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Removing the Blindfold and Tipping the Scales: The Unintended Lesson of Ashcroft v. Iqbal is that Frivolous Lawsuits may be Important to Our Nation

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REMOVING THE BLINDFOLD AND TIPPING THE
SCALES: THE UNINTENDED LESSON OF
ASHCROFT V. IQBAL IS THAT FRIVOLOUS LAWSUITS
MAY BE IMPORTANT TO OUR NATION

*Kenneth S. Klein**

This Article questions whether the gain of curbing perceived frivolous litigation is worth the cost of undermining the core civic value of neutrality of justice. In Ashcroft v. Iqbal, the Supreme Court weighed in on the public debate about frivolous litigation. The Iqbal opinion is essentially a memorandum by the Supreme Court written to the trial judges of America, encouraging these judges to aggressively, indeed very aggressively, identify and dismiss potentially frivolous civil complaints. That leeway-wrapped mandate comes at a cost. A cornerstone of our civic philosophy is that the judicial branch, as a general proposition, is a neutral and impartial arbiter of disputes, without regard to the identity or relative power of the litigants. It is this very concept that underlies the image of Lady Justice wearing a blindfold and holding a balanced scale. Experience tells us that Iqbal dismissals will not be content neutral. There is strong reason to believe that awareness of this lack of neutrality will percolate broadly into the public consciousness, and thus change the public belief in blind justice.

Who knew that our nation's 230-year commitment to neutral justice might be undone by one foreign citizen in America on an invalid visa? Yet, that is the possibility created by *Ashcroft v. Iqbal*.¹ In the *Iqbal* opinion, it

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1. 129 S. Ct. 1937 (2009).

appears the Supreme Court has come to terms with sacrificing one of our core civic principles—the commitment to an impartial judiciary—in order to serve judicial efficiency. This Article will question whether the gain is worth the price.

In *Iqbal*, the Supreme Court weighs in on the public debate about frivolous litigation. *Iqbal* involves a prisoner's lawsuit—a so-called “*Bivens*”² action—asserting that in the wake of the September 11 attacks, also referred to as 9/11, the Director of the FBI and the Attorney General of the United States implemented special detention policies for Muslims foreign nationals in the United States. The Supreme Court held that the lawsuit could be dismissed on a Rule 12³ motion because the case was “implausible.”⁴ It is my view, which I will establish more fully in this Article, that *Ashcroft v. Iqbal* is not primarily a *Bivens* case, or a terrorism case, or even an esoteric case about proper pleadings standards. Rather, *Iqbal* is a memorandum by the Supreme Court written to the trial judges of America encouraging these judges to aggressively, indeed very aggressively, identify and dismiss potentially frivolous civil complaints. In pursuit of this goal, the Court gives such a far-ranging definition of implausible that it is hard to posit a dismissal that would not survive appellate review.

Put simply, the Supreme Court perceives that there is rampant frivolous litigation, and is asking trial judges to do something about it. That mandate comes at a cost. Whether any civil complaint will now survive the inevitable, indeed soon to be ubiquitous, Rule 12 motion to dismiss (one supposes this will quickly be known as an “*Iqbal* motion”) will now turn entirely on the idiosyncrasy of which judge happens to hear the case.⁵ And that is a problem.

As will be developed at more length below, a cornerstone of our civic philosophy is that the judicial branch, as a general proposition, is a neutral and impartial arbiter of disputes, without regard to the identity or relative power of the litigants. It is this very concept that underlies the image of Lady Justice wearing a blindfold and holding a balanced scale. It is an image at odds with the likelihood that certain kinds of classic “little guy” plaintiffs,

2. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (creating a cause of action against the federal government for violations of civil rights as guaranteed by the Federal Constitution).

3. FED. R. CIV. P. 12(b)(6) (“... a party may assert the following defenses by motion: ... (6) failure to state a claim upon which relief can be granted; . . .”).

4. *Iqbal*, 129 S. Ct. at 1959.

5. See Tony Mauro, *Plaintiffs Groups Mount Effort to Undo Supreme Court's "Iqbal" Ruling*, LAW.COM, Sept. 21, 2009, www.law.com/jsp/law/articlefriendly.jsp?id=1202433931370 (explaining that *Iqbal* has forced judges to evaluate pleadings “line by line” and “us[e] subjective factors,” resulting in “an open door to judicial bias”).

such as antitrust plaintiffs and employment discrimination plaintiffs, will now find themselves more often than other types of plaintiffs on the wrong end of *Iqbal* dismissals. Removing the blindfold tips the scales by leaving justice in the eyes of the beholder.

It is not hard to conclude that nations who do not believe in blind justice are more likely to experience civil discord.⁶ *Iqbal* is about to teach us a hard lesson: tolerating a certain amount of potentially frivolous litigation may be necessary to maintaining a peaceful civic life.

Part I of this short Article will trace the commitment in the United States to a neutral and impartial judiciary. Part II will trace the judiciary's increasing concern with perceived frivolous litigation. Part III will discuss how *Ashcroft v. Iqbal* should be understood as the Supreme Court wading into the debate over frivolous litigation. Part IV will draw together these threads to posit that the Court's opinion endangers the public confidence in judicial impartiality.

I. BLIND JUSTICE

Picture yourself driving down the freeway when traffic slows. As you get to the place of the bottleneck, you see that what is causing the problem are four police cars, with lights still flashing, parked on the road's shoulder. There is one stopped pickup truck in front of the four police cars. Several officers are milling around and two officers are escorting a person in handcuffs away from the pickup truck and toward the police cars. Traffic is slowed by "rubber-neckers" eyeing this scene as they drive by. Is your first reaction to assume that the person in cuffs did something wrong, or is it to

6. Thomas J. Moyer, *Extralegality*, in THE OXFORD COMPANION TO AMERICAN LAW 288, 288 (Kermit L. Hall et. al. eds., 2002).

Scholars have posited that people obey the law when they perceive the government is legitimately formed and acts in fair and nondiscriminatory ways. Legitimacy can be provided by the moral and just actions of a government, but according to contractarians such as Hobbs, Locke, Rousseau, Kant, and Rawls, consent of the people is an important prerequisite for any legitimate government, regardless of those moral and just actions. However, the manner in which government acts is also important when analyzing why people obey the law. According to Tom R. Tyler, *Why People Obey the Law* (1990), although people are concerned that governments produce fair outcomes in specific situations, they are primarily concerned with being provided with an opportunity for meaningful participation. Through this participation, people assess the fairness of the legal or political procedures involved, and are more likely to obey the law when those procedures are fair and impartial.).

Id.

assume that the officers are improperly arresting someone? In the United States, I believe the vast majority of people assume the former and not the latter. But why? Because apparently there is a broadly held inherent trust that more times than not, the government's exercise of power is intended to be fair.⁷

That trust in the neutrality and impartiality extends, quite intentionally, to the judicial branch of government.⁸ The principle of neutrality is what underlies the entire symbolism of justice wearing a blindfold.⁹ "To signify our notion of equality we have as a symbol of justice a woman blindfolded And the blindfold symbolizes that the law is not a respecter of person or position."¹⁰

In recent times, in the politically charged Supreme Court opinion deciding *Bush v. Gore*,¹¹ Justice Stevens famously described both the principle and importance of judicial impartiality:

It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.¹²

The notion that every person is entitled to the same modicum of justice finds voice in the Declaration of Independence:

7. I do not presume to argue that this inherent trust either is unanimous or consistently well placed. Stories cannot be ignored such as the one about a Harvard professor being arrested in his own home because of the apparent perception that an African-American in a nice home likely was a burglar. Abby Goodnough, *Harvard Professor Jailed; Officer Is Accused of Bias*, N.Y. TIMES, July 21, 2009, at A13.

8. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2010) (Roberts, J., dissenting) ("All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise.").

9. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 382-83 (1982) (explaining that Western cultures have historically portrayed justice as a blindfolded goddess with scales and swords).

10. *Livingston v. State*, 444 S.E.2d 748, 761 (Ga. 1994) (Benham, J., dissenting).

11. 531 U.S. 98 (2000) (per curiam).

12. *Id.* at 128-29 (Stevens, J., dissenting).

We hold these Truths to be self-evident, that all Men are created equal. . . . That to secure these rights, Governments are instituted among Men The History of the present King of Great Britain is a history of repeated injuries and usurpations He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers. . . . He has . . . giv[en] his Assent [f]or depriving us in many cases, of the benefits of Trial by Jury¹³

The devotion to a neutral and impartial forum is memorialized through the Constitutional grant of diversity jurisdiction to the federal courts.¹⁴ The importance of involving the general populace in the decisions concerning who is entitled to what justice is found in the adoption of the Seventh Amendment.¹⁵ The contemporary plaintiffs' bar perceives its *raison d'être* as taking advantage of making the intended systemic neutrality of the courts into reality in order to protect the rights of the powerless against the powerful.¹⁶ Indeed, our enunciated devotion to "one Nation . . . with . . . justice for all" is so central to our national identity that it is in the text of the American Pledge of Allegiance.¹⁷ Simply put, the belief in the impartiality and neutrality of the courts is a core, defining civic value in the United States.

II. FRIVOLOUS LITIGATION

For a long time, courts and legislatures have been interested in utilizing procedural devices as a means to tamp down what they perceive as a dangerous level of frivolous litigation. For example, Federal Rule of Civil

13. THE DECLARATION OF INDEPENDENCE para. 2, 10, 20 (U.S. 1776).

14. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies between two or more States . . ."); *see also* Ginter *ex rel.* Ballard v. Belcher, Prendergast & Laporte, 536 F.3d 439, 442 (5th Cir. 2008) (quoting Pease v. Peck, 59 U.S. (18 How.) 595, 599 (1855)) ("[T]he need for diversity jurisdiction rests, in part, on the recognition that a 'state tribunal might not be impartial between [its] own citizens' and citizens of another state.'").

15. *See* Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1007–10, 1016, 1020 (1992) (explaining the importance of civil jury trials to Americans at the time the Constitution was enacted).

16. RICHARD S. JACOBSON & JEFFREY R. WHITE, *DAVID V. GOLIATH: ATLA AND THE FIGHT FOR EVERYDAY JUSTICE* (2004) (describing the way in which bands of state trial lawyers transformed the tort litigation system from one that was very plaintiff-averse to a system that is much more plaintiff-friendly).

17. 4 U.S.C. §4 (2006).

Procedure 11¹⁸ was amended “in response to concerns that abusive litigation practices [such as “baseless filings”] abounded in the federal courts”¹⁹ The State of Washington passed statutes intended “to deter meritless appeals” from mandatory arbitration awards, thus “reducing court congestion.”²⁰ Fees are awarded to prevailing defendants in Title VII civil rights cases “principally to deter frivolous litigation.”²¹ Florida has enacted “several statutory provisions for the purpose of reducing unnecessary or frivolous prisoner filings.”²² The New York legislature enacted legislation allowing the imposition of monetary sanctions in certain tort actions based on its conclusion “that frivolous litigation was a contributing cause of a liability insurance crisis.”²³ The Congress enacted the Private Securities Litigation Reform Act of 1995 “[a]s a check against abusive litigation” in private securities fraud actions.²⁴ The attorneys fees provisions of the Clean Air Act are crafted to allow defense recovery of fees “where the litigation was obviously frivolous.”²⁵

There are two particularly under-appreciated aspects of the concern of rampant frivolous litigation. The first is that the jury trial is becoming a vanishing aspect of civil litigation.²⁶ The second is that the perception of

18. FED. R. CIV. P. 11.

19. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990); *see also* *Harkness Apartment Owners Corp. v. FDIC*, No. 87 Civ. 7080, 1993 WL 300031, at *3 (S.D.N.Y. July 30, 1993) (“The primary function of Rule 11 sanctions is to deter frivolous litigation . . .”).

20. *Christie-Lambert Van & Storage Co. v. McLeod*, 693 P.2d 161, 165 (Wash. Ct. App. 1984).

21. *Tancredi v. Metro. Life Ins. Co.*, No. 00Civ.5780, 2003 WL 22299203, *6 (S.D.N.Y. Oct. 7, 2003).

22. *Hall v. State*, 752 So.2d 575, 578 (Fla. 2000) (per curiam), *superseded by statute*, FLA. STAT. ANN. § 944.279 (West, Westlaw through 2010 2d Legis. Sess.), *amended by* 2004 Fla. Law Serv. Ch. 2004-285, *as recognized in* *Isom v. State*, 43 So.3d 776 (Fla. Dist. Ct. App. 2010).

23. *In re Gordon v. Marrone*, 616 N.Y.S.2d 98, 100 (App. Div. 1994).

24. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

25. *Ruckelshaus v. Sierra Club*, 463 U.S. 678, 692 n.13 (1983) (quoting S. Rep. No. 91-1196, at 38 (1970)).

26. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 508 (2004) (explaining that between 1976 and 2002, the absolute number of jury trials decreased by one-third); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1074-76 (2003) (commenting on the risk that lower courts may “curtail litigants’ access” to juries through “efficiency-motivated” determinations on pre-trial motions).

rampant frivolous litigation is apparently an unsupported myth.²⁷ What is new to the discussion of how to deal with perceived frivolous litigation is the notion that the issue has risen to such dangerous levels that other core values can be compromised in order to serve the reduction of frivolous lawsuits. Indeed, in the context of very different politics, when President Clinton sought dismissal of a lawsuit by Paula Jones on the basis that the case was frivolous,²⁸ the Court declined this position, reasoning that “[m]ost frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment [and] the availability of sanctions provides a significant deterrent” to frivolous claims.²⁹

III. ASHCROFT V. IQBAL

To understand the lesson, and agenda, of the Supreme Court in *Iqbal*, one needs to first briefly trace the journey from the Field Codes to *Conley v. Gibson*³⁰ to *Bell Atlantic Corp. v. Twombly*.³¹

David Dudley Field developed the New York Code of 1848, which required “[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.”³² The Federal Equity Rules, adopted in 1912, mimicked this approach.³³ “A difficulty arose, however, in that the Field Code and its progeny required a plaintiff to plead ‘facts’ rather than ‘conclusions,’ a distinction that proved far easier to say than to apply.”³⁴ As one commentator described,

it is virtually impossible logically to distinguish among “ultimate facts,” “evidence,” and “conclusions.” Essentially any allegation in a pleading must be an assertion that certain occurrences took place. The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a

27. *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. On the Judiciary*, 111th Cong. 7 (2009) (statement of Arthur R. Miller, Professor, New York University School of Law) (identifying the lack of “empiric evidence on abuse or frivolousness”).

28. *Clinton v. Jones*, 520 U.S. 691, 708 (1997).

29. *Id.*

30. 355 U.S. 41 (1957).

31. 550 U.S. 544 (2007).

32. 1848 N.Y. Laws 521.

33. See FED. EQUITY R. 25 (requiring a “short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence”).

34. *Twombly*, 550 U.S. at 573–75 (Stevens, J., dissenting).

continuum varying only in the degree of particularity with which the occurrences are described.³⁵

Rule 8 of the Federal Rules of Civil Procedure was intended to clarify this problem, by avoiding any reference to “facts” or “evidence” or “conclusions.”³⁶ Similarly, today Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”³⁷ Notably absent from the Rule 8 formulation is any requirement that a complaint aver “facts.”

For the fifty years immediately preceding *Twombly*, the pleading standard necessary to satisfy Rule 8 came from the opinion in *Conley v. Gibson*,³⁸ which was understood to set forth the standard that a complaint was sufficient unless there was “no set of facts” under which the complaint could succeed.³⁹ Then came *Twombly*.

Twombly involved a plaintiffs’ antitrust action asserting that local and regional telephone companies price-fixed and otherwise engaged in improper anticompetitive activity in order to avoid competition from upstart, but potentially national, providers of local internet and long distance services.⁴⁰ In essence, the plaintiffs saw a pattern of parallel conduct, and on that basis alleged a conspiracy.⁴¹ The Supreme Court affirmed the dismissal of the complaint for failure to plead a “plausible” set of facts.⁴² In explaining its reasoning, the Court emphasized the cost of discovery in antitrust litigation, which for the Court was too much to impose if the plaintiffs did not already have in hand, at the time of the filing of the complaint, at least some facts of conspiracy beyond parallel conduct.⁴³

In light of this emphasis on the uniquely expensive arena of antitrust litigation, the *Twombly* opinion generated much debate over how broadly or

35. Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520–21 (1957).

36. See 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (3d ed. 2004) (“The substitution of ‘claim showing that the pleader is entitled to relief’ for the code formulation of the ‘facts’ constituting a ‘cause of action’ was intended to avoid the distinctions drawn under the codes among ‘evidentiary facts,’ ‘ultimate facts,’ and ‘conclusions’”).

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

38. 355 U.S. 41 (1957).

39. *Twombly*, 550 U.S. at 561 (quoting *Conley*, 355 U.S. at 45–46).

40. *Id.* at 550–51, 564–65.

41. *Id.*

42. *Id.* at 564–70.

43. *Id.* at 555–61.

narrowly *Twombly* should be applied.⁴⁴ Courts themselves were uncertain about the reach or import of the opinion.⁴⁵

Then, two years later, the Supreme Court decided *Iqbal*.⁴⁶ Javiad Iqbal was a citizen of Pakistan and a Muslim.⁴⁷ He was arrested in the United States following the September 11, 2001 attacks on immigration charges, and he was deemed to be of “high interest” to the investigation of “the attacks in particular or to terrorism in general.”⁴⁸ After his conviction and deportation, Iqbal brought a *Bivens* action asserting that in the wake of the September 11 attacks the federal government drafted and implemented a policy of using

44. For a small sampling of the academic discussion of *Twombly* see generally: DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 301–08 (5th ed. 2008); RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 298–310 (5th ed. 2008); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 526–37 (9th ed. 2008); RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 1205–24 (4th ed. 2008); STEPHEN C. YEAZELL, CIVIL PROCEDURE 359–64 (7th ed. 2008); Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/31/LRColl2007n31Bradley.pdf>; M. Norman Goldberger et al., *Courts Begin To Apply ‘Twombly,’* NAT’L L. J., Oct. 15, 2007, at S–1; Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604 (2007); Lee Reeves, *Pragmatism Over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 548–51 (2008); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063–67 (2009); Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008); *Leading Cases—Federal Jurisdiction and Procedure*, 121 HARV. L. REV. 305 (2007); Saritha Komatireddy Tice, *A “Plausible” Explanation of Pleading Standards: Bell Atlantic Corp. v. Twombly*, 127 S. CT. 1955 (2007), 31 HARV. J.L. & PUB. POL’Y 827 (2008).

The legal commentator Dahlia Lithwick colorfully described that the hullabaloo caused by *Twombly* in academia could be compared to that of “releasing a live ferret amid the Federal Rules of Civil Procedure.” Dahlia Lithwick, *The Attorney General Is a Very Busy Man*, SLATE, Dec. 10, 2008, <http://www.slate.com/id/2206441>.

45. See, e.g., *Iqbal v. Hasty*, 490 F.3d 143, 155–58 (2d Cir. 2007), *rev’d sub nom. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

Considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court’s decision in [*Twombly*] . . . [T]he Court’s explanation contains several, not entirely consistent, signals Some of these signals point toward a new and heightened pleading standard. . . . On the other hand, some of the Court’s linguistic signals point away from a heightened pleading standard These conflicting signals create some uncertainty as to the intended scope of the Court’s decision.

Id.

46. 129 S. Ct. 1937 (2009).

47. *Id.* at 1942.

48. *Id.* at 1943.

Muslim beliefs as a criterion for designating people as “high interest” and detaining them under less comfortable conditions.⁴⁹ Iqbal sued John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation, among others.⁵⁰ The result was the opinion that is the subject of this Article, and which included in its more notable holdings that: (1) “a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth,”⁵¹ (2) as to these “conclusory” allegations, the trial court could “draw on its judicial experience and common sense” to evaluate whether the allegations “nudged . . . across the line from conceivable to plausible,”⁵² and (3) this was the pleading standard for “all civil actions” pled under Rule 8.⁵³

Most explicitly consequential in *Iqbal* was where the Supreme Court drew the lines around “conclusory” and “plausible.”⁵⁴ The Court essentially held that if a civil plaintiff does not come into a case with a “smoking gun” level of evidence in hand, then the allegations are “conclusory.”⁵⁵ At least in my roughly 25 years of admittedly anecdotal experience, this was *every* civil case. As to the term “implausible,” the facts of *Twombly* and *Iqbal* are themselves the best illustrations of how much latitude the Court gave to

49. *Id.* at 1943–44.

50. *Id.* at 1942.

51. *Id.* at 1950.

52. *Id.* at 1950–51.

53. *Id.* at 1953.

54. While it is not directly germane to this Article, it bears mentioning (often) that in *Iqbal* the Court relied upon its predecessor opinion, *Twombly*, for the propriety of judging whether facts were “plausible,” while in turn the *Twombly* opinion cited to the Court’s opinion in *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), for the propriety of a trial court assessing the plausibility of facts (*Matushita* involved summary judgment). However, as Professor Edward Brunet argues (and in my opinion, argues unquestionably correctly), in *Matushita* “plausible” was a term of art inapplicable to usage broadly in a Rule 12 context. Edward Brunet, *The Substantive Origins of “Plausible Pleadings”*: An Introduction to the Symposium on *Ashcroft v. Iqbal*, 14 LEWIS & CLARK L. REV. 1 (2010). In other words, the reliance on *Matushita* for the propriety of a trial judge evaluating the plausibility of a pleading is, in essence, a conjurer’s trick by the Court.

55. See Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards onto Unconstitutional Shores*, 88 NEB. L. REV. 261, 273 (2009) [hereinafter *Unconstitutional Shores*] (explaining that the Supreme Court in *Iqbal* gave trial courts the power to perform a “plausibility” review if the plaintiff did not provide a “smoking-gun level of evidence”); see also Ocasio-Hernandez v. Fortunó-Burset, 639 F.Supp.2d 217, 226 n.4 (D.P.R. 2009) (“As evidenced by this opinion, even highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a section 1983 political discrimination suit without ‘smoking gun’ evidence.”).

future trial courts to dismiss civil cases. These two facts patterns—each of which the Court concluded were so sufficiently implausible as to support dismissal—were: (1) that local telecommunications companies, which were acting in parallel to set prices in ways that were a barrier to entry of potential national competitors, also might be acting in concert with each other;⁵⁶ and (2) that in the absence of a signed memo, it was “conclusory” to allege that Attorney General Ashcroft and FBI Director Mueller not only knew that in the wake of the September 11 attacks Muslims were subject to unique conditions of detention and confinement, but that Messrs. Ashcroft and Mueller had a hand in writing and/or implementing these policies.⁵⁷ These two examples suggest that after *Iqbal*, essentially any civil complaint could be characterized as implausible, dismissed, and the dismissal would be affirmed on appeal.⁵⁸

This last aspect of *Iqbal*—that apparently it is the Supreme Court’s intention that trial judges are largely insulated from appellate reversal—may be underappreciated. Professor Adam Steinman argues that *Iqbal*’s two-step analysis confirms that “[t]he threshold issue is whether a crucial allegation in a complaint may be disregarded as ‘conclusory;’ only then does the ‘plausibility’ of an entitlement relief become dispositive.”⁵⁹ Furthermore, “[w]hile there remains some uncertainty about what conclusory means, authoritative pre-*Twombly* sources—the Federal Rules, their Forms, and Supreme Court decisions that remain good law—foreclose any definition that would give courts drastic new powers to disregard allegations at the pleadings phase.”⁶⁰ As goes this argument, the most dramatic aspect of the *Iqbal* opinion—the plausibility review—is of little moment.

I believe this position gives insufficient regard to another essential aspect of the *Iqbal* opinion—the broad discretion being afforded trial courts. It bears repeating that in *Twombly*, the Supreme Court affirmed as implausible a case that alleged that local telephone companies might agree to price-fixing as a means of suppressing common potential national competitors.⁶¹ Correspondingly, in *Iqbal*, the Court held a case should be dismissed as

56. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2006).

57. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951–52 (2009).

58. *Unconstitutional Shores*, *supra* note 55, at 274–75 (“Applying the *Iqbal* meaning of ‘conclusory,’ in any case where discovery would be needed to garner the evidence to succeed at trial, it would appear that a trial court could confidently characterize the complaint as sufficiently ‘conclusory’ to support a plausibility review.”).

59. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1293 (2010).

60. *Id.*

61. *Twombly*, 550 U.S. at 545.

implausible when it alleged that in the wake of the September 11 attacks the federal government may have directed excess attention to Muslims in the United States simply because they were Muslims.⁶² In other words, if *those* allegations could be dismissed, pre-discovery and pre-answer, as facially implausible, then after *Iqbal* it would seem *any* civil complaint could be characterized as implausible, dismissed, and have the dismissal affirmed on appeal.

The same point—that the *Iqbal* opinion essentially insulates any trial court decision from appellate reversal—is equally illustrated by the very language the Supreme Court uses in lieu of “discretion.” The Court holds that “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.”⁶³ Consider the import of this language on an appellate court that is asked to reverse a trial court order. If to allow for appellate reversal, an appellate record would have to support a conclusion by the appellate court that the trial court’s decision was outside the trial judge’s own personal experience and common sense, then the standard of review would seem to be a form of über-abuse of discretion.

One of the interesting aspects of *Iqbal* is that the author of the majority opinion in *Twombly*—Justice Souter—was the author of the dissent in *Iqbal*. His dissent makes plain that he believes the *Iqbal* majority opinion gives trial judges essentially unfettered leeway to dismiss civil complaints as implausible, and that this is not at all what he intended in *Twombly*.⁶⁴

So how do we make sense of *Iqbal*? Given the philosophical arc of *Twombly* to *Iqbal*, the subsequent debate over the reach of *Twombly*, and the oddity that the author of *Twombly* dissented in *Iqbal* and vigorously disagreed with the *Iqbal* majority’s reading of *Twombly*, an explanation emerges. The author of *Twombly* saw the case as presenting the opportunity to address a particular perceived problem—a predatory plaintiff’s counsel using the shear cost of antitrust litigation to file a suit without regard to the merits, but rather merely as a tool to extort a lucrative and quick settlement.

62. *Iqbal*, 129 S. Ct. at 1951–52.

63. *Id.* at 1950.

64. *Id.* at 1959 (“[Petitioner’s characterization of the complaint as implausible] bespeaks a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. . . . The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.”).

Others on the Supreme Court, however, viewed *Twombly* as opening the door to a broader agenda. These other justices were looking for a way to broadly curb frivolous litigation. Just as a particularly pretty bow can make one want an otherwise nondescript box, an attractive fact pattern can “sell” a new procedural and jurisprudential direction. The proponents of using broader procedural devices to curb frivolous litigation saw the language of “implausibility” within *Twombly* as a very useful box, and they saw a post-9/11 suit by a Pakistani Muslim against the Attorney General and the Director of the FBI as a quite attractive bow. It worked. As a result of *Iqbal*, trial judges have now been told they have almost limitless power to go forth, find complaints frivolous, dismiss them, and not be concerned with appellate reversal.

IV. AT WHAT COST?

In *Iqbal*, the Supreme Court gave trial courts such wide leeway that it is hard to describe the set of civil complaints that, regardless of the judge, one could predict with certainty would survive a Rule 12 motion. This is a formula for undercutting confidence in the judiciary as an institution.

Iqbal already has gone viral. On September 15, 2009, roughly five months after the Supreme Court issued its opinion, I ran a computer database search⁶⁵ of federal court opinions citing *Iqbal*. The result was over 1750 hits. The mere frequency of citations to “*Iqbal*” is not, in and of itself, conclusive evidence of an increase in the filing or granting of Rule 12 motions—rather, it might only reflect that now any Rule 12 motion, as a matter of course, cites *Iqbal*, but that the frequency of such motions remains static.⁶⁶ Nonetheless, I am comfortable in my conclusion that *Iqbal* has resulted, and will continue to result, in an explosion of Rule 12 motions being filed. I am confident more Rule 12 motions will be filed because in the wake of *Iqbal*, the motion would, at least in theory, have a chance at being successful in essentially every case. Given this circumstance, how would a lawyer who opted not to file such a motion be able to provide a compelling explanation to their client for why he forwent the opportunity to cheaply cut a case off at the knees pre-

65. Within the “allfeds” database of Westlaw, the search was “Ashcroft v. Iqbal.” The same search on January 4, 2011 resulted in 10,000 hits.

66. Accord Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 604–605, 605 nn.55–56 (2004) (discussing how post-*Celotex* the explosion of citation to *Celotex* in summary judgment motions did not correlate to an increase in the incidence of summary judgment motions).

answer and pre-discovery? It appears that indeed, “*Iqbal* motions” are already becoming ubiquitous.⁶⁷

I would also expect that post-*Iqbal*, there will be an increase in the granting of Rule 12 motions. If a trial court is secure, as it should be after *Iqbal*, that no matter what case the court dismisses as implausible, the dismissal will survive appellate scrutiny, and that discretion is coupled with constitutionally-granted life tenure, then there is little incentive to a trial judge to follow rules defining “conclusory” beyond her own conscience (and I do not mean to minimize the import and frequency of conscience-driven decisions). Put more directly, it is hard to imagine—post-*Iqbal*—the trial judge who perceived a complaint as utterly implausible and yet would decline to dismiss the complaint. After *Iqbal*, fear of appellate reversal certainly would not cause that trial judge to hesitate to dismiss.⁶⁸

The results of these granted *Iqbal* motions would not be content neutral. In other words, some types of plaintiffs (by subject matter, rather than by merit) will disproportionately face *Iqbal* dismissals.⁶⁹ In the two-year period in between *Twombly* and *Iqbal*, among employment discrimination cases, more dismissals occurred in cases citing *Twombly* than in other cases.⁷⁰ Similarly, rates of dismissal spiked post-*Twombly* in civil rights cases.⁷¹ This is particularly troublesome because it is impossible to separate these

67. *But see Access to Justice Denied: Ashcroft v. Iqbal*, *supra* note 27 (statement of Gregory G. Katsas, Former Assistant Attorney General, Civil Division, U.S. Department of Justice) (stating that neither *Iqbal* nor *Twombly* have “proven to be . . . blockbuster” decisions in their “practical impact”).

68. Even in the absence, as yet, of conclusive empirical work, I am confident more Rule 12 motions will be granted post-*Iqbal*. In light of the über-abuse of discretion standard of review discussed above, how could it be otherwise? There is, in fact, already much empirical study underway. One of those ongoing studies that this Author is familiar with—the in-process compilation of the *Iqbal* Task Group within the Pretrial Practice & Discovery Committee of the ABA Litigation Section (on file with Author)—certainly is consistent with the conclusion that *Iqbal* marks a sea change in the behavior of trial courts.

69. *Access to Justice Denied: Ashcroft v. Iqbal*, *supra* note 27 (statement of John Vail, Vice-President and Senior Litigation Counsel, Center for Constitutional Litigation) (explaining that political discrimination, antitrust, employment discrimination, and other civil rights case are disproportionately prone to dismissal under *Iqbal*); *id.* (statement of Debo P. Adegbile, Director of Litigation, National Association for the Advancement of Colored People (“NAACP”) Legal Defense and Education Fund, Inc.) (arguing that *Iqbal* and *Twombly* are negatively affecting civil rights plaintiffs in particular because of the “surreptitious” nature of discrimination today).

70. Joseph A. Seiner, *The Trouble With Twombly: A Proposed Pleading Standard For Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1029 (2009).

71. Kendall W. Hannon, *Much Ado About Twombly? A Study On The Impact Of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1837 (2008).

particular arenas of litigation from issues of race, gender, religion, sexual orientation, and economic empowerment. And while any single case may or may not deserve dismissal, the broad pattern of dismissals cannot be ignored.

In the wake of *Iqbal*, this will be worse. The post-*Twombly* dismissal rates were measured pre-*Iqbal*. In other words, even in an environment where trial judges still were uncertain whether the trial bench had been given broader dismissal power, the granting of Rule 12 motions did not lead to content- or position-neutral results. Post-*Iqbal*, when the authority of trial judges is clear and the wishes of the Supreme Court are plain, the impact will be exacerbated.

In turn, the consequent erosion of confidence in the neutrality and impartiality of the judiciary will be broader than just in the population of constituents involved in specific impact subject matters, such as civil rights or employment discrimination.⁷² A defense attorney would be flirting with malpractice if the attorney failed to file an *Iqbal* motion in virtually every case. After all, it will be the rare case indeed that one could know with certainty could not be dismissed as implausible. In turn, plaintiffs' attorneys in virtually every civil case will have to have an "*Iqbal*" discussion with their client. As a veteran of thousands of conversations with clients about cost and risk, I can tell you that this uncomfortable conversation will be some variant of the following:

ATTORNEY: We need to talk about when you are going to spend your money, and how much you may have to spend before you know whether you are going to get a chance to win this case.

CLIENT: What do you mean?

ATTORNEY: The most expensive months in litigation for a plaintiff are the first month and the last month.

CLIENT: Why?

ATTORNEY: Those months are the most work intensive. The last month is trial. The first month is the initial investigation and drafting of the complaint. My worry is the first month.

CLIENT: Why?

ATTORNEY: I cannot predict whether your case will ever survive the first month. The law has changed recently. The law now lets a trial judge, right at

72. *Access to Justice Denied: Ashcroft v. Iqbal*, *supra* note 27 (statement of John Vail, Vice-President and Senior Litigation Counsel, Center for Constitutional Litigation, P.C.); *id.* (statement of Debo P. Adegbile, Director of Litigation, NAACP Legal Defense and Education Fund, Inc.).

the start, throw out pretty much any case they want to. I cannot tell you if that is a problem here until I see what judge is assigned to your case. I do not find that out until after the lawsuit is drafted, and I file the case down at the courthouse. Then, a judge is randomly assigned to it. No matter what judge gets the case, the other side is going to ask the judge to immediately throw the case out. Some judges throw out a lot of cases that they should not. The Supreme Court has said that is okay.

CLIENT: Do you have doubts about whether I have a good case?

ATTORNEY: No. But that does not matter. There is a lot of pressure on judges to dismiss cases. There is a mood in the country that there are too many lawsuits. Judges are political appointments. You might get assigned the wrong judge. There are some.

CLIENT: But then we could change judges, or appeal?

ATTORNEY: No.

CLIENT: That cannot be right. It cannot be that I have a good case, I spend a lot of money to pay you to draft it, and then I could get thrown out by the wrong judge without ever getting a chance.

ATTORNEY: Actually, that is exactly the problem.

Simply put, lawyers across the civil system now will be counseling clients that whether a civil complaint survives a Rule 12 motion may turn on which judge pulls the case.⁷³

For example in *Al-Kidd v. Ashcroft*,⁷⁴ a Muslim brought a *Bivens* action against John Ashcroft asserting that in the wake of 9/11 he was detained under a material witness warrant because the then-Attorney General implemented a policy of detaining Muslims using such warrants if insufficient facts were at hand to arrest them.⁷⁵ In the wake of *Iqbal*, the defense filed a Rule 12 motion to dismiss.⁷⁶ The trial judge denied the motion, and the Ninth Circuit affirmed.⁷⁷ In other words, among two facially similar cases—*Iqbal* and *Al-Kidd*—one survived and the other did not, based

73. *Id.* (statement of Arthur R. Miller, University Professor, New York University School of Law) (“There is no way the average American, even if armed with effective counsel, can plead to satisfy *Twombly* and *Iqbal*”); *id.* (statement of Debo P. Adegbile, Director of Litigation, NAACP Legal Defense and Education Fund, Inc.) (explaining that the plausibility standard permits judges to “bring to bear their background and common experience,” although the “the background and experience of our judges varies widely”).

74. 580 F.3d 949 (9th Cir. 2009), *cert. granted in part*, 131 S.Ct. 415 (2010).

75. *Id.* at 951–52.

76. *Id.* at 956.

77. *Id.* at 956, 981.

on the reaction of a particular judge to the plausibility of the allegations, and in both instances the trial judges acted within their judicial discretion. In light of *Iqbal*, the initial assignment of the judge may be everything.

Particularly worrisome is the accretive effect of these rulings and the consequent conversations lawyers will be having with clients in virtually every civil case. Over time, lots and lots of people are going to be told that the initial judge assignment will drive the viability of a case, and a material number of these conversations will result in actual experience confirming the concern.

And it is likely that the impact of *Iqbal* will not end at the boundaries of those involved in civil litigation. There will be a broad politicization of *Iqbal*. In *Iqbal*, the Supreme Court gave trial judges the tools to address the perception of this nation as being crippled by too much frivolous litigation.⁷⁸ The “tort reform” movement, and through it the frivolous litigation assertion, already is part of the national political conversation. Notably, the same set of lawsuits, by subject matter, that currently are disproportionately vulnerable to *Iqbal* dismissals are the lawsuits that are part of the national conversation about “judicial activism.” When the Court linked these two strands through its *Iqbal* opinion, the Court made it almost inevitable that now in the context of judicial elections or selections, there will be discussion of the views of the judge or potential judge on the aggressive use of *Iqbal* dismissals.

The best evidence on the inevitable politicization of *Iqbal* comes from the United States Congress. Both the Senate and the House convened hearings and drafted legislation to reverse *Iqbal*.⁷⁹ While that legislation never got out of the committee consideration stage, what is important about these hearings and drafts is only the fact of their occurrence. I am not sanguine about the likelihood of a legislative response, given the obvious political peril of voting to overturn *Iqbal* in an environment where that would be characterized as a vote in favor of frivolous litigation. Nonetheless, by undertaking the effort to legislatively respond to *Iqbal*, Congress has further reduced any likelihood that there will be unawareness of *Iqbal*. The resultant debate over frivolous litigation and impartial justice, will be limited to the traditional stakeholders in the judiciary.

The real problem is when all of these threads come together: the lack of neutrality/impartiality in the granting of *Iqbal* motions; the dependency of outcomes on the idiosyncrasies of the judge; the broadening accretive

78. *Iqbal*, 129 S. Ct. at 1953.

79. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

awareness of the lack of predictability in the courts; the politicization of the judiciary based on the enthusiasm judges have for early dismissals; the disparate impact broadly falling along lines of race, gender, religion, sexual orientation, and economic empowerment; and the likelihood of this entire discussion seeping into a larger public debate. This is a formula for undercutting trust in the judiciary.

The politics of the legislative and executive branches of government have long been a full contact, highly partisan sport. The judiciary, however, outside of occasional bruising judicial confirmation debates, has remained largely immune from these battles.⁸⁰ Unlike the other two branches of government, the judiciary is designed to be neutral. But, as this Article has argued, the *Iqbal* opinion provides the fuel for viewing the judiciary as highly politicized as well. There already is increasing distrust of juries.⁸¹ Adding distrust of judges to the mix is a formula for broad-based dissatisfaction with the neutrality and impartiality of our courts as an institution.

It could be the opening of a Pandora's Box, but perhaps nothing will come of it. But at the risk of sounding histrionic, it is a small step from distrust of the last apparently neutral branch of government—the judiciary—to either civil disobedience or self-help in lieu of civil litigation.⁸²

80. The concern about undercutting the judiciary as an actual, and perceived, impartial and independent branch of government underlies former Justice Sandra Day O'Connor's advocacy to eliminate selection of judges by election. See, e.g., Tom Coyne, *O'Connor Favors Merit Selection of Judges*, CHICAGO TRIBUNE, April 22, 2009 (reporting that former Justice O'Connor believes that campaign spending in judicial elections causes the public to trust judges less).

81. Distrust in the civil jury has resulted in an aggressive reform movement to limit the role of the civil jury. Kenneth S. Klein, *Unpacking the Jury Box*, 47 HASTINGS L.J. 1325, 1325–26 (1996) (explaining that the distrust in the jury system stems from a disbelief that jury members are capable of making the difficult decisions required in many trials).

82. See, *Moyer*, *supra* note 6, at 289.

Governmental action at Ruby Ridge and Waco, Texas, is also cited as symptomatic of governmental intolerance, in this case of pro-gun groups, and have been used as rallying cries for the militia and common-law movements. These groups see the assault weapons ban and the Brady bill as further evidence of a tyrannical government . . . Finally, they point to the lack of personal accountability of federal officials and their allegedly demonstrated lack of understanding of the needs of rural America to show that the federal government has degenerated into state tyranny.

Id.

V. CONCLUSION

Iqbal is the quintessential self-inflicted wound. There are serious unintended consequences of *Iqbal*. It unintentionally creates a constitutional conflict between the Federal Rules of Civil Procedure and the Seventh Amendment.⁸³ There also are intended consequences of *Iqbal*. Prime among those is the intent to empower trial judges to aggressively, and without concern of appellate reversal, identify and dismiss potentially frivolous litigation. This intended consequence comes at a high price. Some meritorious claims, like the baby thrown out with the bath water, will also be dismissed along with the meritless claims. Dismissals will not be content-neutral, and much will turn on the idiosyncrasies of the judge. All of this is harmful because it is contrary to our core civic values. It removes the blindfold and tips the scales of justice.⁸⁴ At some point, the gain of reducing frivolous litigation is not worth the cost. The true lesson of *Iqbal* may be that tolerating a bit more frivolous litigation is necessary to a civil and democratic nation.

83. *Unconstitutional Shores*, *supra* note 55, at 283–87 (discussing the debate over the constitutionality of motions to dismiss).

84. Essentially, our image of Lady Justice will move from that seen at http://farm1.static.flickr.com/163/415093674_edddb13446.jpg (last visited Dec. 21, 2010) (statue of Lady Justice blindfolded with balanced scales), to that seen at <http://www.flickr.com/photos/delina/163475664> (last visited Dec. 21, 2010) (statue of Lady Justice not blindfolded with tilted scales).

