

IQBAL AND EMPATHY

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I. INTRODUCTION

Robert Gibbs, the White House Press Secretary, spent the first half-hour of his May 1, 2009 press corps briefing doggedly deflecting speculation about Justice David Souter's retirement.¹ In fact, the questioning had just turned to the looming H1N1 virus threat when President Barack Obama unexpectedly stepped into the James S. Brady Press Briefing Room.² "I just got off the telephone with Justice Souter,"³ he said, "[a]nd so I would like to say a few words about his decision to retire from the Supreme Court."⁴ After some gracious remarks concerning Justice Souter's twenty year tenure as an Associate Justice, the President turned to the topic of his replacement:

I will seek somebody with a sharp and independent mind and a record of excellence and integrity. I will seek someone who understands that justice isn't about some abstract legal theory or footnote in a case book; it is also about how our laws affect the daily realities of people's lives—whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation.

I view that *quality of empathy, of understanding and identifying with people's hopes and struggles*, as an essential ingredient for arriving at [sic] just decisions and outcomes.⁵

This was not the first time that President Obama spoke of empathy as one of his selection criteria; he had mentioned empathy while on the campaign trail.⁶

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¹ See Press Briefing by Press Secretary Robert Gibbs (May 1, 2009), *available at* http://www.whitehouse.gov/the_press_office/Press-Briefing-By-Press-Secretary-Robert-Gibbs-5-1-09.

² See *id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* (emphasis added).

⁶ See, e.g., Mark Murray, *Context of Obama's 'Empathy' Remark*, MSNBC: FIRST READ, May 1, 2009, <http://firstread.msnbc.msn.com/archive/2009/05/01/1918695.aspx>.

Justice Ginsburg, Justice Thomas, Justice Scalia—they're all gonna agree on the outcome. But it's those 5% of the cases that really count. And in those 5% of the cases what you got to look at it is: What is in the justice's heart? What's their broader vision of what America should be?

You know, Justice Roberts said he saw himself just as an umpire. But the issues that come before the court are not sport. They're life and death. And we need somebody who's got . . . the empathy to recognize what it's like to be a young,

Yet, the reiteration of the President's empathy standard for judicial nominees reignited a fusillade of criticism against Obama and his judicial philosophy, broadsides that the President's nominee, then-Judge Sonia Sotomayor, faced during the hearings. At those hearings, Senator Jeff Sessions charged that empathy would only debase the legal system:

In my view, such a philosophy is disqualifying. Such an approach to judging means that the umpire calling the game is not neutral, but instead feels empowered to favor one team over another. Call it empathy, call it prejudice or call it sympathy, but whatever it is, it's not law.⁷

Senator Mitch McConnell blasted Sotomayor's previous statements and writings, which, to him, suggested that "a judge's personal experiences affect judicial outcomes" and that "[Sotomayor's] experiences will affect the facts that she chooses to see as a judge."⁸

As senators whetted their knives for the confirmation hearings, across the street in the Supreme Court, Justice Kennedy continued to whittle at fifty years of settled expectation about notice pleading in the federal courts. In *Ashcroft v. Iqbal*, the Court indisputably abandoned the battered presumption that claims in federal court will go forward unless "no set of facts" show entitlement to relief.⁹ Instead, complaints are to be evaluated based on their plausibility.¹⁰ And plausibility, ironically enough, requires a judge to "draw on [his] judicial experience and common sense."¹¹

teenaged mom; the empathy to understand what it's like to be poor or African-American or gay or disabled or old. And that's the criteria by which I'm going to be selecting my judges.

Id. Obama had opposed the confirmation of Chief Justice Roberts due in part to Roberts' alleged lack of empathy:

In those [5% of hard] cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy.

Remarks of Sen. Barack Obama, Confirmation of Judge John Roberts, <http://obamaspeeches.com/031-Confirmation-of-Judge-John-Roberts-Obama-Speech.htm> (last visited Mar. 14, 2010).

⁷ Kwame Holman, *Sotomayor Pledges 'Fidelity to the Law' as Hearings Begin*, PBS NEWS HOUR, July 13, 2009, http://www.pbs.org/newshour/bb/law/july-dec09/hearings_07-13.html.

⁸ Paul Kane, *3 Senate Republicans Endorse Sotomayor*, WASH. POST, July 18, 2009, at A02.

⁹ 129 S. Ct. 1937, 1953 (2009).

¹⁰ *Id.* at 1949.

¹¹ *Id.* at 1950. I am not the first to identify this irony. Jessie Hill wrote a short blog entry on the issue shortly after *Iqbal* came down. See Posting of Jessie Hill to Prawfs Blog, <http://prawfsblawg.blogspot.com/2009/05/some-belated-thoughts-on-twombly-iqbal-and-sotomayor.html> (May 31, 2009, 15:18 EST) ("It seems to me that plausibility as a legal standard—though it surely makes appearances elsewhere in the law—inherently calls on the judge to make judgments based on life experiences."). Others have spoken about empathy in adjudication more generally. See, e.g., Lauren Collins, *Number Nine*, NEW YORKER, Jan. 11, 2010, at 42, 53 (discussing Sotomayor and empathy); Michael Dorf, "Empathy and Justice," Posting of Michael

So, a paradox. On the Hill, conservative senators pillory personal experience as an element of the judicial function, arguing that judges are duty-bound to suppress such experience lest it mutate into intolerable “empathy.” Anyone who thinks otherwise, so they say, is not fit to sit as a Justice on the Supreme Court. Meanwhile, a block away, conservative Justices all but invite personal experience—couched as “judicial experience” and “common sense”—as the basis for judicial decision making.

Inconsistent? Perhaps. But the goal of this Essay is not to dwell on the moths in the eyes of others. Doing so is undeniably self-gratifying. It is also fruitless, decadent, and common. Nor is the purpose of this Essay to record another episode of rank partisanship swamping even modest attempts at principled debate.¹² Base political posturing explains a lot, but if we assume politics conquers all, then our entire legal discourse is a vanity. And so, this Essay will assume that the fundamental question is still worth discussing. Who is right? The senators or Justice Kennedy? What is the role of empathy in adjudication?

This Essay argues that empathy does and should play an important, albeit limited role, in a judge’s decision making process. Specifically, empathy is essential for making correct, principled, and unbiased judgments, because empathy is one of the few means we have to understand human motivation. Without empathy, as journalist David Brooks has written, judges “are not objective decision makers. They are sociopaths”¹³ Empathy is a crucial cognitive mechanism that can help compensate for common cognitive bias. As such, empathy, appropriately restricted, should be an accepted and meaningful tool for judges to use in evaluating the sufficiency of complaints, especially as they relate to *Iqbal*’s plausibility pleading standard. While the focus of this Essay will be on empathy as it relates to pleading, the insights of this Essay point to broader applications within the entire structure of the Rules of Civil Procedure (“Rules”).

Part II of this Essay discusses the *Iqbal* decision and its antecedents, and identifies the cognitive problems with the plausibility standard in pleading. Part III describes recent research on empathy, and explores how a narrow understanding of empathy can make plausibility pleading meaningful and more accurate. Part IV discusses the implications of the relationship between empathy and adjudication in the larger context of the Rules and civil jurisprudence.

II. PLEADING: PLAUSIBILITY, PROBABILITY AND POSSIBILITY

For half a century, lawyers learned by rote the *Conley v. Gibson* standard for dismissal of a complaint: “[A] complaint should not be dismissed for failure

Dorf on Dorf on Law Blog, <http://www.dorfonlaw.org/2009/05/empathy-and-justice.html> (May 22, 2009, 11:19 EST). However, I do believe I am among the first to connect this case with the growing body of literature on the psychology of empathy and behavioral law and economics.

¹² For example, consider the realignment of the parties with respect to the propriety of judicial filibusters in the Senate after the election of Obama. See Editorial, *Giving Hypocrisy a Bad Name*, WASH. POST, Nov. 17, 2009, at A30.

¹³ David Brooks, *The Empathy Issue*, N.Y. TIMES, May 29, 2009, at A25.

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.”¹⁴ Then, an earthquake. In *Bell Atlantic Corp. v. Twombly*, a seven member majority seemed to abandon the *Conley* standard.¹⁵

Twombly arose from litigation surrounding congressional attempts to stimulate competition in the telecommunications industry. In the 1980s, the Justice Department forced the breakup of American Telephone & Telegraph into various smaller local telephone companies.¹⁶ These incumbent telephone companies, the “Baby Bells,” took over regional telephone service.¹⁷ The Baby Bells possessed distinct advantages in this deregulated market: they owned the physical plant, cabling, switching, and other infrastructure necessary to provide service.¹⁸ Plaintiffs William Twombly and Lawrence Marcus sued, alleging that the Baby Bells had engaged in parallel conduct, by, among other things, declining to compete against other incumbent carriers in contiguous markets.¹⁹ According to the plaintiffs:

[I]n light of the parallel course of conduct that each engaged in to prevent competition . . . Plaintiffs allege upon information and belief that [the defendants] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.²⁰

The lower court litigation turned on whether simple allegations of parallel conduct could state a claim under Rule 12(b)(6) when the actual conduct was equally explainable as the product either of illegal collusion or coincidence.²¹ The circuit court erred on the side of letting the case go forward—at least to discovery.²² Reciting shop-worn *Conley*, only where “no set of facts . . . would permit a plaintiff to demonstrate” illegal collusion, could the court dismiss the complaint.²³

¹⁴ 355 U.S. 41, 45-46 (1957).

¹⁵ See 550 U.S. 544, 561-63 (2007); see also *id.* at 577 (Stevens, J., dissenting) (remarking that if *Conley* “is to be interred, let it not be without a eulogy”).

¹⁶ *Id.* at 549.

¹⁷ *Id.* at 548.

¹⁸ See *Covad Commc’ns Co. v. FCC*, 450 F.3d 528, 532-34 (D.C. Cir. 2006); see also *Twombly*, 550 U.S. at 550 (citing *Covad* for history of deregulation).

¹⁹ *Twombly*, 550 U.S. at 550.

²⁰ *Id.* at 551 (quoting Complaint ¶ 51, App. 27) (internal quotation marks omitted).

²¹ *Id.* at 553. Specifically, the lower court had said “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.” *Id.* (quoting *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005) (internal quotation marks omitted)).

²² *Id.*

²³ *Id.* (quoting *Twombly*, 425 F.3d at 114) (emphasis added).

The Supreme Court reversed.²⁴ Justice Souter, writing for a seven member majority, observed that few courts had ever taken *Conley's* "no set of facts" formulation literally.²⁵ Instead, courts had demanded various amounts of facts in the pleading to survive a motion to dismiss.²⁶ According to the majority, *Conley's* "no set of facts" formulation "is best forgotten as an incomplete, negative gloss on an accepted pleading standard."²⁷ "[A]fter puzzling the profession for 50 years," Justice Souter observed, "this famous observation has earned its retirement."²⁸ Instead, pleadings must contain "enough facts to state a claim to relief that is *plausible* on its face."²⁹

Criticism of *Twombly's* "plausibility" pleading standard followed.³⁰ Lower courts lamented the lack of clarity of *Twombly*.³¹ Some scholars saw *Twombly* as abandoning the Rules' commitment to notice pleading.³² But uncertainty about *Twombly's* scope tempered this criticism. Specifically, *Twombly* did not clarify whether it set out a new pleading standard for all cases, or only for a subset of particularly complex ones.³³ *Ashcroft v. Iqbal* dispelled any uncertainty. In *Iqbal*

²⁴ *Id.*

²⁵ *Id.* at 562.

²⁶ *Id.*

²⁷ *Id.* at 563.

²⁸ *Id.*

²⁹ *Id.* at 570 (emphasis added). Among the reasons cited by the majority for the switch to plausibility pleading was the enormous costs of discovery in antitrust suits, costs that the majority believed were not adequately controlled by either judicious pre-trial management of discovery, summary judgment procedures or jury instructions. *Id.* at 558-59.

³⁰ See A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431, 433 (2008) (declaring "[n]otice pleading is dead. Say hello to plausibility pleading" and concluding that *Twombly* is "an unwarranted interpretation of Rule 8 that will frustrate the efforts of plaintiffs with valid claims to get into court"); Suja Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1855, 1867-68 (2008) (exploring how the Court's interpretation of the motion to dismiss standard dispenses with the requirements to preserve the jury in cases at common law under the Seventh Amendment). *But see* Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 877 (2009) ("[T]he Supreme Court's decision in *Twombly* does not alter pleading rules in as drastic a way as many of its critics, and even some of its few defenders, suppose."); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1064 (2009) (suggesting that angst regarding *Twombly* is "largely unwarranted"). For an argument that the reaction to *Twombly* and *Iqbal* is overstated, and that there is a way to harmonize the rulings with the text of the existing Rules, see Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming May 2010), Working Paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1442786.

³¹ See, e.g., *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (referring to *Twombly* formulation as "less than pellucid"); *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008) (acknowledging decision is "confusing").

³² See Spencer, *supra* note 30, at 457-59.

³³ See, e.g., *CBT Flint Partners v. Goodmail Sys., Inc.*, 529 F. Supp. 2d 1376, 1379 (N.D. Ga. 2007) (noting reluctance to think that the Supreme Court fundamentally changed the rules of pleading outside of the normal rule making process and limiting *Twombly* to complex cases); Edward D. Cavanagh, *Twombly, the Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 890 (2008) (noting that some of the reasoning of *Twombly* seemed limited to complex cases).

the Court held that plausibility pleading is trans-substantive—it applies to all civil cases in the federal system.³⁴

Iqbal involved the immediate post-September 11 detention of Javid Iqbal, a Muslim Pakistani. Following the September 11, 2001 terrorist attacks, the Justice Department conducted a sweep of approximately one thousand potential suspects.³⁵ One hundred and eighty-four of these suspects, including Iqbal, were designated persons of “high interest,” held incommunicado in a maximum security facility and locked-down for twenty-three hours a day.³⁶

Iqbal subsequently brought a *Bivens* action against John Ashcroft, the former Attorney General, and Robert Mueller, Director of the FBI.³⁷ Iqbal alleged that they specifically selected him as a person of “high interest” on the basis of race, religion and national origin in violation of his First and Fifth Amendment rights.³⁸ He further alleged that both Ashcroft and Mueller willfully and maliciously knew of, condoned and agreed to subject Iqbal to this discriminatory treatment.³⁹

The Court dismissed Iqbal’s suit against Ashcroft and Mueller.⁴⁰ The Court emphasized that the plausibility standard of *Twombly* was not confined to antitrust cases, but governs the pleading standard “in all civil actions and proceedings in the United States district courts.”⁴¹ In any civil case in federal court, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”⁴² Instead, the plaintiff must support legal conclusions with “well-pleaded factual allegations.”⁴³ These allegations must be taken as true, but, even then, scrutinized to see whether “they plausibly give rise to an entitlement to relief.”⁴⁴ Whether such facts give rise to a plausible claim for relief is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”⁴⁵

³⁴ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009). Justice Souter, who wrote the majority opinion in *Twombly*, and Justice Breyer, who joined the majority in *Twombly*, both dissented in *Iqbal*. Their objection was not to the “plausibility” standard, but that its application to Iqbal’s case required dismissal of the complaint, properly construed. *Id.* at 1956-61 (Souter, J., dissenting).

³⁵ *Id.* at 1943.

³⁶ *Id.* Iqbal eventually pled guilty to crimes related to fraudulent immigration documentation and was deported. *Id.*

³⁷ *Id.* A *Bivens* suit is a judicially crafted cause of action against federal agents for violation of constitutional rights. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 392-95 (1971). Although judicially crafted, many of its doctrinal defenses track those of 42 U.S.C. § 1983.

³⁸ *Iqbal*, 129 S. Ct. at 1943-44.

³⁹ *Id.* at 1944.

⁴⁰ But not other prison guards and officials named in the complaint. *See id.* at 1952 (“[W]e express no opinion concerning the sufficiency of respondent’s complaint against the defendants who are not before us.”).

⁴¹ *Id.* at 1953 (quoting Federal Rule of Civil Procedure 1) (internal quotation marks omitted).

⁴² *Id.* at 1949.

⁴³ *Id.* at 1950.

⁴⁴ *Id.*

⁴⁵ *Id.*

Furthermore, because Iqbal alleged invidious discrimination, he had to “plead sufficient factual matter to show that [Ashcroft and Mueller] adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.”⁴⁶ The Court concluded that it was far more plausible that Ashcroft and Mueller’s motivation was a benign or neutral motivation to hold immigration violators in secure conditions until they could be identified or cleared as potential terrorists.⁴⁷ The Court recognized that the detention “would produce a disparate, incidental impact on Arab Muslims,”⁴⁸ but that alone did not make discriminatory motive more plausible than a neutral alternative.

Iqbal raises a host of issues about access to justice, the war on terrorism, institutional competence, and race.⁴⁹ But one perhaps overlooked facet of *Iqbal* is that it lays bare both the fact that pleading doctrine is a form of “choice architecture”⁵⁰ and that the materials used to build that architecture are seriously, and ineluctably, deficient.

As Cass Sunstein has written, “the legal system is pervasively in the business of constructing procedures, descriptions, and contexts for choice.”⁵¹ Juries are selected, evidence is either presented or suppressed, and decisions are made as to which cases should go forward and which should be dismissed. These choices are framed, presented in a certain sequence, and limited by certain cannons and by certain people, all of which impact outcomes. *Iqbal* is one of the unusual cases that expose the meager and borrowed nature of the materials with which we build this architecture. Words are all we have to go on.⁵² But words in civil procedure strive to shape decision making with a precision that they can never completely deliver.

One source of this imprecision is the nature of legal language itself. Law is an extremely conservative language system. It is hostile to neologism, and often finds itself constrained by its own ossified terminology.⁵³ It is unsurprising that *Iqbal* and *Twombly* both strenuously deny that they impose a “probability”

⁴⁶ *Id.* at 1948-49.

⁴⁷ *Id.* at 1952.

⁴⁸ *Id.* at 1951.

⁴⁹ A symposium on *Iqbal* held in March 2010 at the Penn State University, Dickinson School of Law touched on some of these issues.

⁵⁰ RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 11, 81-83 (2008) (coining term “choice architecture”). Indeed, not only Civil Procedure, but also the Rules of Evidence and the Rules of Criminal Procedure are part of this choice architecture.

⁵¹ Cass R. Sunstein, *Introduction*, in *BEHAVIORAL LAW & ECONOMICS* 2 (Cass R. Sunstein ed., 2000).

⁵² See TOM STOPPARD, *ROSENCRANTZ & GUILDENSTERN ARE DEAD*, act I, p. 32 (1967).

⁵³ *Cf.* Transcript of Oral Argument at 32, *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125 (2009) (No. 07-665) (Kennedy, J.) (discussing the public forum doctrine as applied to this case as presenting an “an example of the . . . tyranny of labels”).

requirement at the pleading stage.⁵⁴ Probability—at least in the civil context—is typically understood as the province of the jury.⁵⁵ Probability pleading would have been a true sea change in the division between judge and jury.

Even apart from preserving the appearance of notice pleading, couching the pleading standard as plausibility rather than probability may have some limited utility. It may inhibit judges from *expressly* assuming the functions of a jury—functions guaranteed to the parties by the Seventh Amendment.⁵⁶ But without some richer understanding of the mechanism by which judges make their decisions, or the diction that best shapes those decisions, it hardly rationalizes the gate keeping function of judges beyond the speculative. The *Iqbal* Court avoided the linguistic shoals of “probability” pleading, but did little to navigate out of the danger of erroneous judicial decisions.⁵⁷

A related deficiency is that the terms used in civil procedure often appear selected without reference to data on what linguistic framing best accomplishes the goals set for a system of procedure.⁵⁸ The *Iqbal* Court engineered a new rule of pleading, but without the help and investigation vital to determine whether in fact its new standard accomplishes its avowed purpose. What does plausibility pleading mean? What is a mental demarcation between the probable, the plausible and the possible? Judges routinely make decisions based on these terms—whether a claim is plausible,⁵⁹ whether a rational jury could come to more than one conclusion⁶⁰—and yet, there seems precious little investigation as to which word choices actually lead to the type of cognitive shaping demanded of the judicial system.

In the specific instance of pleading, the *Iqbal* decision seems largely uninformed by psychological evidence detailing the way in which human beings—including judges—assess likelihoods. Psychologists and other cognitive scientists know that human beings do not assess likelihoods by mathematics.⁶¹ Only *homo economicus* actually does the math. *Homo economicus* has unlimited

⁵⁴ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

⁵⁵ See Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619, 650 (2006) (“In a civil action . . . the jury, if there is one, will find for the party which they consider to have the higher probability of being correct in its assertions. The probability which it is the function of the jury to assess is clearly not a statistical probability; for each trial is unique and cannot be considered as one out of a large number of similar trials.”) (quoting M.G. BULMER, PRINCIPLES OF STATISTICS 6 (1979)).

⁵⁶ See U.S. CONST. amend. VII (“In suits at common law . . . the right of trial by jury shall be preserved . . .”).

⁵⁷ In this context, an erroneous choice would be one in which a meritorious claim is dismissed as “implausible” or a frivolous claim is allowed to proceed as “plausible.”

⁵⁸ This is where the work of empiricists is helpful. Cf. *infra* note 77.

⁵⁹ *Iqbal*, 129 S. Ct. at 1943; *Twombly*, 550 U.S. at 570.

⁶⁰ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-27 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 594 (1986).

⁶¹ See THALER & SUNSTEIN, *supra* note 50, at 6-8.

mental resources.⁶² *Homo economicus* assesses the probability of events with cold, rational precision.⁶³ And *homo economicus* is a work of fiction, like Hari Seldon⁶⁴ or Hercules.⁶⁵ Human beings don't do the math; they use back-of-the-envelope estimates, short cuts, and rules of thumb—methods that cognitive scientists and other behavioral scholars have termed heuristics.⁶⁶

Heuristics are the mechanisms by which humans cope with limited cognitive capacity.⁶⁷ Frequently, heuristics lead to correct predictions. People assume that the sun will rise in the morning because the sun has risen every morning in the past.⁶⁸ More importantly, heuristics are unavoidable. Individuals have neither the time nor the raw computational ability to make many complex decisions,⁶⁹ and so we assess likelihoods of certain outcomes by best-guesses based on experience.

But heuristics can also lead to seemingly irrational decisions—or systematically biased ones. For example, people routinely make biased decisions due to the availability heuristic—the tendency to “estimate the frequency of a class by the ease with which they can recall specific instances in that class.”⁷⁰ A person may think a type of cancer is particularly common because one has a friend recently diagnosed with that disease.⁷¹ People also routinely misjudge probabilities by relying on the representative heuristic, which involves “comparing the similarity of the case with the image or stereotype of the class.”⁷² So, for example, people will overestimate the likelihood that a woman reading a book, wearing glasses and shawl, with her hair in a bun, is a librarian or teacher

⁶² See *id.* at 6 (“[H]omo economicus can think like Albert Einstein, store as much memory as IBM’s Big Blue, and exercise the willpower of Mahatma Gandhi.”).

⁶³ *Id.*

⁶⁴ Hari Seldon is the genius from Isaac Asimov’s *Foundation* series, who can predict the future based on mathematical probability. See ISAAC ASIMOV, *FOUNDATION* 26 (1991) (1951).

⁶⁵ Hercules, the mythological figure, is Ronald Dworkin’s exemplar of the supremely wise and supremely principled judge. See RONALD DWORKIN, *LAW’S EMPIRE* 239 (1986).

⁶⁶ See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780 (2001).

⁶⁷ This limitation is known as “bounded rationality.” See Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, in *BEHAVIORAL LAW & ECONOMICS*, *supra* note 51, at 14 (citing Herbert Simon).

⁶⁸ *Id.* at 15 (noting that heuristics are “useful on average”). The rising sun example comes from the philosopher David Hume.

⁶⁹ See *id.* at 14 (“Bounded rationality . . . refers to the obvious fact that human cognitive abilities are not infinite We have limited computational skills and seriously flawed memories.”).

⁷⁰ RICHARD H. THALER, *The Psychology of Choice and the Assumptions of Economics*, in *QUASI-RATIONAL ECONOMICS* 152 (1991).

⁷¹ Conversely, a person may think that a type of cancer is *not* common because a person cannot call to mind anyone with that disease. See Timur Kuran & Cass R. Sunstein, *Controlling Availability Cascades*, in *BEHAVIORAL LAW & ECONOMICS*, *supra* note 51, at 381.

⁷² THALER, *supra* note 70, at 153.

when it is statistically more likely that she has some other type of occupation.⁷³ These are but two illustrations of the heuristics and biases that arise simply from the phenomenon of human cognition.⁷⁴

Judges, although often better trained than laypersons, are not immune from faulty heuristics. Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich have all conducted experiments on the decision making of judges.⁷⁵ These scholars concluded that “[e]mpirical evidence suggests that even highly qualified judges inevitably rely on cognitive decision-making processes that can produce systematic errors in judgment.”⁷⁶ Further, judges, being humans after all, possess implicit biases, “stereotypical associations so subtle that people who hold them might not even be aware of them.”⁷⁷ These biases are sometimes, perhaps often, directed against African-Americans or other minorities, and may appear even if the judge also exhibits deep personal and institutional commitment to impartiality and equality.⁷⁸ Researchers speculate that this implicit bias may result from repeated exposure to minorities in the justice system.⁷⁹

The upshot of this research is that heuristics and their associated biases are often born of experience, and in the same way they are limited by experience.⁸⁰ In a world of plausibility pleading, these heuristics have consequences. Depending on how the inquiry is framed, whether a judge can accurately assess whether an event is plausible may have much to do with whether, and how, the judge has experienced the event alleged. As Jessie Hill wrote of Justice Kennedy in *Iqbal*: “[Y]ou can almost read between the lines to hear him saying, ‘I have never been a victim of discrimination, and I certainly cannot imagine folks like John Ashcroft and Robert Mueller, folks just like me, engaging in illegal discrimination against Muslims in the wake of 9/11’”⁸¹

III. EMPATHY AND EXPERIENTIAL DEFICIT

This is where empathy—in the limited sense of the cognitive capacity or training to imagine oneself in the position of another person—becomes

⁷³ My thanks to Stephanie D. Preston for this familiar example. See also Amos Tversky & Daniel Kahneman, *Introduction*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 4 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) (for another version of this example).

⁷⁴ For more of these heuristics, see generally Sunstein, *Introduction*, in *BEHAVIORAL LAW & ECONOMICS*, *supra* note 51, at 1-10. See also Guthrie et al., *supra* note 66, at 780, who observe that “the very nature of human thought can induce judges to make consistent and predictable mistakes in particular situations.”

⁷⁵ See Guthrie et al., *supra* note 66.

⁷⁶ *Id.* at 779.

⁷⁷ Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 *NOTRE DAME L. REV.* 1195, 1196 (2009).

⁷⁸ *Id.* at 1221-26.

⁷⁹ *Id.* at 1227.

⁸⁰ See Cass R. Sunstein, *Economics and Real People*, 3 *GREEN BAG* 397, 400 (2000) (“Because everyone’s experience is limited, the availability heuristic will produce systematic errors.”).

⁸¹ Hill, *supra* note 11.

important. Empathy is essential to overcoming the limitations of experience. By making conscious effort to imagine themselves in the position of another, judges can arrive at better estimations of whether a set of facts, taken as true, present a plausible claim.

Humans are hard-wired for empathy—that much can be said with confidence.⁸² But the circuitry for empathy, as for almost any other human phenomenon, is extremely complex. Researchers are just now pulling apart the tangle. Depending on the scholar, empathy can consist of one or more of a number of phenomena:⁸³ (1) emotional contagion: the automatic sharing of mental or emotional states, but perhaps without awareness of the trigger for the sharing,⁸⁴ (2) perspective taking: the conscious ability to infer the mental or emotional state of another person, without necessarily sharing the other's emotional state or desiring to help that other person,⁸⁵ (3) sympathy: which is the ability to appreciate and to be moved by another person's emotional state, but not necessarily share his or her physical or emotional state,⁸⁶ and (4) altruism or helping behavior: the act of providing aid, assistance or succor to another.

Although the research is still tender, economic scholars have suggested that empathy—in the specific sense of “perspective taking”—is an essential tool to accurately predict the behavior or motivations of others when choosing in circumstances of uncertainty—as, for example, in the famous prisoner's

⁸² See, e.g., Tania Singer, Ben Seymour, John P. O'Doherty, Klass E. Stephan, Raymond J. Dolan & Chris D. Frith, *Empathetic Neural Responses Are Modulated by the Perceived Fairness of Others*, 439 NATURE 466, 466 (2006) (explaining that recent brain imaging studies “suggest that our ability to empathize relies on neuronal systems that underpin our own bodily and emotional states”); cf. Dominique J.F. de Quervain, Urs Fischbacher, Valerie Treyer, Melanie Schellhammer, Ulrich Schnyder, Alfred Buck & Ernst Fehr, *The Neural Basis of Altruistic Punishment*, 305 SCIENCE 1254, 1254, 1258 (2004) (exploring the reward-related brain centers that are activated when a person punishes a norm violator, even if the punishment imposes costs on the punishing party).

⁸³ Admittedly, some of the problems with studying empathy are definitional. “There are probably nearly as many definitions of empathy as people working on the topic.” Frederique de Vignemont & Tania Singer, *The Empathetic Brain: How, When and Why?*, Opinion, 10 TRENDS IN COGNITIVE SCI. 435, 435 (2006).

⁸⁴ *Id.* (“[T]he baby starts crying because other babies cry but the baby is not necessarily aware that the other is the source of their affective state.”).

⁸⁵ *Id.* (With cognitive perspective taking, one “represents the mental states of others, including affective states, without being emotionally involved.”); see also Stephanie D. Preston & Frans B. M. de Waal, *Empathy: Its Ultimate and Proximate Bases*, 25 BEHAV. & BRAIN SCI. 1, 4 tbl. 2 (2002) (referring to this phenomenon as “cognitive empathy” or “true empathy” or “perspective-taking”).

⁸⁶ See Lauren Wispé, *The Distinction Between Sympathy and Empathy: To Call Forth a Concept, a Word Is Needed*, 50 J. PERS. SOC. PSYCOL. 314, 318 (1986). To Wispé “empathy is a way of ‘knowing.’ Sympathy is a way of ‘relating.’” Wispé’s definition is useful in that she defines sympathy as a cognitive process that leads to prejudice, whereas empathy is a cognitive process concerned with accurate estimation of another’s subjective state. See *id.* at 318-20; see also Preston & de Waal, *supra* note 85, at 4 tbl. 2; Vignemont & Singer, *supra* note 83.

dilemma.⁸⁷ The common features of empathy and perspective taking “allow humans to represent states of other people: others’ intentions, beliefs and thoughts”⁸⁸ Hence, scholars reviewing behavioral data estimate that “people with stronger empathetic abilities are better predictors of others’ motives and actions.”⁸⁹ Preliminary experimental evidence confirms this hypothesis. In a set of experiments involving University of Chicago MBA students and University of Michigan undergraduates, management researchers discovered that individuals consistently fail to correctly identify the risk preferences of others.⁹⁰ Those persons with greater self-reported empathy predicted others’ risk preferences more accurately.⁹¹

Three additional aspects of this empathy research are pertinent to pleading. First, empathy is easy if you share either some attribute or experience with another person. A judge does not have to labor very hard to imagine life as a woman, if the judge is a woman.⁹² Second, humans can employ higher order cognitive functions to inhibit, modify or stimulate this empathetic process.⁹³ Specifically, individuals can choose to actively imagine themselves in the position of another as compensation for a lack of previous experience.⁹⁴ Individuals can also actively decide to inhibit the desire to help another—especially another that looks or lives the same way they do—by cognitive discipline. Third, the accuracy of an individual’s assessment of another person’s emotional state or motivations naturally increases with additional information. A person with limited information is more likely to “project” his or her emotional state or motivations onto another. With more information the assessment of another person’s emotional state or motivations become more accurate.⁹⁵

⁸⁷ Tania Singer & Ernst Fehr, *The Neuroeconomics of Mind Reading and Empathy*, 95 AM. ECON. REV. 340, 340 (2005) (“Economics and game theory are based on the assumption that people are capable of predicting others’ actions.”).

⁸⁸ *Id.* at 343.

⁸⁹ *Id.*

⁹⁰ David Faro & Yuval Rottenstreich, *Affect, Empathy, and Regressive Mispredictions of Others’ Preferences Under Risk*, 52 MGMT. SCI. 529, 538 (2006).

⁹¹ *Id.* To gauge empathy, the subjects of the study rated themselves on a five-point response measure to questions such as “I would describe myself as a pretty soft-hearted person” or “[s]ometimes I don’t feel very sorry for other people when they are having problems.” *Id.* at 537-38.

⁹² See Vignemont & Singer, *supra* note 83, at 439 (“[I]t should be noted that prediction accuracy depends on the similarity between the empathizer’s and the target’s experiential repertoires.”); see also Frans B. M. de Waal, *Putting the Altruism Back into Altruism: The Evolution of Empathy*, 59 ANN. REV. PSYCH. 279, 286, 287, 291 (2008); Preston & de Waal, *supra* note 85, at 16.

⁹³ See Preston & de Waal, *supra* note 85, at 5, 6, 20; Vignemont & Singer, *supra* note 83, at 437.

⁹⁴ See Preston & de Waal, *supra* note 85, at 16-17 (noting that although similarity or familiarity accelerates the ability for an individual to understand another’s emotional state in a given situation, “given longer to decide, a subject can apply conscious cognitive process to interpret the state of an unfamiliar object”).

⁹⁵ *Id.* at 17 (“The degree to which it is empathy rather than projection depends purely on the extent to which the subject’s representations are similar to those of the object, or include information about the object, which in turn determine accuracy.”).

The difficulty is in adequately policing the line between better decision making based on improved cognitive processes, and partisan decision making based on altruistic impulses.⁹⁶ In other words, if what we strive for is impartiality, our rule system doesn't need to repudiate empathy as much as harness it. Ideally, controls will be fashioned from word choices that encourage perspective taking to compensate for experiential deficits, while simultaneously arresting the empathetic process at the moment it turns into altruism, prejudice or bias.

IV. BUILDING A BETTER DECISION MAKER

If the Rules are a type of choice architecture, then they can be designed with the object of minimizing the type of cognitive errors that judges and juries are prone to make. In the case of pleading doctrine, rule makers could take into account that judges will likely make more accurate decisions based on more—rather than less—information, that they are more likely to understand the motives of a party if they share some common experience or characteristic with that party, that they can compensate for lack of personal experience with an active empathetic process, and that they can develop a coordinate ability to suspend the empathetic process when it begins to trigger bias.

In the limited sense of the demand for additional information, *Iqbal* may be a reasonable idea, badly articulated. Even those lawyers brought up on the *Conley* “no set of facts” standard knew that the more factual information presented to the judge, the less likely the case would be dismissed at the pleading stage. Indeed, a major complaint with *Conley* was and continues to be that the “no set of facts” formulation in practice did *not* prevent judges from imposing their own experience on the analysis. Assuming—and this is a huge and controversial assumption—that what the Rules should do is make the gate keeping role at pleading more accurate—rather than more deferential—*Iqbal* may actually be a good thing.⁹⁷

Where *Iqbal* goes wrong is not in its demand for more facts—at least when those facts are available.⁹⁸ 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

⁹⁶ The costs of additional procedural protections versus the expected benefits are also at issue, but not directly addressed in this Essay.

⁹⁷ As I remark below, while pleading may be made more informative, and gate keeping more accurate by more information at the pleading stage, it is at the cost of our previous policy choice that it is better that a frivolous or erroneous suit go forward to discovery than it is to dismiss a marginal, but ultimately meritorious case.

⁹⁸ I leave aside the major defect of both *Twombly* and *Iqbal*—the fact that it imposes a plausibility requirement at the stage in which evidence of motivation and intent may not even be *available* to the plaintiff.

experience” may or may not include the experience of the litigants. The second way *Iqbal* (as well as *Twombly*) goes wrong is that it works a major reformation of pleading doctrine without the benefits of the rule making process. This has been a common complaint among civil procedure scholars.⁹⁹ Where I would add to this chorus is that, in the specific context of empathy, it is the rule making process that is best positioned to research, consider, and craft the empathy regulating devices essential for more accurate decision making.

If empathy is in fact essential for more accurate decision making, then it suggests a far more ambitious project than this Essay can develop. But it does hint at some important directions for further research and policy. For example, judicial training could begin to incorporate some of the experiments that Jeff Rachlinski and others have conducted, in which judges are assessed for bias.¹⁰⁰ The point of these exercises is not to embarrass these public servants, but to enable them to understand their own baseline cognitive biases so that through their higher cognitive processes they may compensate for these biases, without *overcompensating*.¹⁰¹

On a macro level, civil procedural scholars, rule makers, and other stakeholders should become more attentive to behavioral studies on the shaping power of their choice design. Insofar as these groups shape decision making, they are the engineers of a type of choice architecture. This choice architecture can have a number of goals. To the extent the Rules are trans-substantive, an important overarching goal of the Rules will be to provide the mechanisms to reduce the likelihood that decision makers—whether the judge or the jury—will fall into common cognitive errors.¹⁰²

The goal of less cognitive errors cannot stand alone, however. Precise decision making is meaningless without a shared understanding of the target. A Swiss clock can be set to chime precisely at noon, in precisely the wrong time zone. Democratic commitments and societal norms will, of necessity, supply the goals to which this better decision making is directed. For example, the history of American pleading has been based on an implicit assumption that it is better for ten meretricious suits to go forward (at least to discovery) than it is for one meritorious suit to be dismissed.¹⁰³ This value may still operate even with a more

⁹⁹ See, e.g., Helen Hershkoff & Arthur R. Miller, *Celebrating Jack H. Friedenthal: The Views of Two Co-Authors*, 78 GEO. WASH. L. REV. 9, 28 (2009) (“[A]mendment by judicial fiat is a piecemeal process of revision that threatens to undermine the overall coherence of the Federal Rules and to create inconsistencies of application.”).

¹⁰⁰ See Rachlinski et al., *supra* note 77, at 1204-08.

¹⁰¹ See *id.*

¹⁰² This is the seed for one of my larger projects, which is to suggest the reasons and the methods by which the Rules of Civil Procedure can be understood and developed as a system to reduce the incidence of common cognitive errors among jurors. See also Guthrie et al., *supra* note 66, at 826-30.

¹⁰³ See A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 25 (2009) (observing that the Court has signaled with *Twombly* that it prefers judicial efficiency over the previous standard in *Conley* which favored fairness and access, even at the cost of some meritless suits going forward).

refined plausibility pleading standard. In other circumstances, choice architecture may deliberately invite, rather than arrest, empathetic processes, as a counterweight to implicit societal bias. For example, Title VII of the Civil Rights Act of 1964 contains a disparate impact cause of action to account for discrimination that is not intentional, but is the result of hidden biases in the employment process itself.¹⁰⁴ To the extent that Title VII, or any disparate impact theory of recovery, actually *requires* individuals to imagine how their policy choices will affect persons they otherwise would disregard, then the legislation itself is designed to err on the side of empathy.

V. CONCLUSION

The Honorable Jerome Frank wrote that “[T]he judicial judge . . . should be vitally imaginative . . . quick with empathy, the capacity to feel himself into the minds and moods of other men[.]”¹⁰⁵ His observation rings true half-a-century later. Ours is a nation of laws. But law is a human institution, touched in equal measure by human aspiration and human frailty. To pretend that empathy has no place in our judicial system is to pretend that we are judged by Patriarchs or computers.¹⁰⁶ Empathy is part of being human. The question is, what do we do with the reality of empathy? The answer is, we do with empathy what we do with most human traits: we capture it, we tame it, we channel it, and we make it serve our ultimate, shared goal of a more perfect justice.

¹⁰⁴ 42 U.S.C. § 2000e-2(k) (2006). One may also cite victim impact statements in the criminal area as an empathy encouraging procedure.

¹⁰⁵ Jerome Frank, *Corbin on Contracts*, 61 YALE L.J. 1108, 1112 (1952) (book review); *see also id.* at 1113 (“[A] judge who knows nothing but the rules will be a judicial routinier, a dispenser of injustice, since . . . the art of judging really lies in the ability to cope with the unruly.”).

¹⁰⁶ Darrell A. H. Miller, *State DOMAs, Neutral Principles, and the Möbius of State Action*, 81 TEMP. L. REV. 967, 987 n.131 (2008) (“[J]ustice is administered by human beings, not biblical sages or computers.”); Ruth Marcus, *Behind Justice’s Blindfold*, WASH. POST., May 6, 2009, at A21 (“[I]f the right answer was always available to the judge who merely thinks hard enough, we could program powerful computers to fulfill the judicial function.”).

