

“I DO NOT THINK [IMPLAUSIBLE] MEANS WHAT YOU
THINK IT MEANS”: *IQBAL V. ASHCROFT* AND JUDICIAL
VOUCHING FOR GOVERNMENT OFFICIALS

by
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The Supreme Court's use of a "plausibility" standard to order the dismissal of a plaintiff's civil rights action in Ashcroft v. Iqbal has been criticized on a variety of grounds. In this Article, I argue that even if Rule 12(b)(6) of the Federal Rules of Civil Procedure does and should contain such a plausibility standard, the application of that standard to Iqbal's allegations is utterly unpersuasive. The Court could have used qualified immunity to grant relief to the government-official defendants instead of declaring implausible Iqbal's allegation that he was subjected to harsh detention conditions due to his being Pakistani and Muslim. There are, in the pages of the federal reporters, decisions in which trial and appellate courts have sustained civil rights complaints against motions to dismiss. Those complaints, like Iqbal's, alleged conspiracies to target persons based on race or other such characteristics. Therefore, the Court's decision in Iqbal can, in essence, only be understood as vouching improperly that these defendants would not have acted in the ways alleged.

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I. INTRODUCTION

*Ashcroft v. Iqbal*¹ is interesting across a number of dimensions, such as its steroid-injection-like reinforcement of Rule 12(b)(6) of the Federal Rules of Civil Procedure. Applying the rule established just two years

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¹ 129 S. Ct. 1937 (2009).

earlier in *Bell Atlantic Corp. v. Twombly*,² the Court held that the civil rights plaintiff here had to “state[] a plausible claim for relief” to defeat a Rule 12(b)(6) motion to dismiss.³ What *Iqbal* made clear is that, for Rule 12(b)(6) purposes, complaints can be measured on a spectrum ranging from “extravagantly fanciful” to “conceivable” to “plausible,” and that only complaints whose factual allegations make it to the last point will be allowed to proceed.⁴ It is debatable whether this spectrum analysis is faithful to the original understanding of the Federal Rules and notice pleading, but one can accept it and still find fault with the Court’s reasoning. In particular, the Court’s definition of “plausible,” as applied to the factual allegations in the case itself, is rather peculiar, if not implausible.

In this Article, I question the Court’s conclusion that plaintiff *Iqbal*’s allegations were, though not fantastic, still sufficiently “implausible” so as to fail to survive a Rule 12(b)(6) motion to dismiss. In Part II, I set forth *Iqbal*’s allegation that high-level federal government officials selected him for harsh and abusive (mis)treatment while in detention awaiting trial on federal immigration charges. In Part III, I briefly lay out the relevant procedural devices that government-official defendants can use to attack civil rights complaints—namely, the Rule 12(b)(6) motion to dismiss and the qualified immunity defense. Finally, in Part IV, I criticize the Court’s application of its “implausibility” standard to the actual allegations in *Iqbal*’s complaint. I conclude that what the Court has done has similar effect to judicial vouching on behalf of a litigant.

II. THE *IQBAL* DECISION

Shortly after the terrorist attacks on September 11, 2001, Javaid *Iqbal* was charged with conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and with fraud in connection with identification, in violation of 18 U.S.C. § 1028.⁵ He later pleaded guilty to both charges in April 2002 and received a sixteen month prison sentence, upon completion of which he was removed to his home country of Pakistan.⁶

The gravamen of *Iqbal*’s *Bivens*⁷ complaint was that the FBI arbitrarily classified him as a person of “high interest” simply due to his being Muslim and/or Pakistani, pursuant to a policy formulated by

² 127 S. Ct. 1955 (2007).

³ *Iqbal*, 129 S. Ct. at 1950.

⁴ *Id.* at 1951–52.

⁵ *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *1 n.1 (E.D.N.Y. 2005), *rev’d sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

⁶ *Iqbal*, 129 S. Ct. at 1943.

⁷ In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Court held that the Constitution directly conferred a private cause of action to redress certain violations of the Bill of Rights, in practice, providing a federal counterpart to 42 U.S.C. § 1983’s right of action against state officials. *Bivens*, 403 U.S. 388, 391–92 (1971).

Attorney General John Ashcroft and FBI Director Robert Mueller.⁸ As such, he contended, the Bureau of Prisons assigned him for pre-trial detention in the Administrative Maximum Special Housing Unit (ADMAX SHU) of the Federal Metropolitan Detention Center (MDC) in Brooklyn, New York, rather than the general population. There, he was kept in extremely restrictive conditions, such as solitary confinement, for twenty-three hours per day.⁹ He further alleged that, while in custody, he was beaten and abused by prison guards, subjected to air conditioning in the winter and heating in the summer, endless strip searches, infringement of religious practices, and denial of adequate medical care.¹⁰ In all, he and his co-plaintiff raised twenty-one distinct claims against thirty-four named defendants and nineteen “John Does.”

The people whom Iqbal sued for this long list of alleged misconduct included not just Ashcroft and Mueller, but other FBI officials, Bureau of Prison officials, MDC wardens, and other MDC personnel such as prison guards.¹¹ Because of this long list, it is important to keep in mind exactly what improper conduct Iqbal attributed to Ashcroft and Mueller, as opposed to improper conduct attributed to others.¹² Iqbal did not challenge the basis for his arrest.¹³ Nor did he claim that Ashcroft or Mueller conducted the abuse personally. Rather, Iqbal’s allegations against Ashcroft and Mueller consisted of the following:

1. Mueller directed the FBI to arrest “thousands of Arab Muslim men” after the September 11th attacks.¹⁴
2. Ashcroft and Mueller agreed to implement a policy of assigning post-September 11th detainees in ADMAX SHU until they were “cleared” by the FBI of “connection[s] to terrorist activity.”¹⁵
3. Though the complaint identifies other FBI officials as responsible for actually “clear[ing]” detainees of connections

⁸ *Iqbal*, 129 S. Ct. at 1943–44.

⁹ *Id.*; see also *Elmaghraby*, 2005 WL 2375202, at *3. This is comparable to treatment for prisoners in so-called Supermax facilities, including such notable terrorists as Ramzi Yousef (one of the architects of the 1993 World Trade Center bombing). See SIMON REEVE, *THE NEW JACKALS* 235 (1999).

¹⁰ *Elmaghraby*, 2005 WL 2375202, at *3, *7.

¹¹ See *id.* at *1 n.2.

¹² The Court agreed that, if proven, the allegations of beatings and other abuse “demonstrate unconstitutional misconduct by some governmental actors.” *Iqbal*, 129 S. Ct. at 1942.

¹³ *Id.* at 1943. Since he plead guilty to the charges, it would have been difficult to overturn his conviction, as he likely waived his appellate rights. And without overturning his conviction, he would not be able to get any relief under *Bivens* if such relief would implicitly cast doubt on his conviction. See *Heck v. Humphrey*, 512 U.S. 477 (1994).

¹⁴ *Iqbal*, 129 S. Ct. at 1944; First Amended Complaint and Jury Demand at ¶ 47, *Elmaghraby*, 2005 WL 2375202 (No. 04 CV 01809 (JG)(JA)).

¹⁵ *Iqbal*, 129 S. Ct. at 1944; First Amended Complaint and Jury Demand, *supra*, note 14, at ¶ 72.

to terrorist activity, Ashcroft and Mueller “failed to impose deadlines for the clearance process.”¹⁶

4. Ashcroft and Mueller imposed the harsh conditions of confinement on Iqbal “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.”¹⁷

In an unpublished but lengthy opinion, the district court rejected most of the motions to dismiss brought by the various defendants.¹⁸ With respect to Attorney General Ashcroft and FBI Director Mueller, the court denied their motions to dismiss the claims of having subjected the plaintiffs to harsh conditions of confinement for being Muslim and for being Pakistani (claims eleven and twelve) and of having conspired to deprive the plaintiffs of their civil rights for those same reasons in violation of 42 U.S.C. § 1985(3) (claims sixteen and seventeen).¹⁹ It granted their motions to dismiss the plaintiffs’ claim of substantial burden on religious rights under the Religious Freedom Restoration Act, based on qualified immunity (claim thirteen) and the claim that the harsh treatment violated international law under the Alien Tort Statute, based on the United States’ sovereign immunity (claim twenty-one).²⁰ On appeal, the Second Circuit affirmed.²¹ The Supreme Court granted certiorari and reversed.²²

III. RULE 11 AND QUALIFIED IMMUNITY

Rule 12(b)(6) permits a civil defendant to move to dismiss a complaint for failing to state a claim for which relief can be granted.²³ A motion under this section constitutes a responsive pleading and is therefore typically filed, if at all, directly after the complaint and before an answer. As Jeffrey Stempel has explained, a motion to dismiss “tests only the legal strength of [the] plaintiff’s claims, assuming a ‘best case scenario’ of the facts of the dispute.”²⁴ Suppose, for example, that plaintiff raises a cause of action for which the statute of limitations is one year, and, according to the complaint, the event in question took place

¹⁶ *Elmaghraby*, 2005 WL 2375202, at *3.

¹⁷ *Iqbal*, 129 S. Ct. at 1944; First Amended Complaint and Jury Demand, *supra*, note 14, at ¶ 96.

¹⁸ *Elmaghraby*, 2005 WL 2375202, at *35.

¹⁹ *Id.* at *8 (summary of claims against, *inter alia*, Ashcroft and Mueller), *35 (summary of ruling).

²⁰ *Id.* at *31.

²¹ *Iqbal v. Hasty*, 490 F.3d 143, 177–78 (2d Cir. 2007), *rev’d sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

²² *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

²³ FED. R. CIV. P. 12(b)(6).

²⁴ Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 *FORDHAM L. REV.* 257, 269–70 (1991).

more than a year ago. If the complaint does not allege any tolling of the statute of limitations, then the plaintiff cannot prevail even if he or she were to prove every single allegation in the complaint. Accordingly, proceeding with the matter would be a waste of judicial resources, not to mention an unwarranted burden on the defendant.

Because a court reviewing a Rule 12(b)(6) motion is to assume that all the allegations in the complaint are true, courts, as well as the drafters of the Federal Rules of Civil Procedure, have had to develop tools for dealing with strategic plaintiffs. Allegations that are obviously outside the realm of possibility can be ignored.²⁵ Additionally, Rule 11 theoretically operates as a deterrent by potentially subjecting lawyers to sanctions for filing documents with false or frivolous allegations.²⁶

Still, for the typical civil defendant, Rule 12(b)(6) may well not terminate the litigation. Even if the court grants the motion to dismiss, the federal rules provide for liberal use of amended pleadings.²⁷ And if the deficiency in the plaintiff's case lies not in the fantastical nature of the factual allegations, nor their legal deficiency, but rather the plaintiff's inability to prove those allegations, a defendant might not be able to end the case until completing discovery and bringing a motion for summary judgment.²⁸ This is no doubt burdensome for many defendants, as responding to discovery can be both expensive and time-consuming,²⁹ even if they ultimately prevail.

When the defendants are government officials, the burden extends beyond them to include the public as well. In response to lawsuits, government officials might become timid in their execution of their duties. As Judge Learned Hand once explained, "the burden of a trial and . . . the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."³⁰ As a result, courts have established a number of immunity defenses to protect government officials when they are sued for their official acts. Judges, prosecutors, congressional representatives, and the President all receive absolute immunity,³¹ which means that

²⁵ See, e.g., *Brown v. Bargery*, 207 F.3d 863, 866 (6th Cir. 2000).

²⁶ FED. R. CIV. P. 11.

²⁷ See FED. R. CIV. P. 15.

²⁸ FED. R. CIV. P. 56.

²⁹ On the other hand, others perceive summary judgment itself to be the problem, with some scholars arguing that Rule 56 is an unconstitutional infringement on the Seventh Amendment. See Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 140 (2007).

³⁰ *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

³¹ *Stump v. Sparkman*, 435 U.S. 349, 359–60 (1978) (holding that judges have absolute immunity so long as they are acting within their jurisdiction and performing a judicial act); *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976) (holding prosecutors entitled to absolute immunity for prosecutorial acts involving advocacy, but not administrative tasks); *Kilbourn v. Thompson*, 103 U.S. 168, 201 (1881) (holding federal legislators protected by the Speech and Debate Clause, U.S. CONST., art. I, § 6, for legislative acts); *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (holding President

plaintiffs allegedly harmed by such persons when performing official acts have absolutely no judicially enforceable remedy.

All other government officials are entitled to qualified immunity for official acts. Qualified immunity can be overcome, but only when the plaintiff proves that the government-official defendant not only infringed the plaintiff's civil rights, but did so in violation of "clearly established law."³² The justification for qualified immunity is the same as for absolute immunity: to protect government officials from being inhibited in carrying out their official duties due to fear of litigation.³³ However, qualified immunity is more limited in its scope of protection, because a plaintiff can pierce it with a showing that the law, at the time of the alleged civil rights violation, clearly prohibited the act. On the other hand, a decision adverse to the government official claiming qualified immunity can sometimes be appealed immediately to the court of appeals, depending on whether the dispute over its applicability is legal, as opposed to factual.³⁴

When qualified immunity is raised as a defense, litigation naturally ensues over whether the law at the time was "clearly established," which in turn requires deciding what it means to have been "clearly established." In some instances, this is a simple task; the legal claim in the case at hand matches or is sufficiently analogous to that in the cited case. In other instances, however, whether the law was clearly established depends on the level of specificity with which one asks the question.³⁵ The point here is that a court wanting to spare government officials from the burden of litigating civil rights cases can, within limits, define the established law with a high enough degree of specificity to ensure that qualified immunity will apply.³⁶

IV. WHAT'S IMPLAUSIBLE ABOUT "IMPLAUSIBLE"?

A. *Zeroing in on the Court's Reasoning*

The Court, in essence, concluded that the disparate impact of the

entitled to absolute immunity for official acts).

³² Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

³³ *Id.* at 814.

³⁴ See Mitchell v. Forsyth, 472 U.S. 511, 525 (1985).

³⁵ See, e.g., Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.")

³⁶ This is in some ways paralleled by the Court's handling of retroactivity in federal habeas corpus cases, where habeas claims based on "new rules" are barred by *Teague v. Lane*, 489 U.S. 288 (1989). According to the Court, "new rules" are those that are "not dictated by precedent"—a frustratingly vague definition that invites manipulation depending on how broadly or narrowly one construed that term. See generally Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 256–57 (1998) (emphasis omitted).

detention segregation policy on Arabs and Muslims was the result of a legitimate government policy. Because all nineteen of the September 11th hijackers were Muslims, citizens of Arab nations, and members of al Qaeda, the Court found it “no surprise” that efforts by law enforcement officials to capture those with suspected links to the terrorist attacks “would produce a disparate, incidental impact on Arab Muslims.”³⁷

The problem with the Court’s line of reasoning is that Iqbal was not alleging a disparate impact claim. Iqbal was not challenging a race- or religion-neutral policy whose burden disproportionately fell on Arabs or Muslims. One can imagine such a policy if, for example, the federal government had focused its initial post-September 11th investigation on persons suspected of links to al Qaeda because of recent visits to Afghanistan. Such a policy might well have led to a much greater proportion of Muslims being investigated, given that Afghanistan is a predominantly Muslim nation.³⁸ But, according to *Washington v. Davis*,³⁹ there are no disparate impact claims under the Equal Protection Clause; a direct claim under the Constitution requires proof that the government actor not only *knew* that the government action in question would affect the plaintiff’s class of persons disproportionately, but in fact *intended* that effect.⁴⁰

It is therefore not surprising that Iqbal chose to take the more demanding approach of pleading discriminatory intent on the part of the defendants. In so pleading his complaint, he assumed the burden of needing, at the end of the day, to come up with evidence of such discriminatory intent. The Court opened a second line of attack against Iqbal’s complaint here, concluding that several of the allegations were “conclusory” and therefore could be disregarded for the purposes of assessing whether the complaint survived a Rule 12(b)(6) challenge.⁴¹ In the Court’s view, Iqbal’s allegation that the defendants “knew of, condoned, and willfully and maliciously agreed to subject [him]” to the ADMAX SHU “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest” was conclusory in that it merely recited the “elements of a constitutional

³⁷ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009).

³⁸ Of course, I do not mean to suggest that only Muslims would have reason to visit Afghanistan. However, we do know that a number of persons who were released from detention at Guantanamo Bay asserted that they had been captured by Northern Alliance fighters in Afghanistan or Pakistan, where they had gone either to perform relief work or to explore their Muslim heritage further. *See, e.g.*, Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061, 1073 (2005) (citing Petitioner’s Brief on the Merits at 3, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334)).

³⁹ 426 U.S. 229, 239 (1976).

⁴⁰ *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 278–79 (1979). Disparate impact does exist as a theory of liability in employment discrimination cases, but that is because Congress created the cause of action by statute in the Civil Rights Act.

⁴¹ *Iqbal*, 129 S. Ct. at 1951.

[] claim” in a formulaic manner.⁴²

It would be conclusory if Iqbal had alleged simply that “Ashcroft and Mueller discriminated against me because I am Muslim and Pakistani.” But Iqbal’s allegations were more specific than that. As Justice Souter ably demonstrated in his dissent, the majority plainly overlooked the fact that Iqbal did not plead some vague, unspecified discriminatory policy; the complaint alleged the specific policy, and thus gave fair notice to the defendants as to what conduct they were charged with.⁴³

Perhaps what the Court really meant was that it was reasonable for Ashcroft and Mueller to have acted as they did. After all, some polls taken shortly after the September 11th attacks revealed that a majority of Americans supported the use of racial profiling of Arabs and Arab-Americans.⁴⁴ The Court’s reference to the racial and religious composition of the September 11th hijackers might therefore be understood as triggering the “9/11 changed everything” meme that was commonly asserted in the days after the terrorist attacks.⁴⁵

Still, the Court’s insistence that “the purpose of the policy was to target neither Arabs nor Muslims” remains puzzling.⁴⁶ It may be true that the ultimate goal was to detain aliens with potential connections to the September 11th terrorists.⁴⁷ If the allegations were that the government had instead focused on specific conduct that happened to be correlated with being Arab and/or Muslim, then the complaint would fail to state an equal protection violation.⁴⁸ However, Iqbal’s allegation—and it bears repeating that his allegations were to be accepted as true for the purposes of the motion to dismiss—was that the government singled out Arabs and Muslims for investigation *because of* their race and religion.⁴⁹

⁴² *Id.* (internal quotation marks omitted).

⁴³ *Id.* at 1961 (Souter, J., dissenting).

⁴⁴ *See, e.g.*, Samuel R. Gross & Debra Livingston, Essay, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413–14 (2002); Jarvis C. Jones, *Second-Class Americans?*, BENCH & BAR OF MINN., Nov. 2001, at 5 (“According to recent polls, 66 percent of whites and 71 percent of African-Americans support the ethnic profiling of individuals who look to be Arab.”). One striking aspect of these polling results is that the one racial group arguably most subject to racial profiling prior to September 11th, 2001—African-Americans—also supported profiling of Arabs and Arab-Americans by a majority. *Id.*

⁴⁵ GEORGE TENET, *AT THE CENTER OF THE STORM* 305 (2007) (“After 9/11, everything changed.”); Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617, 649–52 (2009) (critiquing the Bush Administration’s position that “everything changed”); David D. Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay, 2007–2008* CATO SUP. CT. REV. 47, 50–51 (2008) (also criticizing the Bush Administration’s position).

⁴⁶ *Iqbal*, 129 S. Ct. at 1951.

⁴⁷ *Id.*

⁴⁸ *See* *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

⁴⁹ *See, e.g.*, *Patterson v. Coughlin*, 905 F.2d 564, 566 (2d Cir. 1990) (noting the purported reason for prisoner’s discipline, though court found hearing to have

The Court recognized as much when it conceded that Iqbal's allegations are "consistent with" discriminatory conduct.⁵⁰ However, the Court then stated that "given more likely explanations, [the allegations] do not plausibly establish this purpose."⁵¹ By itself, the Court's distinction between allegations that are "consistent with," compared to those that "plausibly establish," invidious conduct is not unreasonable. Suppose, for example, that a *Bivens* plaintiff had pleaded just the following two allegations:

1. *I was subjected to abusive treatment in the ADMAX SHU.*
2. *I am Muslim.*

Combined, these two allegations would certainly be "consistent with" his subjection to the abusive treatment because he was Muslim. But "consistent with" in this context would mean simply that the first and second allegation do not conflict with each other. The universe of possible explanations for why he was selected for the abusive treatment in the ADMAX SHU would include his being Muslim and/or Pakistani, though of course, it could include countless other reasons. Perhaps he was being punished for making obnoxious remarks about the warden of the facility, or perhaps he had assaulted a prison guard.⁵² Here, it would be understandable for a court to conclude that the plaintiff's complaint was merely "consistent with" intentional religious or racial discrimination, but not "plausibly" so.

Granted, the plaintiff could well reason that if he were allowed to use the discovery process, he might uncover evidence supporting the inference that he had been subjected to the abusive treatment *because* of his being Muslim. But the problem here is one of pleading, not of evidentiary support. Because the plaintiff has not pleaded impermissible discrimination, it seems reasonable for the court to test the plaintiff's desired inference against other innocuous explanations.

Of course, Iqbal's complaint, reduced to its essence, actually contained a third allegation:

3. *I was selected for the abusive treatment (see first allegation) because I am Muslim and/or Pakistani.*

Thus, Iqbal was not asking the Court to *infer* that he had been discriminated against due to his religion; he informed the Court that he intended to try to prove as much, provided he could get past the motion to dismiss (and qualified immunity defense).

The difference between Iqbal and my hypothetical plaintiff lies in Iqbal's willingness to plead the third allegation. If it is so easy for a plaintiff to avoid the "consistent with"/"plausible" divide that I have drawn here, why wouldn't every plaintiff mimic Iqbal? Theoretically,

violated due process).

⁵⁰ *Iqbal*, 129 S. Ct. at 1951.

⁵¹ *Id.*

⁵² *See, e.g., Rimmer-Bey v. Brown*, 62 F.3d 789, 790 (6th Cir. 1995).

sanctions could be a reason. Rule 11, of course, requires that every pleading be signed by an attorney under threat of sanctions for filing in bad faith.⁵³ Critics have argued that, notwithstanding the 1993 amendments creating a “safe harbor” for filings, the threat of sanctions chills plaintiffs’ lawyers, especially in civil rights cases.⁵⁴

If Iqbal truly had no basis for believing that he had been put into the ADMAX SHU because he was a Muslim, then his complaint would likely have violated Rule 11. On the other hand, Rule 11 cannot require that he have on hand sufficient evidence to prove his allegations before filing his complaint, for plaintiffs would rarely meet such a standard without access to the tools of discovery. Because the plaintiff is unlikely to be able to use deductive reasoning at this stage to prove his complaint, he or she is apt to rely on inductive reasoning as the starting point. Iqbal (and his co-plaintiff, Elmaghraby) might well have looked around and noticed a large number of other Pakistanis in ADMAX SHU.⁵⁵

B. *Government Conspiracies Everywhere*

Although the Court did not explicitly so state, it appears that the majority simply could not accept that Attorney General Ashcroft and FBI Director Mueller would have engaged in a conspiracy to discriminate against Arabs and Muslims by intentionally subjecting them to harsh treatment in the ADMAX SHU for no legitimate reason. This is what the Court found implausible about Iqbal’s complaint. Yet, the use of the word “implausible” in this context is reminiscent of the scene in the classic fantasy movie *The Princess Bride*, where one character keeps misusing “inconceivable,” only to have another character say, “You keep using that word. I do not think it means what you think it means.”⁵⁶

Implausible is generally understood to mean “difficult to believe.”⁵⁷ The Court, therefore, was asserting that it was unbelievable that Attorney General Ashcroft and FBI Director Mueller would have agreed to subject Muslims and others to harsh conditions due simply to their race, religion, or national origin, and without regard for any legitimate penal purpose. This is quite a different position than to conclude that Ashcroft and Mueller would not have acted as they did *without a good justification*.

The pages of the Federal Reporter are replete with examples of what could be considered government conspiracies to act in violation of the

⁵³ FED. R. CIV. P. 11.

⁵⁴ Danielle Kie Hart, *And the Chill Goes On—Federal Civil Rights Plaintiffs Beware: Rule 11 Vis-à-vis 28 U.S.C. § 1927 and the Court’s Inherent Power*, 37 LOY. L.A. L. REV. 645, 669–77 (2004).

⁵⁵ See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES (2003), available at <http://www.justice.gov/oig/special/0306/full.pdf> (noting that thirty-three percent of September 11th immigration detainees came from Pakistan, more than double that of the next most common country of origin).

⁵⁶ THE PRINCESS BRIDE (20th Century Fox 1987).

⁵⁷ AMERICAN HERITAGE COLLEGE DICTIONARY 682 (3d ed. 1997).

Constitution. Minority drivers in numerous jurisdictions have alleged racial profiling on the part of highway patrol officers. In California, a Latino lawyer's lawsuit against the California Highway Patrol (CHP) survived a Rule 12(b)(6) motion to dismiss,⁵⁸ and was settled three years later for \$875,000, an extension of anti-profiling measures that the department had already put into place, and an agreement to collect information about the racial demographics of motorists stopped by the CHP.⁵⁹ Other states have seen similar profiling lawsuits, with some also surviving Rule 12(b)(6) motions.⁶⁰ Another notable example is *Farag v. United States*, in which a district judge denied a motion to dismiss an airline passenger's lawsuit alleging that he was detained following a commercial flight based in part on his being of Arab descent.⁶¹

These cases, of course, pre-date *Iqbal* and therefore, one could argue that they simply applied the wrong legal standard to test whether complaints should survive motions to dismiss. Nevertheless, these cases also demonstrate that some federal judges have not found it implausible that government actors might make law enforcement decisions based in part on the race or ethnicity of their targets.

One could further argue that there is a substantial difference between mere detention of a suspect for further investigation, as was the goal in the cases above, and deliberately abusive treatment of a detainee.

But one must keep in mind that *Iqbal's* detention in the ADMAX SHU occurred after the September 11th attacks when, as we have seen, the government believed that "everything changed."⁶² The devastating nature of the September 11th attacks, with nearly three thousand people killed and thousands others injured, combined with the fear that further al Qaeda attacks might be forthcoming, led the government to take what are now generally viewed as extreme steps to protect the nation. The Office of Legal Counsel, for example, issued a legal opinion in 2002 that concluded that U.S. interrogators could use coercive tactics on suspected al Qaeda detainees so long as they did not inflict pain equivalent to that caused by organ failure.⁶³ Two top al Qaeda leaders, Khalid Sheikh Mohammed (KSM) and Abu Zubaydah were subjected to simulated drowning—a technique known as waterboarding—a combined total of

⁵⁸ See *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131 (N.D. Cal. 2000).

⁵⁹ Maura Dolan & John M. Glionna, *CHP Settles Lawsuit Over Claims of Racial Profiling*, L.A. TIMES, Feb. 28, 2003, at A1.

⁶⁰ See *White v. Williams*, 179 F. Supp. 2d 405 (D.N.J. 2002); *Melendres v. Maricopa County*, No. CV-07-2513-PHX-GMS, 2009 WL 2707241 (D. Ariz. Aug. 24, 2009).

⁶¹ 587 F. Supp. 2d 436 (E.D.N.Y. 2008).

⁶² See TENET, *supra* note 45, at 305.

⁶³ See Memorandum from the U.S. Dep't of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf>. This memo was subsequently withdrawn by Deputy Assistant Attorney General Jack Goldsmith. See JACK GOLDSMITH, *THE TERROR PRESIDENCY* 157–59 (2007).

266 times.⁶⁴ The use of this harsh technique was justified on the ground that it was necessary to extract all useful information from the two men, especially KSM, who was the mastermind behind the September 11th attacks.

In fact, it is not only in terrorism cases where the government might be tempted to mistreat persons in custody for seemingly important reasons. In *Cooper v. Dupnik*, for example, a task force of state and local law enforcement agents was trying to find a suspect believed to be responsible for a two-year crime wave of rapes and robberies in Tucson, Arizona.⁶⁵ They devised a plan for interrogating whichever suspect they would eventually catch:

The core of their plan was to ignore the suspect's Constitutional right to remain silent as well as any request he might make to speak with an attorney in connection therewith, to hold the suspect incommunicado, and to pressure and interrogate him until he confessed. Although the officers knew any confession thus generated would not be admissible in evidence in a prosecutor's case in chief, they hoped it would be admissible for purposes of impeachment if the suspect ever went to trial. They expected that the confession would prevent the suspect from testifying he was innocent, and that it would hinder any possible insanity defense. . . . With the suspect isolated from the outside world and cut off from his attorney, the plan called for [the interrogator] to overcome the suspect's resistance and extract a confession.⁶⁶

As every lover of television police procedurals no doubt knows, a person taken into custody by the police has *Miranda* rights, including the right to remain silent and the right to an attorney.⁶⁷ If the police fail to inform a person in custody of his or her *Miranda* rights or if the police continue to question that person after he or she invokes the right to remain silent or the right to counsel, then no statements obtained from the suspect can be used in the case in chief against him or her. However, if the police inadvertently forgot to Mirandize a suspect, any statements obtained from that person *could* be used for impeachment purposes in rebuttal.⁶⁸ That much of the law was settled in 1986, when the events in question in *Cooper* occurred. When Cooper was identified as the perpetrator (inaccurately, as it turned out), the police task force executed its interrogation plan. Cooper was subjected to a four-hour interrogation that the Ninth Circuit called "sophisticated psychological torture"; police interrogators mocked his requests for an attorney and continued to question him.⁶⁹

⁶⁴ See Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. TIMES, Apr. 20, 2009, at A1.

⁶⁵ 963 F.2d 1220, 1223 (9th Cir. 1992) (en banc).

⁶⁶ *Id.* at 1224–25.

⁶⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁶⁸ *Harris v. New York*, 401 U.S. 222, 224–25 (1971).

⁶⁹ *Cooper*, 963 F.2d at 1248.

What *Cooper* and the KSM and Abu Zubaydah examples have in common is essentially common agreement by a set of law enforcement officials that a particular situation is so serious that it warrants treating suspects in a way that would ordinarily be deemed unacceptable. Critically, though, the purpose behind the (mis)treatment is not sadism, but a desire to obtain useful information.⁷⁰

Therefore, to return to Iqbal's allegations and the Court's rejection of them as being implausible, it in fact is not implausible to think that the government might have decided in the dark days after September 11th, with a majority of Americans in support of racial profiling, that it was necessary to focus on Arabs and Muslims, and then, having captured some to stand trial, subject them to harsh treatment in the ADMAX SHU to soften them up for interrogation or other purposes.

C. *Judicial Vouching for Government Officials*

Application of *Iqbal's* implausibility standard to reject the allegations in the case, therefore, operates as a sort of judicial vouching for the government official defendants. As we have seen, government officials have concocted plans based on the race of the targeted persons, as well as plans to coerce, through physical mistreatment or psychological torment, information or confessions out of persons in custody. To say that it is implausible that Attorney General Ashcroft and FBI Director Mueller would have done so is therefore akin to saying something specific about those two individuals.

Yet, judicial commentary about litigants is prohibited by ABA Model Code of Judicial Conduct Rule 3.3 which states: "A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of the person in a legal proceeding, except when duly summoned."⁷¹ As the comment to this rule notes, a "judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another."⁷²

Of course, I do not mean to argue that the Court has literally *testified* on behalf of Attorney General Ashcroft and FBI Director Mueller, and I am certainly not accusing the Justices of judicial misconduct. However, the values served by Rule 3.3 would seem to have called for a different outcome on the plausibility test. The point of Rule 3.3 is not to have litigation unduly influenced by judges because of the virtue of their office, as opposed to their personal knowledge, when opining on the character of a litigant. The Court did not testify about Attorney General Ashcroft's and FBI Director Mueller's characters, but the reasoning of

⁷⁰ Whether those techniques are likely to be successful is an entirely different question, and one beyond the scope of this Article.

⁷¹ MODEL CODE OF JUDICIAL CONDUCT R. 3.3 (2007).

⁷² *Id.* at R. 3.3 cmt.

the opinion had an equivalent effect.

To the extent that the Court was seeking to reduce the burden on high ranking officials of having to respond to civil rights lawsuits such as *Iqbal*'s, the plausibility requirement seems an unwieldy tool. Rather than declare by judicial fiat that *Iqbal*'s allegations against Ashcroft and Mueller were implausible, the Court could have applied qualified immunity with a dose of "everything changed on 9/11" to hold that it was not clearly established under these circumstances that the government could not subject persons such as *Iqbal* to harsh treatment for counterterrorism purposes. To be sure, I am not arguing myself that this is in fact the most desirable legal holding; I just mean to suggest that the Court could have shielded Ashcroft and Mueller from burdensome litigation and discovery through other means with well-established judicial tools.⁷³

V. CONCLUSION

Iqbal's demand that plaintiff complaints meet a plausibility standard appears inconsistent with the general tenor of notice pleading, but even if that standard itself can be justified, its application to block *Iqbal*'s complaint cannot be. It may well be that *Iqbal* would have failed to *prove* that Attorney General Ashcroft and FBI Director Mueller concocted the plan to place him and others like him in the ADMAX SHU because of their race and religion, but that of course cannot be the standard for evaluating complaints under Rule 12(b)(6). And when we examine other civil rights lawsuits, we do see that on occasion, courts have rejected Rule 12(b)(6) challenges to complaints alleging racial profiling or conspiracy to subject suspects to coercive interrogation. Sometimes government actors do plan to test the limits of, if not outright violate, the Constitution. It is therefore not implausible that Ashcroft and Mueller might have done so.

⁷³ There is much litigation over the degree of specificity with which the clearly established right is described. For example, in *Cooper v. Dupnik*, which was discussed earlier, one could have described the relevant precedents (*Miranda* and *Harris*) as holding either that the police must cease interrogation once the suspect invokes the right to counsel, or that the prosecution cannot use in its case in chief any information obtained during post-counsel invocation interrogation. The majority chose the former, while the dissenters would have adopted the latter.