

Implausible Realities: *Iqbal*'s Entrenchment of Majority Group Skepticism Towards Discrimination Claims

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INTRODUCTION

In *Ashcroft v. Iqbal*,¹ handed down on May 18, 2009, the U.S. Supreme Court held that Javaid Iqbal failed to plead sufficient facts to support the allegation that he had been arbitrarily and unconstitutionally classified by the federal government as a person “of high interest” and detained in a maximum security facility after September 11th, 2001 because of his race, religion, and national origin.² In affirming dismissal of the complaint, the Court noted that the facts alleged did not “‘nudge[] [the plaintiffs’] claims’ of invidious discrimination ‘across the line from conceivable to plausible.’”³ *Iqbal* ostensibly extended to intent-based civil claims the Supreme Court’s earlier decision in *Bell Atlantic Corporation v. Twombly*,⁴ mandating that pleadings in antitrust cases must allege enough facts to plausibly “sho[w] that the pleader is entitled to relief”⁵ under Rule 8(a)(2) of the Federal Rules of Civil Procedure.⁶

To say that *Iqbal* modified the pleading standard in certain types of cases would be a dramatic understatement. The decision profoundly transformed the jurisprudential landscape, shifting the course of lawsuits nationwide. A cursory glance at the ruling’s rate of citation gives a measure of its sweeping impact. Based on a recent search, in the single year since it was decided, *Iqbal* has been cited six times by the Supreme Court, over 300 times by the courts of appeals, and more than 6,500 times by district courts. The pleading requirement set out in *Iqbal* has been extended beyond the *Bivens* claims at issue in that case to a number of different causes of action, including Section 1981 and Title VII. Its vast influence commands close attention, as does the fact that it arose out

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

2. *Id.* at 1951-52. Ehab Elmaghraby, one of the original plaintiffs, withdrew from the lawsuit after reaching a settlement with the federal government for \$300,000. Javaid Iqbal, the other original plaintiff, continued with the lawsuit. See Nina Bernstein, *U.S. is Settling Detainee’s Suit in 9/11 Sweep*, N.Y. TIMES, Feb. 28, 2006.

3. *Iqbal*, 129 S. Ct. at 1952.

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

5. *Id.* at 555.

6. See *Iqbal*, 129 S. Ct. at 1953 (rejecting argument that “*Twombly* should be limited to pleadings made in the context of an antitrust dispute”). See also FED. R. CIV. P. 8(a)(2) (“A pleading that states a claim for relief must contain: . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief.”).

of—and dismissed—a discrimination case brought by a member of an unpopular minority group.

That fact is of particular note because an institutionalized regard for minority entitlements is an important systemic feature preventing democratic governance from devolving into the tyranny of the majority so dreaded by the Framers.⁷ Protections for minorities are embedded in the Constitution and in a variety of statutes, oversight of which is left largely to the least democratic of the three branches of government—the federal judiciary. Relatively insulated from popular whim, the courts are minority groups’ most natural allies in the United States’ tripartite constitutional arrangement. Indeed, the Supreme Court acknowledged that “more searching judicial inquiry” is appropriate to counteract “prejudice against discrete and insular minorities.”⁸ Commentators, too, have stressed the centrality of that particular judicial function in our polity. John Hart Ely wrote about identifying “those groups in society to whose needs and wishes elected officials have no apparent interest in attending,” arguing that “it would not make sense” to assign the protection of such insular minorities “to anyone but the courts.” Ely took as the starting point of his analysis that “courts should protect those who can’t protect themselves politically” by virtue of their minority status.⁹

This Article aims to highlight the limitations and pitfalls of the approach taken in *Iqbal* through critical examination of the Court’s reasoning, on its own terms and in an empirical light, drawing on recent opinion polls about discrimination and statistics detailing the composition of the federal bench, as well as on emerging caselaw in the decision’s wake. *Iqbal*’s embrace of judges’ subjective assessments under the guise of “plausibility” and “common sense” raises concerns that Muslim Americans’ and other minority plaintiffs’ claims of

7. Of course, the Framers’ regard for minorities was quite selective. Notably, it did not include women, African-Americans, and Native-Americans. This Article employs the term “minority” only with great reluctance and for lack of less problematic and equally intelligible shorthand terminology. Commonly understood, the term captures ethnic, racial, and religious groups in the United States that generally self-define or are characterized as non-“white” or non-Christian. Even assuming the existence of a single, monolithic, undifferentiated “white” group, so-called “minority” groups, when counted together, currently make up a significant share of the country’s population. U.S. CENSUS BUREAU, RACE AND HISPANIC ORIGIN IN 2005, at 2, *available at* <http://www.census.gov/population/www/pop-profile/files/dynamic/RACEHO.pdf> (finding that “non-whites” account for nearly 96 million people). Given privilege and power disparities, women, too, are frequently studied as a “minority” group, notwithstanding the statistical reality that there are more females than males in the population of the United States. The term can also be read to carry a dismissive connotation, which this Article does not aim to convey.

8. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

9. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 151-52 (1980).

discrimination—claims that members of these groups find plausible, indeed evident—are far less likely to find agreement with a federal judiciary that does not shine by its diversity.

By enhancing and privileging the dominant, majority perspective's role in a judicial assessment that determines minority rights, the *Iqbal* decision undermines a major façade of the constitutional design and, by extension, the rights of minority groups in this country. Indeed, the Court's coarse reliance on "plausibility" and "common sense"¹⁰ signals an embrace of unfettered judicial subjectivity, setting the stage for the Court's association of broad swathes of immigrants and citizens with terrorists, simply because "the September 11 attacks were perpetrated by 19 Arab Muslim hijackers."¹¹ Though the decision nowhere disclaims fealty to Federal Rule of Civil Procedure 8(a)(2)'s requirement of a short and plain statement nor does it reject the notion that such statements must be accepted as true, it strays from that standard by injecting indeterminate and, ultimately, subjective metrics into the threshold determination.

Judicial discretion, of course, is not the enemy. Our legal system requires and regulates the exercise of subjective judicial discretion in a variety of procedural postures and for a range of reasons. The application of judicial subjectivity is indispensable in those settings; indeed, the influence of subjectivity is inescapable in other contexts as well, where it is not supposed to play as prominent a role. The concern at the core of this Article relates to the embrace of *unfettered* judicial subjectivity and its elevation to the rank of a factor of existential consequence. It is by placing the threshold viability of a legal claim at the mercy of unfettered judicial subjectivity that *Iqbal* seems to cut against the grain of basic fairness, including precepts that are taken and touted as fundamental—that ours is "a government of laws and not of men," for instance.¹² While it was more of a decider in close calls, after some discovery and litigation, *Iqbal* seems to have transformed judicial gut instinct into a gate-keeping mechanism.

Discrimination claims are particularly vulnerable to an unfavorable application of dispositive judicial discretion at the threshold stage. Under *Iqbal*, such claims require a showing of animus or deliberate, invidious intent, which is less likely at the stage where there are the fewest facts available, particularly in cases characterized by stark informational asymmetries between the parties. That the exercise of

10. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (holding that a determination of "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").

11. *Id.* at 1951.

12. *See, e.g.*, MASS. CONST. pt. 1, art. XXX.

judicial subjectivity is, to an extent, racially-inflected raises concerns that minority plaintiffs' odds of success are even further reduced.

Part I of the Article scrutinizes *Iqbal*'s reasoning and its problematic embrace of a subjective plausibility standard at the threshold viability stage.

Following that analysis, it seemed necessary to identify some of the common sense metrics that might determine what comes out of the black box of plausibility assessment. Part II of this Article begins by surveying recent polls and studies reflecting Muslim Americans' experiences of discrimination and the prevalence of anti-Muslim sentiment in the United States. That exercise reveals that whether one believes an invidious discrimination narrative offered by a member of a particular group depends in significant part on the personal background of the observer relative to that of the individual offering the discrimination narrative. In other words, plausibility is in the eye of the beholder and how one assesses plausibility is also colored by the discrimination claimant's origins. Part II then explores how judges are not wholly impervious to ambient biases held by the general public and how their own backgrounds, experiences, and views have a documented impact on judicial outcomes—even ones less overtly pegged to subjective views than cases are under *Iqbal*. Finally, the inquiry turns to the relative lack of diversity on the federal bench and how, given all of the above, the wide latitude for judicial subjectivity under *Iqbal* bodes poorly for future discrimination claims brought by members of minority groups, generally, and Muslim plaintiffs, in particular.

Finally, in Part III, an overview of its progeny thus far tests predictions about the gravity of the threat *Iqbal* poses to equal protection, and probes the analysis offered here of *Iqbal*'s problematic embrace of judicial subjectivity. Cases in its wake so far confirm that *Iqbal* will carry particularly acute risk when it comes to unlawful discrimination claims brought by members of minority groups.

I. IQBAL'S DISQUIETING EMBRACE OF JUDICIAL SUBJECTIVITY: A CRITICAL ANALYSIS OF THE RULING

After *Twombly* and *Iqbal*, the facts alleged in a complaint must be sufficient to "draw the reasonable inference that the defendant is liable for the misconduct alleged" to survive a motion to dismiss.¹³ As will be explored in greater detail below, a survey of caselaw that has emerged in the wake of *Twombly* and *Iqbal* makes clear that federal courts have derived a two-prong pleading standard from the Supreme Court's

13. *Iqbal*, 129 S. Ct. at 1949.

rulings: 1) a court is not required to accept as true “legal conclusions” that are framed as factual allegations;¹⁴ and 2) a determination of a complaint’s plausibility will be “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”¹⁵

Scholars are only beginning to evaluate *Iqbal*’s impact,¹⁶ and much commentary has focused, in a general sense, on the decision’s likely adverse effect on plaintiffs’ chances of overcoming threshold obstacles.¹⁷ Whether minority plaintiffs now stand at a particular disadvantage has not been the subject of extensive analysis.¹⁸ This Article’s core concern

14. *Id.* at 1950.

15. *Id.*

16. A search of the Westlaw and Social Science Research Network databases on March 23, 2010 yielded only twenty law review articles to have discussed *Iqbal* and its progeny in depth, including twelve articles from a symposium on *Iqbal* recently hosted by the law review at Lewis & Clark Law School. Symposium, *Pondering Iqbal*, 14 LEWIS & CLARK L. REV. 1 (2010). This count excludes articles resulting from the instant symposium, hosted by Penn State Dickinson School of Law on March 26, 2010, of which this Article forms part. See Symposium, *Reflections on Iqbal: Discerning Its Rule, Grappling With Its Implications*, 114 PENN. ST. L. REV. 1143 (2010).

17. The law review literature has focused primarily on how the Supreme Court’s two-pronged plausibility pleading standard articulated in *Iqbal* has upended fifty years of well-settled notice pleading doctrine. See, e.g., A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 6 (2009); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. (forthcoming 2010); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010). Some scholarly attention has been paid to *Iqbal* in relation to specific areas of the law. For example: whether *Iqbal* has resulted in higher numbers of motions to dismiss granted under Rule 12(b)(6), Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553 (2010); how *Iqbal* has affected access to discovery, Andrew Blair-Stanek, *Twombly is the Logical Extension of the Mathews v. Eldridge Test to Discovery*, 62 FLA. L. REV. 1 (2010); what the plausibility standard will mean in practice, Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal*, 94 MINN. L. REV. 505 (2009); and the constitutionality of *Iqbal*’s heightened pleading standard under the Seventh Amendment, Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261 (2009).

18. Even in articles that discuss at length the effects of *Iqbal* on plaintiffs’ access to the courts, few have explored specifically *Iqbal*’s impact on civil rights plaintiffs. Patricia Hatamyar’s rigorous study of Rule 12(b)(6) motions to dismiss under *Conley*, *Twombly*, and *Iqbal* only mentions in passing that plaintiffs alleging civil rights violations may be even less likely than before to survive a motion to dismiss after *Iqbal*’s heightened pleading requirements. Hatamyar, *The Tao of Pleading*, *supra* note 23, at 607 (finding that the percentage of Rule 12(b)(6) motions granted in cases alleging civil rights violations increased from 50% under *Conley* to 53% under *Twombly* to 58% under *Iqbal*). Other articles allude to *Iqbal*’s deleterious effect on specific classes of plaintiffs, such as those alleging employment discrimination, but without extensive caselaw discussion. See, e.g., Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 117 (2009); Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2D 413, 415-16 (2009). Some scholars

is that the Court's reliance on such coarse concepts as "plausibility" and "common sense"—indeed, its injection of virtually unfettered judicial subjectivity into the analysis—will adversely impact the odds of success for minority claimants in general and for Muslims claiming discrimination in the national security context more than those of the average plaintiff.

On its face, *Iqbal* leaves untouched the jurisprudential leitmotiv that courts must take allegations as true.¹⁹ However, *Iqbal* qualifies that constant adjudicative rule by freeing judges to dismiss those claims their intuition tells them cannot be true. Alleging a "mere possibility of misconduct"²⁰ is no longer sufficient to "show that the pleader is entitled to relief" under FRCP 8.²¹ A court can now "choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth."²² If the allegations are well-pleaded and deserve the assumption of truth, courts should then "determine whether they plausibly give rise to an entitlement to relief."²³ What ultimately mattered in *Iqbal*—and will influence if not dictate the outcome of future claims by minority group plaintiffs—is whether, in a judge's view, the complaint nudges claims of invidious discrimination "across the line from conceivable to plausible."²⁴

In certain types of cases, particularly ones brought by claimants belonging to minority groups that are underrepresented on the bench, *Iqbal*'s two-pronged approach can be expected to effect a significant erosion of the protections afforded under FRCP 12(b)(6) that pleadings must be taken as true. For such plaintiffs—especially if they are Muslims asserting discrimination claims arising from national security policies—the *Iqbal* Court signaled to judges that they only have to take claims as true insofar as they subjectively find those claims to be

have begun to focus on *Iqbal*'s relationship to civil rights litigation, see, e.g., Suzette M. Malveaux *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 15 (2010); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010), but without much elaboration on why minority plaintiffs are likelier to fail under the Supreme Court's newly-minted plausibility standard.

19. The *Iqbal* Court at no point disputed the continued applicability of FRCP 8(a)(2)'s requirement of a short and plain statement detailing factual matter that should, on its face, be accepted as true. See, e.g., *Iqbal*, 129 S. Ct. at 1949 (quoting language from FRCP 8(a)(2) that "a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief'").

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

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 1951 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

believable. By setting “common sense” as a metric by which to determine plausibility, the Court specifically calls on judges to rely on views that will likely privilege mainstream over minority perspectives by virtue of their being “common.” Having the common view as the appropriate standard is unsettling as it can be intrinsically prejudicial in cases where a minority perception of discrimination undergirds an equal protection claim.

The dissent in *Iqbal* seized on the problematic upshot of the majority’s opinion, reminding that *Twombly*, too, stood for the proposition “that a court must take the allegations as true, no matter how skeptical the court may be.”²⁵ According to the dissent, dismissal must require something more than mere skepticism—it is only appropriate where a court is faced 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.”²⁶ Citing to *Twombly*, the dissent offered a different interpretation of plausibility—that the plaintiff’s alleged facts, assumed to be true, are “suggestive of illegal conduct.”²⁷ The dissent found that the claims at issue in *Iqbal* not only fell far short of the realm of fantasy,²⁸ but they were in fact inconsistent with legal conduct.²⁹

But the dissent did not address some of the more troubling implications of the majority’s ruling, particularly those concerning the viability of discrimination lawsuits brought by Muslim plaintiffs and members of other demographic minority groups. The indeterminacy of *Iqbal*’s plausibility standard clears a path for unchecked judicial subjectivity to function as a major determinant of a lawsuit’s threshold viability.³⁰ Importing *Twombly*’s “flexible ‘plausibility standard,’”³¹ the

25. *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting).

26. *Id.*

27. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. at 563 n.8).

28. In comparing the facts pleaded in *Iqbal* to “claims about little green men” or a “recent trip to Pluto,” Justice Souter noted, “That is not what we have here [in *Iqbal*].” *Id.*

29. *Id.* at 1960.

30. See Tymoczko, *supra* note 23, at 512. Despite these hints in *Twombly* and *Iqbal* of what is needed to suffice as plausible, Tymoczko notes, “the actual meaning of the plausibility standard, as opposed to the scope of its applicability, remains as important and as unclear as ever.” *Id.* at 518. One of the problems with how lower courts have interpreted *Twombly* and *Iqbal* is that many have simply substituted the two-prong analysis from *Iqbal* for any real inquiry into whether the facts stated raise a plausible claim. Thus, the courts might simply look at whether or not the facts alleged are conclusory, which, in and of itself, is a highly subjective determination. Another problem is that many courts have simply recited key phrases from *Twombly* and *Iqbal* that a “formulaic recitation” is not enough, or that the factual allegations must be more than “conceivable,” in an opinion’s section on pleading without any real examination of what those phrases mean and how they apply to the facts alleged.

Iqbal Court held that, to avoid dismissal, claimants must “amplify” with additional facts any claims a judge deems implausible.³² The crucial plausibility determination is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”³³

The Court’s reliance at this connection in its reasoning on such malleable and ill-defined concepts as “plausibility” and “common sense” essentially invites subjectivity and intuition at the expense of judicial caution. While judges are uniquely, perhaps supremely competent at discerning bias, as will be detailed below, their subjective perceptions are not immune to the distortions that influence individual judgment in the general population. Judicial outcomes, too, carry the imprint of judges’ individual backgrounds and biases. Where judges’ subjectivity is given virtual free rein, particular classes of plaintiffs and claims are likelier to bear the impact. *Iqbal*’s shift towards the subjective sets the stage for the most disturbing passage of the Court’s analysis—its association of broad swathes of immigrants and citizens with terrorists, simply because “the September 11 attacks were perpetrated by 19 Arab Muslim hijackers.”³⁴

The complaint alleged that “the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11.”³⁵ The *Iqbal* plaintiffs also claimed that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.”³⁶ However, the Court dismisses these allegations:

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would

31. *Iqbal*, 129 S. Ct. at 1944.

32. *Id.* The Court noted, “*Twombly* called for a ‘flexible pleading standard, which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.’” *Id.* (quoting *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007)). Clearly the *Iqbal* Court believed this case was one in which the facts required amplification to meet the threshold of plausibility. Again drawing upon language from *Twombly*, the Court continued, “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Iqbal*, 129 S. Ct. at 1950 (citing *Twombly*, 550 U.S. at 556).

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

34. *Id.* at 1951.

35. Complaint ¶ 47, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 04-CV-1809).

36. *Id.* at ¶ 69.

produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.

As between that “obvious alternative explanation” for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.³⁷

The Court sees merely “incidental” disparate impact where others, particularly those directly affected by such policies, might discern deliberate, discriminatory and indiscriminate intent to target Arab and South Asian Muslims broadly in the aftermath of 9/11. The Court credits an “obvious alternative explanation” for the policy, one that posits in part that the men had been rounded up “because of their suspected links to the attacks.” Perhaps most interesting at this analytical juncture in the opinion is that the Court could not have found Iqbal’s claims implausible for the reasons it stated. Indeed, the alternative explanation the Justices found for the policy does not hold up to scrutiny.

Had there been a “suspected link” between the plaintiff and the men who were responsible for September 11th, then that would have been a compelling alternative explanation—it would have founded a legitimate law enforcement rationale for the policy as applied to Iqbal and others like him. But there was no such apparent link between the plaintiff and the men who committed the attacks. Indeed, while the Court vindicates the FBI in rounding up “aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts,”³⁸ nowhere does the Court further delineate the plaintiff’s “suspected link to the attacks.”³⁹ One struggles to find the commonalities between the plaintiff, others like him who were swept up in the post-9/11 dragnet, and the 9/11 operatives or their accomplices and handlers. The Court mentions aliens who were unlawfully present in the United States, but the men who carried out the 9/11 attacks themselves all had valid visas.⁴⁰ Thus, while the Court speaks of potential

37. *Iqbal*, 129 S. Ct. at 1951-52 (internal citation omitted).

38. *Id.* at 1951.

39. *Id.*

40. The nineteen men who carried out the attacks on September 11, 2001, were present in the United States on valid visas, the majority of which were obtained in Saudi Arabia. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMM’N REPORT 235 (2004). Prior to applying for a U.S. visa, many of the operatives obtained new “clean” passports to erase information about previous international travel that might have given U.S. consular officials pause. *Id.*

connections to those who committed terrorist acts, on the record before the Court, the only characteristics the plaintiffs are known to have shared with the hijackers are their Muslim faith and ethnic background.⁴¹ Of course, faith and ethnicity are but two of the very many components that can possibly compose individual identity and, more à propos here, they are certainly not the most meaningful or probative identifiers of possible activity on behalf of specified terrorist groups.

What, then, drove the Court's finding of implausibility when it assessed the plaintiff's claims? By enthroning plausibility as the inquiry's touchstone, the Court effectively embraced judicial subjectivity, though it somewhat masked that shift towards the subjective. The decision rhetorically treats the plausibility of pleadings as an objectively ascertainable issue of law, promoting the inquiry to an "abstract" rather than "fact-related" issue of law.⁴² However, the Court repeatedly calls upon judges to assess a complaint's plausibility based upon their own "experience and common sense."⁴³ That language stands in interesting contrast to the Court's "expertise and competence" terminology, employed in an earlier ruling.⁴⁴ The *Iqbal* phrasing connotes individual subjectivity whereas the terms used to guide the exercise of judicial authority in *Boumediene* draw on the lexical field of professional objectivity. In its choice of terms and framing, the Court enshrines judges' subjective views on plausibility; those opinions now carry the authority of law with the high court's blessing. The *Iqbal* ruling erects a black box where judges will decide what sounds right, almost intuitively, by gut check, based on "common sense." Claims can be dismissed because they do not accord with a judge's worldview and her subjective assessment of what is plausible.

As the following sections illustrate, this development will matter most in cases involving discrimination claims like *Iqbal*, where gauging the plausibility that the defendants acted with discriminatory purpose in implementing a challenged policy or practice based upon the facts

41. The *Iqbal* Court repeatedly makes reference to Arab Muslims because the complaint alleged that the government defendants had classified thousands of Arab Muslim men as "being of 'high interest' to the government's post-September-11th investigation by the FBI" Complaint at ¶ 48, *Iqbal*, 129 S. Ct. 1937. Javaid Iqbal himself was not Arab, but rather a Pakistani Muslim. *Id.* at ¶ 1. Professor Romero further details the non-existent nexus between the *Iqbal* plaintiffs and the individuals and organizations responsible for September 11th. Victor C. Romero, *Interrogating Iqbal: Intent, Inertia, and (a lack of) Imagination*, 114 PENN ST. L. REV. 1419 (2010).

42. *Iqbal*, 129 S. Ct. at 1947. The Court notes, "[e]valuating the sufficiency of a complaint is not a 'fact-based' question of law" *Id.*

43. *Id.* at 1950.

44. *Boumediene v. Bush*, 128 S. Ct. 2229, 2276 (2008).

alleged will make or break a case at the preliminary stages.⁴⁵ How the assessment concludes under *Iqbal* will depend in large part on what a judge's common sense tells her about the likelihood that a policymaker's intent rose to the requisite level of deliberation. Judges' views about particular groups and about the prevalence of prejudice and discrimination directed at those groups suddenly take on a central and acknowledged weight in the judicial calculus—they assume a position that, at the very least, was not openly recognized or encouraged in the lead up to *Iqbal*.⁴⁶ The ruling gives judges wider latitude to issue findings in accordance with an inchoate and indeterminate “common sense” standard that fails to cabin subjectivity, instead of ones articulated in keeping with more definite metrics. As will be seen below, the subjective, common sense standard applied by the judiciary will likely tilt towards mainstream, majority group views that include a dose of skepticism towards claims of invidious discrimination against minority groups, particularly unpopular, insular ones.

Majority group skepticism on judges' part, coupled with the stark informational asymmetries that characterize discrimination claims generally (and in particular ones arising in the national security context) raise concerns about minority claimants' chances of success in discrimination suits. Moreover, that the decisionmaking process now consecrated by *Iqbal*'s frontal embrace of subjectivity can be almost inscrutable given that the opaque plausibility standard raises a related concern that rulings will be more insulated from review or challenge. For instance, where a judge tautologically declares a claim implausible, offering little reasoning upon which to hang an appeal, a litigant is left to punt the plausibility determination to the next set of appellate judges who

45. “Where the claim is invidious discrimination in contravention of the . . . Fifth Amendment[], our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose.” *Iqbal*, 129 S. Ct. at 1948 (citing *Washington v. Davis*, 426 U.S. 229, 240 (1976)). Michael Dorf points out that the Court in *Iqbal* acknowledged that the complaint may have alleged misconduct by some of the lower-level defendants, such as the corrections officers and warden at the facility where Javaid Iqbal was detained. Michael C. Dorf, *Iqbal and Bad Apples*, 14 LEWIS & CLARK L. REV. 217, 224 (2010). But as that article notes, at a time when high-ranking Bush administration officials were ordering coercive interrogation and other abuse at Abu Ghraib and Guantánamo Bay, it is hardly implausible to posit that the wardens at the facility where Javaid Iqbal was detained were acting upon orders from higher-ranking officials. *Id.* at 224-25.

46. Though beyond the scope of this Article, an interesting discussion could be had about whether this is a shift for the better, in that it inaugurates transparency where there was hypocrisy and rhetorical window-dressing about the role played by judges' personal views in assessing the viability of such claims. After all, courts were not especially hospitable to non-citizens even before *Twombly* and *Iqbal*. See Shoba Wadhia, *Business as Usual*, 114 PENN. ST. L. REV. 1485 (2010).

will likewise offer their subjective views on the matter, unmoored from any predetermined, concrete benchmarks.

II. PLAUSIBILITY IS IN THE EYE OF THE BEHOLDER: ON THE COLOR OF PERCEPTION AND THE PITFALLS OF EMBRACING SUBJECTIVITY

In dismissing Javaid Iqbal's allegations of intentional discrimination, the Supreme Court in *Iqbal* wrote, "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the September 11th attacks would produce a disparate, incidental impact on Arab Muslims, even though the policy's purpose was to target neither Arabs nor Muslims."⁴⁷ The *Iqbal* Court opined that the facts, as alleged in the complaint, described government conduct that was a legitimate law enforcement response to 9/11.⁴⁸ According to the majority in *Iqbal*, the "obvious alternative explanation"⁴⁹ for the indiscriminate surveillance, arrest, and detention of well over a thousand Arab and South Asian Muslims post-9/11 was national security. As the dragnet was conducted for national security purposes, the *Iqbal* Court accepted that the federal government acted without purposeful invidious discrimination against a particular minority group.⁵⁰

In one breath, the *Iqbal* Court not only acknowledged that Muslims were subject to heightened surveillance and monitoring as a result of law enforcement practices after 9/11, but also condoned the arrest, detention, and deportation of a large number of Muslim suspects as a necessary result of a legitimate counterterrorism policy.⁵¹ According to the Court, Javaid Iqbal failed to plead a plausible claim of intentional

47. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009).

48. *Id.*

49. *Id.*

50. *Id.* at 1951-52.

51. In the *Iqbal* majority opinion, Justice Kennedy narrates the factual background that led to plaintiff Javaid Iqbal's arrest, detention, and subsequent deportation. After September 11, the FBI questioned more than 1,000 individuals who were suspected of having ties to terrorist organizations or activities. *Id.* at 1943. In fact, the exact number of individuals questioned is unknown, as the Department of Justice stopped counting at 1,200. *See* U.S. DEPT. OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1 n.2 (April 2003) (noting that cumulative totals were discontinued after the number reached 1,200 because the statistics became too confusing). Of those individuals, 762 were charged with immigration violations, and 184 were detained as "high interest" suspects. *Iqbal*, 129 S. Ct. at 1943. Iqbal was part of the subset deemed to be of "high interest." *Id.* Given the paucity of demonstrably shared characteristics between Iqbal and the men who carried out the September 11th attacks, one troubling interpretation of the Court's expectation that suspicion would naturally fall more heavily on Muslims is that religious identity is a permissible proxy for articulable suspicion.

discrimination because his complaint did not allege facts that demonstrated the government defendants acted with a “discriminatory purpose.”⁵²

The *Iqbal* majority’s view, of course, stands in stark contrast to that of Muslims in the United States who are directly affected by law enforcement policies after 9/11, and to whom the heightened surveillance and targeted profiling of one discrete group within the larger American public seems indeed deliberate and invidious. That the very scenario dismissed as implausible by the Supreme Court in *Iqbal* is a tangible and recurring reality in the Muslim American experience might indicate that the Court’s assessment of whether Javid Iqbal’s discrimination claim satisfied the subjective plausibility test was colored by the Justices’ own backgrounds, experiences, and views.⁵³ How the plausibility assessment can resolve differently by group will be a focus of inquiry in this Section.

A. *Discrimination and the Muslim American Experience*

Overwhelmingly, Muslim Americans say that discrimination and prejudice because of their Muslim identity is the biggest problem they face in the United States.⁵⁴ Worries that are typically ranked high by the general public—such as economic difficulties and job stress—are only cited as top concerns by 2% of Muslims.⁵⁵ Polls conducted after 9/11 show that Muslim Americans’ fears of discrimination extend even beyond the national security context to everyday experiences. For example, one recent poll found that 37% of Muslim Americans were very or somewhat worried about not being hired for a job because of their ethnicity or religion,⁵⁶ compared to 26% of African American men and 3% of white men.⁵⁷

More generally, polls reflect that Muslim Americans are especially concerned about racial and ethnic profiling on national security grounds after 9/11. Over 50% of Muslims surveyed in a recent national poll

52. *Id.* at 1948 (“As between that ‘obvious alternative explanation’ for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.”).

53. The term “Muslim American” is employed here and throughout in its broadest possible sense—to wit, it is not restricted to Muslim citizens of the United States but is meant to encompass all Muslims in the United States.

54. PEW RESEARCH CENTER, SURVEY, MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 36 (2007) [hereinafter MUSLIM AMERICANS].

55. *Id.*

56. *Id.* at 37.

57. Press release, Equal Employment Opportunity Commission, New Gallup Poll on Employment Discrimination Shows Problems, Progress 40 Years After Founding of EEOC (Dec. 8, 2005), available at <http://www.eeoc.gov/eeoc/newsroom/release/12-8-05.cfm>.

believe that the government singles out Muslims for increased surveillance and monitoring,⁵⁸ and 30% of Muslims who had traveled by airplane in the last year reported being selected by airport security for additional inspection or questioning.⁵⁹ Beyond heightened surveillance and monitoring, Muslim Americans reported many incidents of perceived or actual animus after 9/11. When asked if they had experienced racial discrimination in the past year, 26% of Muslims responded that people had acted as if they were suspicious of them,⁶⁰ and 15% reported they had been called offensive names.⁶¹

By contrast, far from being seen as victims of discrimination, surveys of the general American public confirm that Muslim Americans are widely viewed with distrust and that anti-Muslim sentiment has burgeoned in the United States post-9/11. A 2004 poll found that 47% of respondents believed that Islam is more likely to encourage violence compared to other religions,⁶² and 44% agreed that the government should subject Muslim Americans to additional scrutiny, such as mandatory registration with the federal government, targeted profiling of citizens based on their Muslim or Middle Eastern background, increased surveillance of mosques, and use of undercover law enforcement agents in mosques and Islamic civic organizations.⁶³ Even five years after 9/11, a significant percentage of Americans continued to favor additional security measures for Muslims as a means to prevent future attacks. In response to a poll conducted in 2006, 39% of respondents said they favored requiring Muslim Americans to carry special identification, while 41% believed Muslim Americans should undergo more extensive airport security checks before being allowed to board a flight.⁶⁴

58. MUSLIM AMERICANS, *supra* note 61, at 37.

59. *Id.*

60. *Id.* at 38.

61. *Id.*

62. Erik C. Nesbit & James Shanahan, MSRG Special Report: Restrictions on Civil Liberties, Views of Islam, & Muslim Americans, Cornell University Media & Research Group (December 2004), *available at* <http://www.yuricareport.com/Civil%20Rights/CornellMuslimReportCivilRights.pdf>.

63. *Id.*

64. Lydia Saad, *Anti-Muslim Sentiments Fairly Commonplace: Four in ten Americans admit feeling prejudice against Muslims*, Gallup Organization, Aug. 10, 2006, *available at* <http://www.gallup.com/poll/24073/antimuslim-sentiments-fairly-commonplace.aspx>. Interestingly, the Gallup Poll found that respondents who personally knew a Muslim were less likely to be in favor of measures that restricted Muslim Americans' civil liberties than respondents who did not have any Muslim acquaintances. *Id.* In a curious display of duality, anti-Muslim sentiment is also widely recognized by the general American public as a reality for many Muslims—a 2009 poll found that 58% of Americans believed Muslims in the United States face a lot of discrimination. PEW FORUM ON RELIGION & PUBLIC LIFE, SURVEY, VIEWS OF RELIGIOUS SIMILARITIES AND DIFFERENCES: MUSLIMS WIDELY SEEN AS FACING DISCRIMINATION 5 (2009). A separate

Taken together, the above statistics teach us that Muslim Americans would assay the plausibility of Javaid Iqbal's claims differently from the general public and—as *Iqbal* reflected—from the Justices. Views on the likelihood of discrimination as a general proposition or in a given instance, and perspectives on whether a particular group is a victim of discrimination or a source of terrorist peril—which perspectives, in turn, impact plausibility assessments of discrimination—vary widely across groups of observers. This data raises concerns that judges, too, might view as implausible claims of invidious discrimination advanced by minority group claimants and might regard Muslim claimants in particular not as victims but as threats.⁶⁵ The concerns would be mitigated if judges, by virtue of their training, expertise, and competence, or due to their personal backgrounds, are less likely to be influenced by the factors that shape the perceptions of common citizens. Accordingly, in the next stage of this inquiry, the focus will be on whether we can expect the judiciary to escape the phenomenon of majority group skepticism and suspicion towards discrimination claims by Muslims.

B. Judicial Diversity and the Color of Perception

The majority in *Iqbal* dismissed as implausible what many if not most Muslim Americans regard as incontrovertible—that the impact of post-9/11 law enforcement sweeps on the Muslim community was anything but incidental. Would the Court have assessed the plausibility of Javaid Iqbal's claims differently had one of the Justices been Muslim, or if more of them claimed racial, religious, national, or gender backgrounds that made discrimination a more prominent part of their lives? Is background discernibly relevant to judicial outcomes and, if so, what does the present composition of our federal judiciary allow us to foretell about how particular types of claims brought by certain groups might fare under the subjectivity standard ushered in by *Iqbal*?

poll conducted by the Pew Research Center in 2010 found that the American general public believed that Latinos and African Americans face significantly less discrimination than Muslim Americans. According to the poll, 23% of the public said that Latinos faced a lot of discrimination, and 18% said that African Americans did. See PEW RESEARCH CENTER, SURVEY, A YEAR AFTER OBAMA'S ELECTION: BLACKS UPBEAT ABOUT BLACK PROGRESS, PROSPECTS 4 (2010). The polls did not reach whether discrimination affecting Muslim Americans was viewed as unfair or unwarranted, which might reconcile these poll results with those documenting rampant anti-Muslim sentiment in the same population.

65. As an aside, this data also informs analysis of whether federal officials, in developing and implementing the law enforcement policies at issue in *Iqbal*, were impelled in part by the ambient distrust of Muslims as a group that has been observed in the American public at large.

1. Judicial Subjectivity

Even in the absence of an indeterminate legal standard giving free rein to judicial subjectivity, judicial assessments are not impervious to the influence of judges' backgrounds and attendant perceptions. Recent studies show that a judge's background—especially race and gender—impacts judicial outcomes, both in individual cases and overall decision-making on the bench.⁶⁶ For example, one study found that plaintiffs who appeared before African American judges with a racial discrimination claim were likely to be successful 46% of the time,⁶⁷ while similarly situated plaintiffs who appeared before judges of other races considered together, including white judges, were likely to win only 22% of the time.⁶⁸ Another study found that African American judges found in favor of African American plaintiffs in discrimination cases 50% of the

66. The study of how the race and gender of individual judges impact judicial decision-making is a relatively new area of legal inquiry. Much of the research in this field has focused on racial disparities in criminal sentencing based on the race of the defendant. See David S. Abrams et al., *Do Judges Vary in their Treatment of Race?* (unpublished manuscript), available at <http://econ-www.mit.edu/files/2033> (finding that African American judges appeared to sentence defendants of different races to sentences of comparable length, while white judges exhibited greater disparities in sentencing determinations between white and African American defendants); see also David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285 (2001) (concluding that despite federal sentencing guidelines intended to eliminate disparities in sentencing, unexplained disparities in sentencing lengths exist between defendants of different races); compare Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (empirical study finding that judges harbor biases similar to general population, that these biases can influence judicial decisionmaking, but that judges can compensate for influence of biases). Until recently, there had not been significant numbers of female judges or African American, Asian American, Latino, or Native American judges on either the federal or state benches to draw any meaningful correlations between a judge's gender or race and the impact it may have on how a judge decides a case. Early studies in this area indicated no significant differences in case outcomes when selected by a judge's race or gender. See Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113, 138 (1999). One reason for this may simply have been the statistically small number of judges and the futility of making generalizations from an unrepresentative survey. Another may have been the single-minded focus of the researchers in factoring out all variables except for the judge's race and gender. *Id.* For example, one study that compared the voting records of assumed liberal judges—based on the political affiliation of the appointing president, in that study President Carter—found no meaningful difference in how male judges ruled compared to female judges and African American judges. *Id.* at 139. Again, the narrowness of the study may have preordained the result. After all, it is not wholly surprising that white male judges appointed by Carter would vote similarly to female judges or African American judges in favor of plaintiffs in sex or race discrimination claims, given President Carter's overall liberal bent.

67. Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Claims*, 86 WASH. U. L. REV. 1117, 1141 (2009).

68. *Id.*

time, while white judges found in favor of African American plaintiffs only 10% of the time.⁶⁹

Race plays a role in how judges evaluate the fairness of the courts, as well. For example, when white and black judges were asked whether black litigants are treated fairly in the justice system, 83% of white judges believed that they were, while only 18% of black judges shared that belief.⁷⁰ The dramatic discrepancies in these numbers suggest that, as a group, African American and white judges perceive discrimination differently.⁷¹ Particularly in discrimination cases, judges can be expected to draw heavily upon their own background and experiences to determine whether a given claim is plausible.⁷²

Perhaps predictably based on the above, it also appears that the presence of a range of backgrounds and perspectives would improve overall fairness and impartiality in decision-making beyond individual case outcomes. In other words, though discretion and subjectivity will always play a role in the judicial function, the system more closely approaches its aspiration of impartiality where unrepresentative judicial subjectivity is kept in check through representation of a broader range of judicial subjectivities. As part of a “panel effect,” diversity on the bench contributes to more dialogue between judges in judicial deliberations,⁷³ with each judge contributing their perspective as a “situated actor[] who . . . see[s] the world through the lens of their own knowledge and experiences.”⁷⁴ Studies have shown that the panel effect on judicial outcomes for plaintiffs is positive overall. For example, one study found that male judges were twice as likely to find in favor of plaintiffs in sexual harassment cases—with that rate jumping from 16% to 35%—if a female judge was also on the panel.⁷⁵

69. Beiner, *supra* note 73, at 139.

70. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 436 (2000).

71. Chew & Kelley, *supra* note 74, at 1156.

72. *Id.* at 1121.

73. See Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005).

74. Ifill, *supra* note 77, at 433.

75. Chew & Kelley, *supra* note 74, at 1778. Of course, diversity can be manipulated, so, while remaining duly wary of diversity in superficial appearance, one objective could be to strive for the inclusion of a representative range of backgrounds and viewpoints. See, e.g., ANGELA D. DILLARD, GUESS WHO'S COMING TO DINNER NOW? (2001) (on the conservative diversity movement); Victor C. Romero, *Are Filipinas Asians or Latinas?: Reclaiming the Anti-subordination Objective of Equal Protection after Grutter and Gratz*, 7 U. PA. J. CONST. L. 765 (2005) (arguing that the only real value of diversity is to promote antisubordination).

2. Composition of the Federal Bench

If background does influence judicial outcomes, then the composition of our federal judiciary takes on heightened importance in discrimination cases, particularly where—as under *Iqbal*—the resolution of vital issues is left to subjective judicial discretion. Of the 1,280 sitting judges on the federal bench in January 2010, 80% were male and 20% were female.⁷⁶ Approximately 85% were white, 9% African American, 5% Hispanic, 1% Asian American, and one judge was Native American.⁷⁷ Combined, these results yield a bench that is 69% white male and 15% white female, with the remaining 16% capturing all other groups combined.

While no official statistics are maintained on judges' religious backgrounds, legal scholars studying the role of judges' personal religious affiliations on First Amendment claims found that approximately 26% of the federal judiciary were Catholic, 37% Protestant, 6.3% Baptist, 9% were from other Christian denominations, 13% Jewish, 3% were "other" (such as Mormon, Baha'i, and Unitarian), and 5.5% of judges had no religious affiliation.⁷⁸ Notably, no judges identified in the study were found to be Muslim.⁷⁹

76. Federal Judicial Center, Federal Judges Biographical Database, http://www.fjc.gov/history/home.nsf/judges_frm (last visited Jan. 29, 2010). Official data on the federal judiciary is collected by the Federal Judicial Center. Information about judges' demographic information, such as age, race/ethnicity, and gender (but not sexual orientation) is collected from forms completed by the judges during their appointment to the bench. This information is stored in the Federal Judges Biographical Database, an online repository of information about former and current federal judges. The Biographical Database can be queried by several different fields, including court type, nominating president, and status as an active versus senior judge. Additional biographical information about each sitting judge is available in narrative form. These biographical sketches include date and place of birth, educational background, and employment prior to service on the federal bench. It should be noted at this juncture that President Barack Obama's nominations since he assumed office have been more diverse than the current federal bench which, over time, may improve gender, racial and sexual orientation diversity.

77. *Id.*

78. Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: an Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 576-78 (2004).

79. *See id.* The study also tracked the religious affiliation of claimants and the success rates of religious accommodation claims brought by members of various religious groups. Of the approximately 1,200 First Amendment Free Exercise Clause claims examined, the study found that Muslim plaintiffs filed 14.5% of those claims. *Id.* at 564-66. However, Muslim plaintiffs had one of the lowest rates of success in winning religious accommodation claims, at around 5%. *Id.* at 566. According to the authors of the study, religious groups that occupy near-mainstream status in American society—such as Catholics and Baptists—understandably would have low rates of success on religious accommodation claims as their religious practices were already commonly accepted. *Id.* at 564. This does not explain why Muslims, whose religious beliefs do not

The federal bench is remarkably homogenous compared to the population of the United States as a whole. While the lack of diversity in the judiciary may in part correspond to the lack of diversity in the legal profession more generally, this feature fuels concern around how minority plaintiffs might fare post-*Iqbal*. The paucity of female and non-white judges signifies that Muslim plaintiffs' and other discrimination claims will be heard by judges who are less likely to have personal knowledge of or exposure to daily discrimination.⁸⁰

C. *Iqbal and the Pitfalls of Embracing Subjectivity*

Even in the absence of jurisprudence inaugurating reliance on nearly unfettered judicial subjectivity, judicial judgment is not entirely insulated from judges' personal backgrounds and views. The bench's make-up, coupled with the prevalence of anti-Muslim sentiment in American society, raise concerns that federal judges, just like the Justices in *Iqbal*, would be less likely than affected or minority groups to credit invidious discrimination claims brought by Muslim plaintiffs. This becomes particularly problematic with *Iqbal*, which consecrates unfettered judicial subjectivity in making dispositive plausibility assessments at the threshold stage, yielding an outcome where it is now easier for judges to dismiss claims as implausible without more. That judicial perspectives are likely to lean a particular way given the present state of bench diversity is one thing. By establishing subjectivity, *Iqbal* privileges particular perspectives through the composition of the judiciary, promoting those perspectives to the rank of law.

Discrimination claims are particularly exposed by the *Iqbal* decision because judges, in evaluating the threshold viability of such claims, must now find it plausible that official actors engaged in invidious discrimination directed at Muslim plaintiffs and, generally, plaintiffs who

have near-mainstream status in the United States, fared so poorly in their religious accommodation claims. The authors do not offer any conclusions for why this discrepancy exists, but one possible explanation is the relative lack of judicial diversity and total absence of Muslim judges from the federal bench combined with the prevalence of anti-Muslim sentiment in the general American public.

80. Because people of color have historically been underrepresented in the legal profession, the American Bar Association stood up a Commission on Racial and Ethnic Diversity in the Profession. ABA, About Legal Profession, <http://new.abanet.org/centers/diversity/Pages/AboutLegalProfession.aspx> (last visited April 14, 2010). Again, as noted "non-whites" account for nearly 96 million people in the United States, approximately a third of the total population. See *supra* note 7. Of course, this analysis and the underlying data cannot predict outcomes in particular cases. *Iqbal* itself reminds of that reality—the only justice of color sided with the majority and the members of religious minorities on the Court, including the sole woman, did not produce a determinative "panel effect."

happen to be people of color. The research discussed above raises questions about the likelihood that a judge will take the view that official conduct is driven by invidious discrimination when that judge is not a member of a minority group, when her views of Muslims or other minority groups in America may well be negative (indeed, when she may on some level regard that community as a potential threat), and when she has been granted carte blanche by the Supreme Court to go with her subjective, gut instinct on plausibility.

In *Iqbal*, the outcome was that the Court found it implausible that Javaid Iqbal—and, by extension, other Arab and South Asian Muslims—were victims of invidious discrimination. The Court deemed it more likely that they were legitimate targets in law enforcement’s response to an existential national security threat. But discrimination claims brought by Muslims might not be the only ones affected by the new standard *Iqbal* sets. The *Iqbal* Court’s reliance on “common sense” calls attention to our judiciary’s composition and to studies documenting the constitutive role of identity in subjective perception and, by extension, in the bare plausibility assessments judges must now make. *Iqbal* thus raises serious concern that its establishment of a subjective plausibility standard entrenches majority group skepticism towards discrimination claims more broadly, to the possible detriment of lawsuits brought by members of minority groups generally, which can now be more readily dismissed. In that sense, the *Iqbal* decision risks arming extant prejudice against Muslim Americans and other minority groups by giving subjective viewpoints the force of law at the critical, incipient stages of civil rights litigation.⁸¹

A review of emerging caselaw should help test whether the expectations articulated above are borne out thus far and whether *Iqbal* indeed poses a particularly acute danger to unlawful discrimination claims brought by members of minority groups.

81. That *Iqbal* casts judges in a fact-finding role traditionally reserved for the jury is also troubling, not least because a randomly drawn jury would yield a more diverse and representative range of outlooks than a randomly drawn individual judge or panel of judges. More generally, scholars have noted the tension between *Iqbal* and the Seventh Amendment. See Klein, *supra* note 23, at 262 (“[I]t is unconstitutional to give a judge the power to weigh the factual heft of a complaint at the outset of a civil case and to dismiss it as insufficient.”). Klein notes that this conflict exists after *Twombly* and *Iqbal* given the Supreme Court’s understanding of what facts are sufficient to meet the plausibility standard of pleading. *Id.* at 273. A determination of whether an allegation is conclusory, *Iqbal*, 129 S. Ct. at 1949, which is the first prong of the *Iqbal* standard, and then whether the claim is plausible, *id.* at 1950, require judges to weigh the evidence and make a judgment on its merits. Klein, *supra* note 23, at 274.

III. *IQBAL*'S PROGENY: HOW SUBJECTIVE JUDICIAL ASSESSMENTS OF PLAUSIBILITY HURT MINORITY CLAIMANTS

While it is too soon to draw definitive conclusions about the overall impact of *Ashcroft v. Iqbal*, emerging trends suggest that *Iqbal*'s injection of increased judicial subjectivity into the pleading analysis has already worked to the detriment of minority plaintiffs. According to one recent study, the rates of motions to dismiss granted, both with and without leave to amend, increased from 50% under *Conley* to 53% under *Twombly* to 58% under *Iqbal* for civil rights cases filed in federal district courts.⁸² Beyond the numbers, *Iqbal*'s progeny illustrates a clear and distinct departure from decades of well-established pleading standards. The *Conley* pleading standards operated—at least in theory—to screen

82. Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 607 (2010). Other empirical studies that tracked dismissal rates pre- and post-*Iqbal* have reached differing results. For example, an electronically-generated analysis of motions to dismiss granted under FRCP Rule 12 by the Federal Judicial Center showed little to no difference in rates of dismissal for the seven months prior to *Twombly* compared to the seven months after *Iqbal* in both civil rights employment cases and other civil rights cases. FED. JUDICIAL CTR., ADMINISTRATIVE OFFICE OF THE U.S. COURTS, STATISTICAL INFORMATION ON MOTIONS TO DISMISS RE *Twombly/Iqbal*, <http://www.uscourts.gov/rules/Motions%20to%20Dismiss.pdf>. According to the FJC report, the monthly average rate of motions to dismiss granted during the seven-month period prior to *Twombly* was 48% in civil rights employment cases, compared to 44% during the seven-month period after *Iqbal* for those same types of cases. For other civil rights cases, the monthly average dismissal rate of 67% for the seven-month period prior to *Twombly* was exactly the same as the dismissal rate for the seven-month period after *Iqbal*. A number of methodological differences between the Hatamyar and FJC studies may explain the differing results. First, Hatamyar's analysis focused only on motions to dismiss granted under Rule 12(b)(6). Hatamyar, *supra*, at 584. The FJC study aggregated dismissal rates for all motions to dismiss granted under Rule 12, including Rule 12(b)(1-5) and (7). FED. JUDICIAL CTR., *supra*. Second, Hatamyar compared district court opinions during the two years immediately preceding *Twombly*, the two years between *Twombly* and *Iqbal*, and the three months following *Iqbal*. Hatamyar, *supra*, at 584-85. The FJC study compared dismissal rates between the seven-month period prior to *Twombly* and the seven-month period immediately after *Iqbal*. FED. JUDICIAL CTR., *supra*. *Iqbal*, of course, is too recently decided to draw firm conclusions based on dismissal rates. As more time passes, trends will crystallize. It is also unclear whether either study controls or accounts for the possible effect of self-restraint on the part of plaintiffs' attorneys. In other words, lawyers cognizant of the heightened *Iqbal* standard may refrain from bringing certain lawsuits they would have initiated pre-*Iqbal*. That possibility may account for stability in dismissal rates across periods. A third and final empirical study that must be mentioned in this connection is Professor Reinert's forthcoming, herculean exploration of the key assumption underlying much of the debate regarding heightened pleading standards—namely, that heightened pleading will keep out meritless lawsuits that would have been permitted to move forward pre-*Iqbal*. See Alexander A. Reinert, *The Costs of Heightened Pleading*, IND. L.J. (forthcoming) (demonstrating through novel retrospective empirical analysis that pleadings that would survive under notice pleading standard but not heightened standard are just as likely to be ultimately successful as those cases that would survive heightened pleading).

meritless lawsuits that offered no possibility of redress.⁸³ After *Twombly* and *Iqbal*, however, cases that potentially have merit but lack ample facts or evidence at the pleading stage due to informational asymmetries are subject to the same fate.⁸⁴ Since *Iqbal*, what constitutes ample facts, and whether those facts appear plausible, are matters left to the presiding judge's discretion—whereas one judge may subjectively regard a claim as fanciful or implausible, another may permit a similar claim to proceed.

Through an analysis of discrimination cases decided since *Iqbal*, this section will further explore whether emerging caselaw confirms that *Iqbal*'s plausibility standard enhances the potential for judicial outcomes to hinge on a judge's personal outlook or temperament, to the detriment of Muslim and other minority claimants. The caselaw survey below is neither exhaustive nor empirical,⁸⁵ but rather looks to the language of key judicial opinions to discern what underlying perspectives and biases emerge when judges assess facts and allegations in a complaint for plausibility. The selected cases arise from claims brought by Muslim plaintiffs ensnared in post-9/11 counterterrorism policies like the ones that founded Javaid Iqbal's claim of discrimination, but the set also includes rulings suggesting that *Iqbal*'s impact goes well beyond so-called national security cases, reaching other discrimination claims, especially ones alleging racial discrimination.

83. See Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. (forthcoming 2010) (manuscript at 24, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1467799).

84. *Id.* Professor Bone also points out the mistake of lumping *Twombly* and *Iqbal* together or assuming that *Iqbal* is merely an extension of *Twombly* beyond the antitrust context. He writes:

[M]y point is that *Twombly* implements a thin screening model, while *Iqbal* implements a thick screening model. The two models are different in theory, support different pleading standards, and invite different attitudes toward screening. Many commentators lump *Iqbal* and *Twombly* together. They treat *Iqbal* as just another application of *Twombly*, one in which the plausibility standard is applied outside the antitrust field. This is a mistake. *Iqbal*'s screening approach is qualitatively different than *Twombly*'s, and it is important to understand the differences in order to appreciate *Twombly*'s virtues distinct from *Iqbal*'s vices.

Id. at 24-25.

85. For a comprehensive summary of post-*Iqbal* caselaw organized by federal circuit, see Review of Case Law Applying *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, an ongoing survey of how appellate and district courts have treated the plausibility pleading standard from *Twombly* and *Iqbal*. The report was prepared and is maintained by Andrea Kuperman, law clerk to Judge Lee H. Rosenthal, chair of the Judicial Conference Committee on Rules of Practice and Procedure. It is available on the Federal Judiciary website. See U.S. Courts, Federal Rulemaking, Caselaw Study on post-*Iqbal* Cases, <http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20by%20circuit.pdf>.

A. *Iqbal and National Security*

Easily overlooked in discussion of *Iqbal*'s heightened pleading standard is the case's historical backdrop—the post-9/11 dragnet that resulted in the surveillance, arrest, and detention of hundreds of Arabs, South Asians, Muslims, and those perceived to belong to those groups.⁸⁶ The policies of that era gave rise to numerous legal challenges comparable to Javaid Iqbal's. How those challenges have fared in *Iqbal*'s wake sheds some light on the odds of success that closely situated claimants—Muslims reacting to the perceived or real discriminatory application of counterterrorism policies—can expect will obtain going forward.

1. *Arar v. Ashcroft*

Iqbal set the stage for federal courts to dismiss as implausible other claims raised by Arab, Muslim, and South Asian plaintiffs as a result of civil rights violations stemming from post-9/11 national security policies. On June 30, 2008, prior to the Supreme Court's decision in *Iqbal*, a panel of the Second Circuit Court of Appeals decided *Arar v. Ashcroft*, in which it considered whether Maher Arar, a Muslim Canadian citizen who was detained in New York under the U.S. government's extraordinary rendition program and rendered to Syria for incommunicado imprisonment torture and interrogation, had sufficiently pled a plausible claim under the Torture Victim Protection Act and *Bivens*.⁸⁷ Judge Cabranes, writing for himself and Judge McLaughlin in the majority opinion, held that while Arar alleged sufficient facts to show that the Second Circuit had personal jurisdiction over the federal defendants, who included former Attorney General Ashcroft and FBI Director Mueller,⁸⁸ the pleadings overall did not state a claim under the TVPA⁸⁹ or *Bivens*.⁹⁰

86. See discussion *supra* Section II and notes 54-58. *Iqbal* has drawn comparisons to various infamous Supreme Court decisions made during wartime, such as *Korematsu v. United States*, 323 U.S. 214 (1944). See, e.g., Dawinder S. Sidhu, *First Korematsu and Now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court's Disregard for Claims of Discrimination*, 58 BUFF. L. REV. (forthcoming 2010) (manuscript at 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478787).

87. *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008), *vacated and superseded on rehearing en banc*, 585 F.3d 559 (2d Cir. 2009). It bears emphasis that *Arar* is not a discrimination case, though it offers potent illustration of the problems Muslim and other minority plaintiffs are likely to face under *Iqbal* plausibility, to include the standard's expansiveness beyond the pure discrimination context.

88. *Arar*, 532 F.3d at 174. Judge Cabranes noted that the Supreme Court had granted certiorari on June 16, 2008, to consider the appropriate pleading standard in *Iqbal*, in which the Second Circuit had concluded that Javaid Iqbal had set forth a plausible claim. *Id.* at 174 n.11. Analogizing to its reasoning in *Iqbal*, the Second

On rehearing en banc, seven judges affirmed the dismissal of Arar's complaint for failure to state a claim under either the TVPA or *Bivens* despite his detailed allegations of unconstitutional detention, denial of access to counsel, rendition to Syria, and subsequent torture while imprisoned there.⁹¹ The brief en banc majority opinion agreed with many of the rationales offered by the three-judge panel for the dismissal of Arar's claims under the TVPA for jurisdictional reasons⁹² and under *Bivens* for restraint in devising new remedies.⁹³ However, in a departure from the earlier panel decision, the en banc majority drew upon key language in *Iqbal* to conclude that Arar's complaint was also insufficient to satisfy the plausibility threshold. According to the majority in the en banc opinion, the complaint's fatal defect was that it failed to name specific defendants alleged to have engaged in a violation of Arar's constitutional rights.⁹⁴ In justifying dismissal of his complaint, the majority concluded, "Arar alleges (in passive voice) that his requests to make phone calls 'were ignored,' and that 'he was told' that he was not entitled to a lawyer, but he fails to link these denials to any defendant, named or unnamed."⁹⁵ According to the majority, Arar's complaint failed to state a claim because he did not attribute instances of misconduct to specifically named defendants.⁹⁶

The four dissenters—Judges Calabresi, Pooler, Sack, and Parker— noted the irony of requiring Arar to name his defendants when his allegations included being "held incommunicado"⁹⁷ in a highly secret rendition program: "It should not be forgotten that the full name of the

Circuit concluded that Arar alleged sufficient facts to make out a *prima facie* showing of personal jurisdiction over the federal defendants. *Id.* at 175.

89. *Id.* at 175-76.

90. *Id.* at 190.

91. 585 F.3d 559, 563 (2d Cir. 2009), *petition for certiorari filed*, *Arar*, 585 F.3d 559 (Feb. 1, 2010) (No. 09-923).

92. *Arar*, 532 F.3d at 176 ("Nowhere, however, does [Arar] contend that defendants possessed any power under Syrian law, that their allegedly culpable actions resulted from the exercise of power under Syrian law, or that they would have been unable to undertake these culpable actions had they not possessed such power.").

93. *Id.* at 177 ("By asking us to devise a new *Bivens* damages action for alleged violations of the substantive due process component of the Fifth Amendment, Arar effectively invites us to disregard the clear instructions of the Supreme Court by extending *Bivens* not only to a new context, but to a new context requiring the courts to intrude deeply into the national security policies and foreign relations of the United States.").

94. 585 F.3d at 569 (majority opinion).

95. *Id.*

96. *Id.*

97. *Arar*, 585 F.3d at 616 (dissenting opinion).

Bivens case itself is *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*.⁹⁸ The dissent went on to note:

We doubt that *Iqbal* requires a plaintiff to obtain his abusers' business cards in order to state a civil rights claim. Put conversely, we do not think that *Iqbal* implies that federal government miscreants may avoid *Bivens* liability altogether through the simple expedient of wearing hoods while inflicting injury.⁹⁹

However, that is precisely what occurred in *Arar*. The names of the federal officials who ordered and implemented Arar's detention and rendition under the government's extraordinary rendition program were kept classified pursuant to the State Secrets privilege,¹⁰⁰ while the faces of those who carried out the policy remained hooded. Because of the stark informational asymmetry—with Arar unable to obtain critical bits of information given the circumstances of his detention—he ultimately was left with no remedy.

Writing in a separate dissenting opinion, Judge Parker pointed out that Arar stated as many facts as could reasonably be expected for a person held in detention under a highly secretive rendition program and that the misconduct alleged should have been sufficient to state a claim under *Iqbal*'s "context-specific" plausibility standard.¹⁰¹ According to Judge Parker—and consistent with the analysis in this Article—*Iqbal*'s flaw was the opportunity it presented for judges to insert "judicial experience and common sense" and their own "obvious alternative explanations" to assess whether a claim was sufficiently plausible to make out unconstitutional conduct.¹⁰² Judge Parker criticized the *Iqbal* majority for substituting its own beliefs on the plausibility of Javaid Iqbal's discrimination claim: "Apparently having their own views about the defendants' state of mind, the majority [of the U.S. Supreme Court in *Iqbal*] simply found Iqbal's discrimination claim incredible."¹⁰³ The en banc majority in *Arar* found Maher Arar's claims of rendition and torture similarly incredible, despite his detailed and carefully-worded allegations of misconduct. Liberally applying *Iqbal* to Arar's complaint, the *Arar* majority did not consider that limited discovery might have uncovered the identity of some of the unnamed defendants and that Arar's allegations themselves might be taken as plausible, given everything that had at that point been revealed about the U.S. government's Rendition,

98. *Id.* at 591 (emphasis in original).

99. *Id.* at 592.

100. *Id.* at 575-76 (majority opinion).

101. *Id.* at 616-17.

102. *Id.* at 617.

103. *Arar*, 585 F.3d at 617 (dissenting opinion).

Detention and Interrogation program, even if the misconduct was not attributable to specific actors at an early stage in the litigation.

2. *Ibrahim v. Department of Homeland Security*

Iqbal's embrace of judicial subjectivity appears to have affected the viability of more prosaic discrimination claims in national security contexts less sensational than the extraordinary rendition and torture alleged in *Arar*. In *Ibrahim v. Department of Homeland Security*, the Northern District of California dismissed a complaint filed by Rahinah Ibrahim, a Muslim Malaysian citizen who was detained at San Francisco International Airport and denied boarding on a flight because her name was on the No Fly List.¹⁰⁴ Alleging discrimination based on race and religion, Ibrahim sought damages from United Airlines, the San Francisco Police Department, and several federal defendants for her unlawful detention at the airport, which included being forced to remove her religious headscarf in front of a group of men during a search.¹⁰⁵ Ibrahim also sought injunctive relief for her name to be removed from the No Fly List.¹⁰⁶ While the district court allowed Ibrahim's injunctive relief claim to proceed,¹⁰⁷ it dismissed her damages claim under the heightened pleading standard in *Iqbal*.¹⁰⁸

104. *Ibrahim v. Dep't of Homeland Sec.*, No. 06-00545, 2009 WL 2246194, at *2 (N.D. Cal. July 27, 2009).

105. *Id.* at *10.

106. *Id.* at *9.

107. *Id.* *Ibrahim*'s procedural history warrants further discussion. On August 18, 2008, the U.S. Court of Appeals for the Ninth Circuit reversed dismissal of Ibrahim's complaints against some of the named defendants and remanded the case to the Northern District Court of California. *Ibrahim*, 538 F.3d 1250, 1259 (9th Cir. 2008). Although Judge Kozinski, writing for the majority, did not explicitly state the pleading standard used, the decision appears to have been based on *Conley*. See *id.* at 1258-59. Before the Northern District issued an opinion on the remanded case, the Supreme Court decided *Iqbal*. Under *Iqbal*, on remand, the District Court dismissed Ibrahim's damages claims for discrimination based on race and religious background, but allowed her Fourth Amendment claims against some of the state defendants to proceed. *Ibrahim*, 2009 WL 2246194, at *12. In allowing a subset of her claims to proceed, Ibrahim could seek discovery as to the entire incident, including information regarding her placement on the No Fly List. *Id.* at *1. In an order dated November 19, 2009, Judge Alsup of the Northern District of California held that under the Department of Homeland Security's *Touhy* regulations, which govern disclosure of agency documents and information in legal proceedings, Ibrahim could seek discovery from former federal defendants against whom Ibrahim's claims had been dismissed in an earlier District Court decision. *Ibrahim*, No. 06-00545, 2009 WL 4021757, at *1-4 (N.D. Cal. Nov. 19, 2009). However, Ibrahim could not enforce interrogatories or document requests against the former federal defendants as they were no longer parties to the lawsuit. *Id.* at *3. On December 17, 2009, Judge Alsup again considered what information the former federal defendants were required to disclose after receiving a refusal from the former defendants to hand over "sensitive security information" (SSI) about the watch lists compiled by the

According to the district court, Ibrahim's allegations that she was unlawfully detained because she was Muslim and a citizen of Malaysia were "conclusory and not enough to allow [her] to proceed with her discrimination claims . . . under *Iqbal*."¹⁰⁹ Finding that the facts alleged did not plausibly sustain a claim that Ibrahim was arrested and detained "because of and not merely in spite of" her being a Malaysian Muslim,¹¹⁰ the court noted that the complaint lacked additional facts, such as derogatory statements made by the defendants about Ibrahim's religious or ethnic background, to show that they acted with discriminatory intent.¹¹¹ The court expressed its discomfort with the heightened pleading threshold in *Iqbal* that could result in meritorious claims being dismissed unfairly: "A good argument can be made that the *Iqbal* standard is too demanding. Victims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery. District judges, however, must follow the law as laid down by the Supreme Court."¹¹²

While its reluctance to dismiss Ibrahim's complaint is laudable and its critique of the new pleading standard perspicacious, the district court's application of *Iqbal*'s indeterminate standard nonetheless powerfully illustrates the hazards of unchecked judicial subjectivity in threshold viability determinations. In this district court's view, barring some overt act of discrimination, such as a derogatory statement, Ibrahim's claim that she was deliberately searched and detained because she was Muslim remained implausible. The court failed to see how forcing a Muslim woman to remove her religious headscarf in front of male strangers—a measure that can seem restrained or disproportionate depending on which side of the headscarf one finds oneself—could be taken to provide some evidence of the requisite discriminatory intent.¹¹³ Ibrahim's headscarf was, after all, a thin piece of fabric that posed no obstacle to scanning, wandering, or patdown searches, the measures

Transportation Security Administration. *Ibrahim*, No. 06-00545, 2009 WL 5069133, at *7 (N.D. Cal. Dec. 17, 2009). The District Court finally resolved the discovery impasse by issuing an order against the former federal defendants to produce the information classified as SSI under Section 525(d) of the Department of Homeland Security Appropriations Act, which requires the Department of Homeland Security (DHS) to release SSI documents when a lawful request is made for its public release. *Id.* at *9-10 (quoting Dep't of Homeland Sec. Appropriations Act of 2007, Pub. L. No. 109-295, § 525(d), 120 Stat. 1355 (2007)). DHS may refuse to release SSI if they demonstrate that one of the exceptions to disclosure under the Act applies. *Id.* at *10.

108. *Ibrahim*, 2009 WL 2246194, at *10.

109. *Id.* at *9.

110. *Id.* at *10.

111. *Id.*

112. *Ibrahim*, 2009 WL 2246194, at *10.

113. *Id.*

normally used before requiring individuals to take off other items of clothing implicating personal modesty.

According to the court, however, removal of Ibrahim's headscarf could only plausibly evince discrimination if the officer had permanently deprived her of the scarf or if Ibrahim had been denied a request to be searched privately.¹¹⁴ What that discussion misses is how airline officials who removed Ibrahim's headscarf, even if only momentarily, did so with complete disregard for her own, Muslim standards of personal modesty. That discussion and the outcome in *Ibrahim* are made possible by *Iqbal*'s embrace of judicial subjectivity, its valorization of judges' intuitive views of plausibility to the detriment of minority litigants whose claims of discrimination may well have been borne out by a fuller set of facts had their cases been allowed to proceed into discovery. The *Ibrahim* court's subjective litmus test for plausibility required either an express verbalization of discriminatory intent or else (perhaps) conduct that would violate personal modesty according to non-Muslim standards.¹¹⁵ In that sense, *Ibrahim* replicated and perhaps exceeded *Iqbal*'s approach in setting an impossibly high bar: it isn't discrimination unless the party engaging in discrimination says so explicitly.

B. Racial Discrimination Claims and *Iqbal*

While *Iqbal* appears, even at this early stage, to have impacted how judges assess the plausibility of claims raised by Arab, South Asian, or Muslim plaintiffs after 9/11, the wide latitude to inject judicial subjectivity into the plausibility calculus also seems to have affected how judges view discrimination claims brought by minority plaintiffs generally, not just Muslims. Studies have shown that judicial assessments of a lawsuit's merit are not impervious to judges' own

114. *Id.*

115. In holding that the forced removal of Ibrahim's headscarf did not burden her right to religious expression, the *Ibrahim* court distinguished *Khatib v. County of Orange*, 2008 WL 822562 (C.D. Cal. March 26, 2008), in which the Central District Court in California held that a court officer's refusal to allow a Muslim plaintiff to wear her headscarf in the courtroom and court holding cell was a free exercise clause violation. *Ibrahim*, 2009 WL 2246194, at *10. According to the district court, the key difference between Ibrahim and Khatib's claims was that Khatib was forced to remove her headscarf for a prolonged period of time in the presence of male non-family members. *Id.* The distinction between the two cases—and *Ibrahim*'s disposition—hinged on the judge's subjective assessment of how long an observant Muslim woman's hair would have to be exposed in order to make out a colorable claim. By valorizing judges' subjective assessments of threshold plausibility, the post-*Iqbal* judicial landscape already appears far less welcoming to Muslim discrimination victims looking for vindication in the courts. In that sense, *Iqbal* will further sap Muslim and other minority communities' faith in the courts' ability to deliver redress and justice.

experiences, perceptions, and backgrounds, especially in regards to race.¹¹⁶ Recent caselaw after *Iqbal* suggests that minority plaintiffs seeking remedies for constitutional violations, especially racial discrimination, must now clearly plead purposeful or invidious discrimination to withstand a motion to dismiss.

1. *Monroe v. City of Charlottesville, Va.*

In *Monroe v. City of Charlottesville*, the Fourth Circuit Court of Appeals affirmed the dismissal of Larry Monroe's Section 1983 claim that Charlottesville police officers violated his Fourth and Fourteenth Amendment rights when they conducted an unreasonable search and seizure and unlawfully targeted him on the basis of his race by approaching him at his home and asking for a DNA sample.¹¹⁷ The police officers that came to Monroe's house were conducting an investigation to identify a serial rapist, described in part by victims as "youthful-looking" and "African American," who had assaulted several women in the Charlottesville area.¹¹⁸ As part of the investigation, the Charlottesville Police Department approached all youthful-looking African American men in Charlottesville to ask for a DNA sample, resulting in stops of approximately 190 African American men.¹¹⁹ Monroe alleged that the department approached African American men indiscriminately based on a prohibited racial classification¹²⁰ and that the police would not have adopted such a sweeping approach had the assailant been white.¹²¹

In dismissing both Monroe's Fourth and Fourteenth Amendment claims, the Fourth Circuit found that the police department did not approach Monroe and other African American men based on their race, but rather because they matched a physical description provided by several victims of a criminal suspect.¹²² In justifying its conclusion, the court noted that "[t]his is not a case in which police created a criminal profile of their own volition and decided which characteristics, such as race, that the criminal possessed."¹²³ The Fourth Circuit quoted liberally from the *Iqbal* majority opinion to show that, as in *Iqbal*, no invidious discrimination existed when the result of a law enforcement policy has a

116. See *supra* Section II.

117. *Monroe v. City of Charlottesville*, 579 F.3d 380, 382 (4th Cir. 2009).

118. *Id.*

119. *Id.*

120. *Id.* at 387.

121. *Id.* at 382.

122. *Monroe*, 579 F.3d at 387-88.

123. *Id.* at 388.

“disparate, incidental impact on Arab Muslims,” or—in the case at hand—African American men.¹²⁴

Analogizing the Charlottesville Police Department’s sweeping investigation of African American men to the investigations of Arab Muslim men at issue in *Iqbal*, the court said: “Even though thousands of Arab-Muslim men were investigated in *Iqbal*, the Supreme Court deemed this insufficient to render a legitimate investigatory process unconstitutional. This leaves no doubt as to the justifiability of the [Charlottesville Police Department’s] investigation.”¹²⁵ Both *Iqbal*’s pleading standard and its fact and policy-specific analysis were applied directly and by analogy to legitimize the policy at issue in *Monroe* and justify dismissal of the claims in that case. That *Monroe* borrows *Iqbal*’s “obvious alternative explanation” to sweep aside the disparate impact of a law enforcement investigation on African American men highlights the *Iqbal* effect’s expansiveness beyond the national security terrain where it first arose and the Muslim population to whom it was originally applied.

2. *Hayden v. Paterson*

In another extension of *Iqbal* outside the national security context, the Second Circuit Court of Appeals heard a claim brought by Black and Latino plaintiffs with felony convictions challenging the constitutionality of New York’s felon disenfranchisement laws.¹²⁶ The plaintiffs alleged that the felon disenfranchisement laws, adopted in the 1800s, were based on racial animus, and that the racial animus was still legally operative, as reflected by the laws’ present day disparate impact on Black and Latino New Yorkers’ constitutional right to vote.¹²⁷ The Second Circuit affirmed the dismissal of the plaintiffs’ claim, holding that the complaint failed to show that the disenfranchisement laws were still operating with the specific discriminatory intent to exclude African Americans and Latinos from voting.¹²⁸

In the complaint, the plaintiffs described in great detail the historical context of New York’s felon disenfranchisement laws passed in the 1800s and pointed to instances of intentional racial discrimination, such as the law’s requirement when first passed in 1777 that only “property holders and free men” were eligible to vote.¹²⁹ While the Second Circuit acknowledged that this legislative history sufficiently demonstrated

124. *Id.*

125. *Id.* at 390.

126. *Hayden v. Paterson*, 594 F.3d 150 (2d Cir. 2010).

127. *Id.* at 158.

128. *Id.* at 159.

129. *Id.* at 157.

intentional and invidious discrimination in the historical genesis of New York's voting laws,¹³⁰ it held that the historical racial animus was no longer present in the current iteration of the felon disenfranchisement laws.¹³¹ The court also dismissed the plaintiffs' allegations that despite being facially neutral, the laws have a racially disparate impact on African Americans and Latinos.¹³²

Based on the two-pronged analysis from *Iqbal*, the *Hayden* court held that the facts alleging racial discrimination after the 1894 provision of the disenfranchisement laws were conclusory and did not "nudge [their] claims of invidious discrimination across the line from conceivable to plausible."¹³³ In its plausibility analysis, the court tellingly said, "whether the facially neutral disenfranchisement provision 'restricted the suffrage of minorities' in effect *and intent* is the very assertion that plaintiffs must prove,"¹³⁴ even though it acknowledged earlier in the opinion that discriminatory intent was clearly present in the early versions of the law. In the *Hayden* court's view, the "obvious alternative explanation" was the state's legitimate purpose of excluding from voting individuals convicted of felonies.¹³⁵ The court justified its conclusion by noting that unless the plaintiffs could plead facts showing that the current disparate impact of the felon disenfranchisement laws is unexplainable on grounds other than race, their claim of racial discrimination was not plausible.¹³⁶ By requiring a showing that the disparate impact cannot be explained on grounds other than race, the *Hayden* court arguably goes well beyond what *Iqbal* calls for. In effect, the *Hayden* court transforms *Iqbal*'s subjective plausibility test requiring that the claim be plausible in the judge's view into a strict causality test—plaintiffs must demonstrate to a court's satisfaction that invidious discrimination was the *sole* plausible explanation.

C. *Plausibility after Iqbal*

Because judicial outcomes are not insulated from the influence of judges' backgrounds and because *Iqbal* gives judges ample berth to express their subjective outlooks as they apply the indeterminate

130. *Id.* at 164-65.

131. *Hayden*, 594 F.3d at 165-66.

132. *Id.* at 164. Plaintiffs cited to statistics such as the substantially higher incarceration rates of Blacks and Latinos compared to whites, and disproportionate likelihood that whites convicted of similar felonies would receive a sentence of probation instead of incarceration. Plaintiffs also noted that under the felon disenfranchisement laws, 87% of individuals unable to vote were Blacks and Latinos.

133. *Id.* at 161.

134. *Id.* at 162.

135. *Id.* at 167.

136. *Hayden*, 594 F.3d at 168.

plausibility standard to incipient claims, *Iqbal* raises concern that Muslim and other minority plaintiffs asserting discrimination claims may fare poorly unless pleading standards are readjusted. Indeed, the fear is that judicial subjectivity may well cut against such plaintiffs, given pervasive negative views of Muslim Americans and, more generally, in light of the federal judiciary's composition. Discrimination claims are particularly vulnerable to an unfavorable application of dispositive judicial discretion at the threshold stage because such claims require a showing of animus or deliberate, invidious intent.¹³⁷ The *Iqbal* subjective plausibility standard potentially arms majority group skepticism towards claims of invidious discrimination asserted by minorities, particularly ones already viewed with suspicion. Thus, as discriminatory animus or intent is rarely patent or explicit, seldom will such plaintiffs wield sufficient facts before discovery to allege a plausible claim under *Iqbal*. And, as *Arar* illustrates, even claims alleging indisputable government misconduct will fail unless the conduct can be attributed to specific, named defendants. Cases after *Iqbal* where Muslim and minority plaintiffs have made out plausible discrimination claims only further highlight the almost impossible odds now faced by such claimants.

Recent caselaw suggests that the key to nudging claims of invidious discrimination "across the line from conceivable to plausible"¹³⁸ is to plead facts demonstrating a defendant's personal and purposeful role in the alleged misconduct. In *Padilla v. Yoo*, the Northern District Court in California held that Jose Padilla, who was designated an enemy combatant and held in a military brig for more than three years,¹³⁹ had pled a plausible claim under *Bivens* against then Deputy Attorney General John Yoo, one of the main legal architects of the Bush administration's detention and interrogation policies in the "war on terror."¹⁴⁰ In finding Padilla's allegations to be plausible, the District Court looked to the complaint's specific allegations that Yoo had

137. Ironically, *Iqbal* intervenes and raises these troubling implications at a time when immigration advocates are pressing for *greater* judicial discretion and subjectivity in deportation cases. This suggests that the granting and withholding of discretion to judicial officers in our legal system can be strategic. *Iqbal* grants judges discretion to cut back on minority rights, while immigration judges' discretion remains limited, as such discretion could only be exercised favorably, to mitigate adverse structural effects on immigrants, given the rules and strictures in place. Immigrants, of course, are the archetypal insular minority. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (acknowledging that "more searching judicial inquiry" is appropriate to counteract "prejudice against discrete and insular minorities"); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 151 (1980) (observing that non-citizens are perhaps the most obvious example of a "discrete and insular" minority "since aliens typically can't vote").

138. *Iqbal*, 129 S. Ct. at 1952.

139. *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1012 (N.D. Cal. 2009).

140. *Id.* at 1014.

personally reviewed and issued an opinion on whether to declare Padilla an enemy combatant,¹⁴¹ and overseen memoranda produced by his office justifying practices such as waterboarding and mock burial that Padilla was subjected to during his detention.¹⁴² Yoo's demonstrable personal involvement in key decisions about Padilla's status and detention were critical to the court's threshold finding of plausibility under *Iqbal*.

Similarly, the Ninth Circuit held that Abdullah al-Kidd, a Muslim convert who was arrested and detained at Dulles International Airport in Virginia en route to Saudi Arabia where he was to continue his Islamic studies, pled a plausible claim under *Bivens*, alleging that the U.S. government unlawfully and pretextually detained him under the federal material witness statute because it wished to hold him as a potential terrorist suspect but lacked criminal proof to do so.¹⁴³ Al-Kidd filed his *Bivens* action after he was arrested and detained for sixteen days in maximum security settings, then released upon court order but kept under governmental supervision for fifteen months. At no point was he charged with a crime, nor was he called upon to testify as a witness at any trial.¹⁴⁴ Citing to statements made by then-Attorney General Ashcroft and other Department of Justice officials on the use of the material witness statute to detain potential terrorist suspects,¹⁴⁵ the Ninth Circuit held that, "unlike in *Iqbal*, these are not bare allegations that the Attorney General 'knew of' the policy. Here, the complaint contains allegations that plausibly suggest that Ashcroft purposely instructed his subordinates to bypass the plain reading of the [material witness] statute."¹⁴⁶ On March 18, 2010, the Ninth Circuit voted to deny a petition for rehearing en banc filed by the government.¹⁴⁷

Padilla and *al-Kidd* illustrate acutely the difficulty of getting such cases past the threshold plausibility assessment under *Iqbal*. They are outliers in the sense that the plaintiffs could point to direct, public, and pertinent admissions by named defendants.¹⁴⁸ Such overwhelming proof

141. *Id.* at 1033.

142. *Id.*

143. *Al-Kidd v. Ashcroft*, 580 F.3d 949, 954 (9th Cir. 2009).

144. *Id.* at 952-53.

145. *Id.* at 975.

146. *Id.* at 976.

147. *al-Kidd*, No. 06-36059, 2010 WL 961855, at *4 (9th Cir. March 18, 2010) (affirming earlier Ninth Circuit decision that "al-Kidd alleged sufficient facts in his complaint to state a claim that [defendant Attorney General] Ashcroft directly violated the material witness statute by his own personal conduct" and affirming "district court's decision, allowing al-Kidd's case to proceed against Ashcroft beyond the pleading stage").

148. Dawinder Sidhu notes that *al-Kidd* is an anomaly among civil rights cases because Mr. al-Kidd possessed such clear evidence of intentional misconduct. Sidhu, *supra* note 94, at 70. Sidhu notes:

of misconduct at the pleading stage left little room for the assertion of “obvious alternative explanations” or for the unfavorable exercise of subjectivity or “common sense.” That *Iqbal* is already being read to require the uncommon as a prerequisite to threshold viability augurs restricted access to the courts for certain groups.

D. Appellate Reversals and Other Emerging Trends

Though some of the trends emerging in the wake of *Iqbal* and examined above are troubling, caselaw also suggests some important areas in which *Iqbal* has had negligible impact, and reflects ways in which courts have begun to correct for and cabin *Iqbal*’s flaws.

1. Fourth Amendment Claims under *Iqbal*

At cursory glance, application of *Iqbal*’s stringent pleading standards appears to carry little consequence for claims that do not require discriminatory purpose, including ones brought under the Fourth Amendment. An illustrative recent case is *Argueta v. U.S. Immigration & Customs Enforcement*,¹⁴⁹ which successfully survived a motion to dismiss on the plaintiffs’ claims that they were subject to unlawful searches and seizures under ICE’s pattern of nighttime raids at peoples’ homes with only an administrative warrant.¹⁵⁰

Disagreeing with ICE’s contention that *Iqbal* required dismissal of the plaintiffs’ claims, the New Jersey District Court highlighted several ways in which the case at hand differed from *Iqbal*. First, *Iqbal* involved an equal protection claim that required proof of discriminatory purpose, an element not required under a Fourth Amendment claim.¹⁵¹ Second, in *Iqbal* the Supreme Court held that the government’s detention of Javid Iqbal as a person of high interest was lawful under the reasonable alternative explanation that his arrest was part of a legitimate government investigation of individuals suspected of terrorism activities.¹⁵² Here, no legitimate explanation existed to support ICE’s pattern of conducting unlawful raids using administrative warrants that were deficient for the

[D]irect evidence of intent is rarely unearthed in the course of litigation, let alone possessed at the pleadings stage. As a result, *al-Kidd* should be viewed as an unusual case or high-water mark in terms of what a plaintiff alleging that high-level officials committed illegal conduct may aver at the pleadings stage, not the minimum that all complaints need to meet to defeat a motion to dismiss.

Id.

149. *Argueta v. U.S. Immigration & Customs Enforcement*, 2010 WL 398839 (D.N.J. Jan. 27, 2010).

150. *Id.* at *10.

151. *Id.* at *6.

152. *Id.*

purposes of entering and searching private homes.¹⁵³ The district court in *Argueta* also focused on the fact that the named defendants were ICE officials responsible for raid policies and practices and who had direct and specific knowledge that the raids were being conducted in an unlawful manner.¹⁵⁴

2. Judicial Corrections to *Iqbal*'s Flaws

District and appellate courts have also begun to correct for the flaws in *Iqbal* that can lead to potentially meritorious cases being dismissed at the pleadings stage. For example, the District Court for the Northern District of California held in *Committee for Immigrant Rights of Sonoma County v. County of Sonoma* that the plaintiffs had alleged sufficient facts to withstand a motion to dismiss against their claim for injunctive relief to prevent U.S. Immigrations & Customs Enforcement from conducting future pretextual traffic stops to enforce immigration law.¹⁵⁵ The complaint, filed by an immigrant rights organization on behalf of Latino and Latina community members in Sonoma County, alleged that Sonoma County deputy sheriffs and federal ICE agents conducted targeted traffic stops of Latino residents on the basis of race and that individuals were being stopped solely for immigration enforcement purposes without any actual or suspected criminal basis, a warrant, or probable cause.¹⁵⁶

Citing to the pleading standard from *Iqbal*, the district court found that the plaintiffs pled sufficient facts to withstand a motion to dismiss on their claim for injunctive relief¹⁵⁷ against ICE to prevent future pretextual stops¹⁵⁸ and also sufficiently pled a cause of action against Sonoma County for its role in the traffic stops.¹⁵⁹ The court also allowed for

153. *Id.* at *7.

154. *Id.* at *7-8.

155. *Comm. for Immigrant Rights of Sonoma County et al. v. County of Sonoma*, 644 F. Supp. 2d 1177, 1195 (N.D. Cal. 2009).

156. *Id.* at 1186.

157. In holding that the plaintiffs alleged sufficient facts to survive a motion to dismiss on their injunctive claim, the district court looked to *City of Los Angeles v. Lyons*, in which the Supreme Court held that Lyons, a plaintiff who had been put in a chokehold by Los Angeles Police Department officers during a routine traffic stop, could not seek injunctive relief as he could not prove that he was likely to suffer the same injury again. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). The district court distinguished the facts at hand from *Lyons* by noting that the plaintiffs here alleged a pattern or practice of unlawful pretext stops based on race and suspected immigration status, and that the plaintiffs were likely to encounter ICE agents and Sonoma County deputies again as they lived in neighborhoods are regularly patrolled by the defendants. *Comm. for Immigrant Rights of Sonoma County*, 644 F. Supp. 2d 1177, 1195-96.

158. *Id.* at 1195.

159. *Id.* at 1207.

limited discovery, stressing the importance of allowing plaintiffs access to more information, even in light of *Iqbal*'s heightened pleading standard.¹⁶⁰ In doing so, the district court noted that even though the complaint was deficient in some respects, there was an obligation to balance the many competing factors—discovery, issues of qualified immunity, and clarification and amendment of the deficient claims.¹⁶¹ The district court added that despite *Iqbal* having been cited nearly 1,000 times in the prior two months, lower courts have been given little guidance on how to balance the sufficiency of the pleadings with the necessity to engage in discovery.¹⁶²

Similarly, the district court for the Central District of California held in *Gordon v. City of Moreno Valley* that the plaintiffs, African American barbershop owners and employees in Moreno Valley, alleged sufficient facts under *Iqbal* in their Section 1983 claim against local Moreno Valley government officials who singled out their barbershops for excessively invasive administrative inspections and raids because their clientele were primarily black Moreno Valley residents.¹⁶³ In finding that the plaintiffs had alleged a plausible claim, the district court noted that the raids against the two barbershops followed a similar pattern: they were conducted by Moreno Valley police officers, who unannounced ran into the barbershop wearing bulletproof vests with their firearms displayed¹⁶⁴ and were followed by Board and Code Enforcement inspectors, who searched all areas of the barbershop as part of an “administrative code inspection,” including areas where no barbering took place but where customers often gathered to play cards and dominoes.¹⁶⁵ The police officers blocked the entrances to the barbershop to prevent customers from leaving¹⁶⁶ and questioned customers, demanded to see identification, and ran warrant checks on them.¹⁶⁷

In finding that the complaint plausibly alleged the defendants' discriminatory intent—an element necessary to sustain an equal protection claim—the district court looked to the intrusive nature of the

160. *Id.* at 1210.

161. *Id.*

162. *Id.* at 1210-11 (“There is little case law, however, in the wake of *Iqbal* elucidating the relationship between the adequacy of the pleadings and the plaintiff's right to engage in discovery and the court has not yet determined exactly how it will apply the reasoning of that case to this and the hundreds of other pending cases on the court's docket.”).

163. *Gordon v. City of Moreno Valley*, No. 09-688, 2009 WL 3088557, at *1 (C.D. Cal. Aug. 31, 2009).

164. *Id.* at *2.

165. *Id.*

166. *Id.*

167. *Gordon*, 2009 WL 3088557, at *2.

inspections and the fact that these “unusually aggressive” raids had only been conducted at African American barbershops.¹⁶⁸ The court said:

[I]t can be inferred that there was a discriminatory intent in performing the inspections, the inference presumably being that defendants engaged in a form of racial profiling of African American barbershops perceiving them as somehow a den of criminal activity simply because they are owned and frequented by African American men.¹⁶⁹

Using the two-pronged approach in *Iqbal* to review the sufficiency of the factual allegations, the court found that, unlike in *Iqbal*, here there was no “obvious alternative explanation” to support a nondiscriminatory purpose for the defendants’ conduct.¹⁷⁰

Though heartening, these and other district court cases nonetheless further expose the openness of the *Iqbal* plausibility standard. The threshold assessment will come out differently depending on the type of claimant, category of claim, and judge’s background and subjective bent. With scant guidance from higher courts on how to gauge plausibility, district court judges are left to their own subjective devices, which they are under no obligation to articulate, since the Supreme Court itself condoned reliance on conclusory judicial declarations of implausibility when dismissing complaints. That said, albeit in small numbers, federal appellate courts have begun to reverse district court dismissals under Rule 12(b)(6) where *Iqbal* was deemed to have been applied too stringently. From a search on April 2, 2010, of the 312 federal appellate cases thus far citing *Iqbal*, twenty-six out of those 312 reversed the lower court’s dismissal of the plaintiff’s claim.¹⁷¹ Though appellate courts have not been especially vocal in criticizing district courts for

168. *Id.* at *10.

169. *Id.*

170. *Id.*

171. The federal appellate courts have reversed district courts’ dismissals in a wide variety of cases, including contracts, insurance, civil rights, prisoners’ rights, fraud, and torts cases. For a partial list of appellate cases that have reversed dismissals based on *Iqbal*, see *Chao v. Ballista*, 630 F. Supp. 2d 170 (D. Mass. 2009) (reversing dismissal of prisoner’s Eighth Amendment claim alleging sexual abuse by prison guard and deliberate indifference to the safety of herself and other female prisoners); see also *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009) (holding that plaintiff pled sufficient facts to state plausible employment discrimination claim); *U.S. v. Rolls Royce Corp.*, 570 F.3d 849 (7th Cir. 2009) (holding that facts alleged do not have to exclude all alternative possibilities in order to meet heightened pleading standard under *Iqbal*); *Braden v. Wal-Mart Stores, Inc.*, 2009 WL 4062105 (8th Cir. Nov. 25, 2009) (holding that plaintiff does not have burden of rebutting all alternative explanations to plead sufficient claim under *Iqbal*); and *Waters Edge Living LLC v. RSUI Indem. Co.*, 2009 WL 4366031 (11th Cir. Dec. 3, 2009) (finding that plaintiff alleged plausible claim under *Iqbal* even if facts did not compel an inference so long as reasonable factfinder would draw that inference).

misapplying *Iqbal*, some have instructed lower courts on how to assess a claim's threshold viability under *Iqbal*. For example, in *Fowler v. UPMC Shadyside*, the Third Circuit reversed a district court's dismissal of the plaintiff's disability discrimination claim, noting:

At this stage of the litigation, the District Court should have focused on the appropriate threshold question—namely whether Fowler pleaded she is an individual with a disability. The District Court and UPMC instead focused on what Fowler can “prove,” apparently maintaining that since she cannot prove she is disabled she cannot sustain a *prima facie* failure-to-transfer claim. A determination whether a *prima facie* case has been made, however, is an evidentiary inquiry—it defines the quantum of proof plaintiff must present to create a rebuttable presumption of discrimination.¹⁷²

Such guidance from appellate courts, however, remains rare and does not meaningfully reach into the realm where *Iqbal*'s impact will likely be most dramatic: cases arising from claims of invidious discrimination advanced by Muslim plaintiffs in the national security setting and by minority group plaintiffs generally.

CONCLUSION

Though it is still quite early for the formulation of definitive conclusions, a pattern is already apparent. As the analysis in this Article anticipates, an overview of its progeny thus far reflects the gravity of the threat *Iqbal* poses to equal protection. That cursory survey offers sprouting proof that the establishment of what is essentially a subjective plausibility standard entrenches majority group skepticism towards discrimination claims, to the detriment of lawsuits brought by members of minority groups, which can now be more readily dismissed. *Iqbal* more closely connects outcomes to judges' personal outlooks—some judges are now more at liberty to dismiss claims they subjectively regard as fanciful, while other courts may permit similar claims to proceed. *Iqbal* has recalibrated the scales, pegging judicial outcomes in certain kinds of cases to personal outlook and temperament.

There are many conceivable responses to *Iqbal*. Some members of Congress have introduced legislative proposals that would pull the rug out from under *Iqbal* by restoring the *Conley* pleading standard. Senator Arlen Specter introduced a bill in the Senate in July 2009, the Notice Pleading Restoration Act, that would restore pleading to the pre-*Twombly* standard under *Conley*.¹⁷³ The bill is currently in committee.

172. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009).

173. Notice Pleading Restoration Act, S. 1504, 111th Cong. (2009).

Representative Jerrold Nadler introduced the Open Access to the Courts Act to the same end.¹⁷⁴

Another idea for how courts can respond to the strictures imposed by *Iqbal* while perhaps addressing problems that antedated the decision would be to allow limited discovery before ruling on a motion to dismiss, especially for civil rights plaintiffs, so that potentially meritorious claims advanced by plaintiffs who do not have sufficient evidence due to informational asymmetries are not prematurely dismissed. After all, what might be appropriate in commercial litigation under *Twombly* does not necessarily hold in civil rights cases. Informational and power asymmetries between parties tend to be more pronounced in the latter category of cases. State of mind takes on pivotal importance. This accommodation could be achieved by operation of the common law's incremental process or through formal adoption by the appropriate judicial rules committee of different pleading standards by type of claim asserted.¹⁷⁵ Because these are vastly different processes that are slow and gradual, pursuing both while keeping sight of the fact that neither is likely to deliver prompt satisfaction is important.¹⁷⁶

As things stand, however, given the reality that judicial outcomes are not insulated from the influence of judges' backgrounds, and because *Iqbal* gives judges ample berth to express their subjective outlooks as they apply the indeterminate plausibility standard to incipient claims, Muslim and other minority plaintiffs asserting discrimination claims are likely to fare poorly unless pleading standards are readjusted. Indeed,

174. Open Access to the Courts Act, H.R. 4115, 111th Cong. (2009). It bears emphasis that our pleading system has been broken for many years and access to the courts, especially for plaintiffs alleging civil rights violations, has diminished significantly over the past few decades. Ultimately, restoring pleading to the *Conley* standard would only provide an imperfect and incomplete fix to a very real and longstanding problem.

175. One could also direct guidance at plaintiffs in the post-*Iqbal* world. An obvious recommendation would be to pay close attention to cases such as *Padilla* and *Al-Kidd* and to plead as concretely as possible, with as much amplification as can be adduced, steering clear of apparently conclusory language. More creatively, Professor Gildin suggests that claimants explore sub-federal options under state constitutions. Gary Gildin, *The Supreme Court's Legislative Agenda to Free Government from Accountability for Constitutional Deprivations*, 114 PENN ST. L. REV. 1333 (2010).

176. Some would advocate more aggressive promotion of judicial diversity as a systemic fix. This approach would not necessarily require a massive influx of judges hailing from heretofore underrepresented groups. As studies of the "panel effect" evidence, even relatively limited strides in the direction of increased diversity can yield a disproportionate impact on judicial outcomes. See *supra*, nn. 73-88 and accompanying text. However, given the numerical reality of minority groups, even if their representation were proportional, it would be unlikely in any given case that minority judges would either preside or be on a multi-judge appellate panel. The more realistic aim would be to bring the judiciary—in its instant composition—back within constraints where it can continue to serve its historic purpose of protecting minority rights.

there is ample cause for concern that judicial subjectivity will cut against such plaintiffs, given pervasive negative views of Muslim Americans and, more generally, in light of the federal judiciary's composition. Discrimination claims are particularly vulnerable to an unfavorable application of dispositive judicial discretion at the threshold stage because such claims require a showing of animus or deliberate, invidious intent.

By valorizing judges' subjective assessments of threshold plausibility, the post-*Iqbal* judicial landscape already appears far less welcoming to Muslim discrimination victims looking for vindication in the courts. In that sense, *Iqbal* will further sap Muslim and other minority communities' faith in the courts' ability to deliver redress and justice. That *Monroe* borrows *Iqbal*'s "obvious alternative explanation" meme to sweep aside the disparate impact of a law enforcement investigation on African American men highlights the *Iqbal* effect's expansiveness beyond the national security terrain where it first arose and the Muslim population to whom it was originally applied.

For minority litigants claiming discrimination, *Iqbal* has turned process into the foe of substance. The procedural barrier to entry has been raised so high as to render the odds of ultimate substantive success slim. Under *Iqbal*, the theoretical availability of courts as a forum for discrimination claims is belied by the practical difficulty of bringing viable claims and actually obtaining redress. The disingenuous nature of the resulting state of affairs—offering a mirage of justice, an alluring promise seldom fulfilled—should be alarming to anyone with a concern for the integrity of the American constitutional scheme. Undoing *Iqbal* may be the sole path to restoring the courts fully to their natural and historical function as a haven for insular and unpopular minorities.