

National Judicial Conduct and Disability Law Project, Inc.

From the Selected Works of Zena D. Crenshaw-Logal

Summer 2011

The Official End of Judicial Accountability Through Federal Rights Litigation: Ashcroft v. Iqbal

Zena Denise Crenshaw-Logal



Available at: https://works.bepress.com/zena_crenshaw-logal/1/

The Official End of Judicial Accountability Through Federal Rights Litigation: Ashcroft v. Iqbal

Zena D. Crenshaw-Logal¹

Abstract: As gatekeepers, judges ensure that fact-finders are only exposed to sensible matters. However the landmark U.S. Supreme Court case, *Ashcroft v. Iqbal*, puts federal judges beyond the role of gatekeepers. Now federal cases may survive based on that which presiding judges find sensible or plausible as opposed to the sensibilities of a broader community of stakeholders. Nothing could be more precarious in such an environment than venturing to prove judicial misconduct through Title 42 U.S.C. section 1983 and / or *Bivens* litigation.

Whether or not it reflects “institutional bias”, the “tendency” of judges to discredit allegations impugning one or more of them does “not permit (a) court to infer more than the mere possibility of misconduct” from circumstantial evidence of, for example, a judicial conspiracy to deny equal protection. Fathoming anything else would offend common sense as prescribed by the “judicial experience / common sense” framework of plausibility pleading, extended by *Iqbal* to all federal lawsuits. Surely that paradigm summons the judiciary’s prevailing sentiment(s); an industry-wide wisdom as opposed to the inclination of one or a relatively few judges.

With *Iqbal* there is not even a theoretical opportunity to establish through discovery an otherwise covert judicial conspiracy. As of *Iqbal*, a viable lawsuit simply cannot begin on that basis. And those cases dangling between covert and overt judicial conspiracies to deny equal protection mark for many if not most attorneys the gravesite of their careers. “The punishment imposed for impugning judicial reputation has often been severe, with suspension from the practice of law not uncommon and, in at least one state, mandatory.”

In “restricting access to the courts for those seeking redress for wrongs allegedly perpetrated by private individuals in concert with immune judges”, the judiciary limits civil discovery as a criminal investigation tool. Federal rights cases alleging judicial conspiracies may otherwise evolve into prosecutions under Title 18 U.S.C. sections 241 (*conspiracy against rights*) and / or 242 (*deprivations of rights under color of law*). And before *Iqbal*, the mysterious disposition of such cases could itself signal a criminal cover-up. *Iqbal* extinguishes that possibility unless, under the guise of pleading requirements, direct evidence of one or more judicial conspiracies to deny equal protection is suppressed. Anything less probative of judicial misconduct is properly resolved within the judiciary’s discretion courtesy of *Iqbal*. Hence the judiciary created for itself an immunity to criminal prosecution based on its treatment of circumstantial evidence, even that “just shy of a plausible entitlement” to recovery for judicial conspiracy.

¹ Zena D. Crenshaw-Logal is a founder and co-administrator of the National Forum On Judicial Accountability (NFOJA), <http://50states.ning.com> Crenshaw-Logal studied at the University of Notre Dame Law Centre in London, England and graduated from Northwestern University School of Law in Chicago, Illinois as a Notre Dame and Earl Warren Scholar. I extend a heart-felt thank you to my lead editor and NFOJA’s co-administrator who worked with me through virtually all the litigation culminating with this article, having a perfect name for legal and judicial reform advocacy, Dr. Andrew Jackson. And endless thanks and affection to our greatest benefactor, the wind beneath our wings, my husband, a true patriot, Rodney A. Logal.

Table of Contents

| | |
|---|-----------|
| INTRODUCTION | 2 |
| a. As of <i>Iqbal</i> , Judicial Intuitions Are Disturbingly Potent | 4 |
| b. The Parameters of Actionable Judicial Conspiracies to Deny Equal Protection are Unduly Vague | 5 |
| c. <i>Iqbal</i> is a License to Thwart Civil Recovery for Judicial Conspiracies | 8 |
| I. It is virtually insane for most lawyers to rely on <i>dicta</i>, analogies, or the like in attempting to nudge an alleged judicial conspiracy ‘across the line from conceivable to plausible.’ | 11 |
| a. Federal rights litigation alleging judicial misconduct unduly jeopardizes if not ends legal careers..... | 12 |
| b. <i>Iqbal</i> bestows on federal judges a flexibility some of them have long wielded in dismissing otherwise actionable claims for judicial conspiracy..... | 14 |
| II. <i>Iqbal</i> extends to the judiciary an immunity to criminal prosecution based on its treatment of circumstantial evidence, even that “just shy of a plausible entitlement” to recovery for judicial conspiracy. | 21 |
| CONCLUSION | 23 |

INTRODUCTION

Javaid Iqbal, a Pakistani and Muslim, became the catalyst for an awesome and potentially devastating shift in American jurisprudence on May 18, 2009. On that day the U.S. Supreme Court decided a landmark case involving Javaid, *Ashcroft, et al. v. Iqbal*.² In so doing the High Court extended a formidable pleading standard to all federal lawsuits.

Until *Iqbal* it was not clear that the U.S. Supreme Court categorically retired “notice pleading” as prescribed by its 1957 decision *Conley v. Gibson*.³ The *Conley Court* confirmed that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim”, noting “(t)o the contrary, all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”⁴ Many hoped the shift to “plausibility pleading” five decades later was attendant to and inextricable from antitrust principles implicated by *Bell Atlantic Corp. v. Twombly*.⁵ But in a dramatically different context *Iqbal* repeatedly cites *Twombly*, reinforcing the 2007 decision as *Conley’s* retirement, largely based on two principles:

² 129 S.Ct. 1937 (2009).

³ 355 U.S. 41 (1957).

⁴ *Id.* at 47.

⁵ 550 U.S. 544 (2007).

...

First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we ‘are not bound to accept as true a legal conclusion couched as a factual allegation’. Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’ — ‘that the pleader is entitled to relief.’⁶

In short, “(w)hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”⁷

Harnessing the “experience and common sense” of federal judges across America would undoubtedly prompt many fair, well-reasoned court decisions. Some may count *Iqbal* among them:

...

The complaint alleges 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.’ It further claims 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.’ Taken as true, these allegations are consistent with petitioners’ purposefully designating detainees ‘of high interest’ because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.

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 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

⁶ *Iqbal at 1949-1950*. (internal citations omitted).

⁷ *Id. at 1950*.

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.

But even if the complaint’s well-pleaded facts give rise to a plausible inference that respondent’s arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief. It is important to recall that respondent’s complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent’s constitutional claims against petitioners rest solely on their ostensible ‘policy of holding post-September-11 detainees’ in the ADMAX SHU once they were categorized as ‘of high interest.’ To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as ‘of high interest’ because of their race, religion, or national origin.

This the complaint fails to do. Though respondent alleges that various other defendants, who are not before us, may have labeled him a person of ‘of high interest’ for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving ‘restrictive conditions of confinement’ for post-September-11 detainees until they were ‘cleared’ by the FBI.’ Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation’s top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners’ constitutional obligations. He would need to allege more by way of factual content to ‘nudg[e]’ his claim of purposeful discrimination ‘across the line from conceivable to plausible.’⁸

Alex Reinert, Iqbal’s Supreme Court counsel, arguably shares a hint or more of skepticism by merely referencing the prospect of an “alternative lawful explanation for the *wholesale* detention of Arab, South Asian and Muslim men . . .”⁹ This arguable oxymoron corresponds with the subjectivity that *Iqbal* countenances, whether or not Reinert intends it to indict the decision.

a. As of *Iqbal*, Judicial Intuitions Are Disturbingly Potent

America’s common law repeatedly references the judiciary’s “gatekeeping” function or obligation. For example,

(i)n *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), (the U.S. Supreme) Court focused upon the admissibility of scientific expert testimony. It pointed

⁸ *Id.* at 1951-1952. (internal citations omitted).

⁹ Reinert, Alexander A. “Litigating Civil Rights Claims After *Iqbal*”, p 8, *National Civil Rights Access to Justice Forum*, Emory Law School (12 November 2010). (emphasis added).

out that such testimony is admissible only if it is both relevant and reliable. And it held that the Federal Rules of Evidence ‘assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.’ *Id.*, at 597. The Court also discussed certain more specific factors, such as testing, peer review, error rates, and ‘acceptability’ in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific ‘theory or technique’.¹⁰

As gatekeepers, judges ensure that fact-finders are only exposed to sensible matters. However *Iqbal* puts federal judges beyond the role of gatekeepers. Now federal cases may survive based on that which presiding judges find sensible or plausible as opposed to the sensibilities of a broader community of stakeholders.

Rather than gatekeepers, *Iqbal* ordains federal judges as barometers of purposeful discrimination:

Now that is and should be a frightening thought. When courts are told to draw on experience and common sense that means that predictability will vanish because every judge has had different experiences and has a different definition of common sense. What we will see is that depending on a judge’s views of various types of claims, one judge will dismiss a claim where another would have let it survive.¹¹

Alex Reinert further notes “. . . to the extent that a court is making, at the motion to dismiss stage, a factual determination that is constitutionally committed to the jury, there are significant Seventh Amendment concerns.”¹² Moreover a court should “be wary of dismissing a case based on undisclosed ‘judicial experience’ or ‘common sense,’ without giving the pleader an opportunity to rebut whatever inferences may be drawn from those intuitions.”¹³

b. The Parameters of Actionable Judicial Conspiracies to Deny Equal Protection are Unduly Vague

Speaking of judicial intuitions, less than a month after *Iqbal*, the U.S. Supreme Court decided *Caperton v. A.T. Massey Coal, Co., Inc.*, in which a shared dissent of Chief Justice Roberts, Justices Scalia, Thomas, and Alito emphasizes that . . .

(t)here is a ‘presumption of honesty and integrity in those serving as adjudicators.’ All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise. ‘We should not, even by inadvertence, ‘impute to judges a lack of firmness, wisdom, or honor’.¹⁴

¹⁰ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 at 141 (1999).

¹¹ Scheindlin, Shira A. Judge, U.S. Dist. Ct., S. Dist. of N.Y. – *Inn of Court Dinner Remarks*, “The Future of Litigation”, pp 4-5 (13 January 2010). Available at <http://www.nylj.com/nylawyer/adgifs/decisions/020510scheindlin.pdf>

¹² Reinert, Alexander A. “Litigating Civil Rights Claims After *Iqbal*” at 20.

¹³ *Id.*

¹⁴ 129 S. Ct. 2252 at 2267 (*Dissent of Chief Justice Roberts joined by Justices Scalia, Thomas, and Alito*). (internal citations omitted).

Yet “(t)he judiciary is not immune from having members who abuse their power, are biased, incompetent, or corrupt, or whose actions deny citizens their constitutional rights.”¹⁵ Moreover “(t)here is no history of common law immunity afforded private persons who conspire with judges or other state officers to misuse the judicial process.”¹⁶ Such “a radical departure from normal judicial procedure” is cognizable, “a departure which, if proven, could provide the factual basis for a reasonable inference that the . . . judge agreed (either explicitly or implicitly) with (one or more parties before him or her) to violate (an opponent’s) constitutional rights.”¹⁷

Though a judicial / private sector conspiracy to deny equal protection is not the variety of unconstitutional discrimination it was considering, the *Iqbal Court* explains:

In *Bivens*—proceeding on the theory that a right suggests a remedy—this Court ‘recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen’s constitutional rights.’

...

In the limited settings where *Bivens* does apply, the implied cause of action is the ‘federal analog to suits brought against state officials under Rev. Stat. § 1979, 42 U.S.C. § 1983.’

...

Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose.¹⁸

Of course the U.S. Supreme Court has determined that “(a) judge will not be deprived of immunity (from a *Bivens* or Section 1983 claim) because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the ‘clear absence of all jurisdiction’.”¹⁹ The federal circuits differ as to whether liability extends to a judge’s non-immune, private sector co-conspirator(s).²⁰

Interestingly, the “several policy arguments which can be relied upon to prevent recovery for conspiracies with immune officials (include the fact that) permitting conspiracies to be claimed which include immune judges may expose a judge to the time-consuming effort and chilling effect of submission to discovery and the appearance as a witness.”²¹ Given the inherent value of avoiding that and similar outcomes as often as lawfully possible, it seems the courts would steadfastly define the parameters of an actionable judicial conspiracy to deny equal protection. Instead—borrowing words expressed in another context by Supreme Court Justice Antonin Scalia—that “governing standard is (too often) the unfettered wisdom of (judges), revealed to an obedient people on a case-by-case basis”; an unpredictable, “*ad hoc*, standardless judgment.”²²

¹⁵ Tarkington, Margaret. “A Free Speech Right To Impugn Judicial Integrity In Court Proceedings”, 51 *B.C. L. Rev.* 363 at 391 (2010). (internal footnote omitted).

¹⁶ See, *Sparkman v. McFarlin*, 601 F.2d 261 at 273 (7th Cir. 1979) (*Circuit Judge Swygert dissent*).

¹⁷ *Id.* at 279.

¹⁸ *Iqbal* at 1947-1948.

¹⁹ *Stump v. Sparkman*, 435 U.S. 349 at 356-357(1978). (internal footnote omitted).

²⁰ See, *Sparkman v. McFarlin* at 262.

²¹ *Id.* at 267.

²² *Morrison v. Olson*, 487 U.S. 654 at 712 (1988). (*Scalia, J., dissenting*).

In lamenting the lack of justiciable standards for a political matter before our High Court, Justice Scalia proclaimed “(t)his is not . . . the government of laws that the Constitution established; it is not a government of laws at all.”²³ The sentiment rings substantially true in the context of Seventh Circuit Judge Swygert’s chiding of his appellate court *en banc*:

The plaintiffs’ pleadings are sufficient, at the least, to raise an inference that an agreement existed between the immune judge and a remaining defendant which violated . . . constitutional rights. The holding of the five concurring judges that these pleadings are insufficient under Rule 8(a)(2) not only violates the meaning of the rule as explicated by the Supreme Court, but also transforms *sub silentio* the proof standards of the substantive law of civil conspiracy.

On the basis of this conspiracy allegation and a sparse preliminary record, the Supreme Court reversed the Fifth Circuit’s affirmance of the district court’s summary judgment in favor of the defendants in *Adickes*. Yet this court today has affirmed the dismissal of pleadings which are indistinguishable from the claims in *Adickes* with respect to the sufficiency of the conspiracy allegations.

The five concurring judges have disregarded the Supreme Court’s directive that

a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

They have done so because they have determined that policy objectives, which they believe to be important, would be served by restricting access to the courts for those seeking redress for wrongs allegedly perpetrated by private individuals in concert with immune judges. By a procedural ruling in contravention of the Federal Rules of Civil Procedure and Supreme Court decisions interpreting those rules, this court effectively has engrafted a substantive limitation on section 1983 liability. The court’s ruling makes it more difficult to plead and prove a claim against a distinct class of section 1983 defendants. This decision, like all decisions about imposing or not imposing federal statutory liability for types of wrongdoing, should be based on an evaluation of the competing policy interests; the decisionmaker must determine whether it is better or not to offer the federal judicial system as a forum for redress for such alleged wrongs. But this decision is one reserved for Congress, and Congress promulgated section 1983 and approved the Federal Rules of Civil Procedure without the restriction erected by the five concurring judges in this case. Judicial incantation of hypothetical policy ‘horribles’ cannot justify imposition of this restriction on the scope of the statute’s protection.²⁴

The referenced Supreme Court directive was pre-*Iqbal*. But both then and now “(t)he existence or nonexistence of a conspiracy (was and) is essentially a factual issue that the jury, not the trial judge, should decide.”²⁵

²³ *Id.*

²⁴ *Sparkman v. McFarlin* at 279-281.

²⁵ *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 at 176 (1970) (*Black, J. concurring*).

Should the “inference” Judge Swygert acknowledged have evolved through discovery to requisite probable cause, targeted participants could have been criminally prosecuted under Title 18 U.S.C. sections 241 (*conspiracy against rights*)²⁶ and / or 242 (*deprivations of rights under color of law*).²⁷ In “restricting access to the courts for those seeking redress for wrongs allegedly perpetrated by private individuals in concert with immune judges”, the judiciary limits civil discovery as a criminal investigation tool. Apparently some judges would disregard binding precedent and arguably usurp congressional power to do so, at least occasionally a few decades ago on the Seventh Circuit U.S. Court of Appeals.²⁸

Iqbal introduces a new dynamic, i.e. the placing of lawsuits within or outside the specter of actionable conspiracies by simply deeming related allegations sufficient or insufficient, plausible or implausible. The corresponding labeling “. . . power given to (federal judges is not) confided to their discretion in the legal sense of that term, but . . . granted to their mere will”.²⁹ Not because “(i)t is purely arbitrary, and acknowledges neither guidance nor restraint”, but because it can be wielded without predictable “criterion”.³⁰

c. *Iqbal* is a License to Thwart Civil Recovery for Judicial Conspiracies

Even months before *Iqbal* was decided, the Wall Street Journal reported:

The odds against winning discrimination cases have some employee lawyers reluctant even to try. ‘We will no longer take individual employment-discrimination cases, because there’s such a high likelihood of losing,’ New York plaintiffs’ attorney Joe

²⁶ *Title 18 U.S.C. § 241*: If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured— They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

²⁷ *Title 18 U.S.C. § 242*: Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

²⁸ *See, Sparkman v. McFarlin*.

²⁹ *See, Yick Wo v. Hopkins*, 118 U.S. 356 at 366-367 (1886).

³⁰ *Cf. Id. and Morrison at 711*.

Whatley Jr. says. Job-discrimination case filings declined by 40% from 1999 to 2007, federal court records show.³¹

Prominent civil rights attorneys indicate post-*Iqbal* that . . .

the Supreme Court skewed the balance away from access to courts by elevating the threshold standard that all plaintiffs must meet to pursue legal claims. In *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, the Court suddenly and without clear necessity overturned well-settled law and imposed a more stringent standard for federal cases to survive. These decisions, by dramatically frontloading litigation and inviting judges to substitute their threshold personal judgments in place of evidence, go far beyond the familiar “verdict first, trial second” problem of which high-profile defendants complain. Instead, under *Twombly* and *Iqbal*, we now risk a world in which meritorious claims face “dismissal first, trial never.”³²

Nothing could be more precarious in such an environment than inviting courts “to infer more than the mere possibility of (judicial) misconduct” as part of Section 1983 and / or *Bivens* litigation.

Long apparent is that “outside observers are less inclined to credit judges’ impartiality and mental discipline than the judiciary itself will be.”³³ Commentator and former counsel to the President, John W. Dean, once reported that “. . . the little robed czar or czarina who rules his or her courtroom empire with justice only for the chosen few, almost always remains immune (from reprisal)”.³⁴ At the height of public discontent with America’s judiciary, unprecedented in recent years, Northwestern University School of Law professor Steven Lubet proclaimed that “judges are clearly reluctant to rebuke their colleagues for any but the most egregious offenses – and even then, they often do nothing more than issue private reprimands.”³⁵

“By developing an economic model to understand judicial corruption and creating the only recent sample of discovered cases of judicial bribery against which to test its predictions, (a 2009 Note in *The Yale Law Journal*) attempts to assess the effectiveness of (America’s) anticorruption mechanisms.”³⁶ The Note concludes:

While the small sample size of corrupt judges limits the certainty of our findings, the study suggests there is a troubling gap in our efforts to prevent and prosecute judicial corruption. Of the thirty-eight judges studied in this case, thirty had engaged in corrupt

³¹ Koppel, Nathan. “Job-Discrimination Cases Tend To Fare Poorly in Federal Court”, *The Wall Street Journal* (19 February 2009).

³² Civin, Joshua and Adegbile, Debo P. “**Restoring Access to Justice:** The Impact of *Iqbal* and *Twombly* on Federal Civil Rights Litigation”, American Constitution Society for Law and Policy. Issue Brief, p 1 (September 2010). (internal footnotes omitted).

³³ *Matter of Hatcher*, 150 F.3d 631 at 637 (7th Circuit 1998) citing *In re Mason*, 916 F.2d 384 at 386 (7th Cir. 1990) and *Liteky v. U.S.*, 510 U.S. 540 at 548 (1994).

³⁴ Dean, John W. “**Thoughts on the Law Addressing Bad Federal Judges:** Self-Policing Isn’t Working, But Is There a Good Alternative?”, *Findlaw’s Writ*, p 3 (2004). Available at <http://writ.findlaw.com/dean/20040813.html>

³⁵ Lubet, Steven. “When Judges Investigate Judges”, *Chicago Tribune* (3 June 2004).

³⁶ Pahis, Stratos. “**Corruption in Our Courts:** What It Looks Like and Where It Is Hidden”. 118 *Yale L.J.* 1900 (2009).

acts other than the ones that led directly to their removal or conviction. That they were eventually caught is heartening, but it remains unclear how many other cases are being overlooked.

Even assuming these judges comprise a large share of a very small group of “bad apples,” the many instances in which they were able to act corruptly without consequence is revelatory of deficiencies in our anticorruption institutions.³⁷

The underlying “gap” persists though “key successes of civil rights litigation in the last half century were due, in part, to the liberal pleading standard set forth in the Federal Rules and reinforced by the Supreme Court in *Conley*.”³⁸ That standard made it difficult for Judge Swygert “to discern the precise contours of the plurality’s new pleading requirement” fashioned in 1979 to dismiss a case alleging unlawful judicial bias.³⁹ Already commandeered was the flexibility of *Iqbal*’s labeling power with which cases are simply deemed sufficient or insufficient, plausible or implausible:

The question whether plaintiffs stated their civil rights claims with sufficient particularity was never ruled on by the district judge. The issue neither was briefed on appeal to this court nor raised in the briefs filed subsequent to the Supreme Court decision in *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). Only at oral argument *en banc* and presumably without notice to plaintiffs did defendants raise the pleading issue. Nonetheless, the plurality has taken the opportunity to develop and apply a new and unsupportable pleading requirement for civil rights conspiracy claims.⁴⁰

Fortunately or unfortunately, depending on perspective, such an outcome has become quite supportable.

Reasonable Americans are unlikely to think “threadbare recitals” and / or “conclusory statements” are a commendable way to critique their country’s judiciary. *Iqbal* ends the need, nonetheless, for judges to construct, borrow, and / or address formulations of a “reasonable man” in resolving lawsuits premised on alleged judicial misconduct. The Eastern District of New York supplied one such gauge in addressing recusals: “*Thus, the focus is not on ‘the only partly informed man-in-the-street,’ . . . and whether that individual would conclude that the judge is impartial, but rather the focus is on the reasonable person, who understands and knows all of the relevant facts, and whether that fully-informed individual would conclude that the judge is impartial.*”⁴¹ Presented with similar considerations post-*Iqbal*, federal judges need only focus on the likely conclusions of their colleagues given related pleadings crafted without the benefit of discovery. This standard essentially ends judicial accountability through Title 42 U.S.C. §1983 and *Bivens* claims.

³⁷ *Id.* at 1943.

³⁸ Civin and Adegbile, Issue Brief p 3.

³⁹ *Sparkman v. McFarlin* at 275.

⁴⁰ *Id.* (internal footnote omitted).

⁴¹ *U.S. v. Cutler*, 796 F.Supp. 710 at 712 (E.D.N.Y. 1992). (emphasis added).

I. It is virtually insane for most lawyers to rely on *dicta*, analogies, or the like in attempting to nudge an alleged judicial conspiracy ‘across the line from conceivable to plausible.’

Unlike obscenity, prospective plaintiffs and their lawyers will be hard pressed to know a sustainable allegation of judicial conspiracy when they see it.⁴² Grappling with the judicial misconduct prompting *Caperton* (i.e. failure to recuse), Jeffrey W. Stempel explains:

Justice Benjamin’s error was not just a garden variety application of law to facts that may engender disagreement based on different views of the facts. He consistently applied the wrong legal standard for years in spite of ample opportunity to conduct a proper analysis, doing so in a manner suggesting lack of competence, undue emotional investment in his continued participation, or perhaps even undue desire to aid a major campaign supporter. Although the merits/misconduct line may be fuzzy, some substantive judicial performance is so deficient as to rise to a level of misconduct justifying discipline.⁴³

Even in the face of blatant deficiencies, according to Lara A. Bazelon,

judges have a tendency to let their accused colleagues off the hook out of favoritism, undue sympathy, and a desire to protect the reputation of their circuit. This problem, known as institutional bias, persists due to four interrelated factors, . . . - the secrecy that shrouds the disciplinary process; the lopsided allocation of rights between the complainant and the accused; the perception of . . . serving a rehabilitative rather than a disciplinary purpose; and resistance to transferring high-profile cases out of circuit, where the judges are less likely to know, and sympathize with, the accused . . .⁴⁴

Whether or not it reflects “institutional bias”, the “tendency” of judges to discredit allegations impugning one or more of them does “not permit (a) court to infer more than the mere possibility of misconduct” from an otherwise covert judicial conspiracy. Fathoming anything else would offend common sense as prescribed by the “judicial experience / common sense” framework of plausibility pleading. Surely it summons the judiciary’s prevailing sentiment(s); an industry-wide wisdom as opposed to the inclination of one or a relatively few judges.

While today’s court dissent may become tomorrow’s majority opinion, it is virtually insane for most lawyers to rely on *dicta*, analogies, or the like in attempting to nudge an alleged judicial conspiracy ‘across the line from conceivable to plausible.’⁴⁵ Margaret Tarkington reports that in comparable contexts, “. . . courts have required attorneys to prove the truth of allegations of bias or improper purpose—often extremely strictly and with an exaggerated view of the assertions made by attorneys.”⁴⁶ True, “(i)n many cases of conspiracy essential information can only be

⁴² Cf., *Jacobellis v. Ohio*, 378 U.S. 184 at 197 (1964) (*Stewart, J., concurring*).

⁴³ Stempel, Jeffrey W. “Impeach Brent Benjamin Now!?! Giving Adequate Attention to Failings of Judicial Impartiality”. 47 *San Diego L. Rev.* 1 at 76 (March 2010). (internal footnote omitted).

⁴⁴ Bazelon, Lara A. “Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Trusted to Police Themselves and What Congress Can Do About It”, 97 *Ky. L.J.* 439 at 442 (2008-2009). (internal footnote omitted).

⁴⁵ See *Iqbal at 1951*.

⁴⁶ Tarkington, Margaret. “A Free Speech Right To Impugn Judicial Integrity In Court Proceedings”, 51 *B.C. L. Rev.* 363 at 375 (2010). (internal footnotes omitted).

produced through discovery, and (it has been said that) the parties should not be thrown out of court before being given an opportunity through that process to ascertain whether the linkage they think may exist actually does.”⁴⁷ However,

‘(i)t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management . . .’

. . .

If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.⁴⁸

This passage undoubtedly seals the coffin on attempts to prove judicial conspiracies through circumstantial evidence.

a. Federal rights litigation alleging judicial misconduct unduly jeopardizes if not ends legal careers.

In preparing to address what he describes as “conditional orders”, Thomas O. Main provides this eloquent description of judicial discretion:

The task of judging has been described as the art or science of making discrete choices among competing courses of action. Charged with the mandate to administer justice fairly and equitably, judges are said to have discretion to pursue any lawful course. In both criminal and civil cases, and regarding matters profound and trivial, the exercise of discretion is a core judicial function. The exercise of discretion is often characterized by vivid metaphors: judges confront a frame of possibilities, a zone, a range, a doughnut hole, two paths or a fork in the road, a fenced pasture.

Above all else, such metaphors convey that the exercise of discretion is about choice. For example, under certain circumstances a judge hearing a motion for a mistrial could have the discretion to grant or to deny the motion; the judge could choose either of two paths. In other instances, there might be a range of available courses of action from which to choose: for instance, upon a motion to exclude, as cumulative, the testimony of four additional witnesses, the judge could have discretion to exclude none, one, two, three, or all four of them. Or the discretion in a given instance could be a function of two determinants, such as when a sentencing range includes various combinations of prison terms and probationary periods—a set of options that the fenced pasture metaphor captures perhaps too well.

⁴⁷ *Sparkman v. McFarlin* at 277 citing *Lessman v. McCormick*, 591 F.2d 605 at 611 (10th Cir. 1979).

⁴⁸ *Iqbal* at 1953.

The adversarial process encourages litigants to take extreme positions, and judges may be generally or somewhat persuaded by an advocate's argument in support of a motion yet prefer some intermediate or compromise position. By conferring discretionary authority, the judicial system entrusts judges with the authority to make sound and informed judgments about the relative merits of all the various lawful courses of action that fall within the frame of possibilities. The grant of authority is premised, first, on the notion that the trial judge is in the superior position to see, hear and evaluate the situation with firsthand knowledge. A second (albeit less exalting) justification recognizes that efficiency and finality in adjudication may be more important than accuracy in every instance. The "abuse of discretion" standard of review insulates certain exercises of discretion from rigorous reconsideration on appeal.

Metaphors notwithstanding, the exercise of judicial discretion does not always involve a choice among discrete, identifiable options. Consider, for example, the structural injunction: desegregating a school system, reforming a prison, or disassembling a monopoly demands ingenuity and inventiveness, rather than the wisdom to choose from among a finite set of options. The notion of so-called managerial judging presents another example; allocating system resources efficiently and shepherding litigants through the process expeditiously encourages proactive innovation. Similarly, judicial exercise of the authority to impose nonmonetary sanctions may require much creativity. In these examples, however, the tabula rasa must not be confused with carte blanche. Indeed, fear of judicial activism and of "individualism run riot" has made the exercise of judicial power in these and similar contexts especially suspect and highly controversial.⁴⁹

Based on the strength of these insights, we extrapolate from Main a description of disfavored litigation - that premised on theories "especially detrimental to . . . efficient" court administration: "The claim might be novel or it might be inadequately supported, even if it could survive challenges raised by dispositive motions."⁵⁰

Carl T. Bogus may be the first legal scholar to have formally suggested that something like litigation alleging a judicial conspiracy is not only "disfavored", but taboo for lawyers. In *Culture of Quiescence*, Bogus expresses his ". . . thesis that there is a strongly enforced taboo within the Rhode Island legal culture against criticizing the state's governmental institutions, particularly its courts."⁵¹ Reportedly "(t)he targets and enforcers of this taboo are one and the same: lawyers and judges themselves",⁵² reflecting ". . . a problem in the wider professional culture - a culture that equates disagreement with confrontation, institutional criticism with ad hominem attack, and anything that even smacks of personal criticism with contemptuousness."⁵³ Without conceding the existence of any such taboo-enforcing-mechanism, U.S. Supreme Court

⁴⁹ Main, Thomas O. "Judicial Discretion To Condition", Working Paper 1237, pp 1-3, *bepress Legal Series* - (5 April 2006). (internal footnotes omitted). Available at <http://law.bepress.com/expresso/eps/1237/>

⁵⁰ *See Id. at 16.*

⁵¹ Bogus, Carl T. "Culture of Quiescence", 9 *R. Williams L.Rev.* 351 at 353 (June 9, 2004).

⁵² *Id.*

⁵³ *Id. at 392.*

Justice Stephen Breyer acknowledged that lawyers generally fear retaliation for alleging misconduct or disability on the part of any judge or judges.⁵⁴

b. *Iqbal* bestows on federal judges a flexibility some of them have long wielded in dismissing otherwise actionable claims for judicial conspiracy

In 1995, the Seventh Circuit U.S. Court of Appeals described this colorful case of plaintiff Morton Nesses:

The plaintiff in this suit under 42 U.S.C. sec. 1983 had brought a suit for breach of contract in an Indiana state court and when he lost had sued the defendant’s lawyers, also in an Indiana state court, alleging abuse of process, and had lost that suit too – plus a third suit, also against those lawyers, also in an Indiana state court, also lost. The present suit is against the same lawyers plus some of the judges at the different stages of the Indiana litigation. It alleges a massive, tentacular conspiracy among the lawyers and the judges to engineer Nesses’ defeat by, among other things, declaring him inexcusably dilatory in complying with a discovery order. He claims that the lawyers for this opponent in the original suit for breach of contract used their political clout to turn the state judges against him.⁵⁵

In dismissing Nesses’ lawsuit based on *res judicata*, the Seventh Circuit explains:

...

Nesses’ mistake was to bring his suit alleging the corruption of the tribunal in the same allegedly corrupt state court system (a mode of proceeding that casts great doubt on the good faith of his claim). He could not expect to win if . . . his allegations of corruption are true;⁵⁶

...

I accordingly proposed as a civil trial lawyer and sole plaintiff, *pro se*, that special venue provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO) plus the Washington, D.C. offices of two major defendants warranted my filing in the District of Columbia a 2002 federal case (i.e. pre-*Iqbal*) alleging similar Indiana events.⁵⁷ The Honorable Judge Richard Urbina presided over that case.⁵⁸

Several months before my D.C. RICO case was filed, Seventh Circuit Judge Ripple noted that “(a) litany of particularized facts might be appropriate if the purpose of the complaint were to establish the plausibility of the plaintiff’s allegations.”⁵⁹ Yet much ado was made over the length of my referenced pleadings. Though his description mellowed to a simple acknowledgment that

⁵⁴ “Implementation of the Judicial Conduct and Disability Act of 1980 – A Report to the Chief Justice”, pp 103-104, The Judicial Conduct and Disability Act Study Committee – September 2006.

⁵⁵ *Morton Nesses v. Randall T. Shepard, et al.*, 68 F.3d 1003 at 1004 (1995).

⁵⁶ *Id.* at 1005-1006.

⁵⁷ *See, Crenshaw v. Antokol*, 287 F. Supp. 2d 37 (Dist. Ct, Dist. of Columbia 2003).

⁵⁸ *See, Id.*

⁵⁹ *See, Walker v. Thompson, et al.*, 288 F.3d 1005 at 1011 (7th Cir. 5/1/02).

my “85-page complaint outlines a complicated series of interlocking events and lawsuits”⁶⁰, Judge Urbina initially reported “considerable difficulty” in gleaning my factual allegations.⁶¹

Almost exactly a year from the day that my D.C. lawsuit began, Judge Urbina ordered it transferred to Indiana with the following, admittedly long rendition, consistent with its serious, complex subjects:

I. INTRODUCTION

Pro se plaintiff Zena Crenshaw (“the plaintiff”) brings this action alleging violations of federal civil conspiracy and civil rights statutes by 15 defendants: Spangler, Jennings & Dougherty P.C. (“Spangler”) and Rehana Adat (collectively, “the Spangler defendants”); Joan Antokol, Ralph Cohen, Bonnie Gallivan, Anita Hodgson, Ice Miller Donadio & Ryan (“Ice Miller”), Hoffman-LaRoche, Inc. (“Hoffman-LaRoche”), Julie McMurray, William Wooden and Wooden & McLaughlin (collectively, “the lawyer defendants”); James Martin; Mary Paschen; and Bank One Trust Company, N.A. (“Bank One”).

...

II. BACKGROUND

A. Factual Background

The plaintiff is an African-American woman who was admitted to the practice of law in Indiana. As the court noted in its previous memorandum opinion, the plaintiff’s 85-page complaint outlines a complicated series of interlocking events and lawsuits. These events fall into two categories: those relating to a state products-liability suit and those relating to the management of the plaintiff’s mother’s estate.

1. The Sanchez Litigation

In 1993, on behalf of minor client Sylvia Sanchez, the plaintiff brought suit in Indiana state court against drug manufacturer Hoffmann-LaRoche, two doctors, and a pharmacy and another individual. The *Sanchez* complaint alleged a civil conspiracy that resulted in injury to the plaintiff’s client from an adverse drug reaction. Representing Hoffman-LaRoche in this litigation were defendants Cohen, Gallivan, and Hodgson of Ice Miller, assisted by Hoffman-LaRoche in-house counsel defendants McMurray and Antokol. Defendant Spangler represented the pharmacy and the individual.

The trial judge granted Hoffman-LaRoche’s motion to dismiss. Subsequently, the plaintiff successfully moved to amend her client’s complaint. After some discussion between the plaintiff and defendant Hodgson, Hoffmann-LaRoche moved to dismiss the plaintiff’s amended complaint and requested attorney’s fees based on the plaintiff’s “frivolous” action. The trial judge again granted Hoffmann-LaRoche’s motion to dismiss

⁶⁰ See, *Crenshaw v. Antokol*, 287 F. Supp. 2d 37 at 39.

⁶¹ See, *Crenshaw v. Antokol*, 238 F. Supp. 2d 107 at 108 (Dist. Ct, Dist. of Columbia 2002).

but reserved ruling on attorney's fees until the plaintiff's appeal of the dismissal was resolved. The state court of appeals affirmed the trial judge's dismissal, and the Indiana Supreme Court refused review. Hoffman-LaRoche promptly renewed its request for attorney's fees, which the trial judge granted in 1997. The state court of appeals later reversed the trial judge on the issue of attorney's fees, however, with the Indiana Supreme Court again declining review.

Not satisfied with the state appellate process, the plaintiff took two additional steps. First, she filed a complaint in state court (later removed to federal court) against the *Sanchez* trial judge and defendant Hodgson alleging violations of the United States Constitution, federal civil rights law, state conspiracy and declaratory judgment law. Defendant Wooden & McLaughlin represented defendant Hodgson in this proceeding. The federal judge presiding over the case recused himself in the interests of justice after the plaintiff, citing alleged improper conduct by that judge in a previous case, twice moved to disqualify him. Because the federal judge found her allegations to be categorically false, however, he referred the matter to the Disciplinary Commission for the Supreme Court of Indiana ("the Commission").

Second, the plaintiff met with several African American attorneys in Lake County, Indiana and concluded that her treatment by the *Sanchez* trial judge was typical for minority attorneys prosecuting complex personal injury claims. At a June 1997 press conference held by a coalition of politicians, activists, churches, and citizens, she stated that the trial judge had taken action against her based on her race, and announced that she would be forwarding charges to the Indiana civil rights and judicial qualifications commissions—a step she took within a few days. In response to a query from the judicial qualifications commission, the plaintiff wrote a letter stating that the *Sanchez* trial judge's ruling was consistent with the pattern of bias emanating from the state's courts of general jurisdiction. The plaintiff later sent a copy of the letter to the state civil rights commission and circulated the letter among members of the primarily African-American James Kimbrough Bar Association and the Lake County Bar Association ("LCBA").

Within a few weeks, both the judicial qualifications commission and the civil rights commission dismissed the matter. Shortly thereafter, the LCBA board considered but eventually decided against filing a disciplinary complaint against the plaintiff. Notwithstanding the LCBA board's decision, in December 1997 LCBA member Robert F. Parker filed a grievance with the Commission against the plaintiff.

2. The Estate of Nina M. Crenshaw

Nina M. Crenshaw, mother to the plaintiff, passed away in January 1996. Defendant Bank One served as the personal representative of her estate ("the Crenshaw estate"). In October 1996, defendant Martin became the attorney for Bank One. In May 1997, the plaintiff received notice that the former personal representative of the estate had filed a grievance questioning the plaintiff's use of certain cash assets of the estate. Defendant Martin petitioned the plaintiff for authority to hire an attorney to recover certain estate assets from the plaintiff, but the plaintiff refused.

In July 1997, after receiving a copy of the Martin petition, the Commission subpoenaed the plaintiff for information about the estate. Believing that she was facing heightened Commission scrutiny prompted by her charges against *Sanchez* trial judge, the plaintiff “forwarded a complaint” to the United States District Court for the Southern District of Indiana. In April 1999, after the plaintiff failed to furnish the subpoenaed documents, the Commission suspended the plaintiff from the practice of law. Two years later, in May 2001, the Commission dismissed the grievance stemming from the Crenshaw estate for lack of reasonable cause for misconduct.

In August 2001, defendant Paschen, a Bank One assistant vice president, petitioned the state probate court to allow Bank One to resign as the personal representative of the Crenshaw estate. Bank One argued that its resignation was in the estate’s best interest given that the plaintiff had filed a civil complaint against Bank One regarding its administration of the Crenshaw estate. Despite the plaintiff’s objections, the court approved the petition in November 2001. Representing Bank One in various suits brought by the plaintiff concerning the Crenshaw estate were defendant Martin and defendant Adat, an attorney at Spangler.

B. Procedural History

On November 8, 2002, the plaintiff filed a complaint in this court against the 15 above-referenced defendants, as well as nine members and the executive director of the Commission (collectively, “the Commission defendants”). In her complaint, the plaintiff alleges that the defendants violated the Racketeer Influenced and Corrupt Organizations (“RICO”) Act, 18 U.S.C. §§ 1961 *et seq.*, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the First Amendment to the Constitution. The plaintiff also filed a motion for a temporary restraining order and preliminary injunction against the Commission defendants to prevent them from proceeding with certain disciplinary actions against her. On November 20, 2002, concluding that the plaintiff had failed to demonstrate a substantial likelihood of success on the merits given that venue was uncertain, the court denied both the temporary restraining order and the preliminary injunction. Subsequently, the plaintiff voluntarily dismissed her claims against the Commission defendants.⁶²

Whatever you may infer from Judge Urbina’s apparent impression of my “well-pleaded facts”, keep in mind that the underlying notion of institutionalized race and / or gender-based bias was vetted by “members of the primarily African-American James Kimbrough Bar Association and the Lake County Bar Association (“LCBA”)”⁶³; at a “press conference held by a coalition of politicians, activists, churches, and citizens”⁶⁴; and prompted the LCBA board to decide “against filing a disciplinary complaint against (me).”⁶⁵

⁶² See, *Crenshaw v. Antokol*, 287 F. Supp. 2d 37 at 39-41. (internal footnote and citations omitted).

⁶³ *Id.* at 40.

⁶⁴ *Id.*

⁶⁵ *Id.*

The facts and procedural posture of a 1992 trial court decision provides context for Judge Urbina’s foregoing account of events spanning from 1993 until 2002:

...

This matter is before the Court on a motion to dismiss filed, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, by the two intervening defendants in this case: the Judicial Nominating Commission for the Superior Court of Lake County (the “Commission intervenors”) and the group of judges currently sitting on that court (the “judicial intervenors”). These intervenors (collectively, the “defendants”) have raised difficult issues under the Voting Rights Act of 1965, including one that apparently is of first impression. Their motion has been fully briefed and is ready for resolution.

I. FACTUAL AND PROCEDURAL BACKGROUND

Lake County is located in the far northwest corner of Indiana, next to Lake Michigan near the Illinois border. According to the 1990 census, Lake County is home to 475,594 persons, of whom 116,688, or 24.54%, are black. The total voting-age population of the county is 342,427; of these persons, 76,995, or 22.5%, are black.

The Superior Court of Lake County (the “Superior Court”) was created by the Indiana General Assembly in 1973. As currently structured, the Superior Court has thirteen judges serving in four divisions: civil (five judges), criminal (four), juvenile (one), and county (three). Judges in the county division are elected by popular vote on an at-large, county-wide basis for six-year terms. Judges in the other divisions are selected differently. When a vacancy occurs, the governor of Indiana selects a replacement from a list of three nominees submitted by a seven-member Judicial Nominating Commission, which was created specifically to fill vacancies on the Superior Court. This commission consists of the Chief Justice of the Indiana Supreme Court, or his designee; three attorneys elected by and from all the lawyers in Lake County; and three non-attorney citizens of Lake County, each of whom is appointed by the governor. Once appointed, a judge serves for six years (unless he or she is completing the unexpired term of another judge). A judge who wishes to serve beyond the initial term of appointment must submit to an at-large, county-wide retention vote. If the judge fails to win retention, the nominating commission submits another list of nominees to the governor, who appoints a replacement in the same manner as before. Currently, of the thirteen judges on the Superior Court, all but one — a black judge elected to the county division in 1990 — are white.

The plaintiffs, who are voting-age black citizens of Lake County, initiated the present action on August 9, 1991. Their amended complaint, filed September 24, 1991, alleges that the present system for selecting and retaining judges in the civil, criminal, and juvenile divisions of the Superior Court violates the Voting Rights Act of 1965 by depriving black voters in Lake County of a fair opportunity to elect judges of their choice — presumably black judges. The amended complaint also alleges that the practice of holding at-large, county-wide elections (both for electing county division judges and for

retaining judges in the other divisions) violates the Act by diluting the votes of black citizens, thereby making it impermissibly difficult to elect black judges.⁶⁶

...

A related 1996 decision reflects that . . .

(f)rom 1973 to 1993 . . . twelve judges (had) been appointed to the civil, criminal, or juvenile divisions of the Lake Superior Court. Of those twelve appointees, only one was African-American, and eleven were white. Judge Kimbrough, who was African-American, was a minority-preferred candidate, and was retained each time he stood for election. He served from 1974 until he died in 1987.

...

Between 1976 and 1992, four judicial elections involved African-American candidates: Judge Kimbrough in 1976 and again in 1982; Judge Carter's 1990 primary election; and Judge Carter's 1990 general election.⁶⁷

...

A corresponding major contention was "that in the entire Twentieth Century, in a county that has a significant black population, only two blacks (had) been elected to the Lake County bench."⁶⁸

Clearly my difficulties with various judges – troubles Judge Urbina coined as "(t)he Sanchez Litigation" and "(t)he Estate of Nina Crenshaw" – unfolded while some of those judges defended in complex litigation the racial composition of Lake County, Indiana courts. In a resulting appeal, the Seventh Circuit Court of Appeals references an affidavit that could have been probative in my RICO claims though reportedly, the evidence got mired in technical gaffes by the plaintiffs:

...

Dr. Moore is an historian, and his affidavit sets forth extensive information about the history of official discrimination against African-Americans in Lake County. He also recounted the history of racial discrimination within political parties in the area, in Indiana's state government, and in the schools. He provided an historical backdrop to the County's change from direct popular election of Superior Court judges to the appointment and retention system, noting that the latter system was adopted immediately after Gary, Indiana, Mayor Richard Hatcher (an African-American) had been re-elected to office. Last, he provided demographic information suggesting that the appointment and

⁶⁶ *Bradley v. Indiana State Election Bd.*, 797 F. Supp. 694 at 696-696 (Dist. Ct, S.D. IN 1992). (internal footnote and citations omitted).

⁶⁷ *Bradley v. Work*, 916 F. Supp. 1446 at 1460 (Dist. Ct, S.D. IN 1996).

⁶⁸ *Id.* at 1472.

retention system was being used only in the five counties which together accounted for more than 80% of the state's African-American population.⁶⁹

From this (and the underlying litigation) we can deduce that the impartiality of state judges presiding in Lake County, Indiana was not beyond dispute among local professionals, including lawyers, about the time I introduced the matter to Judge Urbina. By then the State of Indiana had made short shrift of it:

...

The Indiana Judicial Qualifications Commission dismissed (Crenshaw's) claim . . . after initial inquiry. The Indiana Civil Rights Commission did not pursue (Crenshaw's) claim . . . due to its finding of a lack of jurisdiction over the Lake Superior Court's May 8, 1997 order.⁷⁰

...

Later, based on a simple pronouncement, the State of Indiana made short shrift of my legal career: "(t)he hearing officer found that (Crenshaw) failed to offer any credible or articulable evidence or any believable testimony or documented proof to show that Judge Dywan's award of costs and fees was based on race or gender."⁷¹ My "allegations concerning Judge Lozano were not supported by the evidence and were totally without merit", apparently because "Judge Lozano found that the allegations of his improper conduct were completely false and that the alleged comment did not occur."⁷²

⁶⁹ *Bradley v. Work*, 154 F. 3d 704 at 708 (7th Cir. 1998).

⁷⁰ *See, In re Crenshaw*, 815 N.E. 2d 1013 at 1014 (Ind. Sup. Ct. 2004).

⁷¹ *Id.* and *See, In re Crenshaw*, 817 NE 2d 601 (Ind. Sup. Ct. 2004).

⁷² *See, In re Crenshaw*, 815 N.E. 2d 1013 (Ind. Sup. Ct. 2004). Surprisingly a good deal of detail about my interactions with Judge Lozano (albeit an incomplete account) was published:

...

On August 27, 1998, the respondent filed a civil rights lawsuit, *Crenshaw vs. Dywan, et al.*, in the Lake Superior Court 5. The case was later removed to the United States District Court, Northern District of Indiana, Hammond Division, Judge Rudy Lozano presiding. On December 18, 1998, the respondent filed a motion to disqualify Judge Lozano, which the judge denied on January 22, 1999. On November 9, 1999, the respondent filed a second motion to disqualify Judge Lozano. In that motion, the respondent alleged that, in 1986, the respondent and then-attorney Lozano were opposing counsel in a civil case pending in Lake Superior Court. The respondent alleged further that

Lozano apparently harbors personal animosity against [the respondent] stemming from their interaction as opposing counsel in the case of Ash versus Chandler and that he consciously or unconsciously sanctioned her in 1993 to exact revenge for that encounter ...

...

During a brief exchange in the recessed courtroom of the Lake Superior Court in East Chicago, Indiana, Judge Lozano commented to Ms. Crenshaw that he wished she would 'sit on his lap.'

Judge Lozano granted the respondent's second motion to disqualify and directed that the case be reassigned to another federal district judge. Judge Lozano found that the allegations of his improper conduct were completely false and that the alleged comment did not occur. He found further that the allegations were

By January 5, 2007, with nothing more than a perfunctory government investigation, the prospect was preempted of there being institutional bias in 1997, prompting (at least in part) a conspiracy to impose an unwarranted judgment for attorney fees against me,⁷³ escalating to a cover-up and wide-scale retaliation against me.⁷⁴ Rather than a jury trial of the matter, I got a “hearing officer” who found me totally incredible for reasons she has yet to articulate.⁷⁵ When rules of procedure oblige a court to accept the truth of my allegations, some characterization (often disparaging) and / or paraphrase with few if any quotes of my factual and legal contentions are recited and deemed inadequate as a matter of law.⁷⁶

II. *Iqbal* extends to the judiciary an immunity to criminal prosecution based on its treatment of circumstantial evidence, even that “just shy of a plausible entitlement” to recovery for judicial conspiracy.

The further courts stray from verbatim accounts of cases, the more likely they are to misrepresent or distort relevant facts and contentions. But any fact pattern, accurate or inaccurate, helps define the contours of viable causes of action. Labels such as sufficient or insufficient, plausible or implausible, frivolous, specious, vexatious, etc. – affixed without renditions of operative facts, serve to stultify the law.

Noting a series of controversial cases I lost without jury trials, Seventh Circuit Judges Richard A. Posner, John L. Coffey, and Daniel A. Manion deemed me a sore loser:

Our order in this appeal directed appellant Zena Crenshaw to show cause why she should not be sanctioned under Fed. R. App. P. 38 for taking a frivolous appeal. In her response, she instead petitioned for rehearing, reiterating that this appeal is part of her on-going campaign against abuses she perceives within the judicial system.

But it is Crenshaw that has abused the system: whenever she finds herself on the losing end of a matter, she sues the opposing litigants and their attorneys (in this case alone there were 15 defendants), repeatedly alleging that they conspired with presiding judges to receive favorable outcomes. See *Crenshaw v. Baynerd*, 565 F.3d 866 (7th Cir.

made for the improper purpose of manipulating the judicial proceedings in the case. Nonetheless, he granted the second motion to disqualify to avoid the appearance of bias or prejudice.

Id. at 1014.

I was a plaintiff’s trial attorney and Judge Lozano was part of a corporate defense firm before ascending to the federal bench. He was neither my employer, supervisor, lateral co-worker, nor a judge during our referenced encounter. But my hearing officer seemed to find it odd that I did not promptly report the isolated incident as sexual harassment.

⁷³ “The Sanchez Litigation” potentially exposed the multi-billion dollar defendant Hoffmann LaRoche, Inc. (LaRoche) – in fact the entire brand-name prescription drug manufacturing industry – to liability under certain circumstances for injuries caused by generic medication. LaRoche’s history of contending with criminal conspiracy charges is described at <http://www.focus-on-indiana.org/pdf/Roche.profile.pdf>

⁷⁴ See, *Crenshaw v. Antokol*, Appeal No. 06-2046 before the 7th Cir. Ct. of Appeals, *Rehearing Denial / Order of January 5, 2007*, available at <http://www.projectposner.org/case/2007/206FedAppx560>

⁷⁵ *In re Crenshaw*, 815 N.E. 2d 1013 (Ind. Sup. Ct. 2004).

⁷⁶ Confirmation of this proposition is available through an electronic search of cases I prosecuted or defended in any capacity.

1999); *Crenshaw v. Supreme Court of Indiana*, 170 F.3d 725 (7th Cir. 1999); *Crenshaw v. Hodgson*, 24 Fed.Appx. 619, 621 (7th Cir. Dec. 20, 2001); *Crenshaw v. Antokol, et al.*, No. 06-2046, 206 Fed. Appx. 560, (7th Cir. Nov. 16, 2006). All of these suits were dismissed; the only so-called “evidence” of conspiracy that Crenshaw has ever offered is her losing record. In fact, although she is an attorney, Crenshaw is currently suspended from the Indiana state bar and both the Northern and Southern Districts of Indiana for making such allegations against Indiana state judges. *In re Crenshaw*, 815 N.E.2d 1013 (Ind. 2004); *In re Crenshaw*, 130 Fed.Appx. 829 (7th Cir. May 12, 2005); *In re Crenshaw*, No. 06-2585 (7th Cir. Sep. 25, 2006).

This must stop. ‘The judicial system cannot tolerate litigants who refuse to accept adverse decisions.’ *Homola v. McNamara*, 59 F.3d 647, 651 (7th Cir. 1995).⁷⁷

...

In 1980 the U.S. Supreme Court made clear that “merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge.”⁷⁸ It should seem unlikely that without circumvention, I simply asserted the contrary for more than a year in District of Columbia federal courts⁷⁹ and approximately three years in trial and appellate courts of the U.S. Seventh Circuit, from 2002 until 2007.

Of course I sought to convey more than proverbial sour grapes in my quixotic legal journey which Seventh Circuit Judges Posner, Coffey, and Manion finally ended. Properly assessing those pre-*Iqbal* efforts of mine entail knowing and applying appropriate standards of care for decedent estate managers and legal practitioners in Lake County, Indiana. That process supposedly gets us from the “Sanchez Litigation” and “Estate of Nina M. Crenshaw” as Judge Urbina describes them,⁸⁰ to concluding “the only so-called ‘evidence’ of conspiracy that Crenshaw has ever offered is her losing record.”⁸¹ Does even *Iqbal* envision judges (as opposed to expert witnesses) bringing such broad expertise to bear at the pleading stage of litigation? At least one federal trial judge indicates that “(w)hether a party acted with objective reasonableness (in, for example, administering an estate or using legal process) is a quintessential common law jury question.”⁸²

Before *Iqbal*, judges should have been especially wary that suppressing circumstantial evidence of potentially criminal as well as unconstitutional conspiracies to deny equal protection could itself be a crime.⁸³ More than eight (8) months before Judge Urbina transferred my case from D.C. to Indiana, the Sixth Circuit Court of Appeals suggested a good way to sort warranted from unwarranted judicial conspiracy claims:

⁷⁷ See, *Crenshaw v. Antokol*, Appeal No. 06-2046 before the 7th Cir. Ct. of Appeals, *Rehearing Denial / Order of January 5, 2007*, available at <http://www.projectposner.org/case/2007/206FedAppx560>

⁷⁸ *Dennis v. Sparks*, 449 U.S. 24 at 28 (1980).

⁷⁹ My petition to the U.S. Court of Appeals for the District of Columbia was denied on December 31, 2003, thus ending my referenced effort to prosecute RICO claims before Judge Urbina.

⁸⁰ See, *In re Crenshaw*, 817 NE 2d 601 (Ind. Sup. Ct. 2004).

⁸¹ The corresponding details are unpublished.

⁸² *Kidder, Peabody & Co., v. IAG International Acceptance Group*, 14 F.Supp. 2d 391 at 404 (Dist. Ct, S. Dist. of NY 1998).

⁸³ See footnotes 26 and 27 *supra*.

Tahfs may not simply list a series of state court rulings that have not gone as she would have liked, make the conclusory allegation that they are the result of corruption, and expect to survive a Rule 12(b)(6) motion.

...

We find it significant that Tahfs does not argue that the state judge's decisions . . . were wrong as matters of law. Most significantly, Tahfs never identifies the state court actors with whom the Proctors allegedly conspired, other than to designate them as Wayne County Circuit Court staff members. It is clear that, even with discovery, Tahfs could not identify these supposedly corrupt individuals because nowhere in her complaint can she identify *behavior*, as opposed to *outcomes*, suggesting corruption. While we are cognizant of the liberal notice pleading standard that prevails under the Federal Rules of Civil Procedure, we are convinced that under no set of circumstances could Tahfs demonstrate, by the allegations made in her complaint, that staff members of the Wayne County Circuit Court undertook corrupt action in partnership with the Proctors.⁸⁴

An expandable compendium should be possible of judicial behavior and outcomes that do or do not suggest corruption as a matter of law. But entries will not match each case resolved on that basis because their dispositive facts are not always clear if delineated at all.⁸⁵

The disposition of some federal rights cases alleging judicial conspiracy is simply mysterious. *Iqbal* extinguishes the possibility of that state signaling a criminal cover-up. Unless direct evidence of one or more judicial conspiracies to deny equal protection is suppressed under the guise of pleading requirements, the matter is properly resolved within the judiciary's sole discretion courtesy of *Iqbal*.⁸⁶ Hence the judiciary created for itself an immunity to criminal prosecution based on its treatment of circumstantial evidence, even that "just shy of a plausible entitlement" to recovery for judicial conspiracy.⁸⁷

CONCLUSION

Margaret Tarkington contends that . . .

a free speech right to impugn judicial integrity must be recognized for attorneys—even, and perhaps especially, when acting as an officer of the court and filing papers with a court. Such a right is necessary to protect the constitutional rights of litigants to an unbiased judiciary, as well as to preserve statutory rights and other protections granted to criminal and civil litigants regarding judicial qualifications. Further, the recognition of such a right in the attorney preserves litigants' access to courts and due process rights. These rights belonging to litigants are lost or impaired if attorneys can be punished for or chilled from asserting them in court proceedings. Moreover, a free speech right residing

⁸⁴ *Tahfs v. Proctor*, 316 F. 3d 584 at 592 (6th Cir. 2003). (emphasis in original).

⁸⁵ In my view they are rarely clear.

⁸⁶ *See, Iqbal*.

⁸⁷ *Id. at 1953*.

in attorneys to make relevant arguments in court proceedings has been recognized by the Supreme Court as essential to the proper functioning of our judicial system.⁸⁸

Yet as of *Iqbal*, there is not even a theoretical opportunity to establish through discovery an otherwise covert judicial conspiracy.⁸⁹ As of *Iqbal*, a viable lawsuit simply cannot begin on that basis. And those cases dangling between covert and overt judicial conspiracies to deny equal protection mark for many if not most attorneys the gravesite of their careers.⁹⁰ “The punishment imposed for impugning judicial reputation has often been severe, with suspension from the practice of law not uncommon and, in at least one state, mandatory.”⁹¹

I close with an assessment that prompted creation of the National Forum On Judicial Accountability (NFOJA):

It seems ‘the real problem for our country is not the reality or unwarranted perception of judicial misconduct’ . . . , but the lack of forums for addressing allegations of judicial misconduct that do not rely almost exclusively for effectiveness on judicial integrity and/or that of lawyers and/or public officials whose power and/or careers are controlled or substantially impacted by judges. This is not to suggest that judges, lawyers, and public officials whose power and/or careers are controlled or substantially impacted by judges are not generally honest people of great integrity. This report instead decries “a judiciary that is ‘. . . essentially final arbiter of whether it has been corrupted and exclusive regulator of any attorney or judge who would object’.”⁹²

Rather than judicial misconduct or public corruption, NFOJA focuses on restoring the balance of power between America’s judiciary and its sovereign citizens. It also recognizes and advocates the need to encourage, protect, and help vindicate judges and lawyers who expose judicial misconduct and corruption.⁹³

⁸⁸ Tarkington at 370. (internal footnotes omitted).

⁸⁹ See, *Iqbal* at 1953. [“(I)t (would be) counterproductive to require the substantial diversion that is attendant to participating in (such) litigation and making informed decisions as to how it should proceed.”]

⁹⁰ “Some bankruptcy courts construe costs assessed against an attorney through disciplinary proceedings as a nondischargeable ‘fine, penalty or forfeiture’, thereby fostering a class of lawyers who cannot return to the bar due to indigency.” POPULAR, Inc. (Power Over Poverty Under Laws of America Restored), “**Protecting Judicial Whistleblowers In The War On Poverty: A Proposed International Initiative Focusing On The United States**”, p 5 (November 2008). Available at http://www.popular4people.org/files/POPULAR_WhitePaper_finalized.pdf See also, *In re Logal*, 381 BR 706 (Bankr. Court, ND Indiana 2007).

⁹¹ Tarkington at 364. (internal footnotes omitted).

⁹² “Final Report and Recommendations from the Citizens’ Forum On Judicial Accountability”, p 11, (May 2009), available at http://www.njcdlp.org/files/CFOJA_RR_7.pdf

⁹³ In 2009, Reverend Theodore M. Hesburgh, President Emeritus of the University of Notre Dame at South Bend, Indiana, wrote both the Chairman of the U.S. House Judiciary Committee and the U.S. Attorney General, stating:

While gratified that Zena pursues related solutions, I am troubled to find America still grappling with the effectiveness of federal criminal remedies for civil and constitutional rights violations. Your personal attention to these matters with Zena would be greatly appreciated. Apparently she can personally attest to the difficulties of some legal professionals contending with the subject. In fact my then fellow (U.S. Civil Rights) commissioner who later became Solicitor General and is now the late Erwin N. Griswold spoke of such difficulties, noting in 1965 that U.S. lawyers ‘have been concerned, but have felt that they could not speak up’ about certain transgressions of civil and constitutional rights.

...

Hesburgh, Rev. Theodore M., Letter to House Judiciary Com. Chairman, John Conyers, Jr. (D-Mich.) and U.S. Attorney General Eric Holder, 22 September 2009. Copy available at http://www.popular4people.org/files/Hesburgh_Conyers_Holder.pdf

A related statement was presented to the United Nations for its 2010, Universal Periodic Review of America's human rights record. The statement is available at http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/OAK_OrganizationsAssociatingforKindChange.pdf