

## IQBAL AND BAD APPLES

by  
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*In addition to its important implications for federal civil procedure, the Supreme Court’s decision in Ashcroft v. Iqbal put the imprimatur of the Supreme Court on a troubling narrative of the excesses carried out by the Bush Administration in the name of fighting terrorism. In this “few-bad-apples narrative,” harsh treatment of detainees—especially in the immediate wake of the attacks of September 11th, but also years later in such places as Afghanistan, Iraq, the Guantanamo Bay detention center, and elsewhere—was the work of a small number of relatively low-ranking military and civilian officials who went beyond the limits of the law. The actions of these few bad apples, the narrative goes, were regrettable but not the result of official policy. Actions and statements by both the Bush and Obama Administrations promulgated the few-bad-apples narrative. Careful parsing of both the complaint and the Supreme Court opinion in Iqbal shows that in dismissing allegations that high-ranking officials in the Bush Justice Department ordered discriminatory abuse of detainees, the Court accepted that flawed narrative.*

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### I. INTRODUCTION

The Supreme Court’s ruling in *Ashcroft v. Iqbal*<sup>1</sup> has profound implications for at least two important areas of federal law. First, it makes clear that the Court’s 2007 ruling in *Bell Atlantic Corp. v. Twombly*<sup>2</sup>

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<sup>1</sup> 129 S. Ct. 1937 (2009).

<sup>2</sup> 127 S. Ct. 1955 (2007).

establishes rigorous pleading requirements for all federal civil lawsuits. *Twombly* and *Iqbal* require federal district judges to dismiss civil complaints that, after the discarding of “conclusory”<sup>3</sup> allegations, draw inferences that are not “plausible,” in light of the facts pled.<sup>4</sup> Unless overturned by Congress or the Rules Advisory Committee process, the *Twombly/Iqbal* pleading rule will play a potentially decisive role in every federal civil case.

Second, *Iqbal* called into question an entire basis for civil liability for unconstitutional discrimination. The Court rejected “supervisory liability” for a policy-making official on the basis of “mere knowledge of his subordinate’s discriminatory purpose,” absent intentional discrimination by the policy maker himself.<sup>5</sup> Yet, according to the dissent, prior precedent sometimes permitted supervisory liability on the basis of a supervisor’s “deliberate indifference” to the unconstitutional acts of a subordinate.<sup>6</sup> Although relevant to fewer cases than the holding regarding the pleading standard, *Iqbal*’s limitation on supervisory liability could be dispositive in a substantial number of cases.

Despite their recent vintage, the procedural rulings in *Twombly* and *Iqbal* have already been subject to considerable, and generally critical, scholarly scrutiny,<sup>7</sup> including other essays in this Symposium. Although I agree with many of those critiques, this Essay focuses on a different aspect of *Iqbal*: The fact that it puts the imprimatur of the Supreme Court on a particular narrative of the excesses carried out by the Bush Administration in the name of fighting terrorism. According to what I shall call the “few-bad-apples narrative,” harsh treatment of detainees—especially in the immediate wake of the attacks of September 11, 2001, but also years later in such places as Afghanistan, Iraq, the Guantanamo

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<sup>3</sup> *Iqbal*, 129 S. Ct. at 1949–50; *Twombly*, 127 S. Ct. at 1964–65.

<sup>4</sup> *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 127 S. Ct. at 1974.

<sup>5</sup> *Iqbal*, 129 S. Ct. at 1949.

<sup>6</sup> *Id.* at 1957 (Souter, J., dissenting). The dissent cites *Farmer v. Brennan*, 511 U.S. 825, 828 (1994), in support of the deliberate indifference standard. *Farmer* involved an Eighth Amendment claim, rather than an equal protection claim. Thus it does not clearly refute the majority’s tacit assertion that the deliberate indifference standard does not apply to equal protection claims. Under the majority view, a supervisor’s “deliberate indifference” is not the standard for attaching vicarious liability but the standard for gauging a substantive violation of the Eighth Amendment. Although prior cases did not rule out this view, the Court itself had previously referred to “deliberate indifference” as relevant to equal protection claims. See *Collins v. City of Harker Heights*, 503 U.S. 115, 119–20 (1992). The issue was at least open. See *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008) (avoiding the question whether deliberate indifference or purposeful discrimination is the standard for supervisory liability in civil rights suit); *Phillips v. County of Allegheny*, 515 F.3d 224, 244 (3d Cir. 2008) (taking note of a civil complaint raising equal protection claim based, *inter alia*, on deliberate indifference, without rejecting liability on that basis).

<sup>7</sup> For a particularly astute critique, see Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming Mar. 2010), available at <http://ssrn.com/abstract=1448796>.

Bay detention center, and elsewhere—was the work of a relatively small number of relatively low-ranking military and civilian officials who went beyond the limits of the law. The actions of these few bad apples, the narrative goes, were regrettable but not the result of official policy.

Part II of this Essay discusses the abuse of prisoners in the Abu Ghraib prison in Iraq and the Bush Justice Department's authorization of interrogation techniques for high-value detainees that were tantamount to torture. As I explain with respect to interrogation, in an important respect the actions of the Obama Administration have further contributed to, rather than rejected, the few-bad-apples narrative.

Part III parses the Supreme Court's treatment of the factual allegations in the *Iqbal* complaint. The Court finds implausible the assertion that the Attorney General and the Director of the Federal Bureau of Investigation (FBI) respectively designed and implemented a policy of confining Arab and Muslim men in harsh conditions on account of their race, religion, or national origin. That very finding of implausibility, I argue, continues the few-bad-apples narrative.

Part IV concludes with some observations about the likely impact of a Supreme Court ruling that tacitly blesses a government whitewash of official misconduct.

## II. THE FEW-BAD-APPLES NARRATIVE

By now, the Bush Administration's harsh treatment of some detainees has been well documented. Formerly secret memoranda that have been made public and interviews of inside actors show how high-ranking government officials adopted, as official policy, torture and other harsh techniques of interrogation that violated international and domestic law.<sup>8</sup> High-ranking government attorneys in turn wrote memoranda providing the pretext of legal justification for these policies.<sup>9</sup> Although apparently devised originally as a means for obtaining actionable intelligence about imminent terrorist strikes, the abuses spread.

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<sup>8</sup> Two of the best accounts for general audiences are JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008); and PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008). For an excellent insider account, see JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

<sup>9</sup> See, e.g., Memorandum from Jay S. Bybee, Assistant Att'y Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Bybee Memo] (regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A).

*A. Abu Ghraib*

Consider the rituals of degradation practiced at the Abu Ghraib prison in Iraq. As summarized by General Taguba's report, these included placing detainees in sexually humiliating positions as well as direct physical harm, such as "[p]unching, slapping, and kicking detainees; jumping on their naked feet."<sup>10</sup> Why did Americans inflict such treatment on Iraqi prisoners? We can identify at least three causes.

First, at least some of the personnel selected for duty at Abu Ghraib had experience in the United States as prison guards.<sup>11</sup> Humiliation and abuse of prisoners—whether by guards or by other prisoners while guards turn a blind eye, and whether as a means of exercising control or simply done sadistically—are widespread in American prisons.<sup>12</sup> With little or no training in how to run an orderly, non-abusive military prison, some American service members simply adopted and adapted their familiar techniques for dealing with U.S. prisoners.<sup>13</sup>

Second, almost anyone placed in the role of prison guard may begin to exhibit the abusive behaviors that were seen in Abu Ghraib. Experimental studies and analyses of real-world events confirm that otherwise "good" people will often behave badly when given the sort of power that prison guards are given.<sup>14</sup> The most infamous of the experimental studies, conducted by Philip Zimbardo in 1971 using Stanford students play-acting as guards and prisoners, yielded abuses that, when photographed, were "practically interchangeable with those of the guards and prisoners in . . . Abu Ghraib."<sup>15</sup>

Third, abusive interrogation techniques that were approved by the Bush Administration for high-value terrorism suspects migrated to (and mutated at) Abu Ghraib.<sup>16</sup> Even if never formally authorized for Abu

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<sup>10</sup> ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (Mar. 2004), reprinted in THE TORTURE PAPERS, *supra* note 9 (report by Antonio M. Taguba, Major Gen., to Commander of Coal. Forces Land Component Command).

<sup>11</sup> See Philip Gourevitch & Errol Morris, *Annals of War: Exposure*, THE NEW YORKER, Mar. 24, 2008, at 44, 49 (noting the domestic corrections experience of two Abu Ghraib guards); Edward Wong, *Top Commanders Face Questioning on Prison Abuse*, N.Y. TIMES, June 22, 2004, at A1 (noting that Army Specialist Charles Graner, charged as the "ringleader" of abusive guards in Abu Ghraib, was a former corrections officer in the United States).

<sup>12</sup> See John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L.J. 1001, 1022–28 (2009).

<sup>13</sup> Cf. DARIUS REJALI, TORTURE AND DEMOCRACY 315 (2007) (noting that "most techniques that appeared at Abu Ghraib had appeared first in American prisons and plantations, British ships and bases, and French prisons and penal camps in the colonies").

<sup>14</sup> See generally PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL (2007).

<sup>15</sup> *Id.* at 20.

<sup>16</sup> See FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS (Aug. 2004), reprinted in THE TORTURE PAPERS, *supra* note 9 [hereinafter THE SCHLESINGER REPORT] (commonly named after the chairman of the independent panel the report describes "Interrogation techniques intended only for Guantanamo

Ghraib, some of the prisoner abuses that occurred in that prison were nevertheless formally authorized by high-ranking civilian and military officials.<sup>17</sup>

It is thus fair to say that what happened at Abu Ghraib resulted from a combination of on-the-ground decisions by low-ranking military members (and CIA and civilian contractors)<sup>18</sup> and official decisions by high-ranking government officials. Reading the record as a whole, it is hard to disagree with the conclusion of a Human Rights Watch report: the “pattern of abuse [at Abu Ghraib] did not result from the acts of individual soldiers who broke the rules. It resulted from decisions made by the Bush administration to bend, ignore, or cast rules aside.”<sup>19</sup> Yet despite extensive evidence in the public record belying the claim that the Abu Ghraib abuses were the work of a few sadistic bad apples, no one above the rank of sergeant was ever charged with any offense.<sup>20</sup>

*B. The Obama Administration’s Complicity in the Few-Bad-Apples Narrative*

The Bush Administration worked assiduously to promote the few-bad-apples narrative. Both before and after the torture memos found their way into the public record, President Bush insisted that his Administration did not and would not authorize torture.<sup>21</sup> That insistence was either an outright lie or at best relied on the very questionable definition of “torture” that appeared in the memoranda his Justice Department prepared to authorize waterboarding and other techniques that had previously been deemed “torture.”<sup>22</sup> By publicly declaring that

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came to be used in Afghanistan and Iraq”). See also Philip Gourevitch, *Interrogating Torture*, THE NEW YORKER, May 11, 2009, at 33 (describing how such practices as “walling” drifted to Abu Ghraib).

<sup>17</sup> See Gourevitch, *supra* note 16, at 33.

<sup>18</sup> See THE SCHLESINGER REPORT, *supra* note 16, at 942 (discussing the role of contractors and CIA officers in interrogations at Abu Ghraib).

<sup>19</sup> HUMAN RIGHTS WATCH, THE ROAD TO ABU GHRAIB 1 (2004), available at <http://www.hrw.org/reports/2004/usa0604/usa0604.pdf>.

<sup>20</sup> Two officers were subject to non-judicial discipline: Brigadier General Janis Karpinski and Colonel Thomas Pappas. See David Wood, *Abu Ghraib Commander is Cleared of Conviction*, BALTIMORE SUN, Jan. 11, 2008, at A7.

<sup>21</sup> See, e.g., Peter Slevin, *U.S. Pledges to Avoid Torture: Pledge on Terror Suspects Comes Amid Probes of Two Deaths*, WASH. POST, JUN. 27, 2003, at A11 (“The United States is committed to the worldwide elimination of torture and we are leading this fight by example.” (quoting President Bush)); Melissa McNamara, *Bush: ‘We Don’t Torture’: President Tells Katie Couric That Connecting Iraq to War On Terror Is Hardest Part Of His Job*, CBS EVENING NEWS, Sept. 6, 2006, <http://www.cbsnews.com/stories/2006/09/06/eveningnews/main1979106.shtml> (“I’ve said to the people that we don’t torture, and we don’t.”).

<sup>22</sup> See, e.g., Bybee Memo, *supra* note 9, at 183 (asserting that, in order for interrogation methods to constitute torture, “[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. If that pain or suffering is psychological . . . these acts must cause long-term mental harm.”).

official policy condemned torture, Bush tacitly but unmistakably signaled that abuses of prisoners were the result of isolated, rogue actors.

Even as he has initiated steps to change interrogation practices prospectively,<sup>23</sup> President Obama has, through his actions, accepted the core of the few-bad-apples narrative.<sup>24</sup> In April 2009, the Obama Justice Department released four previously confidential memoranda prepared during the Bush Administration.<sup>25</sup> These memoranda show that waterboarding, slamming prisoners into walls, slapping them, and confining a prisoner in a box with insects were matters of carefully considered policy. In a statement accompanying the release of the memoranda, Attorney General Holder renounced their legal reasoning but also made clear that the Justice Department would not prosecute any intelligence officer who had conducted interrogations in reliance on the prior assurances of the techniques' legality.<sup>26</sup> Nor has the Obama Administration shown any appetite for prosecuting any of the high-ranking Bush Administration officials who conceived or provided the pretext of legal justification for the policy of prisoner abuse.

However, Attorney General Holder did appoint a prosecutor to investigate and possibly prosecute perpetrators of detainee abuse that was not specifically authorized.<sup>27</sup> The rogues either used approved methods, such as waterboarding, beyond their authorization or improvised additional torments, such as mock executions, blowing smoke in prisoners' faces, threatening prisoners' family members, and other forms of abuse.<sup>28</sup> While illegal under U.S. and international law, these unauthorized abuses are not clearly worse than some of the techniques that the Bush Administration did authorize. Blowing smoke in a detainee's face, while undoubtedly humiliating, uncomfortable, and unhealthy, does seem less of an offense than repeatedly drowning a prisoner nearly to the point of asphyxiation.

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<sup>23</sup> See Press Release, U.S. Dep't of Justice, Special Task Force on Interrogations and Transfer Policies Issues its Recommendations to the President (Aug. 24, 2009), <http://www.usdoj.gov/opa/pr/2009/August/09-ag-835.html> (proposing that the Army Field Manual govern interrogations).

<sup>24</sup> Pun perceived but not intended.

<sup>25</sup> The memoranda are collected in *Justice Department Memos on Interrogation Techniques*, N.Y. TIMES, Apr. 16, 2009, <http://graphics8.nytimes.com/packages/images/nytint/docs/justice-department-memos-on-interrogation-techniques/original.pdf>.

<sup>26</sup> See Press Release, U.S. Dep't of Justice, Department of Justice Releases Four Office of Legal Counsel Opinions (Apr. 16, 2009), <http://www.usdoj.gov/opa/pr/2009/April/09-ag-356.html>.

<sup>27</sup> See Mark Mazzetti & Scott Shane, *Investigation Is Ordered Into C.I.A. Abuse Charges*, N.Y. TIMES, Aug. 25, 2009, at A1.

<sup>28</sup> A redacted version of the 2004 report on which Attorney General Holder relied in deciding to go forward with the investigation was released in August 2009 and made available in *C.I.A. Reports on Interrogation Methods*, N.Y. TIMES, Aug. 24, 2009, <http://graphics8.nytimes.com/packages/images/nytint/docs/c-i-a-reports-on-interrogation-methods/original.pdf>. See OFFICE OF THE INSPECTOR GEN., CIA, SPECIAL REVIEW: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (2004).

What explains the decision to prosecute the rogue interrogators but not the policy designers and justifiers? Partly, the answer may be diffusion of responsibility. President Obama assigned to Attorney General Holder the task of determining whether to investigate low-ranking officials, applying the Justice Department's ordinary standards regarding the exercise of prosecutorial discretion. In principle, the investigation that the Attorney General has unleashed could lead to indictments of former high-ranking officials in the Bush Administration, perhaps even including the former Vice President and President. In fact, however, it appears that President Obama made a political decision that prosecutions should not be pursued for the high-ranking officials, reasoning that, with respect to what would inevitably be seen as a partisan investigation, it would be better for the country to engage in "reflection, not retribution," and thus to "move forward."<sup>29</sup>

Yet what explains President Obama's simultaneous decision to delegate to the Attorney General the decision to make an apolitical judgment about the prosecution of the low-ranking officials? One could take the view that all of the nation's legal obligations are merely presumptive obligations, defeasible by a sufficiently compelling justification. If so, one would only want the decision to violate a legal obligation to be made at the very highest level, by policy makers who have access to a wide range of information and at least a bit of time to think through the consequences of their decisions. Front-line officers would then be permitted to carry out the instructions of such policy makers—even if those instructions appear to authorize illegal activity (such as waterboarding)—but would otherwise be held to obey the letter of the law.

The chief difficulty with the foregoing rationale for the decision to subject little fish but not big fish to the possibility of prosecution is that it would entail that the high-ranking Bush Administration officials who designed and justified the detainee interrogation policy were actually acting *within their authority* when they concluded that waterboarding and other torments were legally permissible. However, the Obama Administration has not said that, nor does it apparently believe it. Indeed, President Obama has not offered *any* non-political rationale for giving Attorney General Holder permission to bring prosecutions against little fish but not big fish. That silence by the Obama Administration has

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<sup>29</sup> Statement on the Release of Department of Justice Office of Legal Counsel Memos Concerning Interrogation Techniques, DAILY COMP. PRES. DOC. 200900263 (Apr. 16, 2009), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-200900263/pdf/DCPD-200900263.pdf>. Speaking with George Stephanopoulos of ABC News just after the release of President Obama's statement, White House Chief of Staff Rahm Emanuel made clear that it reflected a decision not to prosecute the Bush Administration officials who designed the policy. *See* George Stephanopoulos, *Obama Administration: No Prosecution of Officials for Bush-Era Torture Policy*, ABC NEWS, Apr. 19, 2009, <http://blogs.abcnews.com/george/2009/04/obama-adminis-1.html>.

the foreseeable effect of reinforcing the few-bad-apples narrative of what went wrong under President Bush.

Perhaps it is unfair to criticize a President for taking into account political considerations in deciding whom to prosecute. Presidents are, after all, political actors. As Justice Scalia explained in his dissent in *Morrison v. Olson*—a lone position that has grown in authority since it was essentially vindicated by Independent Counsel Kenneth Starr’s runaway investigation of President Clinton—the decision whether to pursue a prosecution is inevitably and appropriately political (though not in the partisan sense).<sup>30</sup> Courts, by contrast, are understood as following the law in a narrower sense. It is thus especially unfortunate that the Supreme Court in the *Iqbal* case added its own imprimatur to the few-bad-apples narrative, as the next Part explains.

### III. THE SUPREME COURT’S ACCEPTANCE OF THE FEW-BAD-APPLES NARRATIVE IN *IQBAL*

Javaid Iqbal is a Pakistani man who alleged in a federal lawsuit that while he was in custody on immigration charges following the aftermath of the September 11th attacks, his jailors “kicked him in the stomach, punched him in the face, and dragged him across” his cell.<sup>31</sup> He further alleged that he was gratuitously strip-searched; and denied the opportunity to pray—and that all of this was done to him pursuant to a policy of discrimination on the basis of race, religion, and national origin.<sup>32</sup> The Supreme Court’s opinion finding the complaint insufficiently plausible to satisfy the pleading standard of Federal Rule of Civil Procedure 8(a) closely follows the few-bad-apples narrative.<sup>33</sup>

The Court begins by acknowledging that Iqbal’s “account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors.”<sup>34</sup> Which actors, exactly? The Court notes that potentially liable defendants include “the correctional officers who had day-to-day contact with” Iqbal and the wardens of the facility where he was held, but not former Attorney General Ashcroft or former FBI Director Mueller.<sup>35</sup> Then, after explaining why in the majority’s view the complaint was insufficient with respect to Ashcroft and Mueller, it once again states that the opinion does not dispose of the claims against low-

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<sup>30</sup> 487 U.S. 654, 707–08 (1988) (Scalia, J., dissenting) (“Almost all investigative and prosecutorial decisions—including the ultimate decision whether, after a technical violation of the law has been found, prosecution is warranted—involve the balancing of innumerable legal and practical considerations. Indeed, even political considerations (in the nonpartisan sense) must be considered.”).

<sup>31</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1944 (2009).

<sup>32</sup> *Id.*

<sup>33</sup> *See id.* at 1953–54.

<sup>34</sup> *Id.* at 1942.

<sup>35</sup> *Id.* at 1943–45.

ranking officials. Those allegations, the Court says, detail “serious official misconduct.”<sup>36</sup>

That, in a nutshell, is the few-bad-apples narrative. The Justices, no less than the Bush and Obama Administrations, are content to imagine that prisoner abuses—in this case occurring in a federal maximum security prison in Brooklyn rather than at Abu Ghraib, Guantanamo Bay, or a CIA black site—were the work of low-level rogue actors, not high-ranking Bush Administration officials.

To be sure, as a formal matter, the *Iqbal* opinion addresses the sufficiency of pleadings rather than ultimate responsibility. However, careful parsing of the complaint and of the opinion reveals that the latter rests on the few-bad-apples narrative.

The allegation that the Court finds implausible—and thus that warrants dismissal of the complaint against Ashcroft and Mueller under the *Twombly/Iqbal* pleading standard—is the claim that the defendants purposefully designated Arab and Muslim detainees as “of high interest,” and thus subject to the harsh conditions of confinement they encountered, “because of their race, religion, or national origin.”<sup>37</sup> Justice Kennedy says for the Court that “given more likely explanations,” these allegations “do not plausibly establish this purpose.”<sup>38</sup>

What are the more likely explanations? The Court notes that all of the September 11th hijackers were Arab Muslims, and therefore, it is not surprising that the most promising leads would disproportionately point to Arabs and Muslims.<sup>39</sup> In other words, focusing on the contacts of the known hijackers and working outward from there, the investigation ended up scrutinizing many more Arabs and Muslims than one would find in a random cross-section of the population. However, the Court says, it is not plausible to infer that Ashcroft and Mueller respectively devised and implemented a racial or religious profile for designating high-interest suspects.<sup>40</sup> It is so much more likely that the disparate impact on Arabs and Muslims was unintended that the allegation of a purposeful policy of discrimination is not even plausible.<sup>41</sup>

Civil proceduralists are understandably exercised about the Court’s use of a plausibility standard in the first place. But even given that standard, the Court’s further conclusion that the allegations against Ashcroft and Mueller are implausible is still troubling.

*Iqbal*’s complaint listed twenty-four claims against over thirty named defendants and an additional nineteen “John Doe” defendants, with various defendants named in some but not all claims.<sup>42</sup> The claims fell

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<sup>36</sup> *Id.* at 1952.

<sup>37</sup> *Id.* at 1951.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *See id.*

<sup>42</sup> *See* Second Amended Complaint and Jury Demand at 34–56, *Elmaghraby v. Ashcroft*, No. 04 CV 1809 (JG) (SMG) (E.D.N.Y. Oct. 20, 2005) (on file with *Lewis &*

broadly into two categories: those seeking recovery because of the nature of the harm inflicted on Iqbal and his co-plaintiff, Ehad Elmaghraby; and those seeking recovery because of harm done on account of race, national origin, and religion. Ashcroft and Mueller were named in only two of the claims that alleged a harm unrelated to discrimination: the second claim, which alleged a due process violation in assigning the plaintiffs to the harsh conditions of the maximum security prison in which they were held; and the twenty-first claim, which alleged cruel, inhuman, or degrading treatment in violation of customary international law.<sup>43</sup> They were named as defendants in five claims alleging various forms of unlawful discrimination.<sup>44</sup>

Putting aside the two claims not based on allegations of discrimination, which were not within the scope of the Supreme Court's grant of certiorari, is there a basis in the complaint for distinguishing between the claims against Ashcroft and Mueller, on the one hand, and the lower-ranking officials, on the other? Superficial analysis suggests that the answer is yes.

The factual allegations of the complaint repeatedly describe incidents during which, in the course of mistreating the plaintiffs, one or more prison officials disparaged them for being Muslim.<sup>45</sup> These episodes, it might be thought, render plausible the conclusion that the particular officials who manifested religious prejudice against the plaintiffs were in fact engaged in unlawful discrimination. By contrast, the plaintiffs alleged no direct evidence that either Ashcroft or Mueller was prejudiced against Muslims or Arabs.

Yet that is at best a superficial explanation because, as the Supreme Court's equal protection cases make clear, the gravamen of a prima facie complaint of unlawful discrimination is not hatred or prejudice; it is simply racial or religious classification.<sup>46</sup> Indeed, the Court seems to recognize that an allegation of purposeful racial or religious classification, even absent racial or religious animus, would, if proven, be sufficient to subject Ashcroft and Mueller to liability.<sup>47</sup> The Court does not say that Ashcroft and Mueller had shown no animus towards Arabs and Muslims. The Court simply denies that Ashcroft and Mueller were taking account of the plaintiffs' race, national origin, or religion at all.<sup>48</sup>

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*Clark Law Review*). Using a nomenclature generally disfavored in federal court under Federal Rule of Civil Procedure 8(a), the complaint styled each claim a "cause of action." *Id.*

<sup>43</sup> *Id.* at 35–36, 52–53.

<sup>44</sup> *See id.* at 42–44, 46, 48 (claims 11–13, 16, and 17).

<sup>45</sup> *See id.* at 16–18, 21 (paragraphs 87, 96, 113, and 120).

<sup>46</sup> *See, e.g.,* *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2751 (2007) (“[W]hen the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”).

<sup>47</sup> *See* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009).

<sup>48</sup> *Id.*

Yet the allegation that the detainees sent to the abusive maximum security prison unit were disproportionately Arab and Muslim, combined with the allegations of actual incidents of guards' express prejudice alleged in the complaint, would seem to make out a more-than-plausible prima facie case that the underlying policy designed and implemented by Ashcroft and Mueller targeted Arab and Muslim men for confinement under the harsh conditions of the maximum security prison. Perhaps the Justices think that a potentially burdensome lawsuit against the Attorney General and FBI Director should require still more, or that the standard for overcoming qualified immunity in cases against such high-ranking officials should be elevated. The Court says nothing of the sort, however. Purporting to apply a standard applicable in all civil litigation, the majority simply asserts that the inference that Ashcroft and Mueller had relied on race, national origin, or religion in deciding whom to treat as high-value suspects is not plausible.<sup>49</sup>

Here then is the picture that the Supreme Court paints of the domestic situation shortly after September 11th: Arab and Muslim men are disproportionately sent to a maximum security prison unit, where they are subjected to harsh treatment by prison authorities who repeatedly state that, as Muslims and terrorists, they deserve no better, but it is simply not plausible to think that the pervasive and discriminatory abuse resulted from instructions by the Attorney General or the FBI Director. The Court reaches this conclusion even though there is clear evidence in the public record that a similar pattern of abusing Arab and Muslim prisoners occurred in Iraq, and that pattern *was* a result of official policy.<sup>50</sup> Yet the inference that the prison authorities in Brooklyn were acting on orders seems at least as plausible as the correct inference that the Abu Ghraib culprits were acting (more or less) on orders. The *Iqbal* complaint alleged abuses that occurred in the immediate wake of September 11th, when all government officials and especially the Attorney General and the FBI Director, were under enormous pressure to act to prevent what they understandably imagined would be another terrorist attack. It is hardly fantastical or even implausible to think that they would have ordered prison officials to "take the gloves off" when interrogating Arab and Muslim men.

The Court's failure to see in *Iqbal*'s complaint a plausible allegation of official policy is best explained by the Court's acceptance of the few-bad-apples narrative. Human beings, including Supreme Court Justices, are prone to view facts as conforming to pre-existing stock scripts or narratives.<sup>51</sup> In *Iqbal*, the majority simply took for granted that, as between the few-bad-apples account of the abuses *Iqbal* allegedly suffered and the account alleged in his complaint—in which the Attorney General and the FBI Director ordered the discriminatory treatment—the few-bad-apples

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<sup>49</sup> *Id.* at 1941, 1951.

<sup>50</sup> *See supra* Part II.A.

<sup>51</sup> *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 47 (2000).

narrative was the more plausible. The Justices thus blinded themselves to the possibility that the world did not conform to their narrative.<sup>52</sup>

#### IV. CONCLUSION

What harm was done by the Supreme Court's acceptance of the few-bad-apples narrative in *Iqbal*? In answering that question it is tempting to repair to Justice Jackson's famous warning in his dissenting opinion in *Korematsu v. United States*.<sup>53</sup> Accepting that courts may lack the practical authority to stop an unconstitutional military order in real time, he nonetheless objected to *post hoc* judicial rationalization of such an order, warning that the rationalizing "principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."<sup>54</sup> The Supreme Court's decision in *Iqbal* will be used by other litigants; indeed, its civil procedure holding has already done an enormous amount of work (or, depending on one's views about the costs and benefits of litigation, damage). But with respect to the few-bad-apples narrative, the worry is not so much that other courts, or the Supreme Court itself, will apply the *Iqbal* principle in future cases. Instead, we should worry that the Court's acceptance of the few-bad-apples narrative normalizes the underlying abuses.

Anybody who has followed the public debate over the Bush Administration detainee policy with even passing interest is by now aware that key actors, especially former Vice President Cheney, have not only failed to hide the fact that torments such as waterboarding were official policy; they have affirmatively boasted that such practices were justified in the interest of national security.<sup>55</sup> That taking "credit" may seem inconsistent with the simultaneous effort to insist that abuses were the result of low-ranking officers acting on their own. However, the two seemingly contradictory narratives in fact work in tandem: By nominally denying official responsibility for whatever the public deems worst about detainee treatment, those who promulgate the few-bad-apples narrative are tacitly saying that the authorized procedures were acceptable.

Consider an analogy to Holocaust denial. Some people who deny the historical fact of the Nazi murder of six million Jews do so in order to delegitimize the state of Israel as providing a haven for surviving Jews who were chased out of Europe. However, other Holocaust deniers (and some of the Holocaust deniers just described as well) are themselves neo-Nazis or Nazi sympathizers. One might think that a real contemporary Nazi would want to complete the Holocaust rather than deny it. But to

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<sup>52</sup> See *id.* at 113 ("Well-wrought narratives are so successful in making their answers to these questions seem like 'the real thing' that they virtually blind us to the subtle architecture of their construction.").

<sup>53</sup> 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

<sup>54</sup> *Id.*

<sup>55</sup> See Rachel L. Swarns, *Cheney Offers Sharp Defense of C.I.A. Tactics*, N.Y. TIMES, Aug. 31, 2009, at A1.

say so openly—or too openly—would discredit the neo-Nazi, and so instead of expressly advocating a renewed campaign of anti-Semitic genocide, contemporary neo-Nazis thinly veil their advocacy of Nazi policies as a claim about the historical record. European governments that ban Holocaust denial but do not ban most other, equally false, claims of historical fact correctly understand that Holocaust denial is a form of Holocaust advocacy. Likewise, to choose another analogy, juries that acquit defendants accused of acquaintance rape may sometimes be denying that the sex was non-consensual as a means of “really” making the nominally unacceptable normative judgment that the defendant’s conduct was not harmful.<sup>56</sup>

So too in *Iqbal*, the core problem with the Supreme Court’s acceptance of the few-bad-apples narrative may be its implicit normative content, rather than its factual content.<sup>57</sup> If we understand that the few-bad-apples narrative functions as a means of justification by denial, then we can recognize that the Supreme Court’s *Iqbal* opinion, in accepting that narrative, lent its imprimatur to the normalization of discriminatory detainee abuse. I would like to think that the Court did so unwittingly.<sup>58</sup> After all, a majority of the Justices did stand up to the Bush Administration’s most sweeping claims in justification of its detention policies.<sup>59</sup> But wittingly or not, the damage has been done.

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<sup>56</sup> See Sherry F. Colb, “Whodunit” Versus “What Was Done”: When to Admit Character Evidence in Criminal Cases, 79 N.C. L. REV. 939, 991 (2001) (describing the denial intrinsic to a jury decision to construct a stranger rape as no crime).

<sup>57</sup> Lest there be any doubt, I do not mean that the detainee policies of the Bush Administration or those who, whether intentionally or unintentionally have rationalized those policies, are remotely comparable in their loathsomeness to the Nazi Holocaust. I have invoked the phenomenon of Holocaust denial simply because it is the best example I know of denial serving as a cover for justification.

<sup>58</sup> “Perhaps,” as Stanley Cohen says about official denials more broadly, the former Administration officials who simultaneously take credit for and deny prisoner abuse, and all of us who accept this contradiction “have already entered a post-modern version of the Oedipal state: knowing and not-knowing at the same time, but also not caring.” STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 115–16 (2001).

<sup>59</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2758–59 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 508, 537 (2004); *Rasul v. Bush*, 542 U.S. 466, 469, 481–82 (2004).