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THE RISE OF THE COMMON LAW OF FEDERAL PLEADING:
IQBAL, TWOMBLY, AND THE APPLICATION
OF JUDICIAL EXPERIENCE

HENRY S. NOYES*

“The life of the law has not been logic; it has been experience.”

—Oliver Wendell Holmes in *The Common Law*

“Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”¹

—Justice Anthony Kennedy, U.S. Supreme Court

“[When resolving a motion to dismiss, the court has] a question of the meaning of a common law doctrine—namely the federal common law doctrine of pleading in complex cases, announced in *Twombly*.”²

—Judge Richard Posner, U.S. Court of Appeals
for the Seventh Circuit

I. INTRODUCTION

SINCE 1938, Rule 8(a) of the Federal Rules of Civil Procedure (Federal Rules or Rules) has set the standard for how much a plaintiff must allege at the outset of a lawsuit in order to avoid dismissal for failure to state a claim. Rule 8 requires that a plaintiff must include in the complaint “a short and plain statement of the claim showing that the pleader is entitled to relief.” Federal courts developed a well-settled set of principles to apply when deciding whether to dismiss a claim. Among these principles are the following: (1) the plaintiff’s factual allegations are accepted as true; (2) the court must construe the complaint liberally (in favor of the plaintiff) and draw all reasonable inferences in favor of the plaintiff; (3) the court may not consider matters or information beyond what is stated on the face of the complaint, judicially noticed facts, and any attachments to the complaint; (4) the complaint must provide notice to the defendant of the plaintiff’s claims and the grounds on which they rest; and (5) the court should not dismiss the complaint for failure to state a claim unless it

* © Henry S. Noyes 2011. Professor of Law, Chapman University School of Law. I thank the Honorable Jon O. Newman and Professors Scott Dodson and Kevin Clermont for helpful comments on various drafts of this Article. I also am grateful for the comments offered by my colleagues at a Chapman University School of Law faculty workshop.

1. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

2. *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 626 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2165 (2011).

appears beyond doubt that it is impossible for the plaintiff to prove some set of facts in support of his or her claim which would entitle him or her to relief.

These principles can be summarized as: the court must accept the vision of the world described in the plaintiff's complaint and it must view the events that transpired in that world as the plaintiff would view them. This concept is consistent with the adversarial litigation process we have adopted in the United States.³

The litigants are entitled to their day in court to present their cases to an impartial and independent trier of fact. The trier of fact starts with an empty frame and the parties set forth their competing versions of reality. They recreate a past event through the submission of evidence to the trier of fact. The theory behind the adversarial system is that placing responsibility for uncovering evidence on the parties is the best way to ensure that the trier of fact remains impartial, yet obtains all relevant evidence and the most compelling argument in favor of each side's position. The trier of fact accepts the universe of facts that is presented by the parties. The trier of fact does not substitute his or her view of the world and does not supplement the facts submitted by the parties, especially at the pleading stage.

Despite the fact that the trier of fact is getting an incomplete (and sometimes erroneous) view of reality, the court does not step in and substitute its own reality for that presented by the parties. As noted by Chief Justice Roberts, a judge's job is to "call balls and strikes, and not to pitch or bat,"⁴ even if the team that deserves to win is losing. In its recent decisions on pleading standards, however, the Supreme Court has now asked district courts to suit up and get in the game.

In *Bell Atlantic Corp. v. Twombly*⁵ and *Ashcroft v. Iqbal*,⁶ the Supreme Court modified the principles that guide a district court's decision when faced with a motion to dismiss for failure to state a claim. A district court now must determine whether the claim is *plausible*. The Court also declared that "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing

3. See JOHN J. COUND ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* 2 (8th ed. 2001) ("The central feature of [the adversarial system] is the almost total responsibility placed on the parties to the controversy for beginning suit, for shaping issues, and for producing evidence; the court almost takes no active part in these facets of the process." (emphasis omitted)).

4. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of Judge John G. Roberts, D.C. Cir.) [hereinafter *Roberts Confirmation Hearing*]. Although there are critics of Chief Justice Roberts's analogy as imperfect, the criticism is focused on the description of "calling balls and strikes." See, e.g., Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1711-23 (2007); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 702-12 (2007). None argue that a judge's job is to engage in the game of litigation as an advocate.

5. 550 U.S. 544 (2007).

6. 129 S. Ct. 1937 (2009).

court to draw on its judicial experience and common sense.”⁷ Early commentary assumes that the application of judicial experience requires a district court to make a *subjective* determination of the merits of the claim based on that judge’s vision of reality.

A careful review of the meaning of “judicial experience” in the Supreme Court’s opinions, however, refutes this understanding. Instead, the application of judicial experience requires a district court to refer to *objective* information, albeit extraneous to the complaint, to inform itself of the “truth” of the factual picture painted by the plaintiff in the complaint. The court must consider the views of experts and commentators and the experience of the courts as manifest through the results of earlier cases to decide which types of claims, claimants, and factual scenarios ought to be held to a higher pleading standard. In short, the application of judicial experience requires the district courts to develop a common law of federal pleading standards that will be improved and refined over time.

Although this process requires an *objective* determination, it permits, and even requires, the district court to reject the vision of the world presented by the plaintiff in the complaint. Instead, the court must view the facts differently—either based on the results of past cases or the wisdom of experts and commentators on the “reality” of the situation—and make a determination about whether the case *should* go forward. In other words, the district court must suit up, become a player, and get in the game of litigation to protect defendants and the judicial system from cases that are *not meritless*, but are deemed to be *objectively unworthy*.

II. THE LIBERAL PLEADING STANDARD UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

The Federal Rules of Civil Procedure were enacted in 1938. At all times, Rule 8 has governed the “General Rules of Pleading” and established the minimum amount that a party must allege in order to state a claim. As originally enacted in 1938, Rule 8(a)(2) stated: “A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.”⁸ Although Rule 8 of the Federal Rules of Civil Procedure has been amended three times,⁹ the language of Rule 8(a)(2) has remained substantially the same. Today it states: “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.”¹⁰ The *crucial* language of Rule 8 has remained exactly

7. *Id.* at 1950.

8. FED. R. CIV. P. 8(a) (1938) (amended 1966).

9. Rule 8 was amended on February 28, 1966, on March 2, 1987, and again on April 28, 2007. *See* FED. R. CIV. P. 8.

10. FED. R. CIV. P. 8(a)(2).

the same. The plaintiff must include in the complaint “a short and plain statement of the claim showing that the pleader is entitled to relief.”

If a plaintiff's complaint fails to comply with Rule 8(a), the defendant may respond by making a Rule 12(b)(6) motion to dismiss for “failure to state a claim upon which relief can be granted.”¹¹ A complaint may be deficient because it fails to pursue a legally recognized claim (“legal insufficiency”) or because it fails to allege enough facts to state a claim (“factual insufficiency”).¹² If the complaint suffers from legal insufficiency, the claim will be dismissed without leave to amend.¹³ If the complaint suffers from factual insufficiency, the plaintiff's claim will be dismissed with leave to amend and (usually) the plaintiff will try to amend the complaint to add additional factual allegations to state a claim for relief.

A. Principles for Application of the Liberal Pleading Standard

Over the course of more than seventy years, the Supreme Court established and elaborated on a set of principles that a district court should apply when deciding a motion to dismiss for failure to state a claim.

- The Federal Rules of Civil Procedure employ a liberal pleading standard.¹⁴
- Rule 8(a) does not require the plaintiff to allege specific facts.¹⁵
- A complaint is sufficient if it provides “notice” to the defendant of what the plaintiff's claims are and the grounds on which they rest.¹⁶
- A plaintiff's factual allegations must be accepted as true.¹⁷

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

12. See generally Wendy Gerwick Couture, Conley v. Gibson's “No Set of Facts” Test: Neither Cancer Nor Cure, 114 PENN ST. L. REV. PENN STATIM 19 (2010), available at <http://pennstatelawreview.org/114/114%20Penn%20Statim%2019.pdf>; Bradley Scott Shannon, I Have Federal Pleading All Figured Out, 61 CASE W. RES. L. REV. 453 (2010).

13. See Shannon, *supra* note 12, at 475 (“[A] plaintiff seemingly has little choice but to somehow convince the district court that the cause of action underlying its claim, though novel, should be recognized.”).

14. See, e.g., Swierkiewicz v. Sorema N. A., 534 U.S. 506, 514 (2002) (“The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.”).

15. See Erickson v. Pardus, 551 U.S. 89, 93 (2007); see also Conley v. Gibson, 355 U.S. 41, 47 (1957) (“[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

16. See, e.g., Twombly, 550 U.S. at 555; Swierkiewicz, 534 U.S. at 514 (“[P]etitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims.”); Conley, 355 U.S. at 47.

17. See Erickson, 551 U.S. at 94; Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993) (“We review here a decision

- The court must construe the complaint liberally and draw all reasonable inferences in favor of the plaintiff.¹⁸
- The court may not consider matters or information beyond that stated on the face of the complaint, judicially noticed facts, and any attachments to the complaint.¹⁹
- “In appraising the sufficiency of the complaint [the Supreme Court] follow[s] the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”²⁰

Thus, Rule 8 establishes a liberal pleading standard that is transsubstantive; it applies the same to all types of claimants and across all types of claims. Where the Federal Rules of Civil Procedure require heightened pleading, the rules are explicit about the types of claims and the pleading standard that applies. Rule 9 requires that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”²¹ Rule 9’s requirement of pleading with particularity is con-

granting a motion to dismiss, and therefore must accept as true all the factual allegations in the complaint.”); *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (“What Rule 12(b)(6) does not countenance are dismissals based on a judge’s disbelief of a complaint’s factual allegations.”); *United States v. Shubert*, 348 U.S. 222, 225 (1955) (“The allegations of the complaint, on a motion to dismiss, must of course be taken as true.”); *United States v. New Wrinkle, Inc.*, 342 U.S. 371, 376 (1952) (holding that on motion to dismiss, courts must “admit all of the [allegations] as true”); *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 414 (1942) (holding that when ruling on motion to dismiss courts must accept “the allegations of the complaint as true”).

18. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated by* *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *see also* *Frame v. City of Arlington*, 616 F.3d 476, 481 (5th Cir. 2010), *vacated*, 657 F.3d 215 (2011); *Scott v. Fischer*, 616 F.3d 100, 105 (2d Cir. 2010); *Abcarian v. McDonald*, 617 F.3d 931, 933 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1685 (2011).

19. *FED. R. CIV. P. 12(d)* (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.”); *see also* *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (“[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.”); *Miller v. Herman*, 600 F.3d 726, 733 (7th Cir. 2010); *Hall v. Hodgkins*, 305 F. App’x 224, 228 n.1 (5th Cir. 2008).

20. *Conley*, 355 U.S. at 45-46. As the Second Circuit noted in its *Iqbal* opinion, “the ‘no set of facts’ language from *Conley* . . . has been cited by federal courts at least 10,000 times in a wide variety of contexts.” *Iqbal v. Hasty*, 490 F.3d 143, 157 n.7 (2d Cir. 2007), *rev’d*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

21. *FED. R. CIV. P. 9(b)*. In stating a claim for fraud, a plaintiff must allege the specific facts regarding the fraud such as the identity of the person making the fraudulent statement(s), the identity of the person to whom the fraudulent statements were made, and the time, place, and nature of the fraudulent statements. *See Ross v. Bolton*, 904 F.2d 819, 823 (2d Cir. 1990). Rule 9(f) further provides

sistent with code pleading requirements;²² it is inconsistent with the more relaxed requirements of Rule 8.

Rule 8 does not establish a standard by which to evaluate the merit of a claim or the likelihood of success of a claim.²³ This is not to say that the Federal Rules of Civil Procedure are unconcerned with the merits of a claim. The Rules employ a series of requirements and procedural devices to ensure that a case has some merit before a plaintiff will seek to state a claim and proceed with litigation.²⁴ For example, Rule 11 requires a plaintiff's attorney to "certif[y] that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," that the claims the plaintiff asserts are warranted and that the factual allegations currently have evidentiary support or will likely have evidentiary support after discovery.²⁵ Sanctions for filing a meritless complaint that violates Rule 11 include payment of a penalty to the court or the opposing party,²⁶ "an admonition, reprimand, or censure" of the offending attorney by the court,²⁷ and referral of the matter to the state bar association or other relevant disciplinary authorities.²⁸

that "[a]n allegation of time or place is material when testing the sufficiency of a pleading." FED. R. CIV. P. 9(f). But cases interpreting this provision clarify that a plaintiff ordinarily is not required to allege in the complaint the time when or the place where the events at issue occurred. "Rule 9(f) does not have the effect of *requiring* allegations of time and place, but merely operates to make such allegations, *if made*, material for the purposes of testing the sufficiency of the pleading as against, for example, a motion to dismiss." *Kuenzell v. United States*, 20 F.R.D. 96, 99 (N.D. Cal. 1957) (citing 2 JAMES WILLIAM MOORE, FEDERAL PRACTICE § 9.07 (1955)); *see also* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1309 (Supp. 2010).

22. *See* *Christidis v. First Pa. Mortg. Trust*, 717 F.2d 96, 99 (3d Cir. 1983) (citing CHARLES E. CLARK, CODE PLEADING § 48, at 312 (2d ed. 1947)).

23. *See Conley*, 355 U.S. at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."); *see also* FED. R. CIV. P. 8(e) ("Pleadings must be construed so as to do justice.").

24. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 513 (2002) ("Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard.").

25. FED. R. CIV. P. 11(b).

26. FED. R. CIV. P. 11(c)(4).

27. FED. R. CIV. P. 11 advisory committee's notes (1993).

28. *Id.* The Federal Rules of Civil Procedure work in tandem with various rules of professional responsibility. For example, some states have *mandatory* reporting requirements for such sanctions. California, for one, requires that both the sanctioned attorney and the judge issuing the monetary sanctions must report sanctions of more than \$1,000 to the State Bar. *See* CAL. BUS. & PROF. CODE §§ 6068(o)(3), 6086.7(a)(3) (West 2011). The California State Bar is then obligated to investigate any sanctions and determine whether to institute disciplinary proceedings against the offending attorney. CAL. BUS. & PROF. CODE § 6086.7(c).

Rule 56 permits a defendant to move for summary judgment on all or part of a claim at any time until thirty days after the close of discovery.²⁹ The discovery rules allow the parties to discover all of the evidence that supports their adversary's claim.³⁰ It also allows them to discover that their adversary has no evidence, which may be the basis for a summary judgment motion.³¹ Thus, a variety of Federal Rules discourage plaintiffs from pursuing meritless claims and allow defendants to seek early resolution of meritless claims. Beyond the Federal Rules of Civil Procedure, there is one significant deterrent to plaintiffs' lawyers pursuing meritless cases. It generally does not make economic sense to pursue cases for which there will be no financial return.³²

29. FED. R. CIV. P. 56(b)-(c); *see also Swierkiewicz*, 534 U.S. at 514 (“[C]laims lacking merit may be dealt with through summary judgment under Rule 56.”).

30. The Rules limit the scope of discovery. *See, e.g.*, FED. R. CIV. P. 26(b)(1) (limiting scope of discovery, as matter of right, to “any nonprivileged matter that is relevant to any party’s claim or defense” and providing that only upon showing of “good cause” may additional, broader discovery be permitted by order of court). I have written elsewhere, however, that district courts generally refuse to apply the limitations on discovery, despite the fact that the rules have been amended repeatedly to constrain discovery. *See* Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 60-67 (2007). The Supreme Court seems to agree, and its lack of faith in the ability and the willingness of judges to control discovery costs is one of (maybe the main?) reason that it has focused its attention on pleading standards. *See* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (“It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management’ given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.” (citation omitted)).

31. *See, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (determining, on summary judgment, “the burden on the moving party may be discharged by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case”).

32. The U.S. legal system permits (some would say encourages), however, plaintiffs to pursue marginal cases because (as a general matter) each side bears its own costs. A loss for a plaintiff means only a failure to recover, rather than an obligation to reimburse a defendant’s costs and attorneys’ fees, and the costs of vindication for a defendant may not make economic sense. *See, e.g.*, Mark Anderson & Max Huffman, *Iqbal, Twombly, and the Expected Cost of False Positive Error*, 20 CORNELL J.L. & PUB. POL’Y 1, 20-21 (2010); *see also Twombly*, 550 U.S. at 559 (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment] proceedings.”); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (“[A] plaintiff with a largely groundless claim [may seek to] take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence . . .”). Plaintiffs might file suits where they are ignorant of the merits, as well as suits where they know the claim is meritless. *See* Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 530-31 (1997).

B. *The Liberal Pleading Standard Is Consistent with the Adversarial Process*

The adversarial nature of the Federal Rules of Civil Procedure is a hallmark of the American system of justice.³³ The liberal pleading standard is “the keystone”³⁴ of the Federal Rules of Civil Procedure and is consistent with the adversarial process of litigation, which is based on the notion that “the crucible of meaningful adversarial testing”³⁵ is the best guarantor of a just result.³⁶ Under the adversarial process, the parties bring forth evidence to paint a picture of some event that happened in the past. The trier of fact (judge or jury) does not independently investigate the facts, but instead remains neutral so as to avoid reaching a premature decision.³⁷ Judges rely on the parties to frame the dispute and to present evidence as they see fit.³⁸

What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties. . . . Our system of justice is, and has always been, an inquisitorial one at the investigatory stage (even the grand jury is an inquisitorial body), and no other disposition is conceivable.³⁹

The reality that is presented to the trier of fact is necessarily incomplete, even by the time trial has concluded and all witnesses have testified. First, it is an attempt to recreate an earlier event that has already happened. People change. Witnesses forget things. Witnesses and evidence are lost over time. Some critical events are never witnessed and the parties and the trier of fact must make educated guesses about the actual events that unfolded. Second, the rules of evidence sometimes exclude relevant evidence. Third, the parties regularly choose not to submit relevant evidence because it is harmful to their case. Fourth, some parties do a poor

33. See generally FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 1.2, at 4 (4th ed. 1992).

34. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 68, at 470 (5th ed. 1994); see also Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1917 (1998) (describing Rule 8 as “a jewel in the crown of the Federal Rules”).

35. *United States v. Cronin*, 466 U.S. 648, 656 (1984).

36. See *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984); see also *Polk Cnty. v. Dodson*, 454 U.S. 312, 318 (1981) (“The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.”).

37. See Robert Bacharach & Lyn Entzeroth, *Judicial Advocacy in Pro Se Litigation: A Return to Neutrality*, 42 IND. L. REV. 19, 42 (2009) (“[T]he greater danger is the loosening of the well-designed constraints on the role of the judiciary in the adversarial process. Judges are not advocates or advisors. When judges adopt these roles, they violate deeply embedded legal principles.”).

38. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363-81 (1978); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 29 (2003).

39. *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991).

job and fail to present all of the evidence that is helpful to their case. Finally, the parties, the courts, and the jurors are limited in the time that they can devote to the issues at trial.

The liberal notice pleading standard is consistent with the adversarial process. A district court must accept the picture that is painted by the plaintiff's factual allegations.⁴⁰ Even if the picture seems odd or counter-intuitive, the judge does not seek out extrinsic evidence or substitute his or her vision or expectations of the "truth" for that described by the plaintiff.

It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially; a private deed, not communicated to him, whatever may be its character . . . is totally unknown, and cannot be acted upon. The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause; such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages.⁴¹

III. TWOMBLY, IQBAL, AND THE "NEW" FEDERAL PLEADING STANDARD

Despite periodic calls for reform,⁴² it was generally accepted by the Supreme Court, lower courts, and practitioners that liberal notice pleading was the law of the land⁴³ unless and until Rule 8(a) was amended through the rulemaking process.⁴⁴ Thus, Rule 8(a) did not permit a district court to dismiss a complaint that gave the defendant notice of the plaintiff's claim and the grounds upon which it rested "unless it ap-

40. See *supra* notes 14-20 and accompanying text.

41. United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833).

42. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 445-46 (1986) (criticizing "lax" federal pleading standards and pro-plaintiff bias in federal rules).

43. See, e.g., Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 855 (2008) ("Whatever its consequences, the *Conley* standard was clear and well-settled. There was certainly no groundswell to reexamine *Conley*, and no one thought that it was in danger of being altered."). See generally 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1215 (3d ed. 2004) (listing cases treating pleading standards).

44. See Swierkiewicz v. Sorema N. A., 534 U.S. 506, 515 (2002) ("A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" (quoting *Leatherman v. Tarrant Cnty. Narcotics & Intelligence Unit*, 507 U.S. 163, 168 (1993))); see also *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) ("[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.").

pear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief.”⁴⁵

This settled meaning of Rule 8(a) was reiterated numerous times by the Supreme Court despite efforts by various district courts to heighten the pleading standard by requiring the plaintiff to allege more specific facts in support of a claim. As recently as 2002, the Supreme Court stated in a *unanimous* opinion that:

[Rule 8(a)(2)] provides that a complaint must include only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Such a statement must simply “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of un-meritorious claims.

....

... Given the Federal Rules’ simplified standard for pleading, “[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” ... The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.⁴⁶

In 2007, however, the Supreme Court gave new meaning to Rule 8(a).

A. Bell Atlantic Corp. v. Twombly

In *Bell Atlantic Corp. v. Twombly*, the plaintiff-consumers filed a putative class action alleging that the defendant-telecommunications companies had illegally conspired to restrain trade.⁴⁷ The defendants moved to dismiss for failure to state a claim on the ground that the plaintiffs had failed to allege facts showing that the defendants entered into an illegal agreement, and had instead asked the court to infer the existence of such an agreement based on parallel conduct. The district court granted the motion to dismiss because an illegal agreement between the defendants was not the only possible explanation for their parallel conduct.⁴⁸ The court held that the plaintiffs were required to allege at least one additional fact (referred to as a “plus factor”) “that tends to exclude independent self-interested conduct as an explanation for defendants’ parallel behav-

45. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

46. *Swierkiewicz*, 534 U.S. at 513-14 (citation omitted) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

47. *See Twombly*, 550 U.S. at 544.

48. *See id.* at 552.

ior.”⁴⁹ The court concluded that the plaintiffs had failed to allege necessary facts “suspicious enough to suggest that defendants [were] acting pursuant to a mutual agreement rather than their own individual self-interest.”⁵⁰

The Court of Appeals for the Second Circuit reversed.⁵¹ Following existing precedent, the court held that the plaintiffs merely had to allege facts that “include[d] conspiracy among the realm of ‘plausible’ possibilities in order to survive a motion to dismiss” and found that they had done so.⁵² The Second Circuit then noted that the district court had neglected the *Conley* standard in dismissing the plaintiffs’ complaint. It concluded that “to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.”⁵³

The Supreme Court reversed the Second Circuit. In a 7-2 opinion authored by Justice Souter, the Court stated that *Conley*’s

“no set of facts” language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard.⁵⁴

The Supreme Court interpreted the *Conley* standard as one of factual sufficiency (arguably wrongly so),⁵⁵ and explicitly rejected that standard.⁵⁶ Instead, the Court stated that a plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.”⁵⁷ The Court held that the defendants’ motion to dismiss for failure to state a claim must be granted “[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible.”⁵⁸

49. *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003), *rev’d*, 425 F.3d 99 (2d Cir. 2005), *rev’d*, 550 U.S. 544.

50. *Id.* at 182.

51. *See Twombly*, 425 F.3d at 102.

52. *See id.* at 114 (reversing district court decision).

53. *Id.*

54. *Twombly*, 550 U.S. at 561 (citation omitted).

55. *See Couture*, *supra* note 12, at 24-29 (discussing factual sufficiency standard in *Conley*). *See generally* Shannon, *supra* note 12.

56. *See Twombly*, 550 U.S. at 561-63.

57. *Id.* at 570.

58. *Id.* Likewise, the Court stated that “[a]n allegation of parallel conduct . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of ‘entitlement’ to relief.” *Id.* at 557 (alteration in original).

The Court expressly denied that it wanted district court judges to determine the probability of success on a claim.⁵⁹ Nevertheless, “[i]n so ruling, the Court imposed an entirely new test on the pleading stage, instituting a judicial inquiry into the pleading’s convincingness.”⁶⁰

B. Ashcroft v. Iqbal

In 2009, the Court revisited its new pleading test and made clear that this new test applied to *all* federal civil complaints, not just complaints seeking to assert a claim for an antitrust violation.⁶¹ This opinion, however, garnered a bare 5-4 majority and Justice Souter, the author of the *Twombly* opinion, dissented.

In *Ashcroft v. Iqbal*, a Pakistani Muslim who was arrested in the wake of the 9/11 terrorist attacks sued, among others, former Attorney General John Ashcroft and FBI Director Robert Mueller.⁶² Javid Iqbal alleged that the defendants violated the Constitution when they subjected him to harsh conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.”⁶³ Ashcroft and Mueller moved to dismiss the claims against them.⁶⁴ The district court, relying on the *Conley* “no set of facts” standard, denied the motion.⁶⁵

While the defendants’ appeal to the Second Circuit was pending, the Supreme Court issued its *Twombly* opinion. The Second Circuit applied the new “plausibility” standard to Iqbal’s complaint and affirmed the district court’s denial of the motion to dismiss. The Supreme Court’s decision focused on the defendants’ status as high-ranking government officials who could not be held liable for the unconstitutional actions of their subordinates.⁶⁶ Instead, the Court noted the following:

[T]o state a claim based on a violation of a clearly established right, [the plaintiff] must plead sufficient factual matter to show that [defendants Ashcroft and Mueller] adopted and implemented the detention policies at issue not for a neutral, investiga-

59. *See id.* at 545 (“Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”).

60. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 827 (2010).

61. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions’ and it applies to antitrust and discrimination suits alike.” (citation omitted)).

62. *See id.* at 1939.

63. *Id.* at 1944 (alteration in original) (internal quotation marks omitted).

64. *See id.* The complaint alleged twenty-one causes of action against thirty-four current and former federal officials and nineteen “John Doe” federal corrections officers. *See id.* at 1943. But only the allegations against Ashcroft and Mueller were relevant to the issues before the Supreme Court. *See id.* at 1943-44.

65. *See id.* at 1944-45.

66. *See id.* at 1948.

tive reason but for the purpose of discriminating on account of race, religion, or national origin.”⁶⁷

In other words, the plaintiff had to allege specific facts establishing that the defendants acted with a discriminatory state of mind.

The Supreme Court then applied its new pleading test to the complaint in *Iqbal*. The Court determined that the following allegations were “conclusory” and therefore unworthy of an assumption of truth: (1) that the defendants “‘knew of, condoned, and willfully and maliciously agreed to subject [Iqbal]’ to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest’”; (2) “that Ashcroft was the ‘principal architect’ of this invidious policy”; and (3) “that Mueller was ‘instrumental’ in adopting and executing it.”⁶⁸ Not surprisingly, the Court’s conclusion that it was required to disregard these conclusory allegations has come under significant criticism. Professors Kevin M. Clermont and Stephen C. Yeazell have stated that the Court’s new framework is illegitimate because it contravenes the history and purpose of the Federal Rules: “the system of civil litigation created by the Federal Rules had always credited conclusory allegations.”⁶⁹ None other than Justice Souter, the author of the Court’s *Twombly* opinion, argued in dissent that, even accepting the premise that Rule 8 required the Court to disregard conclusory allegations, the Court had wrongly rejected a slew of factual allegations as conclusory. Justice Souter’s opinion is shared by a long list of civil procedure scholars.⁷⁰

The Supreme Court next considered the remaining factual allegations “to determine if they plausibly suggest[ed] an entitlement to relief.”⁷¹ The Court identified two nonconclusory allegations: (1) that “the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11”; and (2) that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT

67. *Id.* at 1948-49.

68. *See id.* at 1951 (citations omitted).

69. Clermont & Yeazell, *supra* note 60, at 836.

70. *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 859-60 (2010); Clermont & Yeazell, *supra* note 60, at 834-36; Sybil Dunlop & Elizabeth Cowan Wright, *Plausible Deniability: How the Supreme Court Created a Heightened Pleading Standard Without Admitting They Did So*, 33 HAMLINE L. REV. 205, 221-22 (2010); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 580-81 (2010); Dawinder S. Sidhu, *First Korematsu and Now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court’s Disregard for Claims of Discrimination*, 58 BUFF. L. REV. 419, 485 (2010); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 194-95 (2010).

71. *Iqbal*, 129 S. Ct. at 1951.

and MUELLER in discussions in the weeks after September 11, 2001.”⁷² The Court quickly concluded that such allegations were “consistent with [the defendants’] purposefully designating detainees ‘of high interest’ because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.”⁷³

The Court adopted the *Twombly* plausibility standard in *Iqbal*, but it provided little guidance on how to draw the line between plausible and implausible claims.⁷⁴ The Supreme Court again expressly denied that it wanted district court judges to determine the probability of success on a claim.⁷⁵ But the Supreme Court clearly went further in that direction in *Iqbal* than it did in *Twombly*. Numerous commentators quickly swung into action to try to define and explain the meaning of plausibility.⁷⁶ Although these commentators define plausibility differently, they generally agree that plausibility is a more rigorous standard and that the Supreme Court expects district courts to grant more motions to dismiss for failure to state a claim.⁷⁷ As Professor Robert Bone stated, “*Twombly* uses plausibility to screen only for truly meritless suits, but *Iqbal* uses it to screen for weak lawsuits too.”⁷⁸

72. *Id.* (alteration in original) (citations omitted) (internal quotation marks omitted).

73. *Id.*

74. See *Dobyns v. United States*, 91 Fed. Cl. 412, 423 (2010) (“*Iqbal* and *Twombly* contain few guidelines to help the lower courts discern the difference between a “plausible” and an implausible claim and a “conclusion” from a “detailed fact.”” (quoting *Riley v. Vilsack*, 665 F. Supp. 2d 994, 1002-03 (W.D. Wis. 2009))).

75. See *Iqbal*, 129 S. Ct. at 1949 (“The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007))).

76. See, e.g., Bone, *supra* note 70, at 859-60; Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 461-63 (2010) (remarking that plausibility standard is “more restrictive” than past standards and represents “major shift” from previous pleading requirements); McMahon, *supra* note 43, at 863-64; David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 134-35 (2010) (examining threshold of plausibility, questions regarding plaintiff’s lack of knowledge, and issues surrounding affirmative defenses); Robert L. Rothman, *Twombly and Iqbal: A License to Dismiss*, LITIG., Spring 2009, at 1, 2; A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009); Daniel W. Robertson, Note, *In Defense of Plausibility: Ashcroft v. Iqbal and What the Plausibility Standard Really Means*, 38 PEPP. L. REV. 111, 129 (2010) (calling plausibility standard “minimal threshold” and “relatively low bar” for plaintiffs); Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal*, 94 MINN. L. REV. 505, 530 (2009).

77. See, e.g., Rothman, *supra* note 76, at 2 (suggesting that district court judges are invited to dismiss claims based on their subjective notions); see also Clermont & Yeazell, *supra* note 60; Dunlop & Wright, *supra* note 70, at 221-22; Spencer, *supra* note 70, at 194-95 (arguing that plausibility standard amounts to heightened evidentiary requirement).

78. Bone, *supra* note 70, at 851. “By a ‘truly meritless suit,’ I mean a lawsuit in which the defendant is *clearly* not liable as an *objective* matter.” *Id.* at 870 (emphasis

IV. TWOMBLY, IQBAL AND THE MEANING AND APPLICATION OF JUDICIAL EXPERIENCE

The Supreme Court's plausibility test includes the following new principles:

- “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”⁷⁹
- “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’”⁸⁰
- In determining whether relief is plausible, the judge must apply judicial experience and common sense to the remaining factual allegations in the light of the context of the particular case.⁸¹

Although much has been written about the Supreme Court’s new plausibility standard, very little has been written about the Court’s statement that a district court must “draw on its judicial experience” to determine whether a claim is plausible. Some commentators have questioned what the phrase “judicial experience” means:

What exactly is judicial experience and common sense? Should a judge rely on past cases involving similar factual situations? How similar do these cases have to be? Would this small sample even be a useful source of information from which to draw a conclusion? What if a judge was new to the bench?⁸²

This Article seeks to answer the question, “What is judicial experience and how does a court apply it?” This Article does not focus on the meaning and application of the well-defined term “common sense.”⁸³

added). A lawsuit that is not meritless, but is “weak,” is one with “too low a probability of trial success.” *Id.*

79. *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570).

80. *Id.* (citations omitted).

81. *See id.* at 1950.

82. Stephen R. Brown, *Correlation Plausibility: A Framework for Fairness and Predictability in Pleading Practice After Twombly and Iqbal*, 44 CREIGHTON L. REV. 141, 144-45 (2010).

83. As set forth in BLACK’S LAW DICTIONARY:

The federal courts generally have not discussed the meaning of judicial experience or the proper method to apply it.⁸⁴ Early commentary on the Court's new pleading standard often mentions the application of judicial experience, but simply asserts that the standard is self-defining or obvious.⁸⁵ Most commentators assume, or conclude without stating the basis for their conclusions, that the application of judicial experience requires a district court to make *subjective* determinations about whether the plaintiff's vision of the world is credible and whether the claim is meritorious.⁸⁶

Common Sense. Sound practical judgment; that degree of intelligence and reason, as exercised upon the relations of persons and things and the ordinary affairs of life, which is possessed by the generality of mankind, and which would suffice to direct the conduct and actions of the individual in a manner to agree with the behavior of ordinary persons.

BLACK'S LAW DICTIONARY 276 (6th ed. 1990). Because the Supreme Court used the separate phrases of "judicial experience" and "common sense," it is likely that the Court intended for them to have different meanings.

84. A February 27, 2011 Westlaw search of the "ALLFEDS" database for the words "judicial /2 experience" and a date after 2008 returned nearly 3,500 documents. Clearly, many courts refer to the application of judicial experience. A review of the decisions, however, gives no insight into what judicial experience entails or how a district court is to apply it. For example, the search revealed forty published opinions issued by one of the federal courts of appeal. None of these forty published opinions discussed the meaning of "judicial experience."

85. Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 21, 2009, at A10, available at <http://query.nytimes.com/gst/fullpage.html?res=9F02E1DA153AF932A15754C0A96F9C8B63&ref=adamliptak> (quoting Professor Stephen Burbank that new standard "'obviously licenses highly subjective judgments'" and "'is a blank check for federal judges to get rid of cases they disfavor'").

86. See Pamela Atkins, Twombly, Iqbal Introduce More Subjectivity to Rulings on Dismissal Motions, *Judge Says*, 78 U.S.L.W. 2667, 2667 (2010) (quoting district court Judge Sydney Stein that new standard will be "'more subjective, more flexible'"); Andrew Blair-Stanek, Twombly Is the Logical Extension of the Mathews v. Eldridge Test to Discovery, 62 FLA. L. REV. 1, 39 n.322 (2010) ("Experience and common sense inherently invite a subjective analysis."); Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337, 1355 (2010) (opining that plausibility test is "unclear and subjective"); Matthew Fischer, *IP Litigation Strategies in the Context of Current Trends*, in LITIGATION STRATEGIES FOR INTELLECTUAL PROPERTY CASES 20 (Michaela Falls ed., 2010) ("What makes the application of the plausibility standard so unpredictable is that the Supreme Court left it to the subjectivity of each district court . . ."); Hatamyar, *supra*, note 70, at 624 ("*Iqbal* uncritically embraced *Twombly*'s 'plausibility' standard without providing much further guidance except for the highly subjective directive to the lower courts to use 'judicial experience and common sense.'"); Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 270-71 ("[T]he decision invites 680-plus district judges to conjure rules on the fly by applying 680-plus distinct bodies of 'judicial experience and common sense' to assess 'plausibility.'"); Ramzi Kassem, *Implausible Realities: Iqbal's Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443, 1447 (2010) (treating "*Iqbal*'s Disquieting Embrace of Judicial Subjectivity"); 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, 93 (2010) (remarking that application of "judicial experience and common sense" permits "subjectivity [that] can result in multiple outcomes in cases in which there are comparable pleadings"); Arthur R.

The few federal judges who have spoken on the issue also assume that the application of judicial experience requires a subjective determination.⁸⁷ This understanding of judicial experience is consistent with the Supreme Court's statement that a district court must draw on *its* judicial experience, rather than judicial experience in general.

Most commentators take the view that the addition of such subjectivity supports arguments against our current litigation system.⁸⁸ District

Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 26 (2010) (arguing that judicial experience and common sense are "highly ambiguous and subjective concepts largely devoid of accepted—let alone universal—meaning"); Miller, *supra*, at 29 ("[T]he Court provided little direction on how to measure the palpably subjective factors of 'judicial experience,' 'common sense,' and a 'more likely' alternative explanation it has inserted into the Rule 12(b)(6) dynamic."); Rothman, *supra* note 76, at 2 ("[I]t appears to be a standard that invites district court judges to dismiss cases based on their own subjective notions of what is *probably* true—a determination that apparently can be made based on events outside the four corners of the complaint."); 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, 530 (2010) ("[R]eliance on 'judicial experience' and 'common sense' necessarily adds a more subjective element to a district court's assessment of whether a plaintiff's claim should go forward."); Spencer, *supra* note 70, at 186 ("One thing that is remarkable about [*Iqbal*] is the Court's decision to permit judges to disregard certain alleged facts and use their 'experience and common sense' to evaluate the plausibility of a claim, rather than holding them to the traditional and more objective approach . . ."); Rajiv Mohan, Recent Development, *A Retreat from Decision by Rule in Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), 33 HARV. J.L. & PUB. POL'Y 1191, 1197 (2010) ("This expression of the role of the judiciary suggests that plausibility is not meant to be guided by clear principles, but instead by the wisdom of judges.").

87. See *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1346 (11th Cir. 2010) (Ryskamp, J., dissenting) ("When plausibility is based on a judge's common sense and experience, different judges will have different opinions as to what is plausible, resulting in a totally subjective standard for determining the sufficiency of a complaint."); see also Shira A. Scheindlin, *The Future of Litigation*, in 27TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION, at 1371, 1374-75 (PLI Lit. & Admin. Practice, Course Handbook Ser. No. 836, 2010) ("Now [applying judicial experience and common sense] is and should be a frightening thought. When courts are told to draw on experience and common sense that means that predictability will vanish because every judge has had different experiences and has a different definition of common sense."). But see *Adams v. N.Y. State Educ. Dep't*, 752 F. Supp. 2d 420, 429 (S.D.N.Y. 2010) (noting that application of judicial experience requires district court to apply "practical test of objective experience").

88. See, e.g., Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 118 (2009) ("Judgments about the plausibility of a complaint are necessarily comparative. They depend in that regard on a judge's background knowledge and assumptions, which seem every bit as vulnerable to the biasing effect of that individual's cultural predispositions as are judgments about adjudicative facts."); Scheindlin, *supra* note 87, at 1374-75 (noting negative consequences of new standard: decreased predictability of motions to dismiss, increased outcome determination by judges instead of juries, and higher likelihood of dismissal in complex litigation); Allan R. Stein, *Confining Iqbal*, 45 TULSA L. REV. 277, 284 (2009) ("To allow a judge to make those determinations based on his own sense of history and human behavior without the benefit of an adversarial presentation of the facts is the precise definition of prejudice: he is pre-judging, without

Judge Lee Rosenthal, who is also Chair of the Judicial Conference Committee on Rules of Practice and Procedure, has stated:

Some of the reaction to *Twombly*, and particularly to *Iqbal*, is hard for me to read as a judge because it reveals a somewhat cynical view of what judges do and how they do it. That view is that judges, either intent on advancing a personal ideological agenda or helpless to prevent the influence of that agenda, will use the *Twombly* and *Iqbal* decisions to dismiss “disfavored” cases.⁸⁹

In order to assess the impact of this new plausibility standard on our system of litigation, we need to determine what the Supreme Court means when it commands a district court to draw on its judicial experience.⁹⁰

A. *Twombly*, *Iqbal*, and Judicial Experience

What did the Supreme Court say in *Twombly* and *Iqbal* about the meaning and application of judicial experience? Almost nothing.

The Supreme Court never used the phrase “judicial experience” in its *Twombly* opinion.⁹¹ It used the word “experience” once in its *Twombly* opinion. The Court stated:

The nub of the complaint, then, is the ILECs’ parallel behavior, consisting of steps to keep the CLECs out and manifest disinterest in becoming CLECs themselves, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience.⁹²

This understanding of experience does not require a subjective determination. Instead, it invites an *objective* determination. What is the most reasonable inference to be drawn from the facts asserted in the instant

regard to the evidence.”); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1313 (2010) (“On its own terms, this inquiry places few constraints on judges and embraces a dangerous amount of subjectivity.”); Mohan, *supra* note 86, at 1199 (“Furthermore, the arbitrariness inherent in *Iqbal*’s new standard threatens to increase partiality in judicial decision making.”). But see Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 498 (2010) (“The need to rely on experience and common sense in drawing inferences is hardly radical—it is a staple of inductive reasoning, which in turn is at the heart of our system of adjudication.”).

89. Lee H. Rosenthal, *Pleading, for the Future: Conversations After Iqbal*, 114 PENN. ST. L. REV. 1537, 1547 (2010).

90. See Noll, *supra* note 76, at 138 (“If ‘judicial experience and common sense’ constitutes a license to rely on broad new categories of extrinsic information at a motion to dismiss, the critics’ fears that motion to dismiss practice will be unduly influenced by individual judges’ differing views of life, the universe, and everything may be warranted. If, on the other hand, ‘judicial experience and common sense’ introduces only a few new premises into courts’ analysis, the critics’ fears may be overstated.” (footnote omitted)).

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

92. *Id.* at 565.

case by reference to a larger body of experience (beyond the experience of this particular district court) with similar factual scenarios?

The Court used the phrase “judicial experience” once in its *Iqbal* opinion:

Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.⁹³

The Court did not elaborate on what constitutes judicial experience.⁹⁴ Nor did it indicate how a district court should apply judicial experience when reviewing a complaint to determine whether the complaint stated a “plausible” claim.

B. *The Supreme Court’s Reference to the Second Circuit’s “Observation” That a District Court Must Draw on Its Judicial Experience*

In its *Iqbal* opinion, the Supreme Court made it appear as though the application of judicial experience on a motion to dismiss was not a new concept. The Supreme Court specifically stated that the Second Circuit had “observed” at pages 157 and 158 of its *Iqbal* opinion that a district court must “draw on its judicial experience and common sense” when assessing the plausibility of a claim.⁹⁵ In fact, the Second Circuit never used the phrases, or discussed the concepts of, “judicial experience” or “common sense” anywhere in its *Iqbal* opinion.⁹⁶

The Second Circuit referred to the use of “experience” only once in its opinion.⁹⁷ This reference occurred in a context that is expressly unrelated to *judicial* experience and unrelated to the determination whether a complaint withstands a Rule 12(b)(6) motion to dismiss.⁹⁸ The Second Circuit quoted from the Supreme Court’s opinion in *Wilkinson v. Austin*,⁹⁹ which discussed “the experience of prison administrators” to determine whether a prison inmate received adequate procedural protections under *Mathews v. Eldridge*.¹⁰⁰ The Second Circuit never referred to “experience”

93. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (citing *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d*, *Iqbal*, 129 S. Ct. 1937).

94. See Noll, *supra* note 76, at 137 (“[The Court] did not address the kind (or sources) of information that inform a court’s judicial experience and common sense.”).

95. *Iqbal*, 129 S. Ct. at 1950.

96. *Iqbal*, 490 F.3d at 143.

97. *Id.* at 163. The Second Circuit never used the words “common” or “sense.”

98. See *id.*

99. 545 U.S. 209 (2005).

100. *Iqbal*, 490 F.3d at 163 (“After weighing all the relevant factors, the Court found that ‘[w]here the inquiry draws more on the experience of prison administrators, and where the State’s interest implicates the safety of other inmates and

of any kind at pages 157 and 158 of its opinion. Nor did it ever refer to “common sense.”

Beginning at page 157 and continuing to page 158 (the specific pages of the Second Circuit’s opinion that the Supreme Court cited), the Second Circuit wrote:

After careful consideration of the Court’s [*Twombly*] opinion and the conflicting signals from it that we have identified, we believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible “plausibility standard,” which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.¹⁰¹

This might be an observation that *more is needed when the court thinks more is needed*. If so, then the application of judicial experience could be subjective—untethered to any legal standard or principle.

On the other hand, the Supreme Court might understand the application of judicial experience to constitute a new (or at least previously unidentified) part of the federal pleading regime.¹⁰² I take the Supreme Court seriously when it says “[t]wo working principles underlie [its] decision in *Twombly*” and application of one such principle—the determination of plausibility—“requires the reviewing court to draw on its judicial experience and common sense.”¹⁰³

The plausibility standard is flexible. Judicial experience must inform the district court about what is plausible in the context of each case. For example, the Supreme Court might understand the application of judicial experience to require a district court (1) to consider the type of claim alleged, the type of plaintiff alleging the claim, the type of defendant being sued, and the vision of reality alleged by the plaintiff, and then (2) to consider a larger, objective body of experience—beyond the subjective experience of any particular district court—with similar factual scenarios. If prior cases and the views of commentators conclude that this *type* of plaintiff usually lost on this *type* of claim against this *type* of defendant or that

prison personnel, . . . informal, nonadversary procedures’ were sufficient.” (alterations in original) (quoting *Wilkinson*, 545 U.S. at 228-29)).

101. *Id.* at 157-58.

102. When reflecting on his Second Circuit opinion in the *Iqbal* case and the Supreme Court’s comment on that opinion, Judge Jon O. Newman remarked that is not clear whether the Supreme Court intended the phrase “drawing on judicial experience and common sense” to be descriptive or definitive. See E-mail from Jon Newman, Circuit Judge of the U.S. Court of Appeals for the Second Circuit, to Henry Noyes, Professor of Law (Mar. 14, 2011) (on file with author). If the phrase is merely descriptive of what judges have always done, then the language does not add anything new to the standards that a court must apply and the sources that they may reference when ruling on a motion to dismiss. See *infra* notes 124-29 and accompanying text. If the phrase is definitive, however, then district courts must determine the proper meaning of judicial experience and then apply it.

103. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009).

discovery is particularly costly or that this type of claim is flooding the courts, then the court should dismiss the claim because the complaint “failed *in toto* to render plaintiffs’ entitlement to relief plausible.”¹⁰⁴

The latter understanding indicates some semantic gymnastics by the Supreme Court. The Court “doth protest too much”¹⁰⁵ that it does “not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”¹⁰⁶ The Court proclaims that plausibility is always the standard. But what plausibility means is informed by judicial experience. In the words of the Second Circuit (the Supreme Court cites approvingly), the standard is always plausibility, but plausibility is itself a “flexible” standard. Although the standard is always the same, because plausibility is a flexible standard, certain plaintiffs and certain types of claims require more convincing facts (not more *specific* facts).¹⁰⁷ I agree with the Court that this is not “heightened fact pleading of specifics,” but it is nevertheless a hierarchy of pleading requirements that results in heightened pleading standards for certain claims and claimants.¹⁰⁸

C. *The Syllabus of the Supreme Court’s Iqbal Opinion Cites to the Supreme Court’s Twombly Opinion on “Experience and Common Sense”*

The syllabus of the Supreme Court’s *Iqbal* opinion cites to *Twombly* for the proposition that “determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense.”¹⁰⁹ The syllabus is, of course, *not* a part of the Supreme Court’s opinion.¹¹⁰ Nevertheless, in support of the proposition that a court should draw on its experience, the syllabus cites to the Court’s *Twombly* decision at page 556 of the relevant volume of the *U.S. Reports*.¹¹¹

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

105. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2.

106. *Twombly*, 550 U.S. at 570; *see also* Clermont, *supra* note 86, at 1340-50 (noting that it is myth that Supreme Court has “readopted fact pleading for the federal courts”).

107. *See* Clermont, *supra* note 86, at 1345 (discussing plausibility tests for “factual convincingness”).

108. *Twombly*, 550 U.S. at 570. For further discussion of the resulting hierarchy of pleading requirements, *see infra* notes 116-21, 137-69, and accompanying text.

109. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009).

110. When the decisions of the Supreme Court are released, they are accompanied by the now-familiar refrain that “[t]he syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.” *See, e.g., Iqbal*, 129 S. Ct. at 1939 n.*. The syllabus is a summary of the case prepared by the “Reporter of Decisions,” a non-judicial court official who is appointed by the Supreme Court and is responsible for editing and publishing the Court’s decisions. *See* 28 U.S.C. § 673(c) (2006) (“The reporter shall, under the direction of the Court or the Chief Justice, prepare the decisions of the Court for publication in bound volumes and advance copies in pamphlet installments.”).

111. *Iqbal*, 129 S. Ct. at 1940.

At page 556 of its *Twombly* decision, the Supreme Court stated the following well-settled principle: “And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very remote and unlikely.’”¹¹²

This quote supports the idea that a complaint will survive *despite* the fact that a judge, employing judicial experience, makes a *subjective determination* that the claim is likely to fail. It is an argument against the consideration of subjective judicial experience in reviewing a motion to dismiss for failure to state a claim.

The Supreme Court then went on to state the following (also at page 556 of its opinion):

In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators, already quoted, that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice.¹¹³

A district court drawing on judicial experience in deciding a motion to dismiss must consider information and evidence beyond that alleged in the complaint, including “the benefit of the prior rulings and considered views of leading commentators,” when deciding whether a claim is plausible.¹¹⁴ Consistent with this understanding of judicial experience, the district court will look to outside sources to decide whether it should accept or reject this particular plaintiff’s world view.¹¹⁵ If prior cases and the views of commentators conclude that this *type* of plaintiff usually lost on this *type* of claim against this *type* of defendant, then the court should dismiss the claim as implausible, absent a more convincing showing by the plaintiff. Again, this understanding of judicial experience invites an *objective* determination, What is the most reasonable inference to be drawn from the facts asserted in the instant case by reference to a larger body of experience (beyond the experience of this particular district court) with similar factual scenarios?

112. *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated by* *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

113. *Id.*

114. *Id.*

115. *Cf.* Noll, *supra* note 76, at 139 (“In view of the Court’s reliance on these essentially legal sources, it seems that *Iqbal*, at most, should be read to authorize courts to rely on what scholars of administrative law have referred to as ‘judgmental facts’ in adjudicating a motion to dismiss. Such ‘facts’—in reality, value-loaded judgments about how the world operates—inhabit a grey area between the substantive law and propositions so obvious or widely accepted they may be judicially noticed.” (footnote omitted)).

V. THE MEANING AND APPLICATION OF "EXPERIENCE AND COMMON SENSE" IN *CAPERTON V. A.T. MASSEY COAL CO.*

Shortly after it issued its *Iqbal* opinion, the Supreme Court issued an opinion in *Caperton v. A.T. Massey Coal Co.*¹¹⁶ In that opinion the Court specified that the application of "experience and common sense" by a district court was a process that involved an *objective* determination.

Caperton involved a claim that a West Virginia Supreme Court of Appeals justice's failure to recuse himself from hearing the appeal of a corporation who had lost at trial to the tune of a \$50 million judgment and whose chief executive officer had contributed \$3 million to the justice's election campaign.¹¹⁷ The Court held that the West Virginia justice's refusal to recuse himself violated the Due Process Clause of the U.S. Constitution.¹¹⁸

In reaching its decision, the majority determined that a due process challenge of this type required the court to undertake an *objective* evaluation of the circumstances and the risk of bias on the part of the judge whose recusal is requested. The Court stated:

As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances "in which *experience* teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."¹¹⁹

The Court was quite clearly referring to a collective *judicial* experience which, *when applied objectively*, dictates the result even though the judge subjectively reaches a different conclusion.

Later in that same opinion, the Supreme Court described what it is that judges do when they perform their judicial function: "The judge inquires into reasons that seem to be leading to a particular result. Precedent and *stare decisis* and the text and purpose of the law and the Constitution; logic and scholarship and *experience and common sense* . . ." ¹²⁰

For practical purposes, this is the same phrase used in the Supreme Court's *Iqbal* opinion. The Court places scholarship in the same judicial toolbox as experience and common sense. Reliance on judicial experience to resolve a motion to dismiss, like a request for recusal, requires the court to refer to extrinsic evidence.¹²¹

116. 129 S. Ct. 2252 (2009).

117. *See id.* at 2256-59.

118. *See id.* at 2264-65.

119. *Id.* at 2259 (emphasis added) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

120. *Id.* at 2252 (emphasis added).

121. Judicial reference to extrinsic evidence when considering a request for recusal would be appropriate and consistent with the adversarial process, however, because the larger judicial body is determining whether the particular judge on

VI. THE MEANING AND APPLICATION OF JUDICIAL EXPERIENCE IN PRE-IQBAL DECISIONS

Prior to issuance of its decisions in *Twombly* and *Iqbal*, the Justices of the Supreme Court had used the phrase “judicial experience” in their opinions in thirty-five different cases.¹²² Only three of these cases involved resolution of a motion to dismiss or a demurrer or something akin to a motion to dismiss.¹²³ None of those three decisions involved the application of judicial experience to a set of alleged or litigated facts.

In those thirty-five opinions, the Supreme Court has used the phrase “judicial experience” with three different meanings. Under any of these three definitions, the application of judicial experience does not require a district court to make a *subjective* judgment about whether the plaintiff’s vision of the world is true. Nor does it require a district court to make a *subjective* judgment about the merits of a claim.

A. *Some Judges Have Done What Judges Do More Than Other Judges*

In the course of its opinions, the Supreme Court has referred to judicial experience to indicate that a particular judge or group of judges have served on the bench for a number of years and have been exposed to a

the case is no longer impartial. By contrast, judicial reference to extrinsic evidence when considering a motion to dismiss is inappropriate and inconsistent with the adversarial process. For a further discussion of the application of judicial experience and the adversarial nature of litigation, see *infra* notes 181-99 and accompanying text.

122. On March 10, 2011, a search of “judicial /1 experience” in the “SCT” database on Westlaw retrieved thirty-seven Supreme Court cases. One of these thirty-seven decisions was the Court’s opinion in *Iqbal*. One other decision included the phrase “judicial experience” in the prefatory statement of the appellants but did not include the phrase anywhere in the Court’s opinion. See *Lorings v. Marsh*, 73 U.S. (6 Wall.) 337, 342 (1867).

123. See *Baker v. Carr*, 369 U.S. 186, 282 (1962) (Frankfurter, J., dissenting) (stating, in appeal of action dismissed for lack of subject matter jurisdiction and for failure to state claim, that “controlling factor in such [non-justiciable political question] cases is that, decision respecting these kinds of complex matters of policy being traditionally committed not to courts but to the political agencies of government for determination by criteria of political expediency, there exists no standard ascertainable by judicial experience or process by reference to which a political decision affecting the question at issue between the parties can be judged”); *Watson v. Emp’rs Liab. Assurance Corp.*, 348 U.S. 66, 79 (1954) (Frankfurter, J., concurring) (reversing district court’s decision granting defendant’s motion to dismiss claims as unconstitutional and noting that earlier opinion recognizing states’ “absolute” and unconditional right to exclude foreign corporations or condition their entry as matter entirely within their discretion had been tempered and qualified by “considerable further judicial experience”); *Magniac v. Thomson*, 56 U.S. (15 How.) 281, 299 (1853) (affirming lower court decision sustaining demurrer and stating that “[t]o the test of these rules the case before us, in common with every appeal to equity, should be brought, and if the effect of such test should prove to be adverse, that effect should be sought in the character of the appeal itself, and not in objections to maxims which judicial experience and wisdom have long established”).

significant number of cases, parties, and legal issues during that time.¹²⁴ For example, in *Dick v. New York Life Insurance Co.*,¹²⁵ Justice Frankfurter wrote in his dissent:

Such disregard of sound judicial administration is emphasized by the fact that the judges of the Court of Appeals are, by the very nature of the business with which they deal, far more experienced than we in dealing with evidence, ascertaining the facts, and determining the sufficiency of evidence to go to a jury.¹²⁶

As proof of the greater experience of the judges of the Court of Appeals, Justice Frankfurter stated the following in a footnote:

The Circuit Judges who decided this case have had the following *judicial experience*: Judge Sanborn: District Court of Minnesota, 1922-1925; United States District Court for the District of Minnesota, 1925-1932; United States Court of Appeals for the Eighth Circuit, since 1932. Judge Woodrough: County Court, Ward County, Texas, 1894-1896; United States District Court for the District of Nebraska, 1916-1933; United States Court of Appeals for the Eighth Circuit, since 1933. Judge Johnsen: Supreme Court of Nebraska, 1939-1940; United States Court of Appeals for the Eighth Circuit, since 1940.¹²⁷

124. See *Liteky v. United States*, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring) (“Out of this reconciliation of principle and practice comes the recognition that a judge’s prior judicial experience and contacts need not, and often do not, give rise to reasonable questions concerning impartiality.”); *Mistretta v. United States*, 488 U.S. 361, 408 (1989) (rejecting prisoner’s challenge to constitutionality of U.S. Sentencing Commission and stating that “judicial participation on the Commission ensures that judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch’s own business—that of passing sentence on every criminal defendant”); *Morrison v. Olson*, 487 U.S. 654, 677 n.13 (1988) (rejecting challenge to Ethics and Government Act which authorized appointment of independent counsel by court and stating that “in light of judicial experience with prosecutors in criminal cases, it could be said that courts are especially well qualified to appoint prosecutors”); *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 463 n.34 (1959) (Frankfurter, J., dissenting) (reviewing jury verdict for plaintiff for sufficiency of evidence and listing judicial biographies of three Eighth Circuit judges to demonstrate their “judicial experience”); *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 608 (White, J., dissenting) (stating that “[m]y brief judicial experience has convinced me that the custom of filing long dissenting opinions is one ‘more honored in the breach than in the observance’”), *vacated*, 158 U.S. 601 (1895); *Hardin v. Jordan*, 140 U.S. 371, 405 (1891) (Brewer, J., dissenting) (stating that “long judicial experience of those [Illinois district and circuit court] judges, and their familiarity with the laws of Illinois, give to th[o]se opinions great weight”).

125. 359 U.S. 437 (1959).

126. *Id.* at 462 (Frankfurter, J., dissenting).

127. *Id.* at 462 n.34 (emphasis added).

This understanding of judicial experience employs the reasoning that judges who have seen more cases develop proficiency and expertise in doing what it is that judges do.¹²⁸

If the Supreme Court meant with its *Iqbal* statement that a district court should draw on its years of experience when deciding whether a complaint states a plausible claim for relief, then the application of judicial experience might not add anything new to our understanding of the federal pleading standards. District court judges should apply their years of experience in reviewing a complaint. Judges should “do what they do”; some judges will have “done what they do” more than others. As demonstrated throughout this Article, I believe that the Supreme Court did not intend this meaning when it referenced judicial experience in its *Iqbal* opinion.

Even accepting this understanding of its meaning, however, judicial experience does not require a district court to make a *subjective* determination of the plausibility of a claim. It simply stands for the principle that judges who have had more judicial experience will be more familiar with—and, therefore, generally better equipped to handle—the process of making decisions that judges are required to undertake.¹²⁹

District Judge Sidney H. Stein considered the new *Iqbal* standard and the use of judicial experience in his remarks to the American Bar Association’s Litigation Section.¹³⁰ Judge Stein “questioned what the scope of review on appeal of rulings on such motions will be, observing that he does not know how closely appeals courts will be regulating the application of judicial experience and common sense in reviewing motions to dismiss.”¹³¹ If the application of judicial experience requires a district court to make a *subjective* determination whether the plaintiff’s vision of the world is credible and whether the claim is meritorious, then the appellate courts should give some deference to judges who have more judicial experience. But appellate review of a motion to dismiss for failure to state a claim is *de novo*, not for abuse of discretion.¹³²

A quick review of the judicial experience of the district court judge who decided the motion to dismiss in the *Iqbal* case and the various judges and Justices who reviewed that decision on appeal confirms that the Supreme Court does not expect appellate courts to give deference to judges

128. See *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 693 (9th Cir. 2010) (“After sixty years of judicial experience with that [clear error] standard, it needs no further explication. We jurists know what it means.”).

129. See Hartnett, *supra* note 88, at 498 (“The need to rely on experience and common sense in drawing inferences is hardly radical—it is a staple of inductive reasoning, which in turn is at the heart of our system of adjudication.”).

130. See generally Atkins, *supra* note 86 (providing statements of Judge Sidney H. Stein, Southern District of New York).

131. *Id.* at 2667.

132. See *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011) (“The court reviews *de novo* a district court’s decision to grant a motion to dismiss for failure to state a claim . . .”).

with more judicial experience. At the time he denied the motion to dismiss in the *Iqbal* case, District Judge John Gleeson had been a district court judge for nearly eleven years.¹³³ The three judges on the Second Circuit panel that decided the *Iqbal* appeal and affirmed Judge Gleeson's order denying the motion to dismiss had a collective twenty-three years of judicial experience as district court judges.¹³⁴ The nine Supreme Court Justices who decided the *Iqbal* case had a collective five years of experience as trial court judges of any ilk. Eight of the Justices—Chief Justice Roberts, Justice Stevens, Justice Scalia, Justice Ginsburg, Justice Kennedy, Justice Thomas, Justice Breyer, and Justice Alito—never served as a trial judge.¹³⁵ Justice Souter served as a trial judge on the Superior Court of New Hampshire for five years.¹³⁶ Thus, the five-Justice majority of the Supreme Court who decided that *Iqbal* had failed to plead a plausible claim had zero district court judicial experience. The district court judge and the Second Circuit judges who determined that the plaintiff had stated a plausible claim in *Iqbal* had a collective thirty-four years of district court judicial experience. The Supreme Court did not give deference to the greater trial court experience of Judge Gleeson or the three Second Circuit judges because the application of judicial experience requires an *objective* determination regarding the most reasonable inference to be drawn from the facts asserted in the instant case by reference to a larger body of experience—beyond the experience of this particular district court—with similar factual scenarios.

B. *Judicial Experience Leads to a Better Understanding of the "Real World" Than That Proffered by a Party*

The Supreme Court also has referred to judicial experience to explain why the Court sometimes rejects a proffered set of facts or inferences—the judiciary knows better the way things happen in the real world than the version that has been offered by one of the parties.¹³⁷ For exam-

133. See *Judge Gleeson*, NYED.USCOURTS.GOV, http://www.nyed.uscourts.gov/General_Information/Court_Phone_Book/JG/jg.html (last visited Sept. 16, 2011) (reporting biographical and professional information on Judge Gleeson). District Judge John Gleeson entered on duty on October 24, 1994, and denied the motion to dismiss on September 27, 2005.

134. See *Circuit Judges' Biographical Information*, CA2.USCOURTS.GOV, <http://www.ca2.uscourts.gov/Judgesbio.htm#DJ> (last visited Sept. 18, 2011) (reporting biographical and professional information on Second Circuit Court of Appeals judges). Judge Jon O. Newman served on the U.S. District Court for the District of Connecticut from 1971 to 1979. Judge Jose A. Cabranes served on the U.S. District Court for the District of Connecticut from 1979 to 1994. Judge Robert D. Sack had no prior judicial experience as a trial court judge.

135. See *Biographies of Current Justices of the Supreme Court*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Sept. 16, 2011).

136. *Id.*

137. See *Grove v. Emison*, 507 U.S. 25, 38 (1993) (reversing district court's determination that redistricting plan adopted by state court violated Voting Rights

Act and stating that “[i]n the District Court’s view, based on ‘[j]udicial experience, as well as the results of past elections,’ a super-majority minority Senate district in Minneapolis was required in order for a districting scheme to comply with the Voting Rights Act” (quoting *Emison v. Growe*, 782 F. Supp. 427, 440 (1992), *rev’d*, 507 U.S. 25)); *Allen v. Illinois*, 478 U.S. 364, 382 n.17 (1986) (Stevens, J., dissenting) (quoting 3 J. WIGMORE, EVIDENCE § 822 (3d ed. 1970), for proposition that “judicial experience” is basis for distrust of confessions made in certain factual scenarios); *Manson v. Brathwaite*, 432 U.S. 98, 119-20 (1977) (Marshall, J., dissenting) (stating that “the unusual threat to the truth-seeking process posed by the frequent untrustworthiness of eyewitness identification testimony . . . combined with the fact that juries unfortunately are often unduly receptive to such evidence, is the fundamental fact of judicial experience ignored by the Court” in its opinion (footnote omitted)); *Chimel v. California*, 395 U.S. 752, 778 (1969) (White, J., dissenting) (stating, in response to appeal raising questions concerning permissible scope under Fourth Amendment of search incident to lawful arrest, that it is “the judgment of Congress [in enacting a statute that provides] that federal law enforcement officers may reasonably make warrantless arrests upon probable cause, and no judicial experience suggests that this judgment is infirm”), *abrogated by Davis v. United States*, 131 S. Ct. 2419 (2011); *In re Gault*, 387 U.S. 1, 44 (1967) (quoting WIGMORE ON EVIDENCE for proposition that “ground of distrust of confessions made in certain situations is, in a rough and indefinite way, judicial experience” (internal quotation marks omitted)); *United Steelworkers v. United States*, 361 U.S. 39, 57 (1959) (Frankfurter, J., concurring) (stating, in action by United States for injunction against labor strike commenced by Attorney General at direction of President of the United States pursuant to statute that permits President to act when he is of opinion that strike will create national emergency, that “[s]uch a decision by the President to invoke the Courts’ jurisdiction to enjoin, involving, as it does, elements not susceptible of ordinary judicial proof nor within the general range of judicial experience, is not within the competent scope of the exercise of equitable ‘discretion’”); *Smith v. United States*, 348 U.S. 147, 153 (1954) (affirming conviction for income tax evasion based on confession and corroborating evidence and stating that foundation of rule that accused may not be convicted on his own uncorroborated confession “lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused”); *Stein v. New York*, 346 U.S. 156, 192 (1953) (affirming felony murder conviction and stating that “reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence”), *overruled in part by Jackson v. Denno*, 378 U.S. 368 (1964); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (holding that, although NLRB’s findings are entitled to respect, reviewing court must consider both evidence that supports NLRB’s findings and evidence opposed to NLRB’s view and stating that “[w]e do not require that the examiner’s findings be given more weight than in reason and in the light of judicial experience they deserve”); *Haley v. Ohio*, 332 U.S. 596, 606 (1948) (Frankfurter, J., concurring) (reversing murder conviction based on confession by fifteen-year-old defendant and stating that “[a]gainst [the Ohio court’s finding that the confession was voluntary despite the factual circumstances indicating otherwise] we have the judgment that comes from judicial experience with the conduct of criminal trials as they pass in review before this Court” and therefore reached a different conclusion); *see also Del Vecchio v. Illinois*, 474 U.S. 883, 887 (1985) (quoting *Stein*, 346 U.S. at 192); *Barefoot v. Estelle*, 463 U.S. 880, 925 n.7 (1983) (same), *superseded by statute*, 28 U.S.C. § 2253(c) (2006), *as recognized in Slack v. McDaniel*, 529 U.S. 473 (2000); *Jackson*, 378 U.S. at 384 n.11 (same); *Wong Sun v. United States*, 371 U.S. 471, 489 (1963) (quoting *Smith*, 348 U.S. at 157); *Payne v. Arkansas*, 356 U.S. 560, 568 n.15 (1958) (quoting *Stein*, 346 U.S. at 192).

ple, in its opinion in *Stein v. New York*,¹³⁸ the Supreme Court noted that judicial experience led the courts to a better understanding of the reality of coerced confessions than the view proffered by the Government.

Coerced confessions are not more stained with illegality than other evidence obtained in violation of law. But reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A beaten confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire-tapping, or larceny may be and often is of the utmost verity. Such police lawlessness therefore may not void state convictions while forced confessions will do so.¹³⁹

Given this understanding of judicial experience, district courts will have leeway to reject the state of the world alleged by plaintiffs who are thought to have a distorted view of the “real world.”¹⁴⁰ Likewise, district courts will have leeway to accept the worldview of certain favored parties whose views of the world are known to be trustworthy.

At oral argument in *Iqbal*, Solicitor General Garre urged the Supreme Court to take such a position. He asked the Court to consider “common government experience” in deciding whether the allegations against the Attorney General and the Director of the FBI were too far-fetched to be “plausible.”

Well, we certainly think—I mean, in *Bell Atlantic*, the Court said common economic experience would support its determination in that case. We think here, and I think the brief filed by former attorney generals from several different administrations makes this point as well, that common government experience would suggest that the Attorney General of the United States is not involved in the sort of microscopic decisions . . .¹⁴¹

138. 346 U.S. 156 (1953), *overruled in part by Jackson*, 378 U.S. 368.

139. *Id.* at 192.

140. See *Roe v. Michelin N. Am., Inc.*, 613 F.3d 1058, 1062-65 (11th Cir. 2010) (affirming denial of motion to remand and stating that “when a district court can determine, relying on its judicial experience and common sense, that a claim satisfies the amount-in-controversy requirements, it need not give credence to a plaintiff’s representation that the value of the claim is indeterminate”); *Black v. State Farm Mut. Auto Ins. Co.*, No. 10-80996-CIV, 2010 WL 4340281, at *1 (S.D. Fla. Oct. 22, 2010) (“[A] district court may employ its own judicial experience or common sense to discern . . . whether a complaint establishes the jurisdictional amount in controversy required for removal.”). But see Robert G. Bone, Twombly, *Pleading Rules*, and the *Regulation of Court Access*, 94 IOWA L. REV. 873, 888-89 (2009) (“What *Twombly* requires is a set of allegations describing a state of affairs that differs from a baseline of normality, and in a way that supports a stronger correlation to wrongdoing than for baseline conduct.”).

141. Transcript of Oral Argument at 15-16, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 5168391 (*italics added*).

This understanding of experience requires the court to reject the plaintiff's proffered reality in favor of an *objectively* more likely reality. It is not that the plaintiff's version of reality is impossible. Nevertheless, the district court may close its eyes to the reality alleged by the plaintiff and substitute a different version of events that hews more closely to the court's objective expectation of reality based on experience.

C. *Judicial Experience Leads to the Development of Common Law Rules*

The Supreme Court also has referred to judicial experience as a proxy for the development, improvement, and refinement of rules of law through the process of reviewing cases, considering commentary of experts, and making decisions over time.¹⁴² For exam-

142. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 850 (1999) (reversing lower court decision granting class certification and stating that “[a]lthough we might assume, *arguendo*, that prior judicial experience with asbestos claims would allow a court to make a sufficiently reliable determination of the probable total [number of claims], the District Court here apparently thought otherwise”); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100-01 (1984) (affirming finding following full trial that NCAA’s television plan violated antitrust laws and stating that portion of its decision “is not based on a lack of judicial experience” with particular market context at issue); *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 216 (1978) (Brennan, J., dissenting) (considering entry of preliminary injunction prohibiting union from picketing on employer’s property and stating that test was “fashioned after some 15 years of judicial experience with jurisdictional conflicts that threatened national labor policy”); *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 296 (1977) (holding that National Labor Relations Act did not preempt state law tort claim and stating that “[j]udicial experience with numerous approaches to the pre-emption problem in the labor law area eventually led to the general rule set forth” and reaffirmed in recent Supreme Court decisions); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 74-77 (1971) (Harlan, J., dissenting) (reviewing judgment for plaintiff in defamation action against radio station defendant following jury trial and stating that it is “impossible to say, at least without further judicial experience in this area, that the First Amendment interest in avoiding self-censorship will always outweigh the state interest in vindicating these policies” and that “where the jury authority has been exercised within such constraints, and the plaintiff has proved that the speaker acted out of express malice, given the present state of judicial experience, I think it would be an unwarranted intrusion into the legitimate legislative processes of the States and an impermissibly broad construction of the First Amendment to nullify that state action”), *abrogated by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *United States v. Reynolds*, 345 U.S. 1, 7-9 (1953) (upholding assertion of privilege and noting limited “judicial experience” of U.S. courts with application of military and state secrets privilege, but greater “judicial experience in dealing with an analogous privilege, the privilege against self-incrimination”); *Johnson v. Muelberger*, 340 U.S. 581, 584 (1951) (holding that Full Faith and Credit Clause barred defendant from collaterally attacking divorce decree on jurisdictional grounds in sister state court where defendant participated in original action and contested jurisdiction in that original action and stating that “[f]rom judicial experience with and interpretation of the [Full Faith and Credit Clause], there has emerged the succinct conclusion that the Framers intended it to help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum”); *Michelson v. United States*, 335 U.S. 469, 486-87 (1948) (affirming convic-

ple, in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,¹⁴³ the Court stated:

The *Garmon* test, itself fashioned after some 15 years of judicial experience with jurisdictional conflicts that threatened national labor policy, has provided stability and predictability to a particularly complex area of the law for nearly 20 years. Thus, the most elementary notions of *stare decisis* dictate that the test be reconsidered only upon a compelling showing, based on actual experience, that the test disserves important interests.¹⁴⁴

The Court's opinion in *Amalgamated Ass'n of State, Electric Railway and Motor Coach Employees of America v. Lockridge*¹⁴⁵ noted that development of the *Garmon* test—a general rule capable of easy application—was necessary “so that lower courts may largely police themselves” and avoid the need for the Supreme Court to determine “on a case-by-case basis . . . whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy.”¹⁴⁶ The Court had tried a number of different approaches to this problem, but none proved satisfactory.

It was, in short, experience—not pure logic—which initially taught that each of these methods sacrificed important federal interests in a uniform law of labor relations centrally adminis-

tion for bribing federal agent and stating that “[t]he confusion and error [that] would engender [from adopting a new rule allowing cross-examination about a defendant's prior arrests] would seem too heavy a price to pay for an almost imperceptible logical improvement, if any, in a system which is justified, if at all, by accumulated judicial experience rather than abstract logic”); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 191 (1941) (holding that employer may not refuse to hire employees solely because of their affiliation with labor union and stating that policy which Congress “expressed in defining the term ‘employee’ both affirmatively and negatively . . . had behind it important practical and judicial experience”); *The Atlas*, 93 U.S. 302, 312 (1876) (stating that “[j]udicial experience has given no better guide than that furnished by Lord Stowell” in published judicial opinion in appeal of action for damages resulting from steamboat collision with tugboat and canal boat); *Magniac v. Thomson*, 56 U.S. (15 How.) 281, 299 (1853) (affirming lower court decision sustaining demurrer and stating that “[t]o the test of these rules the case before us, in common with every appeal to equity, should be brought, and if the effect of such test should prove to be adverse, that effect should be sought in the character of the appeal itself, and not in objections to maxims which judicial experience and wisdom have long established”); see also *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983) (quoting *Michelson*, 335 U.S. at 487).

143. 436 U.S. 180 (1978).

144. *Id.* at 216 (Brennan, J., dissenting) (citing *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 290-91 (1971)).

145. 403 U.S. 274 (1971).

146. *Id.* at 289-90.

tered by an expert agency without yielding anything in return by way of predictability of ease of judicial application.¹⁴⁷

Thus, the Court refers to judicial experience to describe a process by which the federal courts accumulate familiarity by trial and error and, based on that familiarity, develop a general rule (or set of rules) capable of easy application by the lower courts.

This meaning of judicial experience is akin to the development of common law rules. As district courts review complaints applying this new plausibility standard, they will be able to put different types of claims into various categories and will establish presumptive rules as to the plausibility of such claims. Courts will learn to be skeptical of certain types of claims. They will learn to be predisposed to accept the plausibility of certain other types of claims. Federal courts will accumulate judicial experience and develop a new common law of pleading.

There is support for this understanding in the *Twombly* opinion. The Supreme Court stated that “[i]n identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators, already quoted, that lawful parallel conduct fails to bespeak unlawful agreement.”¹⁴⁸ Judicial experience will lead to a new, heightened pleading standard for cases involving certain types of claims.¹⁴⁹

Chief Justice Roberts expressed a variation on this understanding at oral argument in *Iqbal*:

Well I thought, and others may know better in connection to *Bell Atlantic*, but I thought in *Bell Atlantic* what we said is that there's a standard but it's an affected [sic] by the context in which the allegations are made. That was a context of a particular type of antitrust violation and that affected how we would look at the complaint. And here, . . . because we're looking at litigation involving the Attorney General and the Director of FBI in connection with their national security responsibilities, that there ought to be greater rigor applied to our examination of the complaint.¹⁵⁰

Judicial experience will lead to a common law of federal pleading. The district courts will develop a hierarchy of pleading requirements that will require a review of the complaint with greater or lesser rigor because of the type of claim—for example, antitrust—or because of the context of

147. *Id.* at 291; see also *Farmer*, 430 U.S. at 296 (stating that “[j]udicial experience with numerous approaches to the pre-emption problem in the labor law area eventually led to the general rule set forth” in *Garmon* and *Lockridge* decisions).

148. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

149. See *Anderson & Huffman*, *supra* note 32, at 27-29 (discussing application of high plausibility standard “where the expected cost of false positive error is great”).

150. Transcript of Oral Argument, *supra* note 141, at 36-37 (italics added).

the claim—for example, a claim against high-ranking government officials.¹⁵¹

VII. THE APPLICATION OF JUDICIAL EXPERIENCE REQUIRES DISTRICT COURTS TO CREATE A COMMON LAW OF PLEADING STANDARDS

The Supreme Court's *Twombly* and *Iqbal* opinions herald the rise of a common law of federal pleading standards in which district courts are expected to discern and develop a hierarchy of pleading requirements. As Seventh Circuit Judge Richard Posner recently stated, when resolving a motion to dismiss, the court has "a question of the meaning of a common law doctrine—namely the federal common law doctrine of pleading in complex cases, announced in *Twombly*."¹⁵²

This understanding of judicial experience and its application is consistent with the Court's *Twombly* and *Iqbal* opinions,¹⁵³ the Second Circuit's opinion in *Iqbal v. Hasty*,¹⁵⁴ the Supreme Court's *Caperton* opinion,¹⁵⁵ and the historic meaning and application of judicial experience in the Supreme Court's pre-*Iqbal* opinions.¹⁵⁶

Judge Rosenthal notes that this understanding of judicial experience and its application is not new to the federal rules or the federal courts:

Some of the discussion of *Iqbal* has focused on the use of the words "judicial experience and common sense" in describing how judges rule on motions to dismiss as reinforcing this cynical view of judging. These are not new words: Rule 501 of the Federal Rules of Evidence, to use just one example, states that privilege determinations "shall be governed by the principle of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."¹⁵⁷

What do courts do in such circumstances? The Advisory Committee Notes to Rule 26 of the Federal Rules of Criminal Procedure tell us:

This rule contemplates the development of a uniform body of rules of evidence to be applicable in trials of criminal cases in the Federal courts. It is based on [two Supreme Court cases], which

151. See Scheindlin, *supra* note 87, at 1375 ("Because the Supreme Court perceived the extraordinary burden of expensive discovery as a reason for raising the pleading bar, the suggestion has been made that fact pleading is particularly appropriate in complex cases but unnecessary in simple or average cases, where the cost of discovery will not be so burdensome and the same vigilance in gatekeeping by judges is not required.").

152. *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 626 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2165 (2011).

153. See *supra* notes 79-115 and accompanying text.

154. See *supra* notes 95-108 and accompanying text.

155. See *supra* notes 116-21 and accompanying text.

156. See *supra* notes 137-51 and accompanying text.

157. Rosenthal, *supra* note 89, at 1547.

indicated that in the absence of statute the Federal courts in criminal cases are not bound by the State law of evidence, but are guided by common law principles as interpreted by the Federal courts “in the light of reason and experience.” The rule does not fetter the applicable law of evidence to that originally existing at common law. It is contemplated that the law may be modified and adjusted from time to time by judicial decisions.¹⁵⁸

Again, this understanding of judicial experience invites an *objective* determination. What is the most reasonable inference to be drawn from the facts asserted in the instant case by reference to a larger body of experience (beyond the experience of this particular district court) with similar factual scenarios? In other words, the application of judicial experience in the context of federal pleadings requires the district courts to develop and refine a hierarchy of pleading requirements.¹⁵⁹

The application of judicial experience to develop a common law of pleading standards also is similar to, and consistent with, the application

158. FED. R. CRIM. P. 26 advisory committee’s notes (1944) (citations omitted). Rule 501 of the Federal Rules of Evidence was itself derived from then-extant Rule 26 of the Federal Rules of Criminal Procedure. See S. REP. NO. 93-1277, at 7-9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7058-59; H.R. REP. NO. 93-650, at 8 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082-83. At the time the Federal Rules of Criminal Procedure were adopted in 1944, the Federal Rules of Evidence had not yet been enacted.

159. See *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009) (“In other words, the height of the pleading requirement is relative to circumstances.”); *Smith v. Duffey*, 576 F.3d 336, 339-40 (7th Cir. 2009) (affirming dismissal of former employee’s suit against employer for fraud whether or not *Twombly* or *Iqbal* apply); *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) (“Fair notice under Rule 8(a)(2) *depends on the type of case*—some complaints will require at least some factual allegations to make out a ‘showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” (alteration in original) (emphasis added) (citation omitted)); *Barkes v. First Corr. Med.*, No. 06-104-JJF-MPT, 2010 WL 1418347, at *3 (D. Del. Apr. 7, 2010); *Brace v. Massachusetts*, 673 F. Supp. 2d 36, 42 (D. Mass. 2009) (“Properly read, however, the holding of *Twombly* seems limited to highly complex cases—like the antitrust matter before the Court in that case—where a bare bones complaint and the burden of pre-trial discovery might effectively coerce an unwarranted settlement by defendants.”); *Dobyns v. United States*, 91 Fed. Cl. 412, 425 (2010) (“[W]hile recognizing that *Iqbal* makes clear that the new standard applies to all civil cases, these cases hint at the prospect that the standard might resonate differently depending upon the legal and factual scenario encountered.”); see also Hartnett, *supra* note 88, at 496 (“A requirement of plausibility will, however, apply differently in different substantive areas of the law and in different factual situations—it will depend on what facts the substantive law makes material and on the appropriate inferential connections between facts.”); Scheindlin, *supra* note 87, at 1375 (“A corollary to the pleading topic is a recurring proposal for treating some cases differently than others. There have been proposals to track cases as simple, average and complex and to develop different sets of rules for each category. Until now, these proposals have died on the vine, but they are again being proposed, partly in response to the stunning change in pleading requirements.”).

of judicial experience by federal courts to develop presumptive rules and a hierarchy of standards for restraint of trade cases in the antitrust field.¹⁶⁰ For example, when judicial experience permits a court to recognize a particular restraint as fitting into a paradigmatic or archetypal class of restraints, then the court conclusively presumes that the restraint is “unreasonable without inquiry into the particular market context in which it is found.”¹⁶¹

Per se analysis examines whether prior judicial experience with the type of restraint at issue is sufficient to allow a determination that it would always or almost always tend to restrict competition and decrease output. The focus of the inquiry is on accumulated data from prior decisions: an agreement may be declared unlawful with no further analysis, simply by virtue of its being of a type that courts have previously determined to have “manifestly anticompetitive effects,” and no “redeeming virtue.”¹⁶²

In other words, where the courts (collectively) have sufficient experience with a particular claim and factual scenario, the courts refuse to permit the defendant to establish that the *reality* of the situation was uniquely different—that there was in fact healthy competition.¹⁶³ By contrast, where the courts lack such judicial experience, they permit the defendant to prove that highly suspicious conduct is permissible despite the courts’ skepticism.¹⁶⁴

The development of a hierarchy of pleading requirements is not a new concept.¹⁶⁵ Prior to the Supreme Court’s *Twombly* and *Iqbal* opinions,

160. See Richard A. Epstein, *Of Pleading and Discovery: Reflections on Twombly and Iqbal with Special Reference to Antitrust*, 2011 U. ILL. L. REV. 187, 197-99.

161. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100-01 (1984).

162. *California ex rel. Brown v. Safeway, Inc.*, 615 F.3d 1171, 1178 (9th Cir. 2010) (citation omitted) (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007)).

163. See *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 316 (3d Cir. 2010) (“Judicial experience has shown that some classes of restraints have redeeming competitive benefits so rarely that their condemnation does not require application of the full-fledged rule of reason.”); see also *id.* at 318 n.14 (“In applying per se or quick look analysis, courts make judgments based on judicial experience with certain types of restraints and market contexts, without demanding such extensive inquiry into the market in which the specific restraint at issue operates.” (citing *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 779 (1999))); *United States v. Brown Univ.*, 5 F.3d 658, 670 (3d Cir. 1993) (“Per se rules of illegality are judicial constructs and are based in large part on economic predictions that certain types of activity will more often than not unreasonably restrain competition.” (citations omitted)).

164. See *Ins. Brokerage*, 618 F.3d at 317 (“Some restraints of trade are ‘highly suspicious’ yet ‘sufficiently idiosyncratic that judicial experience with them is limited.’” (quoting 11 HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1911a (2d ed. 2005))).

165. Professor Christopher Fairman has written that notice pleading is a myth—that courts have always applied heightened pleading standards to certain types of claims. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 998-1011 (2003) (describing different categories of claims for which

the Civil Rules Advisory Committee (the Rules Committee) undertook to evaluate the extent to which some courts were applying heightened pleading in certain cases.¹⁶⁶ The Rules Committee also considered how the Rules might be modified to accommodate heightened pleading:

“Fact” pleading might be restored, abandoning the 1938 experiment with what is commonly called “notice” pleading. Or Rule 8 might be amended to give teeth to the requirement that the plain and simple statement show that the pleader is entitled to relief. Or specific rules might be adopted for specific claims, in the mode of Rule 9(b). Or, failing any general approach, an attempt might be made to reinvigorate Rule 12(e), moving it back toward the former bill of particulars.¹⁶⁷

Judge Rosenthal has indicated that the Rules Committee is currently reevaluating the pleading standard in Rule 8 and assessing whether the Supreme Court’s rulings in *Twombly* and *Iqbal* require modifications to that standard.¹⁶⁸ “If the problem is the application of the standard in certain kinds of cases or to certain kinds of litigants, that may call for a rule approach that is similar to Rule 9, using different pleading standards for certain kinds of cases.”¹⁶⁹

VIII. PRINCIPLES FOR APPLICATION OF THE NEW PLEADING STANDARDS

Given the Supreme Court’s intended meaning and application of judicial experience, district courts must apply the following principles and conventions when resolving a motion to dismiss pursuant to the new pleading standards:

courts have applied heightened pleading standard, such as antitrust, civil RICO, and defamation claims).

166. See Civil Rules Advisory Committee, Minutes 37 (May 22-23, 2006) [hereinafter Rules Committee Minutes], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV05-2006-min.pdf>.

167. *Id.*

168. See Rosenthal, *supra* note 89, at 1546.

169. *Id.*

- The Federal Rules of Civil Procedure still employ a liberal pleading standard,¹⁷⁰ but the standard is less liberal than it used to be.¹⁷¹
- The liberal pleading standard does not require technical skill in crafting a complaint, but a new goal of the pleading process is to weed out marginal cases, especially when they will be costly to litigate.¹⁷²
- Even if it is possible that the plaintiff can prove some set of facts in support of his or her claim which would entitle him or her to relief, the court must dismiss the complaint unless the claim is plausible.¹⁷³

170. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (stating that “when ruling on a defendant’s motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569-70 (2007) (describing that requiring specific facts beyond those necessary to start claim amounted to impermissible heightened pleading standard); see also *Cortes-Rivera v. Dep’t. of Corr. & Rehab.*, 626 F.3d 21, 28 (1st Cir. 2010) (noting “liberal pleading requirements set out in Fed. R. Civ. P. 8”); *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 174 (3d Cir. 2010) (noting “liberal pleading philosophy of the federal rules”); *Hershey v. Energy Transfer Partners, L.P.*, 610 F.3d 239, 245 n.12 (5th Cir. 2010) (dismissing plaintiff’s complaint for failing “to state a claim under the liberal pleading standards of Rule 8”).

171. For a discussion of the history of the liberal pleading standard, see *supra* notes 61-78, 95-113, and accompanying text.

172. See *supra* notes 152-69 and accompanying text; see also Bone, *supra* note 70, at 870 (describing stricter pleading standard in *Iqbal* as screening weak cases in addition to meritless ones); Epstein, *supra* note 160, at 196 (discussing situations where judgment at pleading stage reduces error and administrative costs); Darrell A.H. Miller, *Iqbal and Empathy*, 78 UMKC L. REV. 999, 1011 n.97 (2010) (arguing that new pleading standards will prevent “marginal, but ultimately meritorious case[s]” from making it past pleading stage); Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMP. L. REV. 627, 646 (2009) (arguing that “[t]he *Twombly* opinion advocates that trial courts put an end to marginal litigation ‘at the point of minimum expenditure of time and money by the parties and the court’” (quoting *Twombly*, 550 U.S. at 558)); Scheindlin, *supra* note 87, at 1375 (“Because the Supreme Court perceived the extraordinary burden of expensive discovery as a reason for raising the pleading bar, the suggestion has been made that fact pleading is particularly appropriate in complex cases but unnecessary in simple or average cases, where the cost of discovery will not be so burdensome and the same vigilance in gatekeeping by judges is not required.”). The courts also might adopt a policy to be more vigilant and demanding when handling certain types of claims that have become far more prevalent. See Marcus, *supra* note 42, at 446-50.

173. See *Twombly*, 550 U.S. at 561-63; see also *Gee v. Pacheco*, 627 F.3d 1178, 1192 (10th Cir. 2010) (holding that “complaint’s allegations contain insufficient factual information to conclude that a constitutional violation is plausible, rather than merely possible”); *Abcarian v. McDonald*, 617 F.3d 931, 937 (7th Cir. 2010) (dismissing claim because “[t]he amended complaint fails to show that it is at all plausible, rather than perhaps theoretically possible”), *cert. denied*, 131 S. Ct. 1685 (2011); *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (holding that complaint must contain enough facts “to render the legal claim plausible, i.e., more than merely possible”); *Harps v. TRW Automotive U.S., LLC*, 351 F. App’x 52, 56 (6th Cir. 2009) (holding that complaints “must contain enough facts to establish a ‘plausible,’ as opposed to merely a ‘possible,’ entitlement to relief”);

- “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’”¹⁷⁴
- The plaintiff’s factual allegations must be accepted as true.¹⁷⁵ But the district court has considerable leeway in determining what constitutes a “factual allegation.”¹⁷⁶
- The court should construe the complaint liberally, but it should not draw all reasonable inferences in favor of the plaintiff.¹⁷⁷

al-Kidd v. Ashcroft, 580 F.3d 949, 978-79 (9th Cir. 2009) (dismissing complaint because “[w]hile it is possible that these [facts] were sufficient to put [the defendant] on notice . . . , the non-specific allegations in the complaint regarding [the defendant’s] involvement fail to nudge the *possible* to the *plausible*, as required by *Twombly*”), *overruled by* 131 S. Ct. 2074 (2011); McLean v. United States, 566 F.3d 391, 399 (4th Cir. 2009) (holding that *Twombly* court pronounced that “allegations in a complaint must make entitlement to relief plausible and not merely possible”); Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. 1451, 1460 (2010) (explaining that after *Iqbal* “the complaint must contain enough factual detail to present a plausible—and not merely a possible—claim”).

174. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citations omitted).

175. See *id.*; *Erickson*, 551 U.S. at 94; *Twombly*, 550 U.S. at 555; see also *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2875 (2010) (noting that courts accept facts of complaint as true); *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 986-87 (2010) (holding that on motion to dismiss, courts “accept as true the factual allegations in the . . . complaint”).

176. See *supra* notes 33-41 and accompanying text; see also *Clermont & Yeazell*, *supra* note 60, at 840 (“Judges will vary in finding nonconclusory allegations of a complaint implausible after considering the specific ‘context’ of the case and applying ‘judicial experience and common sense.’” (citation omitted) (internal quotation marks omitted)).

177. See *Iqbal*, 129 S. Ct. at 1950; *Scheindlin*, *supra* note 87, at 1374 (“The *Twombly* Court explicitly permits a court to consider inferences that favor the plaintiff as well as those that favor the defendant. This likely means that courts are now required to weigh competing inferences and find, at the motion to dismiss stage, that the inferences that can be drawn in plaintiff’s favor are at least as strong, if not stronger, than the inferences that can be drawn in defendant’s favor.”); see also *Miller*, *supra* note 86, at 29-33; *Spencer*, *supra* note 70, at 200 (explaining that “the *Iqbal* decision gave judges more power to scrutinize facts at the pleading stage”); *Suja A. Thomas*, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 225 (“[I]n the determination of whether claims are plausible, courts use their own opinions of the facts and examine the inferences that favor the defendants in addition to inferences that favor the plaintiffs”); *Mohan*, *supra* note 86, at 1201 (“[B]y relying on judicial experience and common sense, different outcomes on similar facts are inevitable.”).

- The court is not limited to consideration of information stated on the face of the complaint, judicially noticed facts, and any attachments to the complaint.¹⁷⁸ In addition, the court must draw on its judicial experience.
- The application of judicial experience requires the district court to reject factual allegations where the court has a better understanding of the way the world is.¹⁷⁹

The application of judicial experience also requires the district court to consider prior federal court experience with similar claims and similar claimants. Where similar claims and similar claimants have historically been unsuccessful, the court should be more demanding in its assessment of plausibility.¹⁸⁰

IX. THE APPLICATION OF JUDICIAL EXPERIENCE AT THE PLEADING STAGE IS INAPPROPRIATE AND INCONSISTENT WITH THE ADVERSARIAL NATURE OF LITIGATION

The application of judicial experience does not require a district court to make a *subjective* judgment about whether the plaintiff's vision of the world is true. Nor does it require a district court to make a *subjective* judgment about the merits of a claim. Drawing on judicial experience does require a district court to consider information beyond that alleged in the complaint.¹⁸¹ A district court must consider the historical success rate of similar claims and similar claimants and the views of leading experts and commentators in the relevant field of substantive law.¹⁸² Thus, some commentators have suggested that plaintiffs should consider ap-

178. See *supra* notes 79-149 and accompanying text.

179. See *supra* notes 95-108 and accompanying text.

180. See *supra* notes 79-121, 143-51, and accompanying text.

181. See *Barkes v. First Corr. Med.*, No. 06-104-JJF-MPT, 2010 WL 1418347, at *3 (D. Del. Apr. 7, 2010) (“[J]udicial experience’ and ‘common sense’ do not permit a court to scour the record for additional facts indicating that claims are plausible, but rather to draw on outside knowledge in determining whether the particular facts alleged ‘raise a right to relief above the speculative level.’” (citation omitted)).

182. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (“[W]e have the benefit of the prior rulings and considered views of leading commentators”); see also *Bone*, *supra* note 70, at 873 (“The assessment of likely trial success that the thick screening model requires is an all-things-considered prediction based on what the complaint tells the judge about the facts and what the judge knows from her experience about how facts like the ones alleged are usually proved in similar cases.”); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 68 n.88 (2010) (“[T]he invitation by *Iqbal* for district judges to use judicial experience and common sense . . . might also require judges to seek outside guidance on certain technical issues of substantive law, such as antitrust law, to determine what is plausible and what is not.”); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 135 n.79 (2011) (citing *Iqbal*, 129 S. Ct. at 1950); *supra* notes 142-51 and accompanying text.

pending empirical evidence or reports of experts to establish why the claim is plausible despite contrary appearances.¹⁸³

The application of judicial experience and the resultant resolution of a motion to dismiss by reference to information outside the complaint are inappropriate for pleading standards and inconsistent with the adversarial process. Rule 12(d) prohibits the parties from offering evidence beyond that set forth in the complaint in support of, or in opposition to, a motion to dismiss:

If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.¹⁸⁴

The Supreme Court did not address the tension between Rule 12(d) and the application of judicial experience.¹⁸⁵ If the parties cannot submit additional information for the court's consideration, it is inappropriate for the court to consider information beyond the scope of the complaint.¹⁸⁶

Rule 12(d) is consistent with due process and the adversarial nature of litigation. The judge relies on the parties to present evidence and make arguments. The judge does not conduct legal or factual investigation.¹⁸⁷ In the context of pleading, the "reality" of the past incident is limited to the facts alleged in the four corners of the complaint itself—the allegations made by the plaintiff and the plaintiff's view of the inferences to be drawn from those allegations. If the court is to consider outside information, it must give each side notice of that intention and a reasonable opportunity to present pertinent material and to offer argument about the value and meaning of such information.¹⁸⁸ Where the party opposing the motion needs time to gather evidence to respond to the motion—particularly when the motion to dismiss is made before discovery occurs—the district court ordinarily will defer or deny the motion to allow time for the

183. See Brown, *supra* note 82, at 172 (describing possible method for litigant to provide empirical evidence to survive motion to dismiss); see also Hartnett, *supra* note 88, at 503 ("[P]erhaps *Twombly* suggests that litigants seek directly to undermine [a judge's] baseline assumption [about what is reasonable] with social science research.").

184. FED. R. CIV. P. 12(d).

185. See Noll, *supra* note 76, at 137.

186. See, e.g., Helwig v. Vencor, Inc., 251 F.3d 540, 552 (6th Cir. 2001) (holding that trial court's decision to *sua sponte* convert motion to dismiss into motion for summary judgment is "serious error"), *abrogated by* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007).

187. See *supra* notes 33-41 and accompanying text.

188. See FED. R. CIV. P. 12(d); David v. City of Denver, 101 F.3d 1344, 1352 (10th Cir. 1996) (holding lower court erred when granting summary judgment motion without further notice to parties).

opposing party to conduct discovery, offer relevant evidence, and prepare pertinent legal argument.¹⁸⁹

The application of judicial experience to consider information outside the pleadings is inconsistent with the adversarial process.¹⁹⁰ The claimant will be left in the dark about the information sought out and considered by the court and will not have a chance to test and oppose such information for relevance, reliability, and biases against the crucible of cross-examination and the other evidentiary mechanisms and litigation processes that are consistent with the adversarial process.¹⁹¹ As Professor Darrel A.H. Miller states:

Where *Iqbal* goes wrong is in its articulation of a standard that seems to privilege experience, without demanding impartiality. *Iqbal* seems to invite judges to determine plausibility based upon their *own* experience, rather than forcing them to do the hard work to imagine themselves in the scenario presented within the four corners of the complaint. "Judicial experience" in operation looks too much like "my experience." And "my experience" may or may not include the experience of the litigants.¹⁹²

Twombly and *Iqbal* now permit a district court judge to go beyond the universe of facts created by the plaintiff to determine whether the plaintiff's allegations convince the court that plaintiff's claim is plausible. It is unfair and improper to resolve a dispute on grounds which the parties had no chance to contest and offer evidence and argument.¹⁹³

189. FED. R. CIV. P. 12(d), 56(d); see, e.g., *Mid-South Grizzlies v. Nat'l Football League*, 720 F.2d 772, 779-80 (3d Cir. 1983) (holding that requests for continuance should be granted "almost as a matter of course" when party opposing motion can point to discovery it needs to obtain evidence from moving party); *Hawkins v. Donovan*, 269 F.R.D. 6, 7-8 (D.D.C. 2010) (holding that evidence presented sufficiently demonstrated that plaintiff was entitled to discovery before litigating on merits of claim).

190. See *Clermont & Yeazell*, *supra* note 60, at 832 ("The new approach does not comfortably mesh, but rather clashes, with the prior procedural system, which of course magnifies the destabilizing effect that comes from cutting a procedural system from its moorings.").

191. Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 202 (2011) (arguing that allowing judges to "reach[] out for issues not put before [the court] by the parties . . . denie[s] parties the right to a full and fair process").

192. Miller, *supra* note 172, at 1011-12.

193. See *Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941); see also *Neitzke v. Williams*, 490 U.S. 319, 329-30 (1989) ("Under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon. These procedures alert him to the legal theory underlying the defendant's challenge, and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the requirements of a valid legal cause of action. This adversarial process also crystallizes the pertinent issues and facilitates appellate review of a

Consideration of information beyond that alleged in the complaint, even where it calls for a purely *objective* determination, also permits trial courts a significant amount of discretion.¹⁹⁴ This grant of discretion is inappropriate because it requires the district courts to make complex and important policy decisions that are normally left to the Legislative and Executive Branches.¹⁹⁵ Drawing lines and creating a hierarchy of pleading standards requires “detailed knowledge about the underlying substantive law and the practicalities of litigating claims arising under that law.”¹⁹⁶ Trial courts are not the appropriate body to make such public policy decisions, particularly because these important judgments will be implemented by hundreds of judges faced with thousands of cases, most of which are unique. Few cases (maybe none) will permit individual judges to immerse themselves in the underlying substantive law and the policy choices that helped define this law—especially, as the Supreme Court demands, at the pleading stage.¹⁹⁷

Finally, the expansion of the trial court’s discretionary powers is a one-way ratchet at the pleading stage; the Supreme Court was not inviting the application of more *lax* pleading standards. The Court intends the exercise of judicial discretion to result in dismissal of a greater number of cases.¹⁹⁸ This problem was specifically identified by the Rules Committee when it considered the task of creating a hierarchy of “claim-specific

trial court dismissal by creating a more complete record of the case.” (footnote omitted)).

194. See *Martin v. United States*, 96 Fed. Cl. 627, 632 (2011) (“The Supreme Court expressly afforded trial courts discretion in ascertaining whether a plaintiff has alleged a plausible claim, urging trial courts to ‘draw upon [their] judicial experience and common sense.’” (alteration in original) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009))); Kenneth S. Klein, *In Discretion: The Consequences of Twombly and Iqbal*, PRETRIAL PRACTICE & DISCOVERY (ABA Sec. on Litig.) Fall 2010, at 22 (“[T]he Court has signaled a grant of super-discretion to the trial courts.”).

195. See Noll, *supra* note 76, at 139-40; Klein, *supra* note 194, at 22.

196. See Rules Committee Minutes, *supra* note 166, at 38; see also Anderson & Huffman, *supra* note 32, at 28 (“Each element of each claim in each area of substantive law needs to be examined to assess whether the high plausibility standard applied in *Twombly* and *Iqbal* is justified.”).

197. See Bone, *supra* note 70; Klein, *supra* note 194, at 22; see also Noll, *supra* note 76, at 139-40 (“More broadly, increased use of judgmental facts increases the power of judges vis-à-vis Congress, the Executive Branch, and the agencies to determine the kind of cases that receive a hearing in federal court. As *Iqbal* pointedly illustrates, a court’s reliance on judgmental facts can directly affect whether particular forms of primary conduct support a federal suit designed to test the legality of that conduct. To the extent judges define and shape judgmental facts, they exercise a power which is not easily distinguished from the legislative power to define norms of substantive law.”).

198. See Bone, *supra* note 70, at 870; Noll, *supra* note 76, at 149 (“The fact that the Supreme Court dismissed two complaints, including a complaint seven federal judges found sufficient, indicates a new willingness to decide cases on the pleadings, and the analysis here ignores the signaling effect of this exercise of judicial power by the Nation’s highest court.”).

pleading rules.” The committee warned about the “perception that the seemingly procedural pleading rules are surreptitiously motivated by distaste for the substantive rights or defenses subjected to higher standards.”¹⁹⁹

X. CONCLUSION

Professors Yeazell and Clermont assert “that by blazing a new and unclear path alone and without adequate warning or thought [the Supreme Court] left the pleading system in shambles.”²⁰⁰ Arguing that *Twombly* and *Iqbal* destabilized the federal pleading regime, they assert that one cause of that destabilization was the addition of the new plausibility standard, an imprecise term that has not yet been defined satisfactorily. As this Article demonstrates, another cause of that destabilization was the addition of the new requirement that district courts apply judicial experience to resolve motions to dismiss.

In this Article, I describe the meaning of “judicial experience” that the Supreme Court intends. The Supreme Court believes that the system of litigation must be protected from cases that are not meritless, but are deemed objectively unworthy. To save the system, the Court wants to develop rules and standards that will restrict the number of cases that survive a motion to dismiss. The Court therefore has tasked federal courts with development of a common law of federal pleading. The Court proclaims that this new regime does not require “heightened fact pleading of specifics.” Instead, the Court offers a universal plausibility standard applicable to all civil actions. But the meaning of plausibility is context-specific and dependent upon judicial experience with similar claims and claimants.

If I am correct in ascertaining the meaning that the Supreme Court ascribes to judicial experience, then the development of a common law of federal pleading will require district court judges to change their traditional role in the adversarial process and become active players in the game of litigation. They must independently investigate and make judgments about the accuracy, reasonableness, and truth of the picture of reality painted by a claimant in a complaint. They also must prejudge each action. Based on objective judicial experience and the views of experts and commentators regarding the chances for success, district courts will disfavor certain types of claims and certain types of claimants and defendants. They will then employ a more rigorous pleading standard to weed out dubious claims. The Court explicitly rejects heightened fact pleading of specifics, but invites district courts to set the bar of plausibility at different heights based on judicial experience.

In the Introduction, I quoted Chief Justice Roberts’s now-famous statement that a judge’s job is to “call balls and strikes, and not to pitch or

199. Rules Committee Minutes, *supra* note 166, at 38.

200. Clermont & Yeazell, *supra* note 60, at 823.

bat.”²⁰¹ I then noted that the Supreme Court has asked district courts to suit up and get in the game. Continuing with the baseball theme, maybe a better analogy is that the Supreme Court wants federal district courts to act less like an umpire and more like representatives of the commissioner’s office. The intended application of judicial experience requires the federal courts to employ the rules in a more stringent fashion against the objectively weaker team to protect against a “lucky” upset that is bad for the larger, long-term interests of baseball. The players and the public should cry foul.

201. *Roberts Confirmation Hearing*, *supra* note 4, at 56. .