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. . . . [T]he extends what
we can see and understand, while constraining bias.

—Claude M. Steele¹

* Associate Professor of Law, Indiana University, Maurer School of Law. I am grateful to Jerry Kang,
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comments on this Article.

1. CLAUDE M. STEELE, WHISTLING VIVALDI AND OTHER CLUES TO HOW STEREOTYPES
INTRODUCTION

This symposium² 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?³ 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.”⁴ While the harvest of interdisciplinary research is vast, this Article emphasizes a growing body of scholarship, known as “behavioral realism,”⁵ 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.⁶ Although one of my previous projects yielded similar findings,⁷ 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).


⁷. See Quintanilla, supra note 5, at 30–42.
analyze, and thereby increasing the power of my study. 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. 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.

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,” 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. CRT
scholars examine the relationships between race, racism, law, and power and
advance a normative framework that critiques the social and legal status quo. 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. By calling these core claims “empirical,” I mean that they
connect with concrete experience. Chief among these core claims is that racism

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).
15. I thank Devon Carbado 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. In short, racism and discrimination are common and ordinary, not aberrational. A second claim is that race and racism are socially constructed—products of law, social thought, social institutions, and social interactions—rather than fixed biological categories. A third claim is that whiteness confers latitude, leeway, and privilege 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. Although these claims are empirical in nature, CRT scholars have tended to draw upon legal storytelling and narrative analysis, often leaving empirical legal methods unexplored, though this appears to be changing. 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. Even so, discovering and dismantling bias

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.


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.


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.


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. 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. Indeed, CRT inquiry has borrowed concepts, laws, data, models, theories, methods, and explanations from neighboring social science disciplines for its inquiries and investigations. 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. 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. 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.

I concur with Devon Carbado’s proposal: “[T]he time is ripe for ‘Critical Race Empiricism’.” 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


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, 326–44 (1987).


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. In so doing, behavioral realism shows that implicit bias and unconscious racism have ramifications and must be addressed across the law. 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. 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. 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. With ingenuity, new technologies and sophisticated empirical methods would enable scholars to study how law shapes race, racism, and racial ideologies. So too, empirical methods can be harnessed to reveal how law changes over time due to race, racism, and racial ideologies.

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. 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


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


is more indirect, subtle, and difficult to detect.\textsuperscript{41} 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.\textsuperscript{42} 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.\textsuperscript{43} Lay theories of racism illuminate how and why people decide whether discrimination occurred.\textsuperscript{44} Lay theories are organized knowledge structures, like schemas, that direct behavior, judgments, and evaluations.\textsuperscript{45}

While studies examining procedural rules and court practices have proliferated,\textsuperscript{46} 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.\textsuperscript{47} 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.\textsuperscript{48} Rule reformers and social scientists now routinely employ

\begin{itemize}
\item \textsuperscript{42} See Dovidio, supra note 41, at 835.
\item \textsuperscript{43} See Dovidio & Gaertner, supra note 41, at 45–46.
\item \textsuperscript{45} Sommers & Norton, supra note 44, at 118.
\item \textsuperscript{46} See Will Rhee, Evidence-Based Federal Civil Rulemaking: A New Contemporaneous Case Coding Rule, 33 PAGE 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).
\item \textsuperscript{47} Rhee, supra note 46, at 17–21; see also Thomas E. Baker, An Introduction to Federal Court Rulemaking Procedures, 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.”).
\item \textsuperscript{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 (1986); Willging, supra note 46, at 1124–25.
\end{itemize}
empirical methods to evaluate procedural rules.49 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.50 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.51 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. Gibson52 to plausibility pleading in Ashcroft v. Iqbal.53 Others have offered excellent discussions of Bell Atlantic Corp. v. Twombly54 and Ashcroft v. Iqbal.55 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.56 In Twombly57 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.
57. Iqbal, 556 U.S at 678 (quoting Twombly, 550 U.S. at 570).
Iqbal,\textsuperscript{58} 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 \textsl{plausible} on its face. Problematically, Iqbal requires federal courts, when deciding whether a complaint is plausible, to draw upon their “judicial experience and commonsense.”\textsuperscript{59} 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.\textsuperscript{60} 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”\textsuperscript{61} 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.\textsuperscript{62} For example, implicit bias may operate when federal courts make highly subjective decisions based on malleable criteria.\textsuperscript{63} CRT

\begin{itemize}
\item \textsuperscript{58} Iqbal, 556 U.S. at 679.
\item \textsuperscript{59} Id.
\item \textsuperscript{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).
\item \textsuperscript{61} Id., 556 U.S. at 679.
\item \textsuperscript{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 Judges, Juries, 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).
\item \textsuperscript{63} See Chew & Kelley, supra note 51, at 1136, 1155–58; Michael I. Norton et al., Causality and Social Category Bias, 87 J. PERSONALITY & SOC. PSYCHOL. 817, 819–22 (2004); cf. Dan M. Kahan et al., “They Saw A Protest”: Cognitive Utilitarianism 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 have studied whether the new pleading standard has increased the dismissal rate under Rule 12(b)(6). 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. 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. 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. 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. 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).


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.76 The second wave conceptualized prejudice from a different paradigm—prejudice was viewed as widespread and rooted in normal rather than abnormal thought processes.71 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.72

Focus shifted from prejudice as a psychopathology to how normal socialization processes support prejudice and aid in its transmission.73 Prejudice, stereotyping, and discrimination were conceptualized as the result of processes—social cognition and social categorization—cognitive processes associated with classifying social information.74 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.75 These new technologies measure implicit attitudes—that is, implicit bias and automatic and unconscious attitudes and beliefs.76 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.77 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).
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.
77. See Dovidio, supra note 41, at 838; Dovidio & Gaertner, supra note 76, at 1086.
racists. In the current wave, these social scientists actively investigate how interpersonal and intergroup contexts and situations affect implicit bias. A chief insight is that social contexts and situations powerfully shape racial prejudice and implicit bias.

Aversive racism rests on a contradiction between explicit and implicit attitudes. 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. 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. Second, because aversive racists adhere to egalitarian principles, they find the thought that they are prejudiced disquieting and disturbing.

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. 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. 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. Yet
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. In these situations, aversive racists may harm minority-group members in ways that allow them to maintain a nonprejudiced self-concept.

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. 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. 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. 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. 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. Recent studies show a similar pattern of results.

Turning from aversive racism to lay theories of racism, a lay theory is an “organized knowledge structure that directs behavior, judgments, and evaluations.” A lay theory of racism signifies the prior beliefs, presuppositions,
and schemas that one holds about the kinds of behaviors that rise to the level of racism and prejudice. 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. Science reveals that prejudice has mutated from overt to more subtle and difficult-to-detect forms. 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. Lay theories of racism, therefore, shape how legal decision makers interpret allegations of discrimination.

Social psychologists have identified two lay theories of racism. Many majority-group members subscribe to the dominant lay theory. This lay theory conceptualizes racist behavior in overt, blatant terms. 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.) 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. 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.


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.
103. See id. at 131.
A less prevalent lay theory conceptualizes racism in both overt and subtle forms. 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. 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. Under this lay theory, ambivalence, anxiety, and passive harm toward stigmatized-group members may be diagnostic of racism. Those who subscribe to this lay theory believe that, in American society, racism against stigmatized-group members continues to be a contemporary problem.

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,” 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. 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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108. See Quintanilla, supra note 5, at 24.
109. See id.
110. See id.
111. See id.
112. Id. 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). Both studies focused on decision making by federal district court judges. Like other studies examining the effect of Iqbal, this investigation examined motions to dismiss filed under Rule 12(b)(6), the mechanism by which defendants challenge the legal sufficiency of claims. Unlike my prior empirical legal study, which employed an eighteen-month time horizon before Twombly and after Iqbal, this updated analysis drew a twenty-four month time horizon.

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

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.


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 and, therefore, did not analyze how retaliation claims or claims based on other legally protected characteristics (such as gender, national origin, or religion) 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. In “Beyond Common Sense,” I discussed the importance of focusing on “situation types” or “particularized situations” when evaluating Iqbal’s effect on Rule 12(b)(6) dismissals. In a similar vein, this updated analysis narrowily 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.

My studies operationalize “ambiguous” cases as meaning cases in which defendants move to dismiss Black plaintiffs’ claims of race discrimination on 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.


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 CTR., 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 (“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.”).


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. 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.” Exhaustion of the EEOC administrative procedures is mandatory. 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. 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; and where plaintiffs sought to hold coworkers liable, rather than an employer, which falls outside the scope of Title VII. Because these cases turn on clear criteria and fixed rules, these cases are neither ambiguous nor entail deficiencies in the factual particularity of pleadings.

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).


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). By operationalizing ambiguity 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 and coded the dependent variable according to the three possible outcomes for decisions under Rule 12(b)(6): granted, denied, or mixed. The research examined the frequency of decisions in each of these three categories twenty-four months before Twombly and twenty-four months after Iqbal.

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?

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.

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)

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

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. 139 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.140

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

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>
<thead>
<tr>
<th></th>
<th>Grant (N)</th>
<th>Deny (N)</th>
<th>Mixed (N)</th>
<th>Total (N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>White Judges</td>
<td>17 (18)</td>
<td>59 (58.4)</td>
<td>3 (2.6)</td>
<td>79</td>
</tr>
<tr>
<td></td>
<td>21.5%</td>
<td>74.7%</td>
<td>3.8%</td>
<td></td>
</tr>
<tr>
<td>Black Judges</td>
<td>4 (3)</td>
<td>9 (9.6)</td>
<td>0 (.4)</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>30.8%</td>
<td>69.2%</td>
<td>0.0%</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>21</td>
<td>68</td>
<td>3</td>
<td>92</td>
</tr>
<tr>
<td></td>
<td>22.8%</td>
<td>73.9%</td>
<td>3.3%</td>
<td></td>
</tr>
</tbody>
</table>

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

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 36–40.
Figure 2A: Percentage of Rulings in Study for White Versus Black Judges Under Conley

![Bar Chart]

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

<table>
<thead>
<tr>
<th></th>
<th>Grant</th>
<th>Deny</th>
<th>Mixed</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>93 (86.8)</td>
<td>59 (63.1)</td>
<td>11 (13.1)</td>
<td>163</td>
</tr>
<tr>
<td>Black</td>
<td>6 (12.2)</td>
<td>13 (8.9)</td>
<td>4 (1.9)</td>
<td>23</td>
</tr>
<tr>
<td>Total</td>
<td>99</td>
<td>72</td>
<td>15</td>
<td>186</td>
</tr>
</tbody>
</table>

Pearson $\chi^2 (2, N = 186) = 8.614, p = .01$, Cramer's $V = .215$
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.142

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,143 a logistic regression pitting the judge’s race (White versus Black) against

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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.\textsuperscript{144} 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.\textsuperscript{145}

\textbf{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 actions declined from 30\% to 23\% after Iqbal.\textsuperscript{\textsuperscript{146}}

\textsuperscript{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.

\textsuperscript{145} See Quintanilla, supra note 5, at 36.

actions rose from 46% under the old standard to 56% under the new standard, 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. The FJC’s study, 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. 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.

III. CRITICAL RACE EMPIRICISM

The Article now turns to how these empirical findings, and critical race
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” 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. Majority-group members tend to conceptualize racism as no longer a modern problem and conceive of racism in primarily overt terms. Meanwhile, many minority-group members, and some majority-group members, subscribe to the belief that racism continues to be a modern problem. They conceive racism in both overt and subtle terms. 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. Racial disparities are widespread in the United States: racial disparities persist in unemployment rates, income levels, incarceration rates, and health care.

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).
157. See CARMEN DE NAVAS-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.\textsuperscript{158} 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.\textsuperscript{159} And with no
real right to be free from modern prejudice, as Hohfield observed long ago,
minority-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.\textsuperscript{160}

Moreover, the new standard alters legal narratives woven within the corpus
of summary judgment case law about whether modern prejudice exists in
American society. \textit{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,
however, will have a limiting epistemological effect on federal antidiscrimination case
law.

Finally, this critical empirical examination illustrates one mechanism by

\textsuperscript{158} See Nier & Gaertner, supra note 156, at 207–18.
\textsuperscript{159} See Llewellyn, supra note 125, at 448 (“[A] right . . . exists in 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.”).
\textsuperscript{160} Nier & Gaertner, supra note 156, at 218.
which colorblind ideologies and modern racism shape law and legal processes.\textsuperscript{161} 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 . . . .”\textsuperscript{162} 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.\textsuperscript{163} 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.\textsuperscript{164} Decision makers cloak biased decisions in acceptable terms, shifting the weight and emphasis of different criteria.\textsuperscript{165}

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.\textsuperscript{166} 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.\textsuperscript{167} Federal courts, moreover, are shifting the quantum necessary to plead discrimination claims, ratcheting upward the requirements of plaintiffs’ prima facie burden.\textsuperscript{168} At summary judgment, plaintiffs’ prima facie burden was applied flexibly, yet federal courts are now applying the “same” standard at the pleading stage restrictively.\textsuperscript{169} This is particularly jarring given that several U.S. Courts of Appeal have expressed great frustration with the \textit{McDonnell-Douglas} framework.\textsuperscript{170}

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

\textsuperscript{161}. \textit{See} Gómez, Understanding Law, \textit{supra} note 37, at 488, 499.

\textsuperscript{162}. Ian Haney López, \textit{Introduction to RACE, LAW AND SOCIETY, supra} note 29, at xviii.


\textsuperscript{164}. \textit{See} Norton et al., \textit{supra} note 63.

\textsuperscript{165}. \textit{See} id.

\textsuperscript{166}. \textit{See} Quintanilla, \textit{supra} note 5, at 43–50.

\textsuperscript{167}. \textit{See} Thomas, \textit{supra} note 55, at 28–34.


\textsuperscript{169}. \textit{See} Thomas, \textit{supra} note 55; Suzanne Goldberg, \textit{Discrimination by Comparison}, 120 YALE L.J. 728 (2011).

\textsuperscript{170}. \textit{See} Brady v. Office of Sergeant of Arms, 520 F.3d 490, 494 (D.C. Cir. 2008) (“[T]he prima facie case [aspect of \textit{McDonnell Douglas}] is a largely unnecessary sideshow . . . . spawning enormous confusion and wasting litigant and judicial resources.”); \textit{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. 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. 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. 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


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.” 174 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 antisubordination 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.” 175 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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