasized the multidimensional aspect of prejudice and harnessed sophisticated new technologies to study processes that were once theorized but not directly measured.<sup>75</sup> These new technologies measure implicit attitudes—that is, implicit bias and automatic and unconscious attitudes and beliefs.<sup>76</sup> While explicit measures of prejudice rely on self-reports, implicit measures harness a variety of techniques, including response latency measures of association (such as the Implicit Association Test), word fragment completion, linguistic cues, attributions, explanations, and functional magnetic resonance imaging.<sup>77</sup> These new technologies enable social psychologists to assess individual differences in implicit and explicit attitudes, helping to differentiate “old-fashioned” racists from aversive

70. See Dovidio, *supra* note 41, at 830; Harding et al., *supra* note 40. For a discussion on prejudice and ethnic relations, see G.M. Gilbert, *Stereotype Persistence and Change Among College Students*, 46 J. ABNORMAL & SOC. PSYCHOL. 245 (1951); Daniel Katz & Kenneth Braly, *Racial Stereotypes of One Hundred College Students*, 28 J. ABNORMAL & SOC. PSYCHOL. 280 (1933).

71. See ALLPORT, *supra* note 40, at 17–27; Dovidio, *supra* note 41, at 831; Thomas F. Pettigrew, *Personality and Sociocultural Factors in Intergroup Attitudes: A Cross-National Comparison*, 2 J. CONFLICT RESOL. 29, 29 (1958).

72. See Gordon W. Allport, *Prejudice and the Individual*, in JOHN PRESTON DAVIS, *THE AMERICAN NEGRO REFERENCE BOOK* 706, 707, 710 (1966).

73. See Dovidio, *supra* note 41, at 831; Pettigrew, *supra* note 71, at 29.

74. See Dovidio, *supra* note 41, at 831; 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.”).

75. See Dovidio, *supra* note 41, at 832.

76. See Fiske, *supra* note 74, at 364–67; John F. Dovidio & Samuel L. Gaertner, *Intergroup Bias*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 1084 (Susan T. Fiske et al. eds., 5th ed. 2010).

77. See Dovidio, *supra* note 41, at 838; Dovidio & Gaertner, *supra* note 76, at 1086.

racists.<sup>78</sup> In the current wave, these social scientists actively investigate how interpersonal and intergroup contexts and situations affect implicit bias.<sup>79</sup> A chief insight is that social contexts and situations powerfully shape racial prejudice and implicit bias.<sup>80</sup>

Aversive racism rests on a contradiction between explicit and implicit attitudes.<sup>81</sup> This form of modern prejudice characterizes the racial attitudes of many well-intentioned people who possess strong egalitarian values and believe themselves to be nonprejudiced, but who nonetheless hold negative racial feelings and stereotypes.<sup>82</sup> That is, implicit bias coexists with egalitarian beliefs and the denial of personal prejudice. John Dovidio and colleagues refer to this modern form of prejudice as “aversive” for two reasons: First, rather than open antagonism, majority-group members feel anxiety toward minority-group members, which leads them to avoid interracial interactions.<sup>83</sup> Second, because aversive racists adhere to egalitarian principles, they find the thought that they are prejudiced disquieting and disturbing.<sup>84</sup>

Social psychologists have closely studied aversive racism over the past decade and achieved an important insight: social contexts and social situations powerfully affect whether and how implicit bias is expressed against minority-group members. In short, situations and contexts powerfully shape and influence implicit bias.<sup>85</sup> Aversive racists aspire to be nonprejudiced; they do not discriminate against minority-group members in situations with strong egalitarian norms, where discrimination would be obvious to others and themselves.<sup>86</sup> In these situations, aversive racists avoid feelings, beliefs, and behaviors that would be associated with bias. When the correct choice is clear and egalitarian norms prevail, aversive racists do not discriminate against minority-group members.<sup>87</sup> Yet

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78. See Dovidio, *supra* note 41, at 835.

79. See Dovidio & Gaertner, *supra* note 76, at 1112.

80. See *id.*; Alice H. Eagly & Amanda B. Diekmann, *What Is the Problem? Prejudice as an Attitude-in-Context*, in ON THE NATURE OF PREJUDICE FIFTY YEARS AFTER ALLPORT 19 (John F. Dovidio ed., 2005).

81. See SAMUEL L. GAERTNER & JOHN F. DOVIDIO, REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL 13–14 (2000).

82. See *id.*; John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 315 (2000).

83. See John F. Dovidio & Samuel L. Gaertner, *When Good People Do Bad Things: The Nature of Contemporary Racism*, in COVERT RACISM 111, 113 (Rodney Coates ed., 2012); Jennifer A. Richeson & J. Nicole Shelton, *When Prejudice Does Not Pay: Effects of Interracial Contact on Executive Function*, 14 PSYCHOL. SCI. 287, 287 (2003).

84. See Dovidio & Gaertner, *supra* note 83, at 111–20.

85. See, e.g., Richeson & Shelton, *supra* note 83; Laura G. Babbitt & Samuel R. Sommers, *Framing Matters: Contextual Influences on Interracial Interaction Outcomes*, 37 PERSONALITY & SOC. PSYCHOL. BULL. 1233 (2011).

86. See Christopher L. Aberson & Tara E. Ettl, *The Aversive Racism Paradigm and Responses Favoring African Americans: Meta-Analytic Evidence of Two Types of Favoritism*, 17 SOC. JUST. RES. 25, 42–43 (2004).

87. See *id.*

aversive racists express bias subtly and in ways that can be rationalized under conditions of situational ambiguity: when norms are unclear, when situations are ambiguous, when the correct choice is unclear, where bias against minority-group members can be rationalized on some factor other than race.<sup>88</sup> In these situations, aversive racists may harm minority-group members in ways that allow them to maintain a nonprejudiced self-concept.<sup>89</sup>

A robust body of social-psychological research has investigated the phenomenon of implicit bias. Many studies examine the phenomenon in scenarios involving ambiguous hiring criteria and in situations where majority-group members exhibit in-group preference for other majority-group members while withholding assistance to minority-group members.<sup>90</sup> Moreover, several studies illustrate the persistence of modern prejudice on jury decision making. For example, in a seminal 1995 study, Johnson, Whitestone, Jackson, and Gatto explored the effect of implicit bias on jury decision making and showed that inadmissible evidence suggesting guilt differentially affects jury decisions depending on whether the defendant is White or Black.<sup>91</sup> In this study, researchers examined White mock jurors' judgments on a White or Black defendant's guilt where inadmissible evidence damaged the defendant's case.<sup>92</sup> While White and Black defendants were treated similarly when all the evidence presented was admissible, consistent with the aversive racism framework, Black defendants fared far worse when the evidence was inadmissible.<sup>93</sup> The results suggest that implicit bias operated against Black defendants because, in self-reports, participants stated that they believed that the inadmissible evidence did not affect their decisions.<sup>94</sup> Recent studies show a similar pattern of results.<sup>95</sup>

Turning from aversive racism to lay theories of racism, a lay theory is an "organized knowledge structure that directs behavior, judgments, and evaluations."<sup>96</sup> A lay theory of racism signifies the prior beliefs, presuppositions,

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88. See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 1, 52 (2004).

89. See James D. Johnson et al., *Justice Is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 893, 893–98 (1995).

90. See Dovidio & Gaertner, *supra* note 88, at 16; see also Norton et al., *supra* note 63, at 820–22.

91. See Johnson et al., *supra* note 89.

92. See *id.*

93. See *id.*

94. See *id.*

95. The 2005 study replicated the result using inadmissible DNA evidence. Participants tended to draw on the inadmissible evidence when judging Black defendants, but not White defendants. See Gordon Hodson et al., *Aversive Racism in Britain: Legal Decisions and the Use of Inadmissible Evidence*, 35 EUR. J. SOC. PSYCHOL. 437 (2005).

96. Jessica A. Cameron et al., *Children's Lay Theories About Ingroups and Outgroups: Reconceptualizing Research on Prejudice*, 5 PERS. & SOC. PSYCHOL. REV. 118, 118 (2001); see also Chi-yue Chiu et al., *Implicit Theories and Conceptions of Morality*, 73 J. PERS. & SOC. PSYCHOL. 923, 923–24 (1997); Carol S. Dweck et al., *Implicit Theories: Individual Differences in the Likelihood and Meaning of Dispositional*

and schemas that one holds about the kinds of behaviors that rise to the level of racism and prejudice.<sup>97</sup> These lay theories satisfy various psychological needs, including helping people make sense of complicated information, creating a social reality that is informative but nonthreatening, and allowing majority-group members to maintain a safe distance from appearing biased.<sup>98</sup> Science reveals that prejudice has mutated from overt to more subtle and difficult-to-detect forms.<sup>99</sup> Yet there is a growing gap between this science and the folk theory that, in American society, racism is no longer a problem. Many adhere to the lay theory that racists are overt bigots, which affects whether they perceive discrimination after the fact and whether, in turn, they form the attribution that a stigmatized-group member was subjected to racism.<sup>100</sup> Lay theories of racism, therefore, shape how legal decision makers interpret allegations of discrimination.<sup>101</sup>

Social psychologists have identified two lay theories of racism.<sup>102</sup> Many majority-group members subscribe to the dominant lay theory. This lay theory conceptualizes racist behavior in overt, blatant terms.<sup>103</sup> Those who subscribe to this lay theory tend to believe that discrimination against stigmatized-group members is no longer a significant problem. (Indeed, many tend to view discrimination against majority-group members as a more pervasive problem.)<sup>104</sup> Under this folk theory, quintessential racism includes discouraging White children from playing with Black children, joining a group that espouses racial bigotry, or rejecting Black job applicants because of their race.<sup>105</sup> Those who hold this lay theory do not perceive modern prejudice—or in-group favoritism toward majority-group members—as racism against stigmatized-group members. Indeed, many who subscribe to this lay theory exhibit “Bayesian racism,” the intuition that it is rational to form impressions about people based on stereotypes about their racial group.<sup>106</sup>

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*Inference*, 19 PERSONALITY & SOC. PSYCHOL. BULL. 644, 644–45 (1993); Daniel C. Molden & Carol S. Dweck, *Finding “Meaning” in Psychology: A Lay Theories Approach to Self-Regulation, Social Perception, and Social Development*, 61 AM. PSYCHOLOGIST 192, 193–94 (2006); Mary C. Murphy & Carol S. Dweck, *A Culture of Genius: How an Organization’s Lay Theory Shapes People’s Cognition, Affect, and Behavior*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 283, 284 (2009); Anecta Rattan & Carol S. Dweck, *Who Confronts Prejudice? The Role of Implicit Theories in the Motivation to Confront Prejudice*, 21 PSYCHOL. SCI. 952, 952–53 (2010).

97. See Sommers & Norton, *supra* note 44, at 118.

98. See *id.*

99. See Dovidio & Gaertner, *supra* note 76, at 1085–86.

100. See Quintanilla, *supra* note 5, at 23.

101. See *id.*

102. See Sommers & Norton, *supra* note 44, at 119, 128.

103. See *id.* at 131.

104. See Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game that They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215, 216 (2011).

105. See Sommers & Norton, *supra* note 44, at 128.

106. See Eric Luis Uhlmann et al., *The Motives Underlying Stereotype-Based Discrimination Against Members of Stigmatized Groups*, 23 SOC. JUST. RES. 1 (2010).

A less prevalent lay theory conceptualizes racism in both overt and subtle forms.<sup>107</sup> Many stigmatized-group members, and some majority-group members, subscribe to this lay theory. Under this lay theory, people are vigilant to subtle cues of prejudice and racism.<sup>108</sup> Unlike the dominant folk theory of racism, this lay theory views a larger swath of behavior as diagnostic of racism, including in-group favoritism toward majority-group members that harms minority-group members.<sup>109</sup> Under this lay theory, ambivalence, anxiety, and passive harm toward stigmatized-group members may be diagnostic of racism.<sup>110</sup> Those who subscribe to this lay theory believe that, in American society, racism against stigmatized-group members continues to be a contemporary problem.<sup>111</sup>

From this social-psychological research, I draw two hypotheses on how the shift from *Conley*'s notice pleading to *Iqbal*'s plausibility pleading may affect legal decision making. First, unlike notice pleading, plausibility pleading is a highly subjective and ambiguous standard, which may allow implicit bias to operate against minority-group members. As a result, judges would likely increasingly dismiss Black plaintiffs' claims of race discrimination, particularly in ambiguous cases. Although I evaluated this hypothesis in my prior piece "Beyond Common Sense,"<sup>112</sup> in this Article, I have expanded the time horizon from eighteen months to twenty-four months, making for a more robust test of this hypothesis. Second, White and Black judges, on balance, likely hold different lay theories of racism. Because the notice pleading rule did not allow judges to rely on lay theories, White and Black judges would tend to reach similar judgments under *Conley*; because *Iqbal* requires judges to draw on their lay theories, White and Black judges will reach dissimilar judgments under *Iqbal*. As a result, there will be a larger gap between how White and Black judges decide motions to dismiss under plausibility pleading than under notice pleading. In "Beyond Common Sense," I compared and contrasted how White and Black judges applied *Iqbal*.<sup>113</sup> In this Article, I now compare and contrast how White and Black judges decided cases both under *Conley* and *Iqbal*, thereby providing an empirical baseline to evaluate whether *Iqbal* has led to differences in how White and Black judges decide motions to dismiss.

## II. AN UPDATED ANALYSIS OF *IQBAL*'S EFFECT ON RACE DISCRIMINATION CLAIMS

The Article now turns to two empirical legal studies that examine how federal district courts have adjudicated Black plaintiffs' claims of race-based

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107. See Sommers & Norton, *supra* note 44, at 128.

108. See Quintanilla, *supra* note 5, at 24.

109. See *id.*

110. See *id.*

111. See *id.*

112. Quintanilla, *supra* note 5, at 32–37.

113. *Id.* at 38–40.

employment discrimination at the pleading stage. I first describe the methods employed and my findings, and then I summarize the results.

### A. Method

I performed two studies examining how federal district courts adjudicated motions to dismiss Black plaintiffs' claims of race-based employment discrimination under Federal Rule of Civil Procedure 12(b)(6).<sup>114</sup> Both studies focused on decision making by federal district court judges.<sup>115</sup> Like other studies examining the effect of *Iqbal*,<sup>116</sup> this investigation examined motions to dismiss filed under Rule 12(b)(6), the mechanism by which defendants challenge the legal sufficiency of claims.<sup>117</sup> Unlike my prior empirical legal study, which employed an eighteen-month time horizon<sup>118</sup> before *Twombly*<sup>119</sup> and after *Iqbal*, this updated analysis drew a twenty-four month time horizon.

Using broad Westlaw<sup>120</sup> searches, I retrieved all cases deciding motions to dismiss in employment discrimination cases filed by Black plaintiffs under Title VII or § 1981.<sup>121</sup> Many of the initially retrieved cases fell beyond the scope of the

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114. FED. R. CIV. P. 12(b)(6).

115. Both studies counted dispositive decisions by federal district courts only, not those of magistrate judges. All magistrate decisions were excluded from the computations, whether or not those decisions were made by consent of the parties. The studies, however, did count decisions in which a federal district court decided whether to dismiss a Black plaintiff's claim of race discrimination after receiving a report and recommendation from a magistrate judge.

116. See CECIL ET AL., *supra* note 64; Hatamyar, *supra* note 65; Moore, *supra* note 65, at 603–67; Kendall W. Hannon, *Much Ado about Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2007). A change in how federal district courts resolve motions to dismiss is only one potential effect of the decision. Other scholars have begun addressing how the decision affects party and attorney behavior. See Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2301–10 (2012).

117. See *Ashcroft v. Iqbal*, 556 U.S. 662, 669 (“Petitioners moved to dismiss the complaint for failure to state sufficient allegations . . .”).

118. See Quintanilla, *supra* note 5, at 31, 34–35.

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

120. All cases were obtained from the Westlaw federal district court database (DCT). Many decisions were not published in the West Reporters and were available only electronically. Decisions exclusively on PACER or CM-ECF that were unavailable on Westlaw were not examined. The study, therefore, does not establish the absolute rate of dismissals in all decisions or measure the absolute number of Rule 12(b)(6) motions decided before and after *Iqbal*. Even so, others have shown that decisions available on Westlaw tend to reflect judicial decision making in unpublished docket orders as well. Moore, *supra* note 65, at 644. Westlaw is a pivotal resource in the transmission of legal knowledge, and hence, if a disparate effect is demonstrated in this widely used legal database, the effect will have epistemological and practical significance on how jurists and advocates handle cases.

121. To increase the power of the study, the inquiry included cases deciding § 1981 claims. See ARTHUR ARON ET AL., STATISTICS FOR THE BEHAVIORAL AND SOCIAL SCIENCES 210, 225–27 (4th ed. 2008) (defining statistical power). Some plaintiffs choose to file claims of discrimination under § 1981 rather than Title VII. Federal district courts use the same test for intentional discrimination under Title VII and § 1981. See, e.g., *Brown v. City of Syracuse*, 673 F.3d 141, 150 (2d Cir. 2012); *Burnell v. Gates Rubber Co.*, 647 F.3d 704, 708 (7th Cir. 2011); *Egonmwan v. Cook Cnty.*

study. For example, the present studies examined claims of race-based discrimination and harassment filed by Black plaintiffs<sup>122</sup> and, therefore, did not analyze how retaliation claims or claims based on other legally protected characteristics (such as gender, national origin, or religion)<sup>123</sup> fared under the new pleading standard.

Whereas most other reported studies have broadly evaluated whether *Iqbal* has increased the dismissal rate overall across all federal cases, or all federal civil rights cases, my studies narrowly focus on a particular category of claims.<sup>124</sup> In “Beyond Common Sense,” I discussed the importance of focusing on “situation types” or “particularized situations”<sup>125</sup> when evaluating *Iqbal*’s effect on Rule 12(b)(6) dismissals. In a similar vein, this updated analysis narrowly examines and evaluates the hypothesis that plausibility pleading has affected Black plaintiffs’ claims of race discrimination and racial harassment in ambiguous cases. Research demonstrates that legal decision makers exhibit aversive racism in ambiguous situations when deciding based upon malleable criteria, but not in unequivocal situations where criteria are clear and fixed.<sup>126</sup>

My studies operationalize “ambiguous” cases as meaning cases in which defendants move to dismiss Black<sup>127</sup> plaintiffs’ claims of race discrimination on

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Sheriff’s Dep’t, 602 F.3d 845, 850 n.7 (7th Cir. 2010). Some plaintiffs advanced claims under both Title VII and § 1981; because courts evaluate the question of intentional discrimination similarly under both provisions, the study counted only the disposition of the Title VII claim to avoid double counting. *See, e.g.*, Hanks v. Shinseki, No. 3:08-CV-1594-G, 2009 WL 2002917, at \*1 (N.D. Tex. July 9, 2009) (granting dismissal of Title VII and § 1981 claims under *McDonnell Douglas* framework). For 1981 cases, the analysis excluded those cases where defendants sought to dismiss on grounds of governmental immunity: for example, in cases where the sole issue is whether a sufficient custom or policy had been alleged for municipality to be liable under § 1981.

122. The study also included claims filed by the Equal Employment Opportunity Commission on behalf of Black claimants. *See, e.g.*, Equal Emp’t Opportunity Comm’n v. Scrub, Inc., No. 09 C 4228, 2009 WL 3458530, at \*3 (N.D. Ill. Oct. 26, 2009).

123. The analysis included Black plaintiffs’ claims of race or color discrimination, but not claims of national origin discrimination.

124. A literature review revealed that only one other study has tailored the analysis to evaluate how *Iqbal* has affected Rule 12(b)(6) dismissals in cases in which the defendant argues that a plaintiff has failed to sufficiently plead factual allegations to support her claim. *See* Brescia, *supra* note 65, at 239. To the extent that other empirical legal analyses have not done so, it appears likely that those studies have underreported *Iqbal*’s effect on the adjudication of Rule 12(b)(6) dismissals. *See* JOE S. CECIL ET AL., FED. JUDICIAL CIR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND (2011), available at [http://www.fjc.gov/library/fjc\\_catalog.nsf](http://www.fjc.gov/library/fjc_catalog.nsf) (“These findings do not rule out the possibility that the pleading standards established in *Twombly* and *Iqbal* may have a greater effect in narrower categories of cases in which respondents must obtain the facts from movants in order to state a claim. Unfortunately, we were not able to restrict this study to motions that involve issues of the sufficiency of the factual pleadings, since we do not know how to identify comparable motions during the period before *Twombly*, when the sufficiency of factual pleading was not thought to be the basis for challenging a pleading.”).

125. *See* Quintanilla, *supra* note 5, at 32; *see also* Leiter, *supra* note 33, at 28–30; Karl N. Llewellyn, *A Realistic Jurisprudence: The Next Step*, 30 COLUM. L. REV. 431, 457–60 (1930).

126. *See supra* Part I; Dovidio & Gaertner, *supra* note 82, at 317–18.

127. The analysis included only those cases in which judicial decisions indicated that the

grounds that plaintiffs had not sufficiently pleaded claims of race discrimination.<sup>128</sup> The studies, hence, exclude claims dismissed on technical grounds for failing to comply with the prerequisites of a viable Title VII action. There are two prerequisites for a viable Title VII action: “filing timely charges of employment discrimination with the [EEOC] and . . . receiving and acting upon the Commission’s statutory notice of the right to sue.”<sup>129</sup> Exhaustion of the EEOC administrative procedures is mandatory.<sup>130</sup> I applied these two prerequisites to draw a distinction between unambiguous and ambiguous claims. Unambiguously weak claims were those where plaintiffs failed to file a timely charge of discrimination with the EEOC or failed to sue within ninety days after receiving a right-to-sue letter.<sup>131</sup> Unambiguously weak claims also included those where plaintiffs failed to exhaust their remedies, such as where plaintiffs’ claims of race discrimination fell beyond the scope of their charges filed with the EEOC;<sup>132</sup> and where plaintiffs sought to hold coworkers liable, rather than an employer, which falls outside the scope of Title VII.<sup>133</sup> Because these cases turn on clear criteria and fixed rules, these cases are neither ambiguous nor entail deficiencies in the factual particularity of pleadings.

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plaintiff was Black or African American. If the decision did not reveal the race or color of the plaintiff, then the case was not counted for purposes of analysis.

128. Because ambiguousness is not a construct that can be directly observed, an operational definition is necessary to translate between social psychological findings and judicial decision making. See CHAVA FRANKFORD-NACHMIAS & DAVID NACHMIAS, *RESEARCH METHODS IN THE SOCIAL SCIENCES* 28 (6th ed. 2000).

129. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973); see also BARBARA T. LINDEMANN & PAUL GROSSMAN, *2 EMPLOYMENT DISCRIMINATION LAW* 1749 (C. Geoffrey Weirich ed., 4th ed. 2007).

130. First, a plaintiff must file an EEOC charge of discrimination within 300 days of the alleged discriminatory practice. 42 U.S.C. § 2000e-5(e)(1) (2006); 2 LINDEMANN & GROSSMAN, *supra* note 129, at 1750–51. A 180-day timeline applies in non-deferral states. 42 U.S.C. § 2000e-5(e)(1). Second, plaintiffs must file suit within ninety days after receiving a right-to-sue letter from the EEOC. 42 U.S.C. § 2000e-5(f)(1). Federal courts allow for equitable tolling of these limitation periods in narrow instances. See, e.g., *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

131. 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 the decision was excluded from consideration. To apply this rule consistently, the study also excluded cases that rejected the defendant’s motion to dismiss based solely on the mistaken belief that the plaintiff’s Title VII claim was untimely. Where federal courts rejected an untimeliness argument but also considered a Rule 8(a) basis for dismissal, the study counted the Rule 8(a) decision on the claim.

132. The same exclusionary rule was applied here as well. If the defendant moved to dismiss a claim for failure to exhaust remedies with the EEOC, and the court granted that motion, then the study excluded that decision from consideration. Where courts rejected defendant’s exhaustion argument but also considered an argument under Rule 8(a), the study counted the Rule 8(a) decision on the claim.

133. Individual employees are not liable under Title VII. The study also excluded cases in which the plaintiff sued the wrong business or governmental entity, drawing on the same exclusionary rule described above.

I deemed the remaining cases “ambiguous” because they required courts to evaluate whether Black plaintiffs had *sufficiently* pleaded claims of race discrimination or racial harassment. These cases turned largely on whether plaintiffs had pleaded claims of discrimination with sufficient factual specificity under Rule 8(a)(2).<sup>134</sup> By operationalizing ambiguousness in this way, the study examined the narrow category of cases most suitable to study whether implicit bias and lay theories of discrimination affect legal decision making. Next, I analyzed each case<sup>135</sup> and coded the dependent variable according to the three possible outcomes for decisions under Rule 12(b)(6): granted, denied, or mixed.<sup>136</sup> The research examined the frequency of decisions in each of these three categories twenty-four months before *Twombly* and twenty-four months after *Iqbal*.<sup>137</sup>

### B. Results

This Article first presents changes in the dismissal rates for Black plaintiffs’ claims of race discrimination and next compares and contrasts how White and Black judges adjudicated these claims under notice pleading versus plausibility pleading.

#### *Study 1: Has Iqbal Increased the Dismissal Rate for Black Plaintiffs’ Claims of Race Discrimination in the Workplace?*<sup>138</sup>

Study 1 tests the hypothesis that federal district courts would grant a larger percentage of motions to dismiss under *Iqbal*’s plausibility-pleading standard than under *Conley*’s notice-pleading rule when deciding Black plaintiffs’ claims of race discrimination in the workplace. The results are presented in Table 1 and Figure 1.

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134. See FED. R. CIV. P. 8(a) (“A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.”).

135. The SPSS database is available upon request. Independent variables included the date (pre-*Twombly* versus post-*Iqbal*), the race of the judge, and the nominating party of the 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.

136. The study coded decisions granted, denied, or mixed. Rulings were granted when a motion to dismiss was granted for all race-based claims that the defendant challenged as insufficient 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 granted in part and denied in part (or mixed) when a motion was denied at least in part for race-based claims: the court accepted part, but rejected part, of the defendant’s argument under Rule 8, and in turn allowed at least one race-based claim to survive dismissal.

137. Because *Twombly* was decided on May 21, 2007, the twenty-four-month range for pre-*Twombly* decisions was from May 20, 2005 to May 20, 2007. *Iqbal* was decided on May 18, 2009. To allow federal courts sufficient time to disseminate and synthesize the case, I began the range on June 1, 2009; therefore, the twenty-four-month range for post-*Iqbal* decisions was from June 1, 2009 to June 1, 2011.

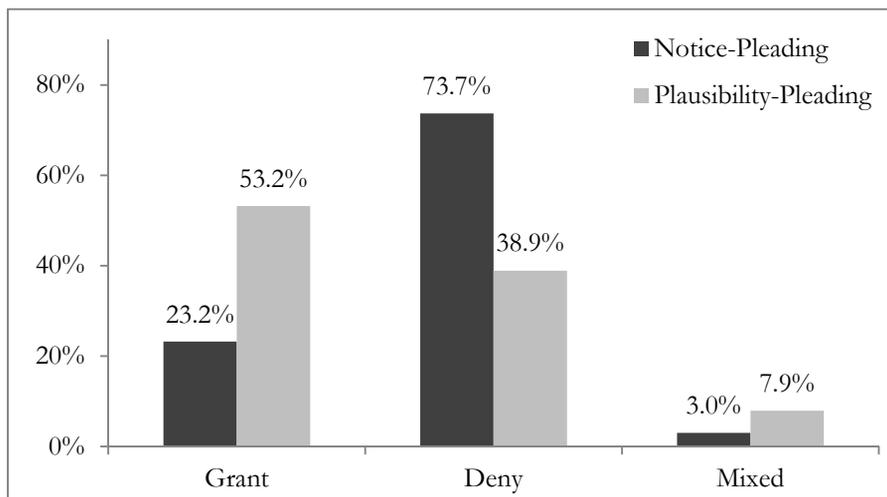
138. For a prior version of this study employing a time horizon of eighteen months rather than twenty-four months, see Quintanilla, *supra* note 5, at 35–37.

**Table 1:** Observed Frequency, Expected Frequency (in Parentheses), and Percentage of Rulings in Study for Black Plaintiffs' Claims of Race Discrimination in the Workplace (Twenty-Four-Month Time Horizon)

	Grant	Deny	Mixed	Total
<i>Conley</i>	23 (42.5) 23.2%	73 (50.4) 73.7%	3 (6.2) 3.0%	99
<i>Iqbal</i>	101 (81.5) 53.2%	74 (96.6) 38.9%	15 (11.8) 7.9%	190
Total	124 42.9%	147 50.9%	18 6.2%	289

Pearson  $\chi^2$  (2,  $N = 289$ ) = 31.55,  $p < .00$ , Cramer's  $V = .330$

**Figure 1:** Percentage of Rulings in Study for Black Plaintiffs' Claims (Twenty-Four-Month Time Horizon)



Study 1 shows that federal district courts have increased the dismissal rate for Black plaintiffs' claims of race-based employment discrimination in ambiguous cases. Within the twenty-four-month time horizon, it was 2.29 times more likely that these claims would be dismissed when challenged as insufficient under Rule 8(a). The Supreme Court's shift in pleading standards from notice pleading to plausibility pleading has resulted in an increased dismissal rate. Courts are increasingly concluding that Black plaintiffs have failed to sufficiently plead claims of discrimination. This increase was statistically significant.<sup>139</sup> Moreover, Study 1

139. Using SPSS, a chi-squared test was performed. A two-way contingency table analysis was used to evaluate the change in dismissal rates. The two variables were (1) time period when the

reveals that, after *Iqbal*, defendants were much more likely to seek to dismiss Black plaintiffs' claims of race discrimination. Indeed, in the twenty-four-month time horizon under *Conley*, defendants moved to dismiss, arguing that Black plaintiffs' claims of race-based employment discrimination were insufficiently plead, ninety-nine times; in the twenty-four-month time horizon under *Iqbal*, defendants moved for dismissal on such grounds 190 times, virtually a two-fold increase.<sup>140</sup>

*Study 2: Did White and Black Judges Decide Motions to Dismiss Differently Under Conley, and Do They Decide Motions to Dismiss Differently Under Iqbal?*<sup>141</sup>

Study 2 evaluates the hypothesis that White and Black judges would, on balance, decide motions to dismiss differently under *Iqbal*'s highly subjective plausibility standard, but not under *Conley*'s notice-pleading rule. Convergence of White and Black judges' decisions under notice pleading and divergence of their decisions under plausibility pleading would be consistent with the social-psychological research discussed in Part I.

**Table 2A:** Observed Frequency, Expected Frequency (in Parentheses), and Percentage of Rulings in Study for White Versus Black Judges Under *Conley*

	Grant	Deny	Mixed	Total
White Judges	17 (18) 21.5%	59 (58.4) 74.7%	3 (2.6) 3.8%	79
Black Judges	4 (3) 30.8%	9 (9.6) 69.2%	0 (.4) 0.0%	13
Total	21 22.8%	68 73.9%	3 3.3%	92

Pearson  $\chi^2$  (2,  $N = 92$ ) = .957,  $p =$  not significant, Cramer's  $V = .102$

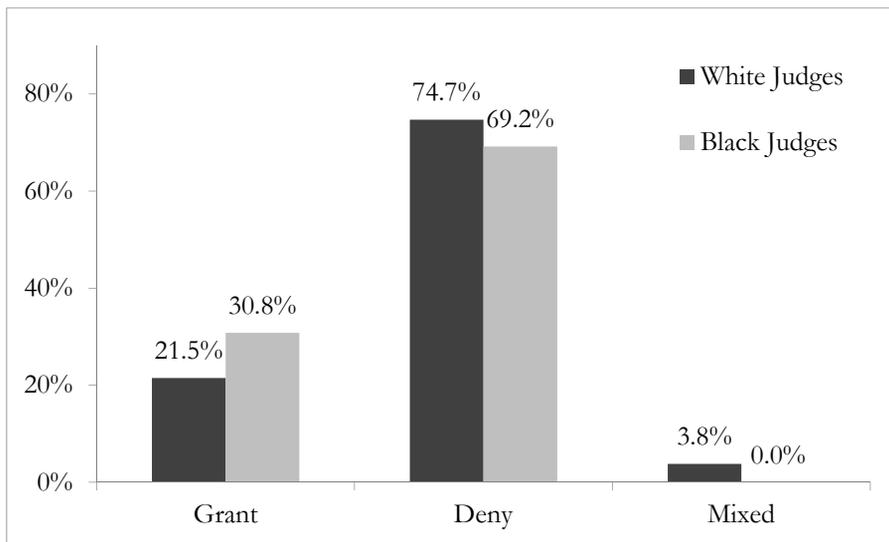
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motion to dismiss was decided with two levels (pre-*Twombly* and post-*Iqbal*), and (2) decision with three levels (grant, deny, mixed). Time period and decision were found to be significantly related, Pearson  $\chi^2$  (2,  $N = 289$ ) = 31.545,  $p < .00$ , Cramer's  $V = .330$ .

140. Because my sample draws on cases available on Westlaw, I note that these figures are samples that reflect the changing legal landscape and do not reflect the total population of all motions activity by the federal courts. Even so, this pattern—the roughly twofold increase in filing of motions to dismiss—is consistent with other empirical legal studies, including the FJC's report. Jonah Gelbach and Lonny Hoffman have argued that focusing solely on dismissal rates understates the problem in the degree that it neglects the rising tide of motions to dismiss filed after *Iqbal*. See Gelbach, *supra* note 116, at 2324; Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the FJC's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 7, 15–16. The pattern reflected by my analysis supports their argument.

141. For a prior study comparing White and Black judges' decisions under *Iqbal* only, see Quintanilla, *supra* note 5, at 38–40.

**Figure 2A:** Percentage of Rulings in Study for White Versus Black Judges Under *Conley*

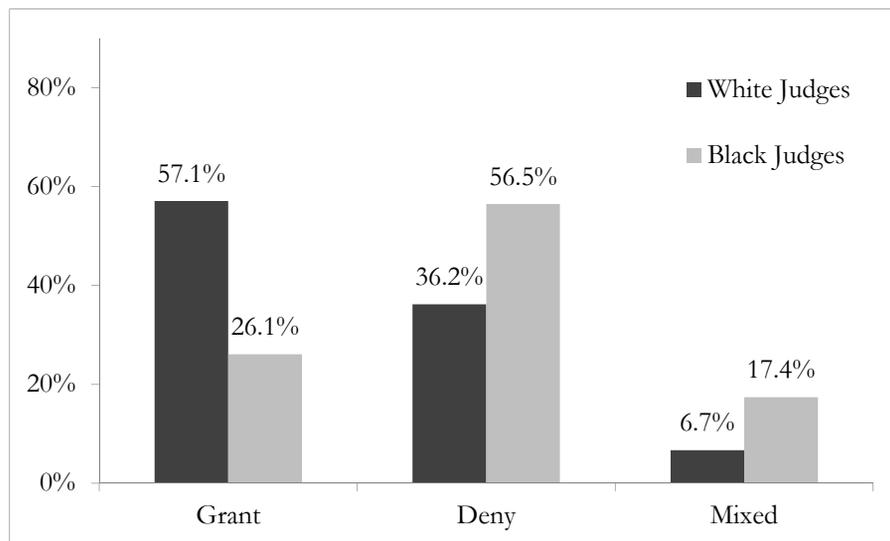


**Table 2B:** Observed Frequency, Expected Frequency (in Parentheses), and Percentage of Rulings in Study for White Versus Black Judges Under *Iqbal*

	Grant	Deny	Mixed	Total
White Judges	93 (86.8) 57.1%	59 (63.1) 36.2%	11 (13.1) 6.7%	163
Black Judges	6 (12.2) 26.1%	13 (8.9) 56.5%	4 (1.9) 17.4%	23
Total	99 53.2%	72 38.7%	15 8.1%	186

Pearson  $\chi^2$  (2,  $N = 186$ ) = 8.614,  $p = .01$ , Cramer's  $V = .215$

**Figure 2B:** Percentage of Rulings in Study for White Versus Black Judges Under *Iqbal*



Study 2 reveals modest differences in how White and Black judges decided motions to dismiss Black plaintiffs' claims of race discrimination under *Conley*, which was not statistically significant. Yet White judges are dismissing Black plaintiffs' claims of employment discrimination under *Iqbal* at a higher rate (57.1%) than Black judges (26.1%), a difference that is statistically significant. It was 2.18 times more likely that a White judge would grant dismissal of these claims than a Black judge.<sup>142</sup>

I performed a follow-up analysis to discern whether the difference in how White and Black judges are applying *Iqbal* can be better explained by political orientation. While there are more White Republican than Black Republican judges,<sup>143</sup> a logistic regression pitting the judge's race (White versus Black) against

142. In a prior study that I performed in 2011, the results were marginally significant due to limited data. However, the present study, which entails a larger time horizon and thus a larger sample of cases, revealed that the differences were statistically significant. A two-way contingency table analysis was conducted to evaluate whether the proportions were similar or dissimilar for dismissal. Judges' race and decisions were found not to be statistically significant under *Conley*, Pearson  $\chi^2(2, N = 92) = .957, p = .62$ , Cramer's  $V = .102$  but statistically significant under *Iqbal*, Pearson  $\chi^2(2, N = 186) = 8.614, p = .01$ , Cramer's  $V = .215$ .

143. This study drew upon the political party of the appointing President as a proxy for the political orientation of each federal district judge. For example, as of August 2012, there were 488 White Republican federal district court judges, 350 White Democrat federal district court judges, 29 Black Republican federal district court judges, and 70 Black Democrat federal district court judges. FJC's website contains a search tool to gather these overall figures. See *Research Categories*, FED.

the judge's political orientation (Democrat versus Republican) revealed that the judge's race better explained the likelihood that a judge would fully grant a motion to dismiss (odds ratio = 3.197, Wald  $\chi^2(1, N = 186) = 4.973, p = .03$ ) and that political orientation (odds ratio = 1.427, Wald  $\chi^2(1, N = 186) = 1.24, p = .27$ ) was not significant.<sup>144</sup> White judges were more than twice as likely to dismiss Black plaintiffs' claims of race discrimination than Black judges—even after taking into account likely political affiliation.

This disparity is largely attributable to whether courts found that Black plaintiffs had sufficiently pleaded *prima facie* cases of discrimination and plausible claims of discrimination.<sup>145</sup>

### C. Discussion

Study 1 demonstrates that the shift from notice pleading to plausibility pleading has increased the dismissal rate for Black plaintiffs' claims of race discrimination. Indeed, the dismissal rate rose from 23.2% under *Conley* to 53.2% under *Iqbal*. It is 2.29 times more likely that a judge will dismiss Black plaintiffs' claims of race discrimination under the new standard. This stark rise in the dismissal rate is greater than increases in other categories of federal actions. For example, similar studies have shown that the base rate of dismissals for all federal

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JUDICIAL CTR., [www.fjc.gov/history/home.nsf/page/research\\_categories.html](http://www.fjc.gov/history/home.nsf/page/research_categories.html) (last visited Oct. 9, 2012).

144. Using SPSS, I performed several sequential logistic regressions. In the first regression, I performed a simultaneous two-level logistic regression (“grant” versus the combination of “deny” and “grant and deny”) with the judge's race and the appointing party of the President as predictors. This simultaneous regression model included both predictor variables, pitting the judge's race against political ideology. This analysis revealed a statistically significant effect of the judge's race on the grant rate for claims of race discrimination after *Iqbal*, odds ratio = 3.197, Wald  $\chi^2(1, N = 186) = 4.973, p = .03$ . In contrast, the beta for political orientation was not significant. Next I performed a sequential logistic regression, which entered the judge's race into the model first, and then asked whether the judge's political orientation offered significant predictive power above and beyond the judge's race. This was a two-level sequential logistic regression (again, “grant” versus the combination of “deny” and “grant and deny”) with the judge's race entered in the first step and the appointing party of the President entered in the second step. In the first step, the analysis revealed a statistically significant effect of the judge's race on the grant rate for claims of race discrimination after *Iqbal*, odds ratio = 3.764, Wald  $\chi^2(1, N = 186) = 7.014, p = .01$ . The second step, which added the judge's political orientation to the model, was not significant, meaning that while the model itself was significant, the judge's political orientation did not add predictive power to the model. In the second step, the beta for political orientation was not significant. For an excellent discussion of logistic regression, see BARBARA G. TABACHNICK & LINDA S. FIDELL, *USING MULTIVARIATE STATISTICS* 437–504 (5th ed. 2007). After *Iqbal*, approximately 11% of the federal district court judges within the sample decided more than one motion to dismiss Black plaintiffs' claims of race discrimination; therefore, to ensure that this repeatedness did not affect the results, I used a repeated measure to account for the fact that some judges were captured more than once. A general estimate equation analysis revealed that this repeatedness did not change the significance of the results or the direction of any of the beta coefficients.

145. See Quintanilla, *supra* note 5, at 36.

actions rose from 46% under the old standard to 56% under the new standard,<sup>146</sup> meaning that the base rate of dismissals for all federal actions increased by 1.21 times, far less than the increased rate for Black plaintiffs' claims of race discrimination.

Study 2 revealed that White and Black judges decided Black plaintiffs' claims comparably under notice pleading, but that White judges granted dismissal at a higher rate than Black judges under plausibility pleading. Under plausibility pleading, White judges dismissed Black plaintiffs' claims of race discrimination at a much higher rate than Black judges, 57.1% versus 26.1%—in other words, it was 2.18 times more likely that a White judge would grant dismissal than a Black judge. A follow-up analysis revealed that the divergence between White and Black judges was not primarily due to political orientation. While there are more White Republican judges than Black Republican judges, White judges were over twice as likely to dismiss these cases than Black judges, even after taking into account political orientation. A logistic regression performed pitting race (White versus Black) against political orientation (Democrat versus Republican) revealed that the judge's race was a better predictor than political orientation of whether or not judges will dismiss these claims.

Finally, while this study examined how judges responded to changes in the pleading standard, judicial decision making is but one aspect of how *Iqbal* has likely affected civil rights litigation.<sup>147</sup> The FJC's study,<sup>148</sup> for example, illustrates that defendants are far more likely to file motions to dismiss under the new pleading rule, meaning that—even holding the dismissal rate constant—the overall percentage of cases dismissed has likely increased.<sup>149</sup> In this regard, Study 1 similarly reveals an overall increase in the likelihood that defendants will file a motion to dismiss these claims. While my investigation did not explore how claimants, defendants, and attorneys have responded to changes in the pleading regime, it may be that plaintiffs' attorneys are less likely to represent plaintiffs whose claims are complex and at the margin, which would tend to either decrease the percentage of counseled cases and/or decrease the absolute number of litigated cases overall. In a prior study, moreover, I found that, when Black plaintiffs choose to litigate claims without counsel, their pro se status shaped judicial impressions at the pleading stage, increasing the likelihood that their claims will be dismissed.<sup>150</sup>

### III. CRITICAL RACE EMPIRICISM

The Article now turns to how these empirical findings, and critical race

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146. See Hatamyar, *supra* note 65, at 597–615.

147. See Gelbach, *supra* note 116, at 2306–07.

148. See CECIL ET AL., *supra* note 64.

149. See *id.* at 8–12; Gelbach, *supra* note 116, at 2324–27; Hoffman, *supra* note 140, at 15–16.

150. See Quintanilla, *supra* note 5, at 52–54.

empiricism more generally, allow one to explore CRT. These empirical findings, for example, illuminate CRT's claims that "blindness" to race cannot ensure neutral and objective application of legal rules and that the everyday application of legal rules and structures, rather than intentional behavior by "bad apples," produces disparate effects.

A significant problem with the new pleading regime, as Study 2 illustrates, is that the new standard requires federal judges to draw on their "experience and common sense"<sup>151</sup> when gauging the plausibility of claims of race discrimination. As a result, majority-group members and minority-group members, on balance, will perceive and handle these claims differently. Applying *Iqbal*, White and Black judges diverge on the plausibility of discrimination. This suggests that jurists are drawing on their lay theories of discrimination, their prior expectations, and their schemas. Research discussed in Part I reveals that majority-group members and stigmatized-group members often subscribe to different lay theories.<sup>152</sup> Majority-group members tend to conceptualize racism as no longer a modern problem and conceive of racism in primarily overt terms.<sup>153</sup> Meanwhile, many minority-group members, and some majority-group members, subscribe to the belief that racism continues to be a modern problem.<sup>154</sup> They conceive racism in both overt and subtle terms.<sup>155</sup> Given the socio-political-demographic composition of the federal judiciary, the subjective nature of the new standard raises the potential that modern forms of prejudice will be underaddressed. In this way, the new pleading standard tends to legitimize the perspective that prejudice is blatant while excluding the perspective of stigmatized-group members who are harmed by more subtle and difficult-to-detect forms of prejudice.

The new pleading standard, as a practical matter, limits the reach of federal protections against discrimination. While federal antidiscrimination laws afford stigmatized-group members protection against blatant racism, the new standard curbs federal antidiscrimination laws from addressing modern prejudice, a form of prejudice that is chronic, persistent, and pervasive in American society.<sup>156</sup> Racial disparities are widespread in the United States: racial disparities persist in unemployment rates, income levels, incarceration rates, and health care.<sup>157</sup> One

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

152. See Sommers & Norton, *supra* note 44, at 128–30.

153. See *id.*

154. See *id.* As Alan Freeman wrote long ago, the concept of racial discrimination may be approached from different perspectives. These different perspectives shape the degree to which people perceive the frequency and occurrence of discrimination in society. See Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–57 (1977).

155. See Sommers & Norton, *supra* note 44, at 128–30.

156. See Jason A. Nier & Samuel L. Gaertner, *The Challenge of Detecting Contemporary Forms of Discrimination*, 68 J. SOC. ISSUES 207 (2012); Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 88 (2007).

157. See CARMEN DEHAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND

source of these disparities is modern prejudice. While overtly racist attitudes and discrimination have waned, prejudice and discrimination have mutated into a more subtle form.<sup>158</sup> Under the new standard, federal antidiscrimination laws now address subtle forms of discrimination only unpredictably and by happenstance—plausibility pleading, thereby, clouds the remedy to halt racial discrimination. Without a reliable, realistic remedy against modern prejudice, stereotyped-group members have no “real right” to be free from modern prejudice.<sup>159</sup> And with no real right to be free from modern prejudice, as Hohfield observed long ago, majority-group members would have the privilege to discriminate against stigmatized-group members in subtle ways that are difficult to detect and prove. In short, despite incremental statutory prohibitions against race prejudice, plausibility pleading renders a wide swath of modern prejudice against minority-group members lawful as a practical matter. Although modern prejudice is subtle, modern prejudice harms stereotyped-group members, and the cumulative effect of this discrimination is substantial.<sup>160</sup>

Moreover, the new standard alters legal narratives woven within the corpus of summary judgment case law about whether modern prejudice exists in American society. *Iqbal* operates at the pleading stage, before plaintiffs have presented their evidence at the summary judgment stage. When federal courts dismiss a case with prejudice, that case will never reach summary judgment. In these cases, plaintiffs’ evidence will never come to light. If federal courts mainly allow only claims of overt racism to survive dismissal, then, to the extent that those claims are not settled earlier, courts will primarily adjudicate claims of overt discrimination at summary judgment. As a result, the corpus of summary judgment case law will emphasize narratives of blatant racism, rather than narratives of how modern prejudice operates in American society. Over time, the body of summary judgment case law will tell tales of overt racism, while excluding narratives of modern prejudice. The bench and bar would, in turn, appraise cases involving subtle racism as outliers, cases unlikely to prevail. The new standard, hence, will have a limiting epistemological effect on federal antidiscrimination case law.

Finally, this critical empirical examination illustrates one mechanism by

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HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010 (2011), available at <http://www.census.gov/prod/2011pubs/p60-239.pdf>; WILLIAM J. SABOL & HEATHER COUTURE, U.S. DEPT OF JUSTICE, PRISON INMATES AT MIDYEAR 2007 (2008), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=840>; BRIAN D. SMEDLEY ET AL., UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (2002); *The Employment Situation: November 2012*, U.S. DEPT LABOR (Nov. 2012), <http://www.bls.gov/news.release/empsit.nr0.htm>.

158. See Nier & Gaertner, *supra* note 156, at 207–18.

159. See Llewellyn, *supra* note 125, at 448 (“[A] right . . . exists to the extent that a likelihood exists that *A* can induce a court to squeeze, out of *B*, *A*’s damages . . . . Accurate statement of a “real rule” or of a right includes all procedural limitations on what can be done about the situation.”).

160. Nier & Gaertner, *supra* note 156, at 218.

which colorblind ideologies and modern racism shape law and legal processes.<sup>161</sup> As Ian Haney López has aptly said, “Law not only constructs race, but race constructs law: racial conflicts distort the drafting and the implementation of laws . . . .”<sup>162</sup> The aversive racism framework predicts that, when legal decision makers apply highly subjective legal standards in contexts where presuppositions about race, racism, and stereotypes are salient, these malleable standards may morph and change.<sup>163</sup> Social psychologists, for example, have found that people engage in casuistry to mask biased decision making from others and themselves by altering standards to recruit acceptable criteria to justify decisions.<sup>164</sup> Decision makers cloak biased decisions in acceptable terms, shifting the weight and emphasis of different criteria.<sup>165</sup>

For example, federal courts are reluctant to explain that they are dismissing discrimination claims because they believe that discrimination is implausible. Rather, federal courts say that they are dismissing these claims because plaintiffs have failed to set forth allegations sufficient to form a prima facie case of discrimination.<sup>166</sup> In effect, the new pleading rule has shifted forward to the pleading stage the prima facie burden that was once reserved for summary judgment only.<sup>167</sup> Federal courts, moreover, are shifting the quantum necessary to plead discrimination claims, ratcheting upward the requirements of plaintiffs’ prima facie burden.<sup>168</sup> At summary judgment, plaintiffs’ prima facie burden was applied flexibly, yet federal courts are now applying the “same” standard at the pleading stage restrictively.<sup>169</sup> This is particularly jarring given that several U.S. Courts of Appeal have expressed great frustration with the *McDonnell-Douglas* framework.<sup>170</sup>

This, in turn, limits the ability of federal antidiscrimination laws to reach and remedy modern prejudice for three reasons. In short, plaintiffs’ prima facie case fails to capture the complex reality of discrimination in American society today, such as discrimination on the basis of prototypical characteristics and

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161. See Gómez, *Understanding Law*, *supra* note 37, at 488, 499.

162. Ian Haney López, *Introduction to RACE, LAW AND SOCIETY*, *supra* note 29, at xviii.

163. See, e.g., Devah Pager et al., *Discrimination in a Low Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 778–79 (2009).

164. See Norton et al., *supra* note 63.

165. See *id.*

166. See Quintanilla, *supra* note 5, at 43–50.

167. See Thomas, *supra* note 55, at 28–34.

168. See Quintanilla, *supra* note 5, at 43–50; Angela K. Herring, Note, *Untangling the Twombly-McDonnell Knot: The Substantive Impact of Procedural Rules in Title VII Cases*, 86 N.Y.U. L. REV. 1083 (2011).

169. See Thomas, *supra* note 55; Suzanne Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011).

170. See *Brady v. Office of Sergeant of Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008) (“[T]he prima facie case [aspect of *McDonnell Douglas*] is a largely unnecessary sideshow . . . spawning enormous confusion and wasting litigant and judicial resources.”); see also *Coleman v. Donahoe*, 667 F.3d 835, 862 (7th Cir. 2012) (Wood, J., concurring).

intersectionality, and it underappreciates the impact that situations have in shaping implicit bias. First, research shows that many Americans more readily apply racial stereotypes to those who appear more stereotypically Black than to those who do not.<sup>171</sup> In this regard, employers may not discriminate against all African Americans, but rather against those who are perceived to be more stereotypically Black. When employers treat other Black employees in a non-discriminatory way, this may tend to render discrimination against others who display more Afrocentric features implausible. These cases would, therefore, likely be dismissed at the pleading stage. Second, plaintiffs with overlapping and intersectional identities tend to fare poorly under existing case law. For example, Black females who claim race and sex discrimination appear to suffer disproportionately under plausibility pleading.<sup>172</sup> Third, the prima facie case underappreciates the situational and contextual nature of discrimination. Implicit bias tends to be expressed against stigmatized-group members in ambiguous situations with unclear norms.<sup>173</sup> Some employers may treat minority-group members well in some situations, while discriminating against them in other situations. Again, the problem is that the prima facie case is restrictive and underappreciates the many forms of racism in American society today. The remedy against modern prejudice is clouded, rendered far less certain, because of the interaction between a prima facie standard that is underinclusive and *Iqbal's* highly subjective pleading standard.

#### CONCLUSION

We return to the beginning of our journey: might CRT benefit from more robust engagement with empirical methods? In answering this question, I first argued that social psychology offers both theory and methods to explore CRT. I then drew on social-psychological theory and methods to conduct an empirical legal study, which illustrated how infusing CRT with empirical legal methods illuminates implicit bias in legal decision making and the process by which race and law interact.

In so doing, this Article empirically investigated the highly subjective nature of the new plausibility-pleading regime. An empirical study supported the conclusion that the new standard serves as a context for aversive racism, implicit

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

172. A follow-up analysis revealed that, under plausibility pleading, Black females' claims of race discrimination are being dismissed at a higher rate than Black males' claims of race discrimination. For example, I performed a logistic regression ("grant" versus "deny" and "grant and deny") of cases after *Iqbal* with the Black plaintiff's gender as a predictor variable in the equation. This analysis revealed a statistically significant effect of the Black plaintiff's gender on the grant rate for claims of race discrimination after *Iqbal*, odds ratio = 1.847, Wald  $\chi^2$  (1,  $N = 182$ ) = 4.150,  $p = .04$ . See also Best et al., *supra* note 31, at 1012.

173. See Dovidio & Gaertner, *supra* note 88, at 52.

bias, and lay theories of racism to operate against stereotyped-group members who assert claims of discrimination.

Although this Article performed an empirical legal study on federal case law, another important line of critical race empiricism will involve experiments. The factorial design can be harnessed to test different rule regimes and to experimentally induce and manipulate implicit bias, lay theories of racism, and the activation of stereotypes. Experiments would, therefore, allow scholars to draw causal inferences and to observe with relatively little difficulty whether the independent variable causes changes in the dependent variable. Here, experiments would allow scholars to evaluate whether rule regimes cause changes in levels of implicit bias or lay theories of racism. With other designs, causal mechanisms cannot be easily determined. Through random assignment to condition and control variables, experiments allow inferences of causality. Experiments, therefore, are an important empirical method for critical race empiricists to harness when studying how rule regimes mediate the effect of stereotypes, implicit bias, and racial ideologies.

Leslie Espinoza and Angela Harris have shown that legal stories have had a powerful and profound effect on legal discourse: “Arguably, the most significant impact of critical theory has been the reformation of legal analytical practices through the use of stories.”<sup>174</sup> Critical race empiricism should not, and need not, *supplant* legal narratives as the means for exposing bias across the law. Instead, critical race empiricism can be harnessed to *supplement* ongoing antistatutory projects. For example, empirical legal methods can be deployed to expose the disparate effect of seemingly neutral legal rules. I concur with Jerry Kang, who has reasoned along a similar vein: “[T]his level of analysis cannot function alone, and it needs supporting analysis from above and even below. What we need is interpenetration, across all the layers of knowledge.”<sup>175</sup> The need for concrete study of *Iqbal*’s new subjective pleading standard is pressing. Here, CRT and critical race empiricism could shape the debate by revealing compelling, concrete examples, and a body of empirical evidence that shows why the need to change pleading rules is urgent. Over time, critical race empiricists may reframe the debate, shifting onto those who laud *Iqbal* the burden to justify the existence of a legal rule that opens the courthouse door to implicit bias while closing the courthouse door to stereotyped-group members harmed by modern prejudice.

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174. See Angela P. Harris & Leslie Espinoza, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1630 (1997).

175. See Jerry Kang, *Implicit Bias and the Pushback from the Left*, 54 ST. LOUIS U. L.J. 1139, 1148 (2010).