

# The Lost Story of *Iqbal*

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*The Supreme Court's 2009 decision in Ashcroft v. Iqbal, which transformed pleading standards across civil litigation, is recognized as one of the most important cases of contemporary civil procedure. Despite the abundant attention the case has received on procedural grounds, the Court's representations of Javaid Iqbal, the plaintiff in the case, and the post-9/11 detentions out of which his claims arose have received far less critique than they deserve. The decision presented a particular narrative of the detentions that may affect readers' perceptions of the propriety of law enforcement practices, the scope of the harm they impose on minority communities, and their ultimate legality. This Article contests that narrative by recovering the lost story of Iqbal. It first retells the story of Iqbal himself—the Pakistani immigrant and cable repair technician whom the opinion presented only categorically as a foreigner, a terrorist suspect, and, at best, a victim of abuse. Drawing on the author's interview of Iqbal in Lahore, Pakistan, in 2016 and other available evidence, the Article reconstructs the facts of Iqbal's immigrant life, his arrest and detention in the wake of the September 11 attacks, and the enduring consequences of being labeled a suspected terrorist. Second, the Article recounts the role of race and religion in the post-9/11 immigrant detentions, challenging the Court's account of the detentions as supported by an "obvious" legitimate explanation. Juxtaposing the lost story of Iqbal and the detentions against the Court's decision ultimately sheds light on the ability of procedural decisions to propagate particular normative visions and understandings of substantive law without the full recognition of legal audiences. Nearly fifteen years after the September 11 attacks and the ensuing mass detentions, Iqbal demands attention to its substance—to the profound questions of race, law, and security that have become even more urgent in the face of new calls for the exclusion of individuals on racial and religious grounds.*

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## INTRODUCTION

Every first-year law student reads *Ashcroft v. Iqbal*,<sup>1</sup> the 2009 Supreme Court decision that transformed pleading standards across civil litigation. Now an established part of the civil procedure canon, the 5–4 decision significantly eased the standard for dismissing complaints for failure to state a claim, upending the liberal pleading regime that had marked federal litigation for half a century. The old standard judged the factual sufficiency of complaints only according to whether they gave defendants fair notice of the basis for the plaintiff’s case, rather than screening cases on their merits.<sup>2</sup> *Iqbal* required instead that a plaintiff set out facts to persuade a judge that her claim was “plausible.”<sup>3</sup> The new pleading standard attracted enormous attention from lawyers, legal scholars, and lower courts. Noting that *Iqbal* had been cited in 85,000 lower court decisions and that instituting plausibility pleading may have especially disadvantaged civil rights plaintiffs, *The New York Times* called the decision possibly “the most consequential ruling in Chief Justice John G. Roberts Jr.’s 10-year tenure.”<sup>4</sup> Indeed, by 2015, the decision had already become one of the five most cited Supreme Court decisions of all time.<sup>5</sup>

Although scholars have exhaustively critiqued the decision on procedural grounds<sup>6</sup> and attempted to measure its impact on civil litigation,<sup>7</sup> two aspects of the decision have received far less attention than they deserve. First is the experience of *Iqbal* himself: Javaid Iqbal, the Pakistani immigrant and cable repairman who challenged the conditions of his confinement in the wake of September 11, 2001. Described in the decision summarily as a foreigner, a suspect, and (at best) a victim of abuse,<sup>8</sup> *Iqbal*’s own story is at risk of

1. 556 U.S. 662 (2009).

2. See *Conley v. Gibson*, 355 U.S. 41, 45–48 (1957).

3. See *Iqbal*, 556 U.S. at 679.

4. Adam Liptak, *Supreme Court Ruling Altered Civil Suits, to Detriment of Individuals*, N.Y. TIMES (May 18, 2015), <http://www.nytimes.com/2015/05/19/us/9-11-ruling-by-supreme-court-has-transformed-civil-lawsuits.html> [<https://perma.cc/928Z-F93G>]. According to a search of the Westlaw database, more than 117,000 lower court decisions had cited *Iqbal* as of September 30, 2016.

5. See Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 389–93 (2016) (listing the 100 Supreme Court decisions most cited by federal courts and tribunals as of September 9, 2015).

6. For a small sample of critiques, see Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 867–83 (2010); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 36–53 (2010); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 168–69 (2010).

7. See, e.g., David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1207–08 (2013); Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 STAN. L. REV. 369, 369–70 (2016) [hereinafter Gelbach, *Material Facts*]; Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2142–70 (2015); Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2277–78 (2012); JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* (2011), [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf) [<https://perma.cc/RXD9-EGHD>].

8. See *Iqbal*, 556 U.S. at 666.

disappearing. Indeed, in doctrinal discussions today, even *Iqbal*'s name is casually fused with that of William Twombly, the named plaintiff in the antitrust case that initiated the Court's transformation of pleading standards two years before *Iqbal*.<sup>9</sup> Many law professors and lawyers simply refer to *Twombly* and *Iqbal* together as "*Twiqbal*"—rendering a detained immigrant the conjoined twin of a subscriber to a local phone service.<sup>10</sup>

Second, the *Iqbal* decision's factual and normative account of the post-9/11 immigrant detentions, out of which *Iqbal*'s claims arose, has not generated nearly the level of scholarly critique that it merits.<sup>11</sup> The memory of those detentions is now receding—both for legal scholars and for a generation of law students too young to recall the daily announcements of immigrants detained in the terrifying aftermath of September 11. For those whose knowledge of the detentions comes solely from their reading of *Iqbal*, the detentions would likely come across as relatively limited in scope, rational in design, and problematic only in the conduct of low-level officials. In stating that an "obvious alternative explanation" for the detentions existed, apart from discrimination, the Court presented the detentions as essentially legitimate—indeed, as self-evidently so.<sup>12</sup> Moreover, in the years since *Iqbal*, countless lower court opinions have reinforced that narrative of the detentions by quoting the Court's glib conclusion of an obvious lawful explanation.<sup>13</sup> Even courts sympathetic to plaintiffs have reproduced the Court's validation of the detentions in the course of distinguishing other pleadings as more plausible.<sup>14</sup>

This Article challenges the Court's rendition of *Iqbal* and the post-9/11 immigrant detentions. In doing so, it shows how procedural decisions can contribute to shaping broader narratives that may ultimately affect substantive

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

10. See, e.g., Christine P. Bartholomew, *Twiqbal in Context*, 65 J. LEGAL EDUC. 744 (2016); William M. Janssen, *The Odd State of Twiqbal Plausibility in Pleading Affirmative Defenses*, 70 WASH. & LEE L. REV. 1573 (2013); A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710 (2013).

11. Only a few law review articles critiqued the Court's treatment of the detentions, including the racialized underpinnings of the decision. See, e.g., Dawinder S. Sidhu, *First Korematsu and Now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court's Disregard for Claims of Discrimination*, 58 BUFF. L. REV. 419 (2010). Several essays that did so appeared in a notable symposium on *Iqbal* and race: Ramzi Kassem, *Implausible Realities: Iqbal's Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443 (2010); Victor C. Romero, *Interrogating Iqbal: Intent, Inertia, and (a Lack of) Imagination*, 114 PENN ST. L. REV. 1419 (2010); Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485 (2010).

12. See *Iqbal*, 556 U.S. at 682 ("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 respondent alleges the arrests Mueller oversaw were likely lawful and justified . . .").

13. See, e.g., *Starr v. Baca*, 652 F.3d 1202, 1214 (9th Cir. 2011); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596–97 (8th Cir. 2009).

14. See, e.g., *Starr*, 652 F.3d at 1214, 1216–17; *Braden*, 588 F.3d at 596–97.

rights. It first tells the lost story of Javaid Iqbal himself. Relying on legal documents, other public material, and the author's interview with Iqbal in Lahore, Pakistan, in 2016, it reconstructs the facts of Iqbal's detention and his life before and after his confinement. This retelling of *Iqbal* opens with Iqbal's working-class immigrant life in New York before his arrest—a narrative that unsettles the Court's simple identification of Iqbal as a suspect and a foreigner. It then highlights the transnational and enduring effects of his detention: although the Court presented Iqbal's deportation as the final legally relevant moment of his story, the experience of being branded a terrorist followed Iqbal to Pakistan and haunts him fifteen years later. Most disturbingly, Iqbal believes that his experience as a post-9/11 detainee in the United States marked him publicly in Pakistan and ultimately led to the persecution and disappearance of his teenaged son.<sup>15</sup> This expanded version of Iqbal's story thus challenges the assumptions that the majority opinion invites—that factual suspicion existed to connect Iqbal to terrorism and that the detentions imposed only temporary and limited harm.

Moving beyond Iqbal, the Article also recovers the lost story of the detentions. That story is lost not in the sense that it has never been told, but rather, in that the Court starkly mischaracterized it. Regardless whether high-level federal officials ordered the racial or religious classification of detainees, as the plaintiff alleged, it is apparent that the race or religion of individuals drove many investigative and arrest decisions in the wake of the September 11 attacks.<sup>16</sup> Furthermore, according to the Justice Department Inspector General—an independent monitor that works within the Department and that conducted a comprehensive investigation of the detentions—numerous government officials knew that a factual basis for suspicion did not exist for many of those classified as persons of interest to the investigation. That classification nonetheless triggered harsh conditions of confinement and widespread physical abuse.<sup>17</sup> The detentions may represent the most pernicious use of race and religion as proxies for suspicion in the post-9/11 period, yet the *Iqbal* opinion summarily legitimized them.

*Iqbal* specifically held that the complaint at issue did not sufficiently allege that defendants Attorney General John Ashcroft and FBI Director Robert Mueller personally engaged in discriminatory conduct. The role of these high-level officials in ordering the detentions, and the extent to which they explicitly relied on race and religion in their decision making, remains unclear: if *Turkmen v. Hasty*, an ongoing legal challenge to the post-9/11 detentions, survives review by the Supreme Court, discovery in that case may provide an opportunity to

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15. See *infra* Part II.

16. See IRUM SHIEKH, *DETAINED WITHOUT CAUSE: MUSLIMS' STORIES OF DETENTION AND DEPORTATION IN AMERICA AFTER 9/11*, at 19 (2011); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS* 16–17 (2003); see also *infra* Section III.B.

17. OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 70; see *infra* Section III.C.

uncover that information.<sup>18</sup> Evidence that has surfaced through *Turkmen* thus far challenges the *Iqbal* majority's bald conclusion that discrimination by these officials was simply implausible.<sup>19</sup>

The key aim of this Article, however, is not to critique the holding of *Iqbal*, but to contest its narrative—a narrative that rendered *Iqbal* and other detainees nearly invisible, that minimized the harm of the mass arrests, and that declared the detentions to be likely lawful. When a procedural decision such as *Iqbal* is disseminated without sufficient critique of its substance, the decision can affect broader understanding of the legitimacy of the state practices at issue. Already, some federal courts have used *Iqbal* to legitimize other sweeping investigations based primarily on the race or religion of individuals.<sup>20</sup> The effect of the decision's narrative, however, likely extends beyond the judges who cite it, to the lawyers, courts, and law students who read it. Because the facts of *Iqbal* illustrate the Supreme Court's approach to plausibility pleading, lawyers and judges are incentivized to uncritically reproduce the Court's judgment on the detentions in the normal course of advocating for clients or deciding other cases. As a result, the nature of legal advocacy transmits the *Iqbal* narrative as perniciously as a replicating virus. Moreover, although the lawyers exposed to that narrative may represent a thin slice of the public at large, lawyers exercise enormous influence upon policymaking and public opinion. Thus, their views on the mass detentions of immigrants that followed the September 11 attacks and the legitimacy of racial and religious profiling may shape society today—in a moment when unprecedented calls for the exclusion of immigrants on religious grounds bring such questions to the forefront of national attention.

This Article unfurls as follows. Part I recaps the Supreme Court's factual presentation and legal analysis in *Iqbal*, critiquing not only the majority opinion, but also the dissents' failure to address some of its worst features. Part II recovers the lost story of Javaid *Iqbal*, bringing to life the individual beyond the bare facts the Justices found legally relevant. Part III argues that, in contrast to the Court's account, racial and religious biases unsupported by factual evidence of suspicion likely drove the investigation and detention of many immigrants after September 11, 2001. Part IV contends that *Iqbal* and its aftermath illustrate the potential for procedural decisions to affect substantive rights, not only by hindering access to the courts, but also by influencing the decisions of courts on substantive law as well as the views of broader legal audiences.

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18. See 789 F.3d 218, 233–37 (2d Cir. 2015), *reh'g en banc denied*, 808 F.3d 197 (2d Cir. 2015), *cert. granted*, 2016 WL 2653797 (U.S. Oct. 11, 2016) (No. 15-1363). After the grant of certiorari, the name of this case changed to *Ziglar v. Abbasi*, but it is referred to throughout this Article as *Turkmen v. Hasty*.

19. See *id.* at 253–54; *infra* Section III.D.

20. See, e.g., *Monroe v. City of Charlottesville*, 579 F.3d 380 (4th Cir. 2009); *infra* Section IV.B.1.

I. *IQBAL* THE DECISION

The central question in *Iqbal* was whether the complaint pled sufficient facts against two high-level federal officials, Attorney General Ashcroft and FBI Director Mueller, to state a claim that they had deprived Javaid Iqbal of clearly established constitutional rights.<sup>21</sup> Iqbal had alleged that federal officials arbitrarily classified him as being of “high interest” to the post-9/11 terrorism investigation and subjected him to physical and verbal abuse, excessive searches, solitary confinement, and other harsh conditions on account of his race, national origin, and religion.<sup>22</sup> Suing thirty-four current and former federal officials and nineteen correctional officers, Iqbal relied on *Bivens v. Six Unknown Federal Narcotics Agents*, a 1971 Supreme Court decision that implied a federal private right of action for damages suits against federal officials based on violations of constitutional rights.<sup>23</sup> Ashcroft and Mueller moved to dismiss the claims against them, contending that Iqbal and his then co-plaintiff, Ehab Elmaghraby, had not sufficiently alleged facts establishing the two officials’ personal involvement in the allegedly discriminatory acts.<sup>24</sup> The district court and the court of appeals each ruled in the plaintiffs’ favor, concluding that they had sufficiently stated claims upon which relief could be granted.<sup>25</sup>

The Supreme Court granted certiorari on two questions: first, whether a “conclusory allegation” that high-ranking officials “knew of, condoned, or agreed to subject” an individual to the unconstitutional acts of subordinate officials sufficiently stated claims under *Bivens*; and second, whether high-level officials could be liable for the unconstitutional acts of subordinates based on “constructive notice” of the discrimination.<sup>26</sup>

## A. THE FACTS AS PRESENTED

The majority opinion opened with a bare statement of Iqbal’s nationality and religion and his relationship to the September 11 investigation: “Javaid Iqbal . . . is a citizen of Pakistan and a Muslim. In the wake of the September 11, 2001, terrorist attacks he was arrested in the United States on criminal charges and detained by federal officials.”<sup>27</sup> Although accurate and legally relevant, these opening lines also presented Iqbal, from the outset, as essentially a foreigner and possible terrorist suspect. In a few sparse paragraphs, the opinion then recounted the facts of Iqbal’s detention: federal officials arrested Iqbal on charges of identification fraud and conspiracy to defraud the United States,

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21. Ashcroft v. Iqbal, 556 U.S. 662, 666 (2009).

22. First Amended Complaint & Jury Demand at 2–3, Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG (E.D.N.Y. Nov. 10, 2009).

23. See *Iqbal*, 556 U.S. at 668 (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)).

24. *Iqbal v. Hasty*, 490 F.3d 143, 165 (2d Cir. 2007); *Elmaghraby*, 2005 WL 2375202, at \*12.

25. See *Iqbal*, 490 F.3d at 165; *Elmaghraby*, 2005 WL 2375202, at \*16.

26. *Iqbal*, 556 U.S. at 689 (Souter, J., dissenting).

27. *Id.* at 666 (majority opinion).

designated him a detainee “of high interest” to the September 11 investigation, and transferred him to a highly restrictive maximum security unit of the Metropolitan Detention Center in Brooklyn.<sup>28</sup> The Court summarized Iqbal’s allegations of abuse by various prison officials,<sup>29</sup> noting that such allegations could state unconstitutional conduct by lower level officials who were not the subject of the current appeal.<sup>30</sup> The chronological account of Iqbal’s experience ended in a further reminder of his outsider status—with Iqbal’s guilty plea, prison term, and deportation “to his native Pakistan.”<sup>31</sup>

The Court’s description of the government’s post-9/11 investigation emphasized the operation’s sheer scale: 4,000 FBI special agents; 3,000 support personnel; 96,000 tips or potential leads received from the public within one week of the attacks; 1,000 people questioned who had “suspected links” to the attacks or to terrorism; and 762 individuals detained on immigration charges, of whom 184 were deemed to be of “high interest” to the investigation.<sup>32</sup> The Court provided little detail, however, as to how the detentions unfolded, how law enforcement identified individuals as having “suspected links” to the attacks, whether any were found to have had such links, or what became of them. The opinion also quoted twice a concurring opinion in the Second Circuit decision below that noted federal officials’ responsibility for responding to “a national and international security emergency unprecedented in the history of the American Republic.”<sup>33</sup> Such statements invited empathy for the federal officials faced with protecting the United States after September 11, but not for the circumstances or experiences of the detainees.

#### B. THE COURT’S LEGAL ANALYSIS

Before turning to the pleading standard, the Court addressed two significant questions of substantive law: the standard in a *Bivens* claim for holding supervisors liable for the constitutional wrongdoing of their subordinates and the discriminatory intent required to establish an equal protection violation.<sup>34</sup> On the first question, the Court held that vicarious liability is inapplicable to *Bivens* claims, and that a plaintiff therefore must show that each government defendant, “through the official’s own individual actions, has violated the Constitution.”<sup>35</sup> The parties had agreed that the theory of *respondeat superior*, by which an employer could be held liable for the acts of its subordinates as a matter of

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28. *See id.* at 667–68.

29. *See id.* at 668.

30. *See id.* at 666.

31. *See id.* at 668.

32. *See Iqbal*, 490 F.3d at 668.

33. *Id.* at 670, 685 (quoting *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring)).

34. *Id.* at 675–77.

35. *Id.* at 676.

course, was unavailable under *Bivens*.<sup>36</sup> But Justice Kennedy's opinion appeared to go further in ruling out other bases for supervisory liability, including one basis that the government had conceded could apply and that most lower courts had accepted: knowledge of a subordinate's constitutional wrongdoing and deliberate indifference as to the result.<sup>37</sup>

Having defined the applicable standard as requiring proof of a defendant's personal misconduct, the Court then characterized the intent standard needed to establish discrimination.<sup>38</sup> The Court cited existing cases holding that equal protection violations required proof of discriminatory intent, not just a disproportionate impact on a particular group.<sup>39</sup> The Court concluded that a plaintiff must plead sufficient factual allegations "to show that [defendants] adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin."<sup>40</sup> This portion of the opinion could be read simply as a restatement of the longstanding requirement of discriminatory intent. Alternatively, it could be read as requiring plaintiffs challenging law enforcement profiling to establish that officials acted out of an improper motive, such as racial hostility, *even* in a case involving explicit classifications on the basis of race—an interpretation that would contradict the Court's approach to equal protection jurisprudence in other contexts.<sup>41</sup>

Having summarily addressed two complex questions of substantive law, the Court then addressed the pleading standard.<sup>42</sup> Citing its earlier decision in *Bell Atlantic Corp. v. Twombly*, the Court ruled that a "two-pronged approach" should govern the review of complaints: First, a court should disregard any "conclusory" allegations in the complaint, such as mere "recitals of the ele-

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36. See Brief for Respondent Javid Iqbal at 46, *Iqbal*, 556 U.S. 662 (No. 07-1015) (stating that it was "undisputed that supervisory *Bivens* liability cannot be established solely on a theory of *respondeat superior*").

37. See *Iqbal*, 556 U.S. at 690–91, 693 (Souter, J., dissenting) (naming alternative tests for supervisory liability apart from *respondeat superior*); see also William N. Evans, Comment, *Supervisory Liability After Iqbal: Decoupling Bivens from Section 1983*, 77 U. CHI. L. REV. 1401, 1408 n.45 (2010) (noting that, prior to *Iqbal*, lower courts mostly accepted "objective deliberate indifference" as a basis for supervisory liability under 42 U.S.C. § 1983); *id.* at 1414 (noting that circuit courts prior to *Iqbal* generally applied the same supervisory liability test under *Bivens* as under § 1983). *Iqbal*'s interpretation of supervisory liability in a *Bivens* and § 1983 context—and the wide divergence in the lower courts regarding the scope of supervisory liability after *Iqbal*—has received some attention in academic literature. See, e.g., William N. Evans, *Supervisory Liability in the Fallout of Iqbal*, 65 SYRACUSE L. REV. 103 (2014); Peter Laumann, *Ashcroft v. Iqbal and Binding International Law: Command Responsibility in the Context of War Crimes and Human Rights*, 16 U. PA. J.L. & SOC. CHANGE 181 (2013); Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-Iqbal/Connick World*, 47 HARV. C.R.-C.L. L. REV. 273 (2012).

38. See *Iqbal*, 556 U.S. at 676–77.

39. See *id.*

40. *Id.* at 677.

41. See *infra* Section IV.B.

42. See *Iqbal*, 556 U.S. at 677–80.

ments of a cause of action.”<sup>43</sup> Such allegations were not entitled to the presumption of truth applicable to factual allegations.<sup>44</sup> Second, a court should assume the truth of the remaining “well-pleaded factual allegations” and “determine whether they plausibly gave rise to an entitlement to relief.”<sup>45</sup>

Turning to Iqbal’s complaint, the Court rejected certain allegations as conclusions not entitled to the presumption of truth.<sup>46</sup> Accordingly, it put aside the allegation that Ashcroft and Mueller “‘knew of, condoned, and willfully and maliciously agreed to subject [Iqbal]’ to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.’”<sup>47</sup> The Court further refused to credit the statements in the complaint that Ashcroft was the “principal architect” of the discriminatory detention policy and that Mueller was “instrumental” in implementing it.<sup>48</sup>

Once it had stripped out those allegations, the Court found that only two factual allegations in the complaint remained against Ashcroft and Mueller, and that neither of them plausibly established a discriminatory purpose.<sup>49</sup> First, the Court pointed to the allegation that the FBI, under Mueller’s direction, “arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11.”<sup>50</sup> The Court held that although that allegation was “consistent” with plaintiff’s claim of purposeful discrimination, “more likely explanations” existed.<sup>51</sup> In the most striking paragraph of the opinion, the Court offered its own view of the more plausible explanation for the detentions:

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 respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were

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43. *Id.* at 678–79 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007)).

44. *Id.* at 679.

45. *Id.*

46. *See id.* at 680.

47. *Id.* (second alteration in original) (quoting First Amended Complaint & Jury Demand, *supra* note 22, at 16–17).

48. *Iqbal*, 556 U.S. at 680–81 (quoting First Amended Complaint & Jury Demand, *supra* note 22, at 4).

49. *See id.* at 681.

50. *Id.* (quoting First Amended Complaint & Jury Demand, *supra* note 22, at 10).

51. *Id.*

illegally present in the United States and who had potential connections to those who committed terrorist acts.<sup>52</sup>

The opinion called the foregoing account an “‘obvious alternative explanation’ for the arrests,” one that made “purposeful, invidious discrimination . . . not a plausible conclusion.”<sup>53</sup>

Having disposed of that allegation from the complaint, the opinion then turned to the claim that Ashcroft and Mueller approved a “policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI . . . .”<sup>54</sup> The Court characterized this allegation from the complaint as establishing only 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.”<sup>55</sup> Such a statement, the Court held, could not push plaintiff’s claim of purposeful discrimination “across the line from conceivable to plausible.”<sup>56</sup> As a result, the Court concluded, Iqbal’s complaint against Ashcroft and Mueller ought to be dismissed unless sufficiently amended.<sup>57</sup>

#### C. THE MAJORITY’S VIEW OF THE DETENTIONS

Together, the opinion presented both factual assumptions and normative assertions about Iqbal and the post-9/11 detentions. The majority’s cursory reasoning makes it difficult to disentangle the two, but nonetheless, a reader with no prior knowledge of the facts would likely make several inferences from the opinion. First, as a threshold matter, a reader would probably assume that most of those arrested in the aftermath of September 11, including Iqbal, were Arab and Muslim. Second, a reader might interpret the Court’s murky discussion of the “obvious alternative explanation” in either of two ways. A reader might infer that, in the Court’s view, government officials made the arrests on the basis of neutral criteria not including ethnicity or religion, and that such criteria merely had a “disparate, incidental” effect on Arab Muslims. One might imagine, for instance, that the detentions were based on specific information that tied individuals to terrorism without any reference to race or religion, and that the detentions merely affected mostly Arabs or Muslims because members of those groups were disproportionately involved in al Qaeda terrorism or disproportionately likely to know the hijackers. Alternatively, a reader might interpret the majority opinion as stating a normative claim: that even if law enforcement officials *did* take into account ethnicity and religion in their

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52. *Id.* at 682.

53. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 567 (2007)).

54. First Amended Complaint & Jury Demand, *supra* note 22, at 13; *see also Iqbal*, 556 U.S. at 681.

55. *Iqbal*, 556 U.S. at 683.

56. *Id.* (quoting *Twombly*, 550 U.S. at 570).

57. *Id.* at 687.

investigation, such considerations were legitimate because of the ethnic and religious composition of the hijackers and al Qaeda. Either way, the Court's characterization of the investigation as targeting those who had a "suspected link to the attacks" or "potential connections to those who committed terrorist acts" would suggest to the reader that factual information existed to connect those detained to the September 11 attacks or future threats of terrorism.

Third, on the role of high-level government officials, a reader might assume from the opinion that Mueller and Ashcroft likely only established a neutral policy of holding suspected terrorists in secure conditions, rather than classifying detainees on the basis of race or religion. And because Iqbal's complaint challenged the constitutionality of his restrictive confinement, rather than his arrest, only the intent of these officials with respect to the labeling of individuals as high-interest detainees ultimately mattered.

A reader would likely understand that the Court was analyzing allegations from a complaint, rather than purporting to provide a definitive account of the detentions. Yet a reader might still accord the Court's factual depiction substantial weight for several reasons. First, the Court put forward its conclusions with a self-assurance that suggested that no other understanding was possible, particularly in proclaiming that an *obvious* alternative explanation existed for the impact of the detentions on Muslim men. Second, readers, especially those less familiar with the conventions of notice pleading prior to *Twombly* and *Iqbal*, might expect that the complaint would have presented the plaintiff's best case. Thus, if the complaint—at least as construed by the Court—did not allege certain facts relevant to the legal claims, one might simply assume that no basis existed for believing the omitted facts to be true. And third, many readers rely on dissents to identify weaknesses in a majority opinion, whether omissions in the factual representation or flaws in the legal analysis. Because the dissenting Justices did not object to certain factual representations or normative assumptions of the majority opinion, readers might not have noticed those features as contestable or flawed.

#### D. THE DISSENTS' OMISSIONS

The main dissent in the case, authored by Justice Souter and joined by three dissenting Justices, rejected the majority's apparent elimination of supervisory liability under *Bivens* and its interpretation of the plausibility pleading standard.<sup>58</sup> A second dissent by Justice Breyer argued that trial judges could use case-management strategies to prevent unwarranted interference in the work of public officials, obviating the need for a blanket change in the pleading standard.<sup>59</sup> Although critiquing the majority's treatment of supervisory liability and the pleading standard, the dissents did not counter the majority's presentation of

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58. *See id.* at 687–88 (Souter, J., dissenting).

59. *See id.* at 699–700 (Breyer, J., dissenting).

*Iqbal* as essentially foreign or the arrests as obviously lawful.<sup>60</sup>

These omissions are notable against a tradition of Justices choosing to issue “heroic dissents,” especially in cases on race.<sup>61</sup> Dissenters often seek to humanize the individuals at the center of a case by presenting facts that dispel stereotypes or appeal to empathy. In cases involving discrimination, dissenters frequently identify a racial or social context that the majority might have ignored. For instance, in *Korematsu v. United States*, a case some have compared to *Iqbal*,<sup>62</sup> dissenting Justices highlighted Fred Korematsu’s identity as an American citizen and California resident<sup>63</sup> and set out at length the racist stereotyping of Japanese-Americans that prevailed among the public and government decision makers.<sup>64</sup> Even in cases where the court majority dismisses such facts as immaterial to the legal questions at hand, dissenting Justices frequently justify including them as relevant social context.<sup>65</sup>

Unlike such opinions, the dissents in *Iqbal* did not affirmatively humanize *Iqbal*, elaborate on the social and political facts of the detentions, or comment on the majority’s characterization of the detentions’ lawfulness. To be sure, Justice Souter’s dissent provided some additional details on *Iqbal*’s allegations of harsh treatment, perhaps increasing empathy for *Iqbal* as a victim of mistreatment.<sup>66</sup> But this addition did not mitigate his outsider status. Even a brief reference to *Iqbal* as a former cable repairman who had lived a decade in Long Island—a fact readily available from earlier media coverage of the case<sup>67</sup>—

60. Perhaps this reflects a more general inability on the part of courts to identify with individuals who have been (correctly or incorrectly) linked to terrorism, due to the perception of the crime as uniquely heinous. See WADIE E. SAID, *CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS* 42–43 (2015) (commenting that, in terrorism cases as opposed to other kinds of criminal cases raising an entrapment defense, courts rarely note any sympathetic features of the defendants).

61. See generally MELVIN I. UROFSKY, *DISSENT AND THE SUPREME COURT* (2015); David Cole, Opinion, *The Power of a Supreme Court Dissent*, WASH. POST (Oct. 29, 2015), [https://www.washingtonpost.com/opinions/the-power-of-a-supreme-court-dissent/2015/10/29/fbc80acc-66cb-11e5-8325-a42b5a459b1e\\_story.html?utm\\_term=.65200c6a32c8](https://www.washingtonpost.com/opinions/the-power-of-a-supreme-court-dissent/2015/10/29/fbc80acc-66cb-11e5-8325-a42b5a459b1e_story.html?utm_term=.65200c6a32c8) [<https://perma.cc/QJT4-T46Y>].

62. See Sidhu, *supra* note 11, at 426, 494–95; Allan R. Stein, *Confining Iqbal*, 45 TULSA L. REV. 277, 301 (2009).

63. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 242–43 (1944) (Jackson, J., dissenting).

64. See *id.* at 237–41 (Murphy, J., dissenting).

65. See, e.g., *Connick v. Thompson*, 563 U.S. 51, 80–90 (2011) (Ginsburg, J., dissenting) (presenting a “contextual account” of the *Brady* violations in defendant’s trial); see also *id.* at 72–73 (Scalia, J., concurring) (criticizing the “dissent’s lengthy excavation of the trial record” as irrelevant to the legal claims at hand). For other examples, see *Brumfield v. Cain*, 135 S. Ct. 2269, 2286–87 (2015) (Thomas, J., dissenting) (providing extended, empathetic description of the children of the *victims* of a murder in a death penalty case); *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) (addressing the continued social significance of race); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643 (2007) (Ginsburg, J., dissenting) (providing additional detail regarding plaintiff’s experience with gender-based pay discrimination).

66. See *Ashcroft v. Iqbal*, 556 U.S. 662, 688–89 (2009) (Souter, J., dissenting).

67. See, e.g., Nina Bernstein, *2 Men Charge Abuse in Arrests After 9/11 Terror Attack*, N.Y. TIMES (May 3, 2004), [http://www.nytimes.com/2004/05/03/nyregion/2-men-charge-abuse-in-arrests-after-9-11-terror-attack.html?\\_r=0](http://www.nytimes.com/2004/05/03/nyregion/2-men-charge-abuse-in-arrests-after-9-11-terror-attack.html?_r=0) [<https://perma.cc/XY4K-5K72>] [hereinafter Bernstein, *2 Men Charge Abuse*]; Nina Bernstein, *Held in 9/11 Net, Muslims Return to Accuse U.S.*, N.Y. TIMES (Jan. 23, 2006),

might have enabled readers to see *Iqbal* in a more local and ordinary light. Likewise, greater factual context on the detentions—also readily available to the Court—might have warned readers against uncritically accepting the majority’s pronouncement that they were obviously lawful.<sup>68</sup>

Justice Souter likely viewed his role as responding more narrowly to the questions actually before the Court. But his choice to respond in a technical, procedural fashion to a majority opinion that included substantive, racialized judgments might have left readers with the impression that those judgments were acceptable. In addition, certain language in the main dissent might have indirectly suggested that *Iqbal*’s allegations were a stretch. Although Justice Souter credited *Iqbal*’s discrimination claims against Ashcroft and Mueller as plausible, his opinion characterized the test for rejecting factual allegations in notably minimalist terms. Justice Souter contended that, no matter how “skeptical the court may be,” it should accept the allegations in a complaint as true unless the allegations “are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.”<sup>69</sup> Concluding that “[t]hat is not what we have here,”<sup>70</sup> the opinion had the effect of distinguishing *Iqbal*’s factual assertions from only the most ridiculous of scenarios. Indeed, a similar line of questioning characterized the oral argument before the Court: Justice Souter, adopting a hypothetical that Justice Breyer had initiated, asked plaintiff’s counsel whether the discrimination claims against Ashcroft and Mueller were more plausible than a claim that the president of Coca-Cola was putting “mouses” in Coke bottles.<sup>71</sup> In like fashion, the “little green men” reference conveyed that *Iqbal*’s claims perhaps only fell short of absurdity. Read against a tradition of heroic dissents, the *Iqbal* dissents might well have signaled that the majority opinion’s factual and normative characterization of the detentions was acceptable, even if it erred in its interpretation of the pleading standard and supervisory liability.

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<http://www.nytimes.com/2006/01/23/nyregion/held-in-911-net-muslims-return-to-accuse-us.html> [https://perma.cc/5E9Y-YJNR] [hereinafter Bernstein, *Held in 9/11 Net*].

68. Here, the dissenting Justices could have drawn on the comprehensive Inspector General report on the detentions, OFFICE OF THE INSPECTOR GEN., *supra* note 16, which the majority opinion cited for a different point, *see Iqbal*, 556 U.S. at 667. Amicus briefs submitted to the Court also further described the detentions. *See generally* Brief of Amici Curiae Japanese American Citizens League et al. in Support of Respondent, *Iqbal*, 556 U.S. 662 (No. 07-1015); Brief of Amici Curiae, The Sikh Coalition et al. in Support of Respondent *Iqbal*, *Iqbal*, 556 U.S. 662 (No. 07-1015).

69. *Iqbal*, 556 U.S. at 696 (Souter, J., dissenting).

70. *Id.*

71. *See* Transcript of Oral Argument at 13, 40–41, *Iqbal*, 556 U.S. 662 (No. 07-1015). Justice Souter may have asked the question only to make the point that the factual claims alleged here were far removed from the kind of absurd factual allegation that should be rejected at the outset. Indeed, he stated earlier in the argument that, in contrast to the mice-in-Coke-bottles scenario, the plaintiffs’ claim of high-level involvement by the Attorney General “does not have that kind of bizarre character to it.” *Id.* at 16. But repeatedly framing the discrimination claims at issue against an absurd point of comparison trivialized the claims and suggested that the Justices did not view them with the seriousness that is normally accorded allegations of racial discrimination, let alone with empathy.

## II. THE LOST STORY: JAVAID IQBAL

A quarter-century ago, critical race theorist Richard Delgado argued that complaints and judicial opinions alike offer “stylized versions” of a person’s experience, relying on “existing statutory and case law as a type of ‘screen’ that makes certain facts relevant and others not.”<sup>72</sup> He noted that complaints alleging race discrimination may struggle to relate stories in terms that courts will accept, leading to dismissals that further validate dominant narratives.<sup>73</sup> Although critical race theorists are known for using narrative methods to challenge conventional legal accounts, even scholars with a different ideological orientation have criticized law’s neglect of the persons behind doctrinal abstractions.<sup>74</sup>

Sympathetic to such critiques, this Part aims to recapture Iqbal’s lost story, a story that begins and ends outside the bounds of the “material” facts. The account draws heavily on the author’s interviews with Iqbal, including an in-person interview in Lahore, Pakistan, in January 2016.<sup>75</sup> Wherever possible, it corroborates facts using multiple sources, including court documents from multiple cases.<sup>76</sup> Even now, however, a good deal of relevant material, especially government documents, remains undisclosed or sealed pursuant to protective orders.<sup>77</sup> As a result, this narrative represents Iqbal’s perspective more so than that of government officers involved in his case.<sup>78</sup> In addition, the passage of time means that even Iqbal’s memories of his detention are nearly fifteen years old. For all these reasons, this account cannot be read as a complete or

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72. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2428 (1989).

73. *See id.* at 2428–29.

74. *See* JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 18–19 (1976).

75. I interviewed Iqbal in Lahore, Pakistan, in January 2016, for approximately three hours and followed up with two Skype phone interviews of approximately one hour each in February 2016. All interviews were conducted in English, with the exception of a few Urdu words used by Iqbal that I understood or that he translated on the spot. I first obtained Iqbal’s contact information through Alexander Reinert, the attorney who argued his case before the U.S. Supreme Court and lower federal courts. Prior to meeting Iqbal, I submitted a research proposal to the Stanford University Institutional Review Board (IRB) and conducted a risk assessment responsive to IRB questions. The IRB ultimately declared the application exempt from approval; nonetheless, I followed the advice I had received from country experts regarding risk minimization.

76. I reviewed numerous documents that I could obtain, including public material from Iqbal’s civil case, the criminal case against Iqbal, discovery materials lodged in the Supreme Court in conjunction with an amicus brief filed by the *Turkmen* plaintiffs, reports of the Justice Department Inspector General, documents from the civil case sent to me by Iqbal, briefs in Freedom of Information Act litigation related to the detentions, and news media accounts.

77. *See, e.g.*, Brief for Respondent Javaid Iqbal, *supra* note 36, at 43 (noting that each of the thousands of documents produced by the Government in the litigation was classified as confidential and produced only pursuant to a protective order).

78. Some aspects of Iqbal’s account, such as his experience in Pakistan following his return, are especially difficult to corroborate. Although Iqbal provided legal documents to corroborate part of that account, *see infra* Section II.F, I did not interview other individuals in Pakistan regarding that experience, partly to minimize potential risks from the research.

judicially determined presentation of the facts.<sup>79</sup> With these limitations acknowledged, this Part endeavors to present a richer account of Iqbal beyond *Iqbal*. It ends with a discussion of some of the more notable implications of this retelling.



#### A. THE IMMIGRANT EXPERIENCE

In 1992, Iqbal arrived at JFK Airport from Faisalabad, Pakistan, brought into the country on a false passport by immigration smugglers.<sup>80</sup> He settled in Long Island, and for nearly a decade, he worked long hours at multiple jobs to send money to family back home.<sup>81</sup> For much of that time, Iqbal worked as a gas station attendant in Huntington, Long Island, sometimes seven days a week, opening at five in the morning and closing at ten at night.<sup>82</sup> At other times, he rang up purchases at a 7-Eleven,<sup>83</sup> made sandwiches at Subway,<sup>84</sup> washed dishes at a bar,<sup>85</sup> and worked the graveyard shift as a security guard.<sup>86</sup> Finally, after a customer at the Gulf's gas station in Huntington told him of an opening at a leading New York cable company, he landed the job he ended up loving

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79. For the sake of readability, I do not use qualifying phrases such as “according to Iqbal” uniformly throughout the text of the narrative, but all facts presented should be read in conjunction with the source material referenced in the corresponding footnotes. In addition, at the risk of stating the obvious, it should be acknowledged that, like all narratives, this narrative is limited by the mediating role of the author’s own interpretation.

80. Telephone Interview with Javaid Iqbal (Feb. 12, 2016).

81. *Id.*

82. Interview with Javaid Iqbal in Lahore, Pak. (Jan. 7, 2016).

83. Telephone Interview with Javaid Iqbal, *supra* note 80.

84. Interview with Javaid Iqbal, *supra* note 82.

85. *Id.*

86. Telephone Interview with Javaid Iqbal, *supra* note 80.

most.<sup>87</sup> For five years prior to his arrest, Iqbal worked as a cable repair technician, calling himself the “Cable Guy” after his favorite movie, Jim Carrey’s 1996 dark comedy of the same name.<sup>88</sup> Interviewed fifteen years later, Iqbal still relished the memories of his around-the-clock availability as a “cable guy” in Long Island:

I was the only person who had [the] radio 24 hours—me and the truck, 24 hours with me. Because whenever they got emergency, they called, “Iqbal! You gotta go to exit 47, the lady got no TV. Right away. Go ahead there.” 50 dollar for the gas, 50 dollar tip. 100 bucks. So I was greedy about that, that every dollar makes [a] difference. I send money home. And I will change my family’s life.<sup>89</sup>

As he came to know the community through his work as a gas station attendant and cable repairman, Iqbal increasingly felt at home in America. He recalled the regular customers who brought him food at the gas station at Thanksgiving and Christmas:

Imagine, they were sitting at the home preparing dinner for their family. And in the back of their head they also remembered me[,] too. And they pack [a] plate of food and they drive all the way to the gas station and bring me the food. I was feeling that I’m part of this family. I’m part of this system. Before I was feeling that I am a foreigner. But those feelings, those moments, make me realize, make me feel that I am American—I’m family of American family.<sup>90</sup>

Eventually, Iqbal married an American woman whom he met while working at the gas station, moved in with her and her children, and applied for a green card based on his marriage.<sup>91</sup> After four and a half years of marriage, the two separated.<sup>92</sup> Iqbal moved into a tiny studio apartment in Long Island that he shared with a roommate who worked the night shift.<sup>93</sup>

Iqbal’s decade on Long Island had features common to those of many undocumented immigrants and other features that may have distinguished it. Like other immigrants, Iqbal worked for part of his time in the United States using a false identity, one that he purchased from two men in Brooklyn for

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87. Interview with Javaid Iqbal, *supra* note 82; Telephone Interview with Javaid Iqbal, *supra* note 80.

88. Interview with Javaid Iqbal, *supra* note 82; Telephone Interview with Javaid Iqbal, *supra* note 80.

89. Interview with Javaid Iqbal, *supra* note 82.

90. *Id.*

91. Telephone Interview with Javaid Iqbal, *supra* note 80.

92. See Bernstein, *2 Men Charge Abuse*, *supra* note 67; Telephone Interview with Javaid Iqbal, *supra* note 80.

93. Interview with Javaid Iqbal, *supra* note 82.

\$1,500.<sup>94</sup> He says he obtained identification documents in the name of “Abdul Khaliq” after someone stole his identity; he suspected that it was a Pakistani salesperson at a jewelry store in Queens who asked him for his mother’s maiden name in the course of swiping his credit card.<sup>95</sup> The use of a false ID later figured heavily in the criminal case brought against Iqbal in the fall of 2001, as did more serious allegations that he was also engaging in financial fraud.<sup>96</sup>

#### B. ARREST AND DETENTION

On the morning of September 11, Iqbal had an appointment to renew his work authorization card with the U.S. Immigration & Naturalization Service (INS) in lower Manhattan.<sup>97</sup> He never made it there: as he neared the office, one block away from the World Trade Center, he saw the first plane heading toward the Twin Towers.<sup>98</sup> When the second plane hit some twenty minutes later, and it became clear to everyone in the area that a terrorist attack was unfolding, Iqbal joined the crowds of New Yorkers fleeing the scene.<sup>99</sup> With train and bus transportation largely suspended, he was stranded with thousands of others at Grand Central Station until police finally allowed people to board the subway late that evening and return to their homes.<sup>100</sup> When he got out at a stop in Jamaica, Queens, a reporter from a local TV station was interviewing exiting passengers about what they had seen.<sup>101</sup> Iqbal says he gave his name and told the reporter how pained he felt at the loss of innocent life.<sup>102</sup>

Less than eight weeks later, on November 2 or 3, 2001, Iqbal was arrested.<sup>103</sup> As Iqbal recounted, it was a Friday night, and he was home alone.<sup>104</sup> He heard a helicopter hovering close by and, pushing back the curtains, saw police cars in the street.<sup>105</sup> Iqbal had no inkling that the police attention was directed at him until he heard a knock at his door:

Two guys in civilian dress were standing in front of the door and they didn’t show their ID or anything. They said, “Hey buddy, open the door.” I just—I just like froze there. Because of their look—they were well-built, you know. “Open your door.” I just opened the door. Bang! They just came in through the door. Dragged me to the ground. Dropped me to the ground—one guy just

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94. *Id.*

95. *Id.*

96. *See infra* notes 122–38 and accompanying text.

97. Interview with Javaid Iqbal, *supra* note 82.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See* First Amended Complaint & Jury Demand, *supra* note 22, at 15; Bernstein, *2 Men Charge Abuse*, *supra* note 67. The complaint sworn out by an INS agent puts the date as November 3, 2001. Complaint at 2, United States v. Iqbal, No. 1:01-cr-01318-ILG-1 (E.D.N.Y. Sept. 30, 2002).

104. Interview with Javaid Iqbal, *supra* note 82.

105. *Id.*

put his knee right here on my back and they cuffed me. And they make me sit on the couch.<sup>106</sup>

Two officers started searching the room.<sup>107</sup> According to Iqbal, several things in the apartment caught their interest. First, on top of the TV, they found a letter from the INS informing Iqbal of his appointment in lower Manhattan on the morning of September 11.<sup>108</sup> Iqbal recalled one agent pointing out the letter to the other, then calling someone on the radio to ask whether Iqbal actually had an appointment that day.<sup>109</sup> The officers accused him of lying about having the appointment<sup>110</sup> and of going to the World Trade Center with the intent of helping the hijackers.<sup>111</sup> Surprised at their incredulity, Iqbal insisted that the INS had determined the date of his appointment and that he had not been able to attend because the building was closed.<sup>112</sup>

According to Iqbal, the officers again appeared to grow suspicious when they came across an issue of *Time* magazine featuring the burning World Trade Center on the cover and a Pakistani newspaper reporting on the attacks.<sup>113</sup> Iqbal had purchased the *Time* magazine at a newsstand and picked up the free Pakistani newspaper from Jackson Heights, the immigrant enclave in Queens he visited weekly to stock up on Pakistani food.<sup>114</sup> Despite the wide availability of the publications, their coverage of the September 11 attacks appeared to pique the officers' suspicion.<sup>115</sup>

The officers used a classic “good cop, bad cop” routine on the night of the arrest, with one officer cursing and banging the table and threatening Iqbal if he refused to cooperate and the other seeking to build his trust.<sup>116</sup> The agents asked Iqbal questions regarding travel to Afghanistan and knowledge of Osama bin Laden,<sup>117</sup> in addition to asking him to recount in detail where he had lived and worked in the United States.<sup>118</sup> The agents also questioned Iqbal about the second ID that he was using at the time.<sup>119</sup> Iqbal says that he acknowledged working under a false identity and described the circumstances of his acquiring

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Interview with Javaid Iqbal, *supra* note 82.

111. *Thook mila khana, kapron par pishaab, FBI nay begunaah Pakistani par zulm ki inteha kar di* [*Spit Mixed in Food, Urine on Cloths—FBI Crossed the Limit of Cruelty on an Innocent Pakistani*], ROZNAME KHABREN (Pak.), Mar. 19, 2003, at 1–2 (Timsal Masud trans.) [hereinafter *Spit Mixed in Food*].

112. Interview with Javaid Iqbal, *supra* note 82.

113. *Id.*; see also Bernstein, *2 Men Charge Abuse*, *supra* note 67 (noting that officers “found a *Time* magazine showing the trade towers in flames”).

114. Interview with Javaid Iqbal, *supra* note 82.

115. *Id.*

116. *Id.*

117. *Spit Mixed in Food*, *supra* note 111.

118. Interview with Javaid Iqbal, *supra* note 82.

119. *Id.*

it.<sup>120</sup> He offered to lead the officers to the jewelry store in Queens to further investigate his claim that his identity had been stolen and misused.<sup>121</sup>

On the Monday following his arrest, Iqbal was arraigned before a magistrate judge in the U.S. District Court for the Eastern District of New York who entered an order to detain him.<sup>122</sup> In support of a charge of making a false statement, an INS special agent swore out a complaint saying that Iqbal had stated that his name was Abdul Khaliq when the INS agent and an FBI special agent appeared at his residence, and that Iqbal had presented them with a New York state driver's license in that name.<sup>123</sup> According to the agent's statement, Iqbal then admitted that his real name was Javaid Iqbal, that he did not have lawful immigration status, and that he had entered the United States using another identity that smugglers had assigned him ("Muhammad Mumtaz").<sup>124</sup> The complaint states that, after Iqbal consented to the search, the agents found checks, a Social Security card, and several credit cards in the name of Abdul Khaliq.<sup>125</sup>

That day, Iqbal was brought to the Metropolitan Detention Center (MDC) in Brooklyn and housed with the general inmate population.<sup>126</sup> Later that month, a grand jury indicted Iqbal on two counts of identity fraud for obtaining a driver's license in the name of Abdul Khaliq and for possessing a Social Security card in that name.<sup>127</sup> In December, Iqbal pled not guilty to both charges.<sup>128</sup> At the time, Iqbal was represented by Richard Shanley,<sup>129</sup> a court-appointed attorney who Iqbal felt treated him like a terrorist: Shanley demanded to know how often Iqbal had visited Afghanistan or received special military training, accused him of lying when he said he had done neither, and insisted that Iqbal "look[ed] like a commando."<sup>130</sup> After some time, Iqbal refused to see him,<sup>131</sup> and a friend paid for a private criminal defense attorney, Frank Lopez, to represent Iqbal instead.<sup>132</sup>

The government labeled Iqbal as being of interest to the terrorism investigation early on; by November 2001, it had included Iqbal on a list of over one hundred federally charged detainees connected to the September 11 investiga-

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120. *Id.*

121. *Id.*

122. Docket at ECF No. 2, *United States v. Iqbal*, No. 1:01-cr-01318-ILG-1 (E.D.N.Y. Sept. 30, 2002).

123. Complaint, *supra* note 103, at 1–3.

124. *See id.* at 3–4.

125. *See id.* at 4–5.

126. First Amended Complaint & Jury Demand, *supra* note 22, at 15; Telephone Interview with Javaid Iqbal, *supra* note 80.

127. *See* Indictment at 1–2, *Iqbal*, No. 1:01-cr-01318-ILG-1; *see also* Docket, *supra* note 122, at ECF No. 7.

128. Docket, *supra* note 122, at ECF No. 8.

129. *Id.*

130. Interview with Javaid Iqbal, *supra* note 82.

131. *Id.*; *see also* Docket, *supra* note 122, at ECF No. 10 (noting that Shanley had been relieved).

132. *See* Docket, *supra* note 122, at ECF No. 10; Interview with Javaid Iqbal, *supra* note 82.

tion.<sup>133</sup> It remains unclear why the government did so. An FBI list of “Special Interest Cases” from May 2002 includes Iqbal but, in a section of the list used to provide a factual narrative of each case, notes only that Iqbal was using a fraudulent Pakistani passport and was charged with making false statements.<sup>134</sup>

On January 8, 2002, the same day that Lopez first appeared in court on Iqbal’s behalf,<sup>135</sup> the government indicated that it might seek a superseding indictment against Iqbal.<sup>136</sup> The following month, a grand jury charged Iqbal with conspiracy to utter counterfeited securities, uttering forged securities, and identity fraud, specifically accusing Iqbal of creating checks in the names of various financial institutions and depositing them in bank accounts in his name.<sup>137</sup> Iqbal initially entered a not guilty plea to the new charges.<sup>138</sup>

### C. CONFINEMENT AT THE METROPOLITAN DETENTION CENTER

During his two months of confinement in the general inmate section of the MDC, Iqbal heard rumors about the “K Unit” of a new building in the MDC,<sup>139</sup> which ultimately housed eighty-four inmates arrested in connection with the September 11 investigation.<sup>140</sup> Inmates in the general prison population voiced concern that terrorist groups might attack the building because their members were reportedly being held there.<sup>141</sup> Still, Iqbal did not imagine that he would

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133. A publicly released list of 110 federally charged detainees dated December 7, 2001, lists a “Javaid Iqbal” charged with 18 U.S.C. § 1001 in the Eastern District of New York. *See* Defendant’s Notice of Filing of Amended & Supplemental Exhibits, Exhibit 7 at 5, *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 217 F. Supp. 2d 58 (D.D.C. 2002) (No. Civ.A. 01-2500 GK). Iqbal is also included on an amended list of 108 federally charged detainees released in early February 2002 after the *Center for National Security Studies* suit was filed under the Freedom of Information Act. *See id.*, Exhibit 5 at 3. His name also appeared on a list released by the Justice Department in late November 2001 of ninety-three individuals charged with federal crimes. *See* Masood Haider, *Predicament of Detained Pakistanis*, *DAWN* (Dec. 9, 2001), <http://www.dawn.com/news/1062418> [<https://perma.cc/48UB-NCFE>] (noting that at least seventeen of those appeared to be Pakistani, including a “Javaid Iqbal”).

134. *See* JTTF Special Interest Cases at 16, *Turkmen v. Ashcroft*, 915 F. Supp. 2d 314 (E.D.N.Y. 2013) (No. 02-CV-2307). The document notes brief procedural updates for Iqbal’s case through the end of January 2002 but reports no additional factual information. *See id.* In both *Iqbal* and *Turkmen*, discovery against officials not claiming qualified immunity and against non-parties proceeded while Ashcroft, Mueller, and other officials claiming qualified immunity appealed the lower courts’ decisions not to dismiss claims against them. *See* Motion for Leave to File & Brief for Amici Curiae Ibrahim Turkmen et al. in Support of Respondent Javaid Iqbal at iii, 3, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 07-1015) [hereinafter *Turkmen Amicus Brief*]. Although ordinarily subject to a protective order, certain documents produced in discovery by the United States, including the list of Special Interest Cases, were permitted to be disclosed by the *Turkmen* plaintiffs to the Court on the public record for purposes of filing an amicus brief in *Iqbal*. *See id.* at iv, Exhibit I; *see also* JTTF Special Interest Cases, *supra*, at 1 (noting that the document is “subject to protective order”).

135. *See* Docket, *supra* note 122, at ECF No. 12.

136. *Id.* at ECF No. 10.

137. Superseding Indictment at 1–3, *United States v. Iqbal*, No. 1:01-cr-01318-ILG-1 (E.D.N.Y. Sept. 30, 2002).

138. Docket, *supra* note 122, at ECF No. 17.

139. Telephone Interview with Javaid Iqbal, *supra* note 80.

140. OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 5.

141. Telephone Interview with Javaid Iqbal, *supra* note 80.

be sent there until it actually happened.<sup>142</sup> His transfer occurred on January 8, 2002, the same day that the government indicated in court that it might seek a superseding indictment.<sup>143</sup> No public information explains what prompted the transfer—whether it was new information that had emerged in the criminal investigation, the announcement in court of Iqbal’s retention of private counsel, or something entirely unrelated.

That evening, correctional officers told Iqbal that he would be having a meeting with his lawyer—an announcement that struck those around him as unusual, given the time of day.<sup>144</sup> Instead, the officers brought him to a room on a separate floor where a guard announced his presence: “Captain, here’s the one.”<sup>145</sup> According to Iqbal, he saw nearly a dozen men waiting in the room.<sup>146</sup> Upon Iqbal’s arrival, several officers kicked and beat him, called him a “terrorist,” punched him in the face, and threw him against the wall.<sup>147</sup> After the physical abuse, which had left Iqbal bleeding from his mouth and nose, the officers cuffed his arms and legs and moved him through an underground tunnel to the ninth floor of the new building, where he was forced to strip and undergo an extensive search.<sup>148</sup>

Around March 20, 2002, prison guards subjected Iqbal to a second particularly severe attack.<sup>149</sup> That day, officers conducted three strip and body-cavity searches of Iqbal, and he protested when the officers ordered a fourth search.<sup>150</sup> In retaliation, the guards punched Iqbal in the face and kicked him, causing him to bleed.<sup>151</sup> After further physical abuse, one officer urinated in the toilet in Iqbal’s cell and turned off the water so that he could not flush it until morning.<sup>152</sup> Despite his requests for help, Iqbal stated that he did not receive medical care for two weeks after the incident.<sup>153</sup> In addition to these especially serious attacks, Iqbal alleged that prison guards routinely punched and kicked him during morning searches of his cell.<sup>154</sup>

During his six months in the Administrative Maximum Special Housing Unit, or ADMAX SHU, Iqbal was usually confined in his cell for all but one hour

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142. *Id.*

143. See Docket, *supra* note 122, at ECF No. 10; First Amended Complaint & Jury Demand, *supra* note 22, at 15.

144. First Amended Complaint & Jury Demand, *supra* note 22, at 20; Bernstein, *2 Men Charge Abuse*, *supra* note 67; Telephone Interview with Javaid Iqbal, *supra* note 80.

145. Telephone Interview with Javaid Iqbal, *supra* note 80.

146. *Id.*

147. First Amended Complaint & Jury Demand, *supra* note 22, at 20–21; Telephone Interview with Javaid Iqbal, *supra* note 80.

148. First Amended Complaint & Jury Demand, *supra* note 22, at 21; Telephone Interview with Javaid Iqbal, *supra* note 80.

149. First Amended Complaint & Jury Demand, *supra* note 22, at 21.

150. *Id.* at 21.

151. *Id.* at 21.

152. *Id.* at 21–22.

153. *Id.* at 32.

154. *Id.* at 25; Interview with Javaid Iqbal, *supra* note 82.

each day.<sup>155</sup> Prison officials kept the light on nearly all the time—a light so strong that inmates referred to it as the “brain melter.”<sup>156</sup> MDC guards regularly called him a “terrorist,” a “killer,” a “Muslim bastard,” and a “Muslim killer.”<sup>157</sup> When taken to exercise on rainy days, Iqbal was left outside until drenched and then brought back to his cell where prison officials deliberately turned on the air conditioner.<sup>158</sup> On cold winter mornings, prison guards brought detainees, undressed, outside to the tenth floor of the MDC and then watched how they reacted to the freezing temperatures.<sup>159</sup> Iqbal says that he and other detainees repeated religious incantations to withstand the cold.<sup>160</sup> In the ADMAX SHU, strip and body-cavity searches were routine: Iqbal experienced them each morning as well as multiple times before and after visits to court or to the medical clinic.<sup>161</sup> Deprived of adequate food and subjected to harsh treatment, Iqbal lost over forty pounds in detention.<sup>162</sup>

Iqbal also recalled how the prison guards spoke of his religion. When the guards granted an inmate’s request for a copy of the Quran, they threw the Quran on the ground and shouted at the detainees.<sup>163</sup> Iqbal described the scene, unconsciously slipping into an American accent fifteen years later as he recalled their words:

And then, you know, they shout at us: “This is what you read? This is what makes you terrorists? This is what makes you terrorists?” Then they curse. “You guys are gonna get killed here. We make sure you guys get killed here because you killed our innocent people. You killed our innocent people. You’re gonna die here. You deserve to die here. We’re gonna turn your countries to [the] ground. We’re gonna make your countries miserable for [the] rest of their lives.”<sup>164</sup>

During his six months in the K unit, Iqbal was hindered from meeting or communicating with his lawyers. He stated that Lopez, his private criminal defense attorney, tried to visit him at the facility but was incorrectly told that Iqbal was not located there.<sup>165</sup> Iqbal further alleged that a correctional officer

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155. First Amended Complaint & Jury Demand, *supra* note 22, at 3, 15.

156. Interview with Javaid Iqbal, *supra* note 82.

157. First Amended Complaint & Jury Demand, *supra* note 22, at 16.

158. *Id.*

159. Interview with Javaid Iqbal, *supra* note 82.

160. *Id.*

161. First Amended Complaint & Jury Demand, *supra* note 22, at 25.

162. *Id.* at 17.

163. Interview with Javaid Iqbal, *supra* note 82.

164. *Id.*

165. *Id.*; see also First Amended Complaint & Jury Demand, *supra* note 22, at 30 (“Mr. IQBAL’s attorney was turned away from the MDC several times, being falsely informed that Mr. IQBAL had been transferred to another facility.”); Plaintiff Iqbal’s Responses to Defendant Linda Thomas’s First Set of Interrogatories at 13–14, *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG (E.D.N.Y. Nov. 10, 2009) (stating that Lopez tried to visit but was turned away on one occasion); Plaintiff Iqbal’s

would sometimes disconnect the phone if he complained to his lawyers about conditions in the prison<sup>166</sup> and that he was allowed only one brief call to family in Pakistan during his stay in the ADMAX SHU.<sup>167</sup>

Many of these allegations align with findings of the Justice Department Inspector General, which conducted more than one hundred interviews and obtained videotape evidence in its investigation of conditions at the MDC.<sup>168</sup> The Inspector General found the following: MDC detainees were confined to cells for at least twenty-three hours a day; exercise was offered on the exposed top floor of the MDC on cold winter mornings;<sup>169</sup> nearly twenty-four hours each day of illumination in the cells caused lack of sleep, depression, and panic attacks among the inmates;<sup>170</sup> and access to counsel was sometimes blocked.<sup>171</sup> Moreover, the Inspector General substantiated allegations that MDC staff members slammed detainees into walls, twisted and bent detainees' arms and hands, and otherwise inflicted pain on detainees, while routinely calling them terrorists and killers.<sup>172</sup> The abuse occurred despite the "compliant and non-combative" behavior of the September 11 detainees.<sup>173</sup> The Bureau of Prisons eventually disciplined several officers accused by detainees of abuse, largely in response to the Inspector General investigation, although the Justice Department did not bring criminal charges against any of them.<sup>174</sup>

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Supplemental to Defendant Linda Thomas' First Set of Interrogatories at 23, *Elmaghraby*, No. 04 CV 01809 JG SMG (stating that Iqbal received one visit from Lopez at the MDC and spoke with him on the phone on seven or eight occasions).

166. First Amended Complaint & Jury Demand, *supra* note 22, at 29.

167. Plaintiff Iqbal's Responses to Defendant Linda Thomas's First Set of Interrogatories, *supra* note 165, at 12.

168. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK 6-7 (2003).

169. See OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 152.

170. *Id.* at 153-54.

171. *Id.* at 135-37.

172. OFFICE OF THE INSPECTOR GEN., *supra* note 168, at 28-30. Sixteen to twenty MDC staff members, "a significant number of the officers who had regular contact with the detainees," participated in the verbal and physical abuse. *Id.* at 8.

173. *Id.* at 13.

174. Of the individual officers whom Iqbal accused of assaulting him at the MDC, none were prosecuted in connection with his allegations or those of other post-9/11 detainees. See Nina Bernstein, *Officer Named in Abuse Suit Was Accused in Earlier Scandal*, N.Y. TIMES (May 7, 2004), <http://www.nytimes.com/2004/05/07/nyregion/officer-named-in-abuse-suit-was-accused-in-earlier-scandal.html> [<https://perma.cc/QBS3-KG78>] (noting that Justice Department decided not to prosecute correctional officers accused of abuse with respect to September 11 detainees). Some of these officers, however, were ultimately convicted of abuse in later cases involving other detainees: In 2007, a jury convicted Captain Salvatore LoPresti, then "[o]ne of the highest-ranking officers at the Metropolitan Detention Center," of conspiracy in planning and then covering up the beating of an inmate in a high-security unit. Alan Feuer, *High-Ranking Jail Officer is Convicted of Conspiracy in Beating*, N.Y. TIMES (Oct. 26, 2007), <http://www.nytimes.com/2007/10/26/nyregion/26abuse.html> [<https://perma.cc/2UDK-HU3U>]. Officers Angel Perez and Elizabeth Torres were sentenced for their role in assaulting another inmate in a separate incident. Press Release, U.S. Attorney's Office, E. Dist. of N.Y., Former Bureau of Prisons Correctional Officer Sentenced on Conviction Arising from Inmate Beating and Subsequent Cover-up

In April 2002, Iqbal pled guilty to two charges—conspiracy to make, utter, or possess counterfeit securities and fraud with identification documents—and the government dismissed charges related to making the forged and counterfeit securities and a separate charge of identity fraud.<sup>175</sup> He later told *The New York Times* that he pled guilty only to escape the abuse.<sup>176</sup> On September 17, 2002, Judge I. Leo Glasser sentenced him to sixteen months imprisonment, a \$200 assessment, and three years of supervised release with the condition that he not return to the United States illegally.<sup>177</sup>

Around late July 2002, after pleading guilty but before his sentencing, Iqbal was returned to the general inmate population of the MDC.<sup>178</sup> Given that Bureau of Prisons policy required FBI clearance before detainees could be released into the general population, the FBI had likely determined by that point that it no longer had investigative interest in Iqbal.<sup>179</sup> In January 2003, Iqbal was moved<sup>180</sup> to the Passaic County Jail, in New Jersey, which housed hundreds of post-9/11 detainees in less harsh conditions.<sup>181</sup> During his incarceration, Iqbal's wife signed divorce papers, making him ineligible for legal status through marriage.<sup>182</sup> Iqbal received a hearing before an immigration judge who asked whether he wanted to fight his deportation or accept voluntary deportation to Pakistan.<sup>183</sup> Tired of confinement and convinced that the U.S. government would never let someone once branded a terrorist stay in the United States, Iqbal agreed to voluntary removal, signing papers that prohibited him from

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(Sept. 11, 2008), <http://www.justice.gov/archive/usao/nye/pr/2008/2008sep11.html> [https://perma.cc/QD9N-KN7C]. With respect to the employment (rather than criminal) consequences of the abuse, the Bureau of Prisons announced that it fired two correctional officers, demoted three senior officers, and suspended six others for their roles in abusing September 11 detainees, although the identities of these officers were not made public. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 14 (2006). Meanwhile, certain other officers accused by Iqbal and other detainees obtained prestigious positions elsewhere. See *New Warden Chosen for State Prison*, CITIZEN (Jan. 1, 2016), [http://www.citizen.com/news/2016-01-15/Local/New\\_warden\\_chosen\\_for\\_state\\_prison.html](http://www.citizen.com/news/2016-01-15/Local/New_warden_chosen_for_state_prison.html) [https://perma.cc/NNB3-FVHS] (reporting that Michael Zenk was selected as warden of the New Hampshire State Prison).

175. Docket, *supra* note 122, at ECF No. 21.

176. See Bernstein, *2 Men Charge Abuse*, *supra* note 67.

177. Docket, *supra* note 122, at ECF No. 25.

178. First Amended Complaint & Jury Demand, *supra* note 22, at 15.

179. See OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 127 (“When the FBI liaison . . . told the . . . BOP liaisons that the FBI had no further investigative interest in a particular detainee, the BOP liaison drafted a clearance memorandum . . . . When the Warden received this memorandum, the detainee could be ‘normalized’ (i.e., released to the general population). However, this process did not occur quickly . . . .”). This report presents a case study of one unnamed detainee whose dates of arrest and transfer appear to match those of Iqbal: The report notes that a detainee arrested in New York who arrived at the MDC on November 5, 2001, was cleared by the FBI on May 16, 2002, but the BOP did not receive notification of clearance until June 13, 2002, “due to an internal FBI admin[istrative] error.” *Id.* at 130. The inmate was released into the general population the next day. *Id.*

180. See First Amended Complaint & Jury Demand, *supra* note 22, at 4 (stating that Iqbal was at the MDC until “on or about January 15, 2003”).

181. See OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 5, 17.

182. Telephone Interview with Javaid Iqbal, *supra* note 80.

183. *Id.*

returning to the United States for a decade.<sup>184</sup>

#### D. DEPORTATION TO PAKISTAN

In early 2003, Iqbal arrived at the Chaklala Airbase in Rawalpindi, Pakistan, on a chartered flight carrying over one hundred Pakistani deportees.<sup>185</sup> As Iqbal boarded the plane in Buffalo, a U.S. official told him, “You’re damn lucky you’re going back home alive. But we promise you, you won’t [be] alive more than three years.”<sup>186</sup> During the journey from Buffalo to Rome to Rawalpindi, metal cuffs restrained Iqbal’s hands and feet, and he was seated in the back of the plane near a group of FBI agents.<sup>187</sup> When the plane landed at the airbase, Pakistani commandos boarded the plane, having apparently been told that Iqbal had made trouble on the flight.<sup>188</sup> Iqbal swore at the FBI agents, accusing them of continuing to lie about him even at that late stage.<sup>189</sup> Speaking in Urdu, he asked the Pakistani officers how a person who had his hands and feet restrained could have made trouble on the flight.<sup>190</sup> A sympathetic Pakistani official assured Iqbal that he understood, removed the cuffs, and allowed him to leave.<sup>191</sup>

After Iqbal returned to Faisalabad, he gave interviews to two Urdu-language Pakistani newspapers, *Roznama Express* and *Roznama Khabren*, which ran extended articles on his experience in U.S. custody.<sup>192</sup> The return of hundreds of Pakistani deportees from the United States in 2002 and 2003 had been front-page news in Pakistan.<sup>193</sup> One of the newspapers that interviewed Iqbal also published photographs of him displaying scars on his legs from the prison abuse.<sup>194</sup> The newspaper quoted him describing his ongoing trauma from the experience: “I cannot speak for long time, I cannot walk, I cannot hear. I cannot even eat and drink easily. I do not know if I will [ever] get . . . better or not.”<sup>195</sup>

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184. *Id.*; Interview with Javaid Iqbal, *supra* note 82.

185. Interview with Javaid Iqbal, *supra* note 82; *see also* Cam Simpson et al., *Immigration Crackdown Shatters Muslims’ Lives*, CHI. TRIB. (Nov. 16, 2003), <http://www.chicagotribune.com/news/watchdog/chi-0311160374nov16-story.html> [<https://perma.cc/S2ZP-8D72>] (describing July 2003 flight of Pakistani deportees to Chaklala and noting that four planeloads of Pakistanis departed from the United States had previously arrived there).

186. Interview with Javaid Iqbal, *supra* note 82.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Spit Mixed in Food*, *supra* note 111; *Pakistan go nihsaan-e-ibrat bana den gay: Amreeki jailon mein kaid Pakistani ko FBI ki dhamki [We Will Make Pakistan a Symbol of Warning: FBI Threatens Pakistanis in American Prisons]*, ROZNAAMA EXPRESS (Pak.), Mar. 18, 2003, at 5–39 (Timsal Masud trans.).

193. Simpson et al., *supra* note 185.

194. *Spit Mixed in Food*, *supra* note 111.

195. *Id.*

Seeing his emotional state, Iqbal's family took him to various doctors and psychologists, who advised his family to keep him busy.<sup>196</sup> As word got out about Iqbal's experience in the United States, he also received some support from old friends who contacted him.<sup>197</sup> Iqbal's family helped him set up a mobile shop in Faisalabad, which initially made strong sales and employed four workers.<sup>198</sup>

But Iqbal's decision to go public with his experience also drew unwelcome attention. Shortly after the news stories appeared, someone from the Pakistan Ministry of Foreign Affairs called Iqbal's home and told his father that Iqbal should "shut his mouth, or else he will be history."<sup>199</sup> The officer warned that Iqbal's statements could endanger the U.S.–Pakistan relationship.<sup>200</sup> Scared by the threat, his father insisted that Iqbal not do anything to further publicize his experience or anger the U.S. government.<sup>201</sup> Iqbal believes that Pakistani government officials continued to monitor him in the ensuing years: when bomb blasts periodically occurred in the region, for instance, intelligence officers came to Iqbal's shop demanding to know where Iqbal had been.<sup>202</sup>

At the same time, Iqbal's story attracted the interest of Islamic militants in the region, who believed that Iqbal's experience at U.S. hands would make him sympathetic to their cause and an attractive spokesperson for their message.<sup>203</sup> Men from groups including Lashkar-e-Jhangvi, Sipah-e-Sahaba, Jaysh Muhammad, and the Taliban of Pakistan, all of which had deep networks in the poorer areas of Punjab, began visiting Iqbal.<sup>204</sup> The militants assumed that Iqbal nursed anger and hatred that they could exploit, and that his story of mistreatment could inspire others to enlist.<sup>205</sup> With regular visits and phone calls to his shop and home, these groups mounted what Iqbal perceived as "psychological warfare" against him, maintaining their attempts to recruit him despite his refusal to join.<sup>206</sup> The stress from these encounters made it difficult for Iqbal to concentrate on his business, eventually causing it to fail.<sup>207</sup>

While government officials and militants harassed Iqbal because they believed his U.S. experience might incline him toward extremism, others in his community suspected him of being a CIA agent.<sup>208</sup> People in the neighborhood whispered that the U.S. government would never allow a person held as a

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196. Telephone Interview with Javaid Iqbal, *supra* note 80.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. Telephone Interview with Javaid Iqbal, *supra* note 80.

203. Interview with Javaid Iqbal, *supra* note 82; Telephone Interview with Javaid Iqbal (Feb. 15, 2016).

204. Telephone Interview with Javaid Iqbal, *supra* note 203.

205. *Id.*

206. *Id.*

207. *Id.*

208. Interview with Javaid Iqbal, *supra* note 82.

terrorist to return to Pakistan unless he had agreed to work for the United States.<sup>209</sup> Iqbal noted the irony: although “America threw me out of their country,” in his own country he was branded an American agent.<sup>210</sup> Years after Iqbal’s return to Pakistan, a teacher told Iqbal’s son that everyone knew that Iqbal worked for the CIA, calling it a “very dirty thing” for a Pakistani to work for the “enemy of Pakistan.”<sup>211</sup>

#### E. THE LEGAL CHALLENGE

Despite opposition from his family and harassment from society, Iqbal insisted on sharing his story and, when the opportunity arose, pursuing a legal challenge. Two organizations working with post-9/11 detainees, the Islamic Circle of North America and Amnesty International, connected Iqbal with Haeyoung Yoon of the Urban Justice Center, a public interest organization.<sup>212</sup> She in turn enlisted Alexander Reinert of the private prisoner rights law firm Koob & Magoolaghan.<sup>213</sup> A separate lawsuit, *Turkmen v. Ashcroft*, was already underway on behalf of a class of male noncitizens of South Asian or Middle Eastern origin who had been detained for minor immigration violations,<sup>214</sup> but Iqbal was not part of that class because he had been detained on criminal charges. Iqbal says that his lawyers warned him “to think a thousand times” before deciding to sue.<sup>215</sup> He chose to sue because he wanted people to know the darker side of America: he saw the post-9/11 detentions as a reflection of systematic racism and imperialism that had also led to deadly U.S. interventions in Iraq, Afghanistan, and other Muslim countries.<sup>216</sup>

His lawyers filed a complaint in the Eastern District of New York in May 2004 on behalf of Iqbal and a second man, Ehab Elmaghraby, an Egyptian Muslim who also alleged discriminatory confinement and abuse.<sup>217</sup> As the suit moved forward, Iqbal communicated with his lawyers from the “shelter” of his mobile shop in Faisalabad because his family disapproved of his litigation activities.<sup>218</sup> For Iqbal, a singular moment in the litigation occurred in early 2006, when he and several *Turkmen* plaintiffs returned to the United States to give depositions and undergo discovery-related medical exams.<sup>219</sup> Discovery against Ashcroft and Mueller had been stayed pending appeals of their motion

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209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*; Telephone Interview with Javaid Iqbal, *supra* note 80.

213. Telephone Interview with Alexander Reinert (Mar. 15, 2016).

214. See First Amended Class Action Complaint & Demand for Jury Trial at 2, *Turkmen v. Ashcroft*, 915 F. Supp. 2d 314 (E.D.N.Y. 2013) (No. 02-CV-2307).

215. Interview with Javaid Iqbal, *supra* note 82.

216. *Id.*

217. Complaint & Jury Demand at 1–2, *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG (E.D.N.Y. Nov. 10, 2009).

218. Telephone Interview with Javaid Iqbal, *supra* note 80.

219. See Bernstein, *Held in 9/11 Net*, *supra* note 67; Interview with Javaid Iqbal, *supra* note 82.

to dismiss, but the court had permitted discovery to proceed against lower level defendants not claiming qualified immunity.<sup>220</sup> The United States had initially objected to bringing back the deported detainees, but the magistrate judge threatened to schedule discovery of the defendants first if the defendants did not agree to depose the plaintiffs in the United States.<sup>221</sup> Faced with that possibility and the potential cost of deposing the plaintiffs abroad,<sup>222</sup> the government agreed to admit Iqbal and other ex-detainees if they cleared extensive background investigations and received the approval of multiple federal agencies.<sup>223</sup> According to the Center for Constitutional Rights, which represented the *Turkmen* plaintiffs, these depositions marked the first time that the U.S. government allowed individuals who had been barred from returning to the United States to enter the country to pursue a civil case.<sup>224</sup>

Still, as a condition of entry, the government required the plaintiffs to stay at an undisclosed New York hotel, under the custody of U.S. marshals.<sup>225</sup> They could not have visits or phone or email communication, except with legal counsel, and they had to swear in advance that they did not fear returning to their countries of origin, a condition designed to preclude asylum claims.<sup>226</sup> Despite the onerous security restrictions and his family's fears that he might never return,<sup>227</sup> Iqbal experienced his two-day deposition as a release: he "felt so light" because he had told government lawyers his story, and he believed that the truth behind the detentions would "spread all over the United States."<sup>228</sup>

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220. See Turkmen Amicus Brief, *supra* note 134, at 3 (noting that discovery conducted in *Turkmen* and *Iqbal* in district court had been limited to non-parties and parties not claiming qualified immunity).

221. Docket at May 9, 2005, Minute Entry, *Turkmen v. Ashcroft*, 915 F. Supp. 2d 314 (E.D.N.Y. 2013) (No. 02-CV-2307); Telephone Interview with Alexander Reinert, *supra* note 213.

222. Telephone Interview with Alexander Reinert, *supra* note 213.

223. See Letter from Stephen E. Handler to Magistrate Judge Steven M. Gold Regarding United States' Position Regarding Plaintiffs Entering the United States at 1, *Turkmen*, 915 F. Supp. 2d 314 (No. 02-CV-2307).

224. See *Turkmen v. Ashcroft*, CTR. FOR CONST. RTS., <http://ccrjustice.org/home/what-we-do/our-cases/turkmen-v-ashcroft> [<https://perma.cc/4ZG9-V4TV>] (describing February 2006 paroling of ex-detainees in timeline section of website).

225. See Letter from Stephen E. Handler to Magistrate Judge Steven M. Gold Regarding United States' Statement Regarding Paroling Plaintiffs into the United States at 2, *Turkmen*, 915 F. Supp. 2d 314 (No. 02-CV-2307); Bernstein, *Held in 9/11 Net*, *supra* note 67.

226. See Letter from Stephen E. Handler to Magistrate Judge Steven M. Gold Regarding United States' Statement Regarding Paroling Plaintiffs into the United States, *supra* note 225, at 2; Bernstein, *Held in 9/11 Net*, *supra* note 67. After the plaintiffs objected to the condition that the parolees provide a sworn statement that they did not fear returning to their countries of origin, see Letter from Def. United States by Stephen E. Handler to Magistrate Judge Steven M. Gold Regarding Plaintiffs' 8-12-05 Letter Re: Conditions of Parole at 1, *Turkmen*, 915 F. Supp. 2d 314 (No. 02-CV-2307), the United States agreed not to use the statement to oppose any application for immigration relief made by the plaintiffs except for purposes of impeachment, see Letter from Stephen E. Handler to Magistrate Judge Steven M. Gold Regarding United States' Position Regarding Conditions of Parole, *Turkmen*, 915 F. Supp. 2d 314 (No. 02-CV-2307).

227. Telephone Interview with Javaid Iqbal, *supra* note 80.

228. Interview with Javaid Iqbal, *supra* note 82.

Shortly after the depositions, Iqbal's co-plaintiff settled his claims because of health and financial concerns.<sup>229</sup> Iqbal continued alone, and in 2007, the Second Circuit affirmed the district court's refusal to dismiss claims against Ashcroft and Mueller.<sup>230</sup> The following year, the Supreme Court granted certiorari.<sup>231</sup> After the Supreme Court decided in favor of Ashcroft and Mueller, Iqbal settled the case, with the United States paying him \$265,000 in exchange for a dismissal of all claims against all defendants.<sup>232</sup> Iqbal agreed to settle only when his lawyers implored him to do so in light of the significant legal obstacles that lay ahead.<sup>233</sup>

Iqbal had mixed feelings about the resolution of the case. The compensation helped Iqbal cover debts he had incurred from his failing mobile business and from surgery for a son born with a malfunctioning kidney.<sup>234</sup> And he felt proud of his role in preserving the history of U.S. actions and in the knowledge that law students and courts would remember his name.<sup>235</sup> He described how he shares the story of his legal challenge with his children:

Sometimes I open [the decision] on [the] Internet, so I tell my daughter, tell my kids, I say, "Look, this is your father. If I die tomorrow, remember your father. You know, seven pages. This is history. This is not a joke. And you should never feel ashamed of this—that your father got arrested. But feel proud of your father."<sup>236</sup>

But Iqbal deplored the fact that he never received an official acknowledgment of wrongdoing or a declaration that he was innocent of terrorism connections, which he believes would have helped clear his name in Pakistan.<sup>237</sup> Nor did the resolution of his case come with any prospect of resettlement in a third country where he and his family could feel safe—a concern that has only intensified

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229. See Nina Bernstein, *U.S. is Settling Detainee's Suit in 9/11 Sweep*, N.Y. TIMES (Feb. 28, 2006), <http://www.nytimes.com/2006/02/28/nyregion/us-is-settling-detainees-suit-in-911-sweep.html> [<https://perma.cc/QQN3-X44K>].

230. *Iqbal v. Hasty*, 490 F.3d 143, 177 (2d Cir. 2007).

231. *Id.*, cert. granted sub nom. *Ashcroft v. Iqbal*, 554 U.S. 902 (2008).

232. See Letter by Javaid Iqbal, *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG (E.D.N.Y. Nov. 10, 2009) (requesting dismissal of case based on October 2009 settlement of Iqbal's claims); Stipulation for Compromise Settlement & Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677 at 2, *Elmaghraby*, No. 04 CV 01809 JG SMG (on file with author). Around the same time, the government settled the claims of five *Turkmen* plaintiffs for a total of \$1.26 million. Press Release, Ctr. for Constitutional Rights, *Five New York Men Detained and Abused in Post-9/11 Immigration Sweeps Settle Case for \$1.26 Million* (Nov. 3, 2009), <http://ccrjustice.org/home/press-center/press-releases/five-new-york-men-detained-and-abused-post-911-immigration-sweeps> [<https://perma.cc/N8W7-9RHX>].

233. Interview with Javaid Iqbal, *supra* note 82; Telephone Interview with Javaid Iqbal, *supra* note 203.

234. Telephone Interview with Javaid Iqbal, *supra* note 203.

235. Interview with Javaid Iqbal, *supra* note 82.

236. *Id.*

237. Telephone Interview with Javaid Iqbal, *supra* note 203.

over time.<sup>238</sup>

F. LIFE AFTER THE LITIGATION: “IT’S NOT OVER”<sup>239</sup>

Six years after the settlement of the case, Iqbal describes the consequences of his detention as ongoing—as inflicting “day-by-day punishment.”<sup>240</sup> Militant groups continue to harass his family and seek to recruit them in order to capitalize on his story.<sup>241</sup> Most significantly, he maintains that his refusal to go along with their entreaties led to the lodging of false capital charges against his teenaged son and the issuance of a death warrant against the son from local religious authorities.<sup>242</sup>

Beginning when his eldest son was in his final year of high school, Iqbal recounted, the groups that regularly harassed Iqbal began appealing to him to send his son to join them:

So they start asking me, give my son for them . . . so “we should get revenge from United States because they’ve done wrong with you. You should not sit like that. You’re Muslim brother. Stand up for your right. They’re *kuffar* [disbelievers], they’re this and that, they deserve punishment, they deserve *badla*—revenge.” I said, I get my revenge. But not with gun—with pen. I lived there. I know the society of United States of America, I know the people, I know the system. In that system, if you’re right, and somebody has done wrong with you, don’t give up. Stand up for your right. You will get your right. . . . With a gun, no. I won’t choose this way. Never did, never will, never teach my family [that], never teach my kid [that]. . . . But they never give up.<sup>243</sup>

The men followed his son to school, appealing to him to seek revenge on his father’s behalf.<sup>244</sup> Iqbal and his son both refused the entreaties. Then, in an act that Iqbal understood to be retaliation for their refusal, someone accused his son of burning papers with Islamic religious writing on them<sup>245</sup>—a criminal violation under Pakistan’s penal code.<sup>246</sup> According to human rights groups, blasphemy charges are often levied against religious minorities in Pakistan, sometimes

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238. *Id.*

239. Interview with Javaid Iqbal, *supra* note 82.

240. *Id.*

241. *Id.*; Telephone Interview with Javaid Iqbal, *supra* note 203.

242. Interview with Javaid Iqbal, *supra* note 82. Iqbal’s oldest son, whom he helped raise, is his wife’s son from an earlier marriage. Iqbal and his wife also have three other children. Telephone Interview with Javaid Iqbal, *supra* note 80.

243. Interview with Javaid Iqbal, *supra* note 82.

244. Telephone Interview with Javaid Iqbal, *supra* note 203.

245. Interview with Javaid Iqbal, *supra* note 82.

246. PAK. PENAL CODE §§ 295 to 295-C (listing several “offences relating to religion” under Chapter XV of penal code).

resulting in vigilante murders of the accused or others in their communities.<sup>247</sup> Iqbal, a Muslim, recalled that mobs torched a Christian neighborhood in a town not far from Faisalabad on mere accusations that some among them had defaced the Qur'an, adding, "This is not Islam, this is not religion, this is craziness."<sup>248</sup>

The legal documents in the case against Iqbal's son suggest the following: In March 2013, the president of a local religious welfare society told the police that he had come across burned copies of papers containing prayers for the Prophet.<sup>249</sup> Based on his statement, the police registered a "First Information Report" that described the accusations as stating a violation of a criminal prohibition against defiling sacred objects,<sup>250</sup> an offense punishable by a two-year prison term or fine.<sup>251</sup> A subsequent police report noted that the complainant had identified Iqbal's son as the perpetrator based on information from "reliable sources."<sup>252</sup> The same individual later accused five additional young men of participating in the offense.<sup>253</sup> A judge then issued an arrest warrant against Iqbal's son, but for the far more serious offense of defiling the name of the Prophet,<sup>254</sup> a charge that carries a death sentence under Pakistani law.<sup>255</sup> While the criminal case was still pending, in May 2014, an independent local religious institution issued a *fatwa*, or legal opinion, decreeing that Iqbal's son and the five other youth were guilty of disrespecting the Prophet of Islam and that the "punishment in law and *Sharia* is [a] death sentence."<sup>256</sup>

Iqbal recalls the events as follows. The police visited his home one night and accused his son of burning the holy papers.<sup>257</sup> His son told him that he and his

247. See HUMAN RIGHTS WATCH, WORLD REPORT 2015: PAKISTAN, at 421 (2015) (describing persecution and murders of Christians and Ahmadis for alleged blasphemy); see also Aleem Maqbool, *Sectarian Violence Hits Pakistani Town*, BBC NEWS (Aug. 12, 2009), [http://news.bbc.co.uk/2/hi/south\\_asia/8196013.stm](http://news.bbc.co.uk/2/hi/south_asia/8196013.stm) [<https://perma.cc/X9UP-LCS2>] (describing murders of Christians in Gojra, Pakistan, following allegations that Christians in a nearby town had torn up and burnt pages of the Qur'an); Omar Waraich, *Pakistan: Who's Attacking the Christians?*, TIME (Aug. 5, 2009), <http://content.time.com/time/world/article/0,8599,1914750,00.html> [<https://perma.cc/J2AX-LR7M>] (noting that many Pakistani Christians "question whether they can remain safe in a country that . . . continues to have blasphemy laws that have been repeatedly exploited by violent extremists").

248. Telephone Interview with Javaid Iqbal, *supra* note 203. For news coverage of the same incident, see Maqbool, *supra* note 247; Waraich, *supra* note 247.

249. See First Information Report No. 236, Millat Town, Faisalabad Police Station (Mar. 24, 2013) (on file with author).

250. *Id.*

251. PAK. PENAL CODE § 295.

252. Police Form 25-54(I), Millat Town, Faisalabad Police Station (June 24, 2013) (on file with author).

253. Form Challan Under Section 173 CR.P.C. No. 514/14, Millat Town, Faisalabad Police Station (Apr. 14, 2014) (on file with author).

254. See Arrest Warrant No. 236/13, Court of Asif Bashir Additional District & Session Judge, Faisalabad (on file with author).

255. PAK. PENAL CODE § 295-C; see also HUMAN RIGHTS WATCH, *supra* note 247, at 421 ("Section 295-C of Pakistan's penal code makes the death penalty mandatory for blasphemy, although no one has yet been executed for the crime.")

256. Evidence of Sharia Verdicts Serial No. 199, Jamia Rizvia Mazhar-e-Islam (May 10, 2014) (on file with author).

257. Telephone Interview with Javaid Iqbal, *supra* note 203.

friends were playing cricket that day near a box containing religious papers, but they had not touched them, let alone burned them.<sup>258</sup> The family learned that a *fatwa* decreeing death had been issued when someone dropped an envelope containing a copy at their home.<sup>259</sup> Terrified of the potential repercussions, and without informing anyone, Iqbal's son fled.<sup>260</sup> Neither Iqbal nor his family members have heard from him since—it has been “utter silence.”<sup>261</sup>

Iqbal is convinced that the militants who had targeted him were responsible for the false case against his son.<sup>262</sup> He does not know the individual who lodged the complaint, but believes that he was either a follower of one of the groups in question or paid to make the accusation, because “everything in Pakistan is for sale.”<sup>263</sup> But Iqbal's family blamed him for his son's disappearance, telling him, “Because of you, because of you, the kid ran away from home.”<sup>264</sup> The charges and death warrant against his son made Iqbal question his decision to speak out about his experience in the United States.<sup>265</sup> He lamented:

The young man's life has been destroyed just because of me. Now it was time that I should have . . . [had] him married and settle[d] . . . . He got scholarship from high school, he got scholarship first year in college, he got scholarship second year in college. . . . That brilliant child he was. They destroyed him. Just because I didn't give him to them. If I [had] agree[d] with them, they would be very happy—now he'd be fighting somewhere in the mountains. But [because I said] no, they have destroyed his life.<sup>266</sup>

Haunted by the disappearance of his son and afraid for his other children, Iqbal describes life now as “worse than being at the MDC.”<sup>267</sup> Having once been branded a terrorist, he says, “I am free but not free.”<sup>268</sup> He is anxious to raise his children without harassment or fear, and he remains wistful about the life he once had in America:

If they asked me [my] last wish today, and if they asked me, “Would you wish to go to America?” I would [a] thousand times say, “Yes, yes, yes,” but not by myself—with my kids. Take me there. And I will be working again in the street as a cable guy.<sup>269</sup>

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258. *Id.*

259. Telephone Interview with Javaid Iqbal, *supra* note 203.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. Telephone Interview with Javaid Iqbal, *supra* note 203.

266. Interview with Javaid Iqbal, *supra* note 82.

267. Telephone Interview with Javaid Iqbal, *supra* note 203.

268. *Id.*

269. Interview with Javaid Iqbal, *supra* note 82.

Fifteen months of confinement as a terrorist seared into Iqbal one image of the U.S. government, but a decade in Long Island had exposed him to another America—one of kind people, economic opportunity, relative freedom, and a legal system that offered the hope of challenging injustice.<sup>270</sup> Those dueling images seem to confound him, even now.

#### G. REIMAGINING IQBAL

What should one take away from the lost story of Iqbal? First, an extended account invites us to humanize the individual considered in cursory and categorical terms by the Court and rendered a procedural symbol by lawyers.<sup>271</sup> The tendency to place individuals into familiar categories is a product of both the conventions of legal argument<sup>272</sup> and basic cognitive processing. A body of social psychology research establishes the existence of an “out-group homogeneity effect”: people tend to view members of groups other than their own as more homogenous than members of their own group.<sup>273</sup> Moreover, since September 11, even sympathetic portrayals of Muslims often depict them in undifferentiated terms—as a line of masked Guantanamo detainees clad in identical orange jumpsuits or as a human pyramid of naked Abu Ghraib prisoners. Perhaps a narrative offers the hope of envisioning at least one individual beyond the readily available frames of Muslim, terrorist suspect, and abused prisoner.<sup>274</sup> These frames need not be replaced by an equally one-dimensional trope of the heroic, flawless immigrant to be rejected as all too simple.<sup>275</sup>

Second, this account challenges the implication in the majority opinion that a legitimate factual basis for suspicion connected Iqbal to terrorism.<sup>276</sup> Little information has been made public regarding why law enforcement officials considered Iqbal a threat or designated him for detention in the highly restrictive unit of the MDC. Although government officials may have feared that individuals using false identities or engaging in financial fraud could assist terrorist travel or financing, no public information suggests any reason to suspect such a linkage in his case. Indeed, if one credits Iqbal’s account of his interviews with law enforcement, the questions about his presence in lower Manhattan on September 11, his possession of news stories regarding the

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270. *Id.*

271. *See supra* notes 10, 27 and accompanying text.

272. *See, e.g.*, JAMES BOYD WHITE, *THE LEGAL IMAGINATION* 114 (abr. ed. 1985) (describing tendency of legal language to render caricatures of individuals but noting that this tendency is not unique to lawyers).

273. *See* Markus Brauer, *Intergroup Perception in the Social Context: The Effects of Social Status and Group Membership on Perceived Out-Group Homogeneity and Ethnocentrism*, 37 *J. EXPERIMENTAL SOC. PSYCHOL.* 15, 15 (2001) (listing studies).

274. *See* Romero, *supra* note 11, at 1434 (noting that the Justices could have viewed Iqbal as an individual rather than as part of an aggregate).

275. *See, e.g.*, BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* 77–78 (2001) (describing the image of the “supercitizen immigrant” in U.S. political discourse).

276. *See supra* Section I.A.

attacks, and his knowledge of Osama bin Laden suggest an investigation casting about for signs of terrorist connections rather than prompted by information suggesting such connections.<sup>277</sup>

In the end, all signs suggest that Iqbal was fully cleared: he was released from the MDC's maximum security unit, permitted to return to Pakistan mere months after his sentencing, allowed to return to the United States for his deposition, and eventually given hundreds of thousands of dollars in a settlement with the U.S. government.<sup>278</sup> Moreover, during the five years in which he pursued the case, the government never publicly indicated that it had had a credible basis for suspecting him of terrorism, although it presumably had every incentive to share such information. Despite all this, the Court's framing of the basis for the post-9/11 detentions—as targeting those suspected of involvement in terrorism<sup>279</sup>—continues to associate Iqbal with terrorism in the U.S. public record. Indeed, one federal court of appeals has recently read the *Iqbal* decision as casting doubt on his innocence, stating that in contrast to other immigrants detained after September 11, Iqbal was subjected to harsh detention because of his “suspected ties to the 9/11 attacks.”<sup>280</sup>

Third, Iqbal's story suggests that the effects of the detentions were not as limited in space or time as readers of the Supreme Court decision might have assumed. Little has been written about the transnational experiences of post-9/11 detainees following their deportations or the effects on the societies to which they returned, but what exists suggests that Iqbal's experience in Pakistan is not unique.<sup>281</sup> The categorical exclusion of those within a racial or religious group is often justified as a temporary process of sorting the loyal from the disloyal, with the implication that the status quo *ante* will be restored after the emergency passes. Proponents of the internment of Japanese-Americans, the post-9/11 detentions, and the exclusion of Muslim immigrants from the United States have all justified such measures in this fashion.<sup>282</sup> But Iqbal's

277. See *supra* notes 103–21 and accompanying text.

278. See *supra* notes 181–84 and accompanying text; Section II.G.

279. See *supra* note 11.

280. See *Turkmen v. Hasty*, 789 F.3d 218, 255 (2d Cir. 2015), *cert. granted*, 2016 WL 2653797 (U.S. Oct. 11, 2016) (No. 15-1363). *Turkmen* interpreted *Iqbal* in such a fashion to distinguish other post-9/11 detainees' claims from those in *Iqbal* and thereby enable them to survive. See *id.* Although *Turkmen* interpreted *Iqbal* this way in the interest of other detainees, its interpretation is a telling example of how legal advocacy forces lawyers and judges to delegitimize the claims of earlier litigants in order to salvage the claims of present ones. In such a context, narrating the experiences of individuals outside the confines of legal argument is even more critical.

281. See SHIEKH, *supra* note 16, at 21, 23 (presenting six oral histories based on interviews with forty post-9/11 detainees in the United States, Pakistan, Egypt, and India and including the transnational consequences of their detentions and deportations); see also Emily Ryo, *Developing Legal Cynicism Through Immigration Detention* 1, 4 (Aug. 2016) (unpublished manuscript) (on file with author) (arguing based on empirical study of general immigrant detainees in Southern California that the detention experience spreads cynicism about the U.S. legal system and authorities through transnational networks).

282. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 218–19 (1944) (upholding “temporary” exclusion order against all Japanese-Americans due to military finding that “it was impossible to bring

story challenges the tendency to characterize such practices as imposing limited harm: as in his case, such measures may affect individuals and societies far beyond the United States and for far longer than the immediate application of a policy. For Iqbal, the emotional trauma and social repercussions of the detention have not subsided.<sup>283</sup> Even if Iqbal cannot *prove* a linkage between his detention and the disappearance of his son, he strongly believes that the events are connected.<sup>284</sup> And the widespread transmission of his and other detainees' experiences in U.S. custody through news media and social networks may well have affected international perceptions of the United States.

### III. THE LOST STORY: RACE, RELIGION, AND THE POST-9/11 DETENTIONS

This Part turns from Iqbal's individual story to the detentions as a whole. Hundreds of individuals were arrested and detained in connection with the September 11 investigation, most of them for immigration violations alone; a smaller number, like Iqbal, faced criminal charges.<sup>285</sup> The *Iqbal* decision presented the detentions as affecting primarily Arab Muslims, as targeting those with suspected connections to terrorism, and as occurring without the personal involvement of Ashcroft or Mueller in discriminatory decisions.<sup>286</sup> A more grounded account of the post-9/11 detentions suggests instead the following: First, the detainees were likely not predominantly "Arab Muslim," and Iqbal was not Arab—which at least partly undermines the basis for the Court's assertion that any profiling was rationally tied to both the religion and national origin of the terrorists.<sup>287</sup> Most Muslims are not Arab, and most Arab-Americans are not Muslim, but the Justices conflated the two groups as readily as the U.S. public after September 11. Second, significant evidence supports the idea that the ethnicity and religion of individuals factored heavily into investigative and detention decisions, as opposed to the detentions being race- or

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about an immediate segregation of the disloyal from the loyal"); OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 13 (noting that, according to his deputy, Assistant Attorney General for the Criminal Division Michael Chertoff, with respect to post-9/11 detainees, "[W]e have to hold these people until we find out what is going on"); Press Release, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> [<https://perma.cc/T82Z-QQ6S>] ("Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.").

283. See *supra* notes 239, 267–68 and accompanying text.

284. See *supra* notes 241–42 and accompanying text.

285. The exact number of detainees is unknown. Iqbal's complaint referred to "thousands of Arab Muslim" detainees. First Amended Complaint & Jury Demand, *supra* note 22, at 10. The Inspector General identified 762 individuals who were detained by the INS and placed on a special "INS Custody List" because the FBI had assessed them as being connected to terrorism or because the FBI could not determine whether they had such a connection. OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 1–2. In the weeks after September 11, the government publicly reported the numbers of people either questioned or arrested, but it stopped publicly reporting those numbers after the total reached 1,200. *Id.* at 1 n.2.

286. See *infra* notes 300, 318, 352 and accompanying text.

287. See *infra* Section II.A.

religion-blind in design and disproportionate only in effect.<sup>288</sup> Third, the factual basis linking detained individuals to suspicions of terrorism was often thin or absent, and many government officials knew at a fairly early stage of the mass detentions.<sup>289</sup>

At the same time, without discovery, it remains unclear whether Ashcroft and Mueller had a role in any discriminatory decision making: no smoking gun has emerged to prove intentional classification by either official on the basis of ethnicity or religion. The Second Circuit, however, recently concluded in *Turkmen v. Hasty*, the class action suit brought by those detained on immigration charges, that discrimination claims against the two high-ranking officials are plausible.<sup>290</sup> The *Turkmen* majority's decision arrives at a strikingly different conclusion from *Iqbal* on the plausibility of the claims against the high-level officials based on a far more detailed complaint.<sup>291</sup> Circuit judges split evenly on a decision to rehear the case en banc, and the Supreme Court recently granted the government's petition for writ of certiorari in the case.<sup>292</sup>

The story of the detentions has been lost not in the sense that it has never been told, but in the sense that the *Iqbal* opinion created a misleading version of history that lawyers and law students now ubiquitously read.<sup>293</sup> The Court ignored information from multiple sources, including a comprehensive and sometimes scathing report on the detentions by the Justice Department's independent Inspector General.<sup>294</sup> The majority in *Iqbal* cited the Inspector General report for its bare statistics on the scope of the government's post-9/11 investigation but failed to include its pointed conclusion that the "monumental challenges" facing the government after September 11 did not excuse the arbitrary labeling of aliens as terrorism suspects and the protracted failure to clear them

288. See *infra* Section III.B.

289. See *infra* Sections III.B, III.C.

290. See *Turkmen v. Hasty*, 789 F.3d 218, 256 (2d Cir. 2015), *cert. granted*, 2016 WL 2653797 (U.S. Oct. 11, 2016) (No. 15-1363).

291. See Fourth Amended Complaint & Demand for Jury Trial, *Turkmen v. Ashcroft*, 915 F. Supp. 2d 314 (E.D.N.Y. 2013) (No. 02-CV-2307); see also *infra* Section III.D.

292. *Turkmen v. Hasty*, 808 F.3d 197, 203 (2d Cir. 2015), *cert. granted*, 2016 WL 2653797 (U.S. Oct. 11, 2016) (No. 15-1363).

293. Some legal scholars discussed the *Iqbal* decision in light of immigration law and nationality-based profiling. See Juliet P. Stumpf, *The Implausible Alien: Iqbal and the Influence of Immigration Law*, 14 LEWIS & CLARK L. REV. 231, 233–34 (2010); Wadhia, *supra* note 11, at 1489–90. For pre-*Iqbal* law review articles discussing the detentions, see generally Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002).

294. OFFICE OF THE INSPECTOR GEN., *supra* note 16; see also OFFICE OF THE INSPECTOR GEN., *supra* note 168, at 28 (supplementing first report with discussion of allegations of physical and verbal abuse at the MDC). For a more detailed analysis of these reports and the role of inspectors general in protecting individual rights, see generally Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013).

of terrorist ties.<sup>295</sup> In rejecting any connection to high-level government officials as implausible, the Court also disregarded the material that the *Turkmen* plaintiffs had obtained in discovery and presented in an amicus brief in *Iqbal*.<sup>296</sup>

Nearly fifteen years later, much about the detentions remains unknown, including information about the internal processes government officials used to target individuals for investigation and classify detainees. This Part does not purport to provide a comprehensive account of the detentions—at this point, such an account is not possible. But it highlights the material facts that the Court neglected or misrepresented, drawing on the Inspector General report, discovery material from *Turkmen*, and additional public sources. Access to further information is limited as a result of judicial decisions sealing the immigration court hearings of post-9/11 detainees,<sup>297</sup> denying information requests under the Freedom of Information Act,<sup>298</sup> and, of course, protecting high-level government officials from discovery.<sup>299</sup> A fuller account thus awaits the decisions of future executive officials and courts regarding the disclosure of such materials.

#### A. DEMOGRAPHICS OF THE DETAINEES

At the most elemental level, the opinions in *Iqbal* are striking in that they implied most detainees, including *Iqbal*, were “Arab Muslim.” The majority opinion called the arrests “likely lawful and justified” because the September 11 attacks were “perpetrated by 19 Arab Muslim hijackers” who belonged to a group “headed by another Arab Muslim . . . and composed in large part of his Arab Muslim disciples”—all of which, the Court said, made it unsurprising that law enforcement actions would disproportionately affect “Arab Muslims.”<sup>300</sup> Referring to Arab Muslims four times in a single paragraph, the Court could hardly leave readers with an impression other than that the detainees were primarily Arab Muslims, and that *Iqbal* himself was one. Indeed, even some critics of the decision assumed as much.<sup>301</sup> Reading the dissent would have only

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295. See *Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009); OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 195–96.

296. *Turkmen Amicus Brief*, *supra* note 134, at 9–14.

297. *N. Jersey Media Grp. v. Ashcroft*, 308 F.3d 198, 199, 221 (3d Cir. 2002) (holding that press and public do not have First Amendment right to access immigration hearings of “special interest” aliens). *But see* *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (affirming grant of preliminary injunction against closure of hearings).

298. *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 937 (D.C. Cir. 2003) (holding that government was entitled to withhold names of post-9/11 detainees and information related to their arrests and detention).

299. See *Iqbal*, 556 U.S. at 687. *But see* *Turkmen v. Hasty*, 789 F.3d 218, 256 (2d Cir. 2015), *cert. granted*, 2016 WL 2653797 (U.S. Oct. 11, 2016) (No. 15-1363) (refusing to dismiss claims by post-9/11 detainees against Ashcroft and Mueller).

300. *Iqbal*, 556 U.S. at 682.

301. See, e.g., Laumann, *supra* note 37, at 181 (describing *Iqbal* complaint as alleging “discrimination against Muslim-Americans, particularly those of Middle Eastern background”); Romero, *supra* note 11, at 1425–26 (referring to “Arab Muslim men like *Iqbal*” and noting that *Iqbal* shared the “race”

strengthened that impression: the dissent actually identified Iqbal as an Arab Muslim in more explicit terms than did the majority opinion.<sup>302</sup>

Iqbal, of course, was Pakistani, not Arab, and as far as can be discerned from public data, perhaps only half of the total detainees held on immigration charges came from Arab countries.<sup>303</sup> According to the Inspector General, the top ten nationalities of the 762 aliens detained for immigration violations in connection with the September 11 investigation through August 2002<sup>304</sup> were as follows: Pakistan (254 individuals), Egypt (111 individuals), Turkey, Jordan, Yemen, India, Saudi Arabia, Morocco, Tunisia, and Syria.<sup>305</sup> Thus, the single largest number of detainees came from a non-Arab country (Pakistan, at fully a third of the total number), and non-Arab countries accounted for three of the top six nationalities represented (Pakistan, Turkey, and India). Although most of these countries are predominantly Muslim, some are not Arab (such as Pakistan or Turkey), and others are neither Arab nor mostly Muslim (India). As one researcher has suggested, Pakistanis may have been so heavily represented among the detainees—despite their lack of representation among the hijackers—because they worked “in low-paying jobs in public spaces” and were visibly brown-skinned, in addition to being undocumented.<sup>306</sup>

One might fault the *Iqbal* complaint for introducing the conflation of Arabs and Muslims; after all, the complaint stated that the FBI “arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11.”<sup>307</sup> On the other hand, the Court converted the factual allegation into the basis for a sweeping judgment that discrimination was implausible. The Court’s repeated references to Arab Muslims suggests either that the Court did not know the difference between “Arab” and “Muslim” and treated the categories as interchangeable, or that it believed that those who were detained largely shared both the ethnicity and religion of the hijackers.

The first possibility, if true, would suggest a striking level of ignorance on the part of the nation’s highest court: Arabs and Muslims, after all, are distinct groups, both as a definitional and empirical matter. “Arab” describes a person

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and “national origin” of the hijackers). Some scholars did point out the discrepancy. See Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 250–51; Kassem, *supra* note 11, at 1453 n.41. But even recent articles continue to assume from the decision that Iqbal was Arab. See, e.g., Bartholomew, *supra* note 10, at 750 (stating that Iqbal “and other Arab detainees” alleged they were treated as terrorist suspects).

302. See *Iqbal*, 556 U.S. at 698 (Souter, J., dissenting) (“The complaint contains specific allegations that . . . [certain federal officials] implemented a policy that discriminated against Arab Muslim men, including Iqbal, solely on account of their race, religion, or national origin.” (emphasis added)).

303. See OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 21. The Inspector General report does not include numerical values for each nationality, but it presents a bar chart that enables a rough assessment of the composition of detainees. *Id.*

304. *Id.* at 2, 5.

305. *Id.* at 21.

306. SHIEKH, *supra* note 16, at 9, 14.

307. See *Iqbal*, 556 U.S. at 681 (quoting First Amended Complaint & Jury Demand, *supra* note 22, at 10).

who identifies with a particular linguistic and cultural heritage, whereas “Muslim” describes an adherent of a religion, Islam.<sup>308</sup> Although most Arabs are Muslims, millions are not; in fact, about three-quarters of Arab-Americans are Christian.<sup>309</sup> Moreover, not all, or even most, Muslims are Arab: Arabs constitute only fifteen to eighteen percent of the worldwide Muslim population, and only one of the ten countries worldwide with the largest Muslim populations is predominantly Arab.<sup>310</sup> Thus, Arab and Muslim are no more synonymous than white and Christian.

The Justices may simply have conflated the two groups without hesitation, which is consistent with the human tendency to absorb social constructions of race without conscious recognition. The failure to distinguish between Arabs and Muslims, after all, has historical roots in U.S. law and public life: early Arab-Christian immigrants to the United States struggled to convince skeptical U.S. judges that they were Christian, not Muslim, and hence entitled to be considered “white” and eligible for naturalization under U.S. law.<sup>311</sup> The popular conflation of the two groups became manifest in the post-9/11 period, when race and religion merged in social constructions of the enemy. Leti Volpp has argued that the September 11 attacks consolidated “a new identity category that groups together persons who appear ‘Middle Eastern, Arab, or Muslim.’”<sup>312</sup> Government policies and over one thousand acts of hate violence targeted those perceived to be Middle Eastern, Arab, or Muslim, defining that category in opposition to a “strongly patriotic and multiracial” new American national identity.<sup>313</sup> Muneer Ahmad similarly identified “a new racial construct” after the September 11 attacks focused on “the ‘Muslim-looking’ person,” an identity that “capture[d] not only Arab Muslims, but Arab Christians, Muslim non-Arabs (such as Pakistanis or Indonesians), non-Muslim South Asians (Sikhs, Hindus), and even Latinos and African-Americans, depending on how closely they approach[ed] the phenotypic stereotype of the terrorist.”<sup>314</sup>

The emerging post-9/11 construct not only swept in members of distinct groups somehow perceived to be linked to the terrorists—it also combined the dual stereotypes associated with racial and religious aspects of the profile. As a racial construct, the profile projected deep-seated historical racism against other

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308. D.C., MD., & VA. ADVISORY COMMS. TO THE U.S. COMM’N ON CIVIL RIGHTS, CIVIL RIGHTS CONCERNS IN THE METROPOLITAN WASHINGTON, D.C., AREA IN THE AFTERMATH OF THE SEPTEMBER 11, 2001, TRAGEDIES 5, 7 (2003); see also Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29, 37–43 (2013) (explaining distinctions between the two groups).

309. D.C., MD., & VA. ADVISORY COMMS. TO THE U.S. COMM’N ON CIVIL RIGHTS, *supra* note 308, at 5–6.

310. *Id.* at 7.

311. Beydoun, *supra* note 308, at 29, 31–37.

312. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002).

313. *Id.* at 1579–81, 1584, 1590.

314. Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1278–79 (2004).

non-white communities onto the group newly anointed as the enemy.<sup>315</sup> But the construct also drew on ideas about Islam as a religion: the hijackers' expressed religious motivation for their actions made it possible not only to draw on generations-old fears of Islam, but also to justify the profile in terms of a potentially shared ideology rather than crude biology. In merging Arabs and Muslims, the new construct thus borrowed from the worst of both racial and religious tropes, while making the profile appear more respectable than one that relied on race alone.<sup>316</sup>

But perhaps the Court did not conflate Arabs and Muslims and instead assumed that most of those detained actually shared both the religious and ethnic identities of the hijackers. If so, the belief was wrong—and the ethnicity of the plaintiff in the case, if not the demographic statistics in the Inspector General report that the Court cited, ought to have given the Court pause. Nor was it a harmless error: the majority specifically rejected the plausibility of Iqbal's discrimination claims on the grounds that the ethnic and religious composition of those detained *matched* the ethnic and religious composition of the hijackers and al Qaeda.<sup>317</sup> To the extent that only one (or neither) characteristic matched, it weakened the Court's argument for the rationality of the linkages. In fact, with respect to Iqbal and the large number of non-Arab detainees, their status as non-Arabs ought to have *de-linked* them from terrorism based on the stated reasons for the Court's crude profile, because their ethnicity actually differentiated them from the hijackers, Osama bin Laden, and many al Qaeda members. The Court's confident assertion of a legitimate policy of identifying terrorist suspects thus rested on a basic factual misrepresentation.

#### B. RACE AND RELIGION IN INVESTIGATIVE AND ARREST DECISIONS

The most serious problem with the Court's discussion of the detainees, however, was not that the Court thought they were Arab Muslims, but that it assumed that either (1) profiling had not occurred or (2) any profiling that had occurred was rational and justified. In contrast to the first possible assumption, abundant evidence suggests that race, ethnicity, and religion—or perceptions as to those characteristics—drove many of the initial decisions to scrutinize those who ended up being classified as September 11 detainees. These facts belie any argument that the detentions were neutral at their inception and only disparate in their effect. And in contrast to the Court's implication that the detentions focused on those with a suspected relationship to terrorism, the facts suggest that, for many of the detainees, no individualized basis for suspicion existed

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315. *Id.* at 1282–85.

316. Earlier American depictions of the enemy have also compounded bias by merging racial and religious stereotypes. Claims about Japanese-Americans' disloyalty during World War II blended racial and religious stereotypes of the Japanese, *see* *Korematsu v. United States*, 323 U.S. 214, 237 (1944) (Murphy, J., dissenting), as did assertions about Catholic immigrants in the mid-twentieth century, *see* DOUG SAUNDERS, *THE MYTH OF THE MUSLIM TIDE* 115–21 (2012).

317. *See supra* note 300 and accompanying text.

apart from observations of facially innocuous conduct and the perceived race or religion of the individuals. Far from a “legitimate” effort to arrest those who had a “suspected link to the attacks,”<sup>318</sup> it appears instead that federal officials detained many people who were simply brown and undocumented and who happened to fall under the gaze of law enforcement officers or fearful members of the public.

It does appear that the FBI had an individualized factual basis for suspicion of *some* immigrant detainees, at least at the outset. For instance, a May 2002 FBI list of “Special Interest Cases,” released in discovery, included some individuals who had lived with, attended flight school with, or otherwise directly associated with one or more of the hijackers.<sup>319</sup> Although none of the detainees were ultimately implicated in the attacks,<sup>320</sup> the initial information in such cases included facts that would likely have created an investigative interest independent of racial or religious affiliation.

In many other cases, however, no such individualized factual basis for suspicion appears to have existed. The Inspector General report did not focus on the basis for investigative decisions<sup>321</sup> but nonetheless observed that the “leads that resulted in the arrest of a September 11 detainee often were quite general in nature, such as a landlord reporting suspicious activity by an Arab tenant.”<sup>322</sup> The report listed several examples of detainees who attracted scrutiny based on ordinary behavior tied to a racial descriptor. For instance, “several Middle Eastern men” were arrested as September 11 detainees when law enforcement authorities found pictures of famous buildings, including the World Trade Center, during traffic stops.<sup>323</sup> Another noncitizen was classified as a September 11 detainee after someone reported to the FBI that the grocery store where the individual worked was “operated by numerous Middle Eastern men, 24 hours—7 days a week” and that there were “[t]oo many people to run a small store.”<sup>324</sup>

Widespread news accounts and human rights reporting likewise suggested that vague suspicions based on the perceived ethnicity or religion of individuals undergirded many investigatory and arrest decisions. A Human Rights Watch report described how tips from “spouses, neighbors, or members of the public” or chance encounters with law enforcement ensnared many immigrants.<sup>325</sup> It detailed, for instance, the stories of two Somali men accosted as suspicious because they had kneeled to pray in a parking lot; of an Egyptian man detained after he asked a Newark police officer for directions; and of an Iranian citizen

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318. *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009).

319. *See* JTTF Special Interest Cases, *supra* note 134, at 6, 11.

320. SHIEKH, *supra* note 16, at 19.

321. OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 3–4, 69.

322. *Id.* at 16.

323. *Id.*

324. *Id.* at 17.

325. *See* HUMAN RIGHTS WATCH, PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES 12–15 (2002).

stopped for speeding whose Muslim-sounding name apparently attracted the officer's notice.<sup>326</sup> One journalist reported, based on interviews with FBI officers in New York, that “[i]t seemed that anyone who had ever seen a Muslim or suspected a neighbor of being a Muslim called in,” and that FBI agents receiving such tips “tried to prioritize. . . . But mostly they went after everything.”<sup>327</sup> Indeed, the *Turkmen* plaintiffs alleged that law enforcement officers sometimes treated Muslims as essentially fungible: when officers following a tip regarding one woman learned that she was breastfeeding an infant, they agreed to arrest her husband instead.<sup>328</sup>

In the *Iqbal* oral argument, Chief Justice Roberts took issue with *Iqbal*'s lawyer's statement that individuals were “swept up” in the immigration or criminal justice system.<sup>329</sup> But widespread reports of the detentions suggest that, for a significant number of detainees, that is exactly what happened: although they may well have violated immigration or criminal laws, they fell under suspicion only because of widespread public and law enforcement attention directed toward “Muslim-looking” immigrants in New York and elsewhere.<sup>330</sup> The actual basis for the detentions, therefore, undermines the Court's depiction of a rational process of identifying those with suspected connections to terrorism.<sup>331</sup>

#### C. DESIGNATION OF IMMIGRANTS AS SEPTEMBER 11 DETAINEES

Although many individuals appear to have attracted law enforcement scrutiny largely because of their perceived race or religion, the extent to which such factors affected the subsequent *classification* of detained individuals is less clear. Much of this information is not yet in the public domain. One of the most comprehensive accounts of the detentions, the Inspector General report, concluded that detainees were classified as being “of interest” to the September 11 investigation mostly on the basis of “the type of lead the law enforcement officers were pursuing when they encountered the aliens, rather than any evidence that they were terrorists.”<sup>332</sup> If this is so, then the initial decision to investigate an immigrant on terrorism suspicions, even if those suspicions were based on racial or religious biases, would have directly affected the subsequent

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326. *See id.*

327. STEVEN BRILL, *AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 11 ERA* 37–38 (2003).

328. *See Turkmen v. Hasty*, 789 F.3d 218, 229 (2d Cir. 2015), *cert. granted*, 2016 WL 2653797 (U.S. Oct. 11, 2016) (No. 15-1363).

329. *See* Transcript of Oral Argument, *supra* note 71, at 57.

330. *See* SHIEKH, *supra* note 16, at 19, 21 (arguing based on oral histories of forty ex-detainees that “[o]ne story after another reveals that racial profiling triggered suspicion against individuals and that specific questions about their religion led to their arrests”).

331. The question here was not whether it was rational to assume that individuals of a particular religious or racial background might be more likely *than others* to support al Qaeda, given the demographic composition of the hijackers; rather, it was whether it was rational to assume that the *average* individual of a particular racial or religious background was likely to do so, such that a broad dragnet would be an appropriate method of identifying future threats.

332. OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 41.

classification of a detainee. According to the report, once the INS detained those who had immigration violations, it labeled individuals as being “of interest” to the terrorism investigation if the FBI had either declared them to be of interest or, in many cases, if the FBI had indicated that it could not determine whether it had any interest.<sup>333</sup> Moreover, government officials designated any immigrant detained in the New York area following a terrorism lead a “September 11 detainee,” regardless of whether the person was the subject of the lead or whether any factual information suggested a connection to terrorism.<sup>334</sup> This particular decision affected hundreds of individuals, because those arrested in New York constituted sixty percent of all detainees.<sup>335</sup>

Once designated as September 11 detainees, the Inspector General report found, immigrants became subject to an unwritten but “clearly understood” policy, decided at the highest levels of the Justice Department and FBI, that prohibited their release until the FBI could clear them of connections to terrorism.<sup>336</sup> The agencies maintained this policy even though officials within the INS, FBI, and Justice Department knew early on that many September 11 detainees “might not have a nexus to terrorism.”<sup>337</sup> Some remained classified as being of interest to the investigation long after information surfaced that should have resolved any suspicion: for instance, authorities continued to hold three Middle Eastern men whom New York police officers had arrested after finding plans for a public school in their car, even though their employer had confirmed the day after the arrest that they were working on construction at the school.<sup>338</sup> The report further noted that the decision to label some detainees as being of “high interest”—not just “of interest”—to the investigation was similarly arbitrary, even though it led to even more serious consequences for the detainees.<sup>339</sup>

Having determined these facts, the report criticized the “indiscriminate and haphazard manner” in which detainees were labeled as being “of interest” or of “high interest” to the investigation.<sup>340</sup> It concluded that:

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333. *Id.* at 13, 40.

334. *Id.* at 41.

335. *Id.* at 111.

336. *Id.* at 37–40.

337. *Id.* at 45.

338. OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 42.

339. *See id.* at 111, 118. The *Iqbal* complaint centered on discrimination in the designation of detainees as being of “high interest” to the investigation. *See* First Amended Complaint & Jury Demand, *supra* note 21, at 2–3. Race and religion presumably did not distinguish those who were labeled “high interest” from others who were designated “of interest” to the investigation, because most of those in both categories were apparently South Asian, Middle Eastern, North African, or Muslim. *Id.* On the other hand, the question of why certain detainees were labeled “high interest” while others were not depends in part on the point of comparison. Race or religion may well have distinguished those who were labeled high-interest detainees from other noncitizens who had similar criminal or immigration law violations. For instance, among inmates who faced criminal charges for identity theft or financial fraud, perhaps only those who were Muslim or Arab were treated as “high-interest” detainees.

340. OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 70.

Even in the hectic aftermath of the September 11 attacks, . . . the FBI should have taken more care to distinguish between aliens who it actually suspected of having a connection to terrorism as opposed to aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism but simply were encountered in connection with a [September 11-related] lead.<sup>341</sup>

The report does not identify any government official expressly and categorically classifying detainees on the basis of ethnicity or religion; no one is quoted in the report as ordering, receiving, or being aware of an order to designate individuals of Muslim, South Asian, or Middle Eastern background as persons of interest to the investigation.<sup>342</sup> But the report does suggest widespread knowledge within the Justice Department, the FBI, and the INS that many detainees had been arrested and classified as September 11 detainees without an individualized factual basis for suspicion of terrorism. Furthermore, in light of pervasive media accounts of racial and religious descriptions of individuals driving the arrests,<sup>343</sup> it seems reasonable that many government officials would have known not only that individualized suspicion was frequently absent, but also that racial and religious assumptions played a significant role in creating the pool of those classified as September 11 detainees.<sup>344</sup>

The ultimate disposition of the September 11 detainee cases supports the idea that little factual evidence connected those arrested to terrorism. According to Georgetown University Law Center Professor David Cole, not a single person subjected to detention in the United States after September 11 was charged with any connection to the September 11 attacks, and only three noncitizen detainees arrested in the investigation—a group of Arab men from Detroit—were charged with terrorism offenses of any kind.<sup>345</sup> The Detroit men were ultimately acquitted, and the government repudiated its case against them and investigated the prosecutors who brought the case for ethical violations.<sup>346</sup> A close analysis of

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341. *Id.*

342. The *Turkmen* complaint suggests, however, that the few detainees who were not Muslim, Arab, or South Asian were treated differently from the outset. For instance, it notes that five Israelis detained for allegedly celebrating after the September 11 attacks were quickly given consular visits, moved out of the ADMAX SHU, and delisted as INS detainees. Fourth Amended Complaint & Demand for Jury Trial, *supra* note 291, at 14.

343. See, e.g., Evan Thomas et al., *Justice Kept in the Dark*, NEWSWEEK, Dec. 10, 2001, at 36–44 (noting that stories of “innocent Muslim men swept up in the post-September 11 dragnet” were becoming “uncomfortably commonplace” and that Justice Department officials privately acknowledged a lack of evidence tying detainees to al Qaeda).

344. Indeed, the *Turkmen* complaint references one high-ranking Justice Department official who stated that he had concerns that detainees were being held based on their ethnicity. Fourth Amended Complaint & Demand for Jury Trial, *supra* note 291, at 15.

345. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 25–26, 240 n.12 (2003). Two U.S. citizens detained as “material witnesses” were also charged with terrorism-related crimes. *Id.* at 26.

346. *Id.* at 240 n.12; Eric Lichtblau, *The Demise and Afterlife of the ‘Detroit Sleeper Cell’ Case*, N.Y. TIMES (Nov. 18, 2013), <http://www.nytimes.com/2013/11/18/booming/the-demise-and-afterlife-of-the-detroit-sleeper-cell-case.html> [<https://perma.cc/L4FS-HNW9>].

statistics released in 2012 by the Justice Department's National Security Division on unsealed international "terrorism and terrorism-related" convictions<sup>347</sup> supports Professor Cole's assertion that the September 11 investigation did not result in convictions for offenses directly related to international terrorism.<sup>348</sup>

The absence of convictions for terrorism offenses does not rule out the possibility that the government brought *non*-terrorism charges against other individuals whom it actually suspected of supporting terrorism. The National Security Division statistics list over one hundred defendants, including Iqbal, who were identified during the September 11 investigation and convicted of some criminal offense.<sup>349</sup> But the document specifically states that it lists these individuals "regardless of whether investigators developed or identified evidence that they had any connection to international terrorism."<sup>350</sup> This document suggests that the government may never have separated those whom it continued to suspect had a terrorism nexus—if any—from those who were simply identified in the course of the investigation. Additionally, the short sentences that most of these defendants received suggest that there was little to connect them to terrorism; for instance, a 2003 study found that the median sentence for terrorism-related cases after September 11 was only fourteen

347. U.S. DEP'T OF JUSTICE, NATIONAL SECURITY DIVISION STATISTICS ON UNSEALED TERRORISM AND TERRORISM-RELATED CONVICTIONS 9/11/01–12/31/11 (2012).

348. The Justice Department National Security Division identified four individuals whose convictions "arose from the nationwide investigation conducted after September 11" and who were charged with Category I offenses, defined as "violations of federal statutes that are directly related to international terrorism (regardless of the offense of conviction)." See U.S. DEP'T OF JUSTICE, INTRODUCTION TO NATIONAL SECURITY DIVISION STATISTICS ON UNSEALED TERRORISM AND TERRORISM-RELATED CONVICTIONS 1 (2012); U.S. DEP'T OF JUSTICE, *supra* note 347, at 13–17. None of these cases, however, involve an individual arrested after September 11 as part of the September 11 investigation for a violation that seems attributable to terrorism. The first of the four identified individuals, Zacarias Moussaoui, a French citizen, pled guilty to terrorism but was arrested several weeks *before* September 11, 2001, and was thus not identified in the nationwide sweep. See *Timeline: The Case Against Zacarias Moussaoui*, NPR (May 3, 2006, 11:58 AM), <http://www.npr.org/templates/story/story.php?storyId=5243788> [<https://perma.cc/KR58-7NYP>]. Richard Reid, a British citizen, was convicted after trying to set his shoes on fire on a trans-Atlantic flight in December 2001—an act of terrorism, but one identified abroad and not as part of the nationwide September 11 investigation. See Pam Belluck, *Threats and Responses: The Bomb Plot; Unrepentant Shoe Bomber Is Given a Life Sentence for Trying to Blow Up Jet*, N.Y. TIMES (Jan. 31, 2003), <http://www.nytimes.com/2003/01/31/us/threats-responses-bomb-plot-unrepentant-shoe-bomber-given-life-sentence-for.html> [<https://perma.cc/4KAR-RYKC>]. John Walker Lindh, a U.S. citizen, was detained in Afghanistan for fighting with the Taliban. Neil A. Lewis, *American Who Joined Taliban Pleads Guilty*, N.Y. TIMES (July 15, 2002), <http://www.nytimes.com/2002/07/15/national/americans-who-joined-taliban-pleads-guilty.html> [<https://perma.cc/L5U6-7HRR>]. The fourth individual was Salam Ibrahim El Zaatari, a Lebanese art student convicted of an air safety violation for trying to board a plane with a utility knife in his handbag. See Christopher Dreher, *The Nightmare*, SALON (Dec. 11, 2001), [http://www.salon.com/2001/12/12/el\\_zaatari/](http://www.salon.com/2001/12/12/el_zaatari/) [<https://perma.cc/688D-DL4M>]. Subsequent events, however, strongly suggest there was no terrorism link: two U.S. attorneys involved in the case disclaimed any connection to terrorism, *see id.*, and El Zaatari was sentenced to time served and remanded to INS custody, Docket at 4, *United States v. El Zaatari*, No. 2:01-cr-00269 (W.D. Pa. Dec. 13, 2001).

349. U.S. DEP'T OF JUSTICE, *supra* note 347, at 13–17.

350. U.S. DEP'T OF JUSTICE, *supra* note 348, at 2.

days.<sup>351</sup>

It is also possible that the government chose to deport, rather than prosecute, some noncitizens whom it suspected of supporting terrorism. But again, one would have expected the government to neutralize individuals who presented any serious threat through certain and substantial prison sentences. The possibility that the FBI permitted immigration authorities to deport some individuals it suspected of terrorism is difficult to refute given available information—but also has little support in the public record.

#### D. THE ROLE OF ASHCROFT AND MUELLER

Perhaps the hardest factual question, at least from the point of view of contesting the *Iqbal* narrative, remains what Ashcroft and Mueller themselves knew and ordered. Although *Iqbal* misrepresented the circumstances of the detentions, the decision held only that the complaint failed to plausibly allege the requisite personal involvement of the two high-level officials.<sup>352</sup> Even if some officials within the Attorney General’s office and the FBI knew that racial and religious classifications were at the root of many detentions and nonetheless adopted policies that labeled such detainees as suspects,<sup>353</sup> did Ashcroft and Mueller play a personal role in these decisions?

That question is now the subject of *Turkmen*. The operative complaint in *Turkmen*, amended after *Iqbal*, states *Bivens* claims against Ashcroft, Mueller, and other defendants for the discriminatory and punitive treatment of eight detainees of Middle Eastern, North African, and South Asian origin.<sup>354</sup> The Second Circuit refused to dismiss claims against Ashcroft and Mueller in that case,<sup>355</sup> generating a vigorous dissent<sup>356</sup> and an evenly split circuit vote on rehearing the case en banc.<sup>357</sup> Despite the similarity of the equal protection claims to those in *Iqbal*, the *Turkmen* court held that the complaint and attached Inspector General report allowed a court to reasonably infer that the New York FBI field office discriminatorily targeted individuals, that Ashcroft and Mueller knew of that discrimination, and that they “actively condoned” it by including the New York detainees on a master list of aliens of interest to the September 11

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351. *Criminal Terrorism Enforcement Since the 9/11/01 Attacks*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Dec. 8, 2003), <http://trac.syr.edu/tracreports/terrorism/report031208.html#> [<https://perma.cc/2P3V-C3UF>]; see also Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST (June 12, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/11/AR2005061100381.html?sid=ST2010111602361> [<https://perma.cc/4JKF-ATXA>] (noting that of 142 individuals linked to terrorist groups, thirty-nine were convicted of minor crimes producing modest punishments).

352. *Ashcroft v. Iqbal*, 556 U.S. 662, 682–83 (2009).

353. See *supra* Section III.C.

354. *Turkmen v. Hasty*, 789 F.3d 218, 225 (2d Cir. 2015), *cert. granted*, 2016 WL 2653797 (U.S. Oct. 11, 2016) (No. 15-1363).

355. See *id.* at 256.

356. See *id.* at 265–302.

357. *Turkmen v. Hasty*, 808 F.3d 197, 203 (2d Cir. 2015) (denying rehearing en banc), *cert. granted*, 2016 WL 2653797 (U.S. Oct. 11, 2016) (No. 15-1363).

investigation.<sup>358</sup>

In finding the requisite personal conduct of Ashcroft and Mueller, the Second Circuit panel also relied on statements from the *Turkmen* complaint that suggested the two officials' close coordination of the investigation.<sup>359</sup> Much of that information came from evidence the *Turkmen* plaintiffs had obtained in discovery against lower level officials or from the Inspector General report: for instance, discovery materials showed that Ashcroft received a detailed daily "Attorney General Report" on the detentions;<sup>360</sup> Mueller acknowledged that he knew that the INS detained a number of people based on a "pass[ing] assoc[iation]" with the investigation;<sup>361</sup> Ashcroft on one occasion personally ordered the placement of five people on a separate watchlist, suggesting some attention to individual cases;<sup>362</sup> and Ashcroft and Mueller met regularly regarding the September 11 investigation and discussed detention policy in some of those meetings.<sup>363</sup> These allegations do not establish the involvement of Ashcroft or Mueller in *discriminatory* decisions, but they suggest a level of involvement in arrest and detention decisions that may have gone beyond what the Justices in *Iqbal* assumed.<sup>364</sup>

An account by journalist Steven Brill goes further in linking Ashcroft and Mueller to the ethnic targeting of detainees. After describing how tips about Muslims engaged in ordinary activities flooded FBI offices after September 11, Brill reports that agents followed up on almost all of the tips because of specific guidance from the Justice Department:

From his command post in the FBI operations center, Ashcroft told Mueller that any male from eighteen to forty years old from Middle Eastern or North African countries whom the FBI simply learned about was to be questioned and questioned hard. And anyone from these countries whose immigration papers were out of order—anyone—was to be turned over to the INS.<sup>365</sup>

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358. *Turkmen*, 789 F.3d at 253–54.

359. *See id.* at 239–42. The *Turkmen* decision also notes that the Inspector General report presented a lower level Justice Department official, not Ashcroft, as making the decision to include the New York detainees in the broader INS list of those of interest to the investigation; the court nonetheless deemed it plausible that Ashcroft had been consulted on the decision by that point. *Id.* at 242–44.

360. *Turkmen* Amicus Brief, *supra* note 134, at 9.

361. *Id.* at 11 (alterations in original).

362. *See id.* at 15.

363. *Id.* at 16–17.

364. Several times during the oral argument in *Iqbal*, the Solicitor General argued that high-level officials could not have been involved in "microscopic" or "granular" decisions involving the classification of detainees. Transcript of Oral Argument, *supra* note 71, at 16, 22, 62. Although Ashcroft and Mueller may not have routinely participated in individual decisions, they may have been closely involved in policymaking regarding the detainees.

365. BRILL, *supra* note 327, at 38. Brill reports, based on sources that he does not identify, that Mueller was uncomfortable with a "dragnet" that involved going after people "simply because they were Muslim men," but that Ashcroft "literally said during one meeting at the FBI operations center" that the way to ensure that no one was overlooked who might commit a new act of terrorism "was to round up anyone who fit the profile." *Id.* at 149.

Brill's account is unproven and only generally sourced.<sup>366</sup> Yet, as Dawinder Sidhu has pointed out,<sup>367</sup> the idea that high-level officials may have ordered the singling out of immigrants of certain ethnic backgrounds for questioning would be consistent with a host of *formal* policies that the Justice Department deployed in the two years following the attacks. Those policies explicitly targeted noncitizen men for greater scrutiny on the basis of their nationality and included programs to question thousands of Arab noncitizen men,<sup>368</sup> to require immigrant men from twenty-four predominantly Muslim countries to undergo questioning and fingerprinting through the "special registration" program,<sup>369</sup> and to prioritize the deportation of immigration law violators from mostly Muslim countries.<sup>370</sup> These programs relied openly on nationality, not race or religion per se.<sup>371</sup> But they help make plausible the idea that Ashcroft or Mueller might have instructed law enforcement officers to focus on immigrants of Middle Eastern or South Asian origin.

The evidence that has publicly surfaced to date does not directly tie the two high-level officials to discriminatory decision making. In an adversarial process, Ashcroft and Mueller might ultimately defeat it. But the allegations and information at issue in *Turkmen*, at the least, challenge the Supreme Court's ready dismissal of Iqbal's claims as implausible. If *Turkmen* withstands Supreme Court review, that case may lead to discovery against Ashcroft and Mueller for the first time, illuminating the role that high-level officials may or may not have played in discrimination.<sup>372</sup> The full story of the detentions has yet to be written.

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366. Without specifying who said what, Brill attributes the information in the relevant section of his book to personal interviews with a supervisory special agent in the Newark FBI office, INS Commissioner James Ziglar, U.S. Assistant Attorney General for the Criminal Division Michael Chertoff, a public affairs officer in the Justice Department, and three other unnamed FBI agents in the Newark and Detroit offices. *See id.* at 627–39, 643.

367. *See* Sidhu, *supra* note 11, at 497.

368. *See* U.S. GEN. ACCOUNTING OFFICE, GAO-03-459, HOMELAND SECURITY: JUSTICE DEPARTMENT'S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001 (2003) (see section on "What GAO Found"). The GAO reported that nationalities were selected based on countries where intelligence indicated an al Qaeda presence, and that originally fifteen nations were identified and later twenty-six nations. *Id.* at 7–8.

369. *See* Simpson et al., *supra* note 185.

370. *See* Memorandum from the Deputy Attorney Gen. on Guidance for Absconder Apprehension Initiative (Jan. 25, 2002).

371. These policies focused explicitly on nationality rather than race or religion—a form of classification that U.S. courts have frequently permitted as applied to noncitizens. *See, e.g.,* Narenji v. Civiletti, 481 F. Supp. 1132, 1144 (D.D.C. 1979) (explaining that a regulation that classifies based on national origin is upheld if overriding national interests justify it).

372. The plausibility of the plaintiffs' claims also depends on whether *Iqbal* interpreted the Equal Protection Clause to require proof of animus even where plaintiffs allege an explicit classification. *See infra* Part IV. Note that, even if the Equal Protection claim here were to require a show of animus, the *Turkmen* complaint includes one allegation attributing anti-Muslim sentiment to Ashcroft. *See* Fourth Amended Complaint & Demand for Jury Trial, *supra* note 291, at 19–20. That allegation is based on a report that Ashcroft remarked, "Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you." Johanna Neuman, *Bush's*

IV. REREADING *IQBAL* AT THE JUNCTURE OF PROCEDURE AND SUBSTANCE

From the moment the Supreme Court issued *Iqbal*, legal scholars and lawyers recognized the potential for the procedural ruling to affect substantive rights. Many feared that plausibility pleading would specifically harm those asserting civil rights and discrimination claims: Legal scholars noted that the information needed to plead discriminatory intent, such as facts regarding the defendant's state of mind or the internal development of government policies, would frequently be within the defendant's sole possession.<sup>373</sup> Moreover, critics observed that the Court's invitation to evaluate pleadings based on "judicial experience and common sense"<sup>374</sup> licensed judges to draw on intuitions that might differ based on race, gender, or other identities.<sup>375</sup> In screening the merits without actual evidence, judges might succumb to implicit biases and stereotypes that they did not even realize they harbored.<sup>376</sup> Indeed, judges convinced that the United States has become "post-racial" might find it especially hard to believe that decision makers could act for discriminatory reasons.<sup>377</sup> For all of these reasons deriving from the interaction of procedural standards with substantive law, critics feared that the impact of *Iqbal* would fall particularly harshly on marginalized groups.<sup>378</sup>

Although this scholarship has examined in depth the impact of plausibility pleading on racial equality claims, the lost story of *Iqbal* and the post-9/11 detentions suggests that there is more to be said regarding the decision's effects on subordinated groups and the particular way in which procedure and substance interact to produce that effect. In the guise of a procedural decision, *Iqbal* presents a particular narrative of race and security that may affect readers' perceptions of the propriety of law enforcement practices, the scope of the harm they impose on minority communities, and their ultimate legality. As an avowedly procedural decision, *Iqbal* did not purport to reach or resolve the substantive merits of such issues. But precisely because the Court treated questions of substance in passing, with little acknowledgment or depth, its treatment of such questions may influence readers without their recognizing that they have been

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*Inaction over General's Islam Remarks Riles Two Faiths*, L.A. TIMES (Nov. 23, 2003), <http://articles.latimes.com/2003/nov/23/nation/na-boykin23> [<https://perma.cc/SY7N-9CFB>].

373. See, e.g., Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 123, 159 (2011); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 168–69 (2010).

374. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

375. Kassem, *supra* note 11, at 1455–63; Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 93–94 (2010); Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 2–3 (2011).

376. See, e.g., Quintanilla, *supra* note 375, at 26.

377. Malveaux, *supra* note 375, at 93–94.

378. In the years since *Iqbal*, however, a vigorous empirical debate has developed as to whether existing data validates such concerns. For two recent contributions to this debate, see generally Gelbach, *Material Facts*, *supra* note 7; Reinert, *supra* note 7.

influenced. Moreover, because the dissenting Justices did not call out the substantive assumptions in the majority opinion, those assumptions may go unnoticed despite their reproduction and effects. Setting the lost story of *Iqbal* against the Supreme Court's decision ultimately sheds light on the ability of procedural decisions to propagate particular normative visions and understandings of substantive law.

This Part first recaps the *Iqbal* narrative and its cavalier attitude toward the detainees, then shows how that narrative has affected lower courts' substantive law decisions, and finally argues that the broad dissemination of the decision may have still broader effects on legal audiences.

#### A. REVISITING THE *IQBAL* NARRATIVE

Earlier Sections of this Article argued that *Iqbal* presented a factually misleading and normatively problematic account of the post-9/11 detentions.<sup>379</sup> The majority opinion implied that targeting decisions were either not based on racial or religious criteria at all or that any use of such criteria was rational and justified. The decision also deemed it implausible that the nation's highest federal officials acted with discriminatory intent. By contrast, this Article's description of *Iqbal*'s experience and the detentions writ large shows that the process by which detainees were identified and classified as suspects may have relied heavily on the race and religion of individuals, and that little evidence of actual terrorism connections existed for many detainees.<sup>380</sup> Evidence that has emerged from discovery in *Turkmen* also suggests that the allegations against Ashcroft and Mueller may be more plausible than the *Iqbal* court recognized.<sup>381</sup>

Beyond all this, there is something perhaps even more pernicious about the Court's description of the detentions. The Court's response to the complaint's allegation that "thousands of Arab Muslim men" were detained following the September 11 attacks is surprising precisely because the Court found the statement to be utterly *unsurprising*.<sup>382</sup> One would think that mass detentions of any kind in the United States, and particularly detentions falling almost exclusively within particular ethnic or religious communities, might at least give pause. The sheer scope of the alleged detentions in this case—thousands of individuals in a matter of months—might be expected to raise questions, even in the wake of a devastating terrorist attack. Yet the Court treated the mass detentions as banal—as if it were entirely natural that horrific violence committed by nineteen men should generate suspicion of thousands of others who shared (or appeared to share) their broadly defined racial or religious identity.

The Court seemed neither troubled by the possibility that the mass detentions were overinclusive nor moved by sympathy for those who were affected,

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379. See *supra* Section I.C.

380. See *supra* Sections III.B, III.C.

381. See *supra* notes 354–64 and accompanying text.

382. See *Ashcroft v. Iqbal*, 556 U.S. 662, 669 (2009).

despite the allegations of harsh confinement and serious abuse stemming from their being labeled terrorism suspects. In many cases where law enforcement practices adversely affect large numbers of people who are innocent of the crime under investigation, courts at least purport to acknowledge the harm even if they ultimately find the practice to be legal. That acknowledgment may be limited or even appear patronizing, as when courts describe the impact on minority communities as “unfortunate” or concerns as “understandable” before proceeding to reject legal challenges to the underlying practices.<sup>383</sup> Yet in *Iqbal*, there is not even this professed attempt to empathize: there is no suggestion that the consequences for *Iqbal* or others might have been “unfortunate” or that the detentions may have created “understandable” concern for individuals and communities.<sup>384</sup> Instead, the limits of empathy are laid bare as the detainees receive not even a gesture of judicial regret. The dismissive attitude of the Court toward the communities affected by law enforcement policies may signal as much as the decision itself.

#### B. THE DISSEMINATION OF THE *IQBAL* NARRATIVE

The effect of *Iqbal* may be to normalize expansive uses of racial and religious criteria by law enforcement and to desensitize legal audiences to the effects of such policies on minority communities. In some cases, those effects may appear in the form of substantive legal interpretation by lower federal courts.<sup>385</sup> In other cases, the effects may not show up so directly, because lawyers or courts may absorb the messages of a decision without citing it as precedent.<sup>386</sup> *Iqbal*, after all, is seen as a procedural decision about pleading standards, not as a substantive decision about the intersection of race, religion, and security. Yet there is reason to believe that legal audiences do absorb such messages and that this absorption may contribute to perspectives on more contemporary policy debates.

##### 1. Effects of *Iqbal* on Substantive Law

At least two courts have explicitly invoked *Iqbal*'s account of the detentions—rather than its procedural holding alone—to legitimize other race- or religion-based investigative practices and to discount the scope and severity of the harms inflicted. The Fourth Circuit did so in *Monroe v. City of Charlottesville*,<sup>387</sup> a case far removed from national security concerns. There, the plaintiff in a putative class action alleged that, after reports of serial rapes committed by a suspect described as a young black man, the Charlottesville, Virginia police

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383. See, e.g., *Brown v. City of Oneonta*, 221 F.3d 329, 339 (2d Cir. 2000) (describing the questioning of hundreds of black men in the city of Oneonta, New York, based on a suspect description as “frustrat[ing]” and “understandably upsetting” but not a violation of equal protection doctrine).

384. See *supra* Section I.D.

385. See *infra* Section IV.B.1.

386. See *infra* Section IV.B.2.

387. 579 F.3d 380 (4th Cir. 2009).

approached 190 “youthful-looking black males” and asked them for DNA samples.<sup>388</sup> The court dismissed the equal protection claim, holding that the police’s use of race to identify individuals based on victim descriptions of the suspect did not constitute a governmental racial classification entitled to strict scrutiny.<sup>389</sup> In justifying this conclusion, the Fourth Circuit relied extensively on *Iqbal*, liberally citing the Supreme Court’s decision and specifically its statement that, given that Arab Muslims had committed the September 11 attacks, it was unsurprising that a lawful investigative policy would disproportionately affect Arab Muslims.<sup>390</sup>

The court thus took from *Iqbal* a particular substantive message quite apart from the plausibility of the pleading: it read the case as foreclosing the possibility of an invidious governmental racial classification where the suspects in an investigation were described as being of a particular race.<sup>391</sup> The decision itself had not resolved what level of constitutional scrutiny should be applied to review a law enforcement investigation of individuals of a particular race, based on a victim’s description of the suspect, nor had it addressed the circumstances in which state interests might render such an investigation constitutional despite use of a racial classification. Furthermore, the court had not ruled on whether the known demographic characteristics of the suspects in a case could justify the investigative targeting of others of that background on the speculation that *additional* unknown suspects might exist. These are serious and open questions under the law.<sup>392</sup> Yet *Monroe* read *Iqbal* as legitimizing law enforcement practices that take race or religion into account, not just as rejecting the factual sufficiency of a particular complaint.

Moreover, *Monroe* used *Iqbal* to license a law enforcement practice in spite of its harm to large numbers of people. The court opined that the massive questioning in Charlottesville was not a “dragnet” because police had not questioned all black men in the city but “only” the 190 individuals who came to the attention of police for some other reason.<sup>393</sup> Because *Iqbal* had approved the investigation of “thousands of Arab Muslim men,” the Fourth Circuit stated, the decision left “no doubt as to the justifiability of the City’s investigation” in

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388. *Id.* at 382.

389. *See id.* at 389–90.

390. *See id.* at 389; *see also* Kassem, *supra* note 11, at 1472–73 (discussing *Monroe* as an example of *Iqbal*’s impact on minority plaintiffs alleging race discrimination).

391. *See Monroe*, 579 F.3d at 389–90 (“Because of the victim’s racial identifications, the resulting ‘incidental’ impact of police investigations on young, black men . . . did not stem from an explicit government classification . . . [There is] no express governmental racial classification in this case, [so] *Monroe*’s equal protection claim is foreclosed.”).

392. *See generally* R. Richard Banks, Essay, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201 (2004); R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001); Dov Fox, *The Second Generation of Racial Profiling*, 38 AM. J. CRIM. L. 49 (2010); Stephen Menendian, *What Constitutes a “Racial Classification”?: Equal Protection Doctrine Scrutinized*, 24 TEMP. POL. & CIV. RTS. L. REV. 81 (2014).

393. *Monroe*, 579 F.3d at 390.

Charlottesville.<sup>394</sup> To clinch its conclusion, the court parroted the language of *Iqbal*: “Because the description of the assailant included being a young-looking black male, it is no surprise that the officers’ investigation almost certainly produced a disparate but incidental impact on young, black males, even though the purpose of investigation was to target neither African-Americans nor males.”<sup>395</sup> Thus, as in *Iqbal*, the court deemed the effect on hundreds of individuals of a particular race as purely “incidental”—a word choice that labeled the harm in these cases as not only unintended, but insignificant.<sup>396</sup>

Of course, *Iqbal* was not the first judicial decision to license the use of race in circumstances like that of *Monroe* or to discount the impact on large communities. Most notoriously, in *Brown v. City of Oneonta*, the Second Circuit had rejected equal protection claims arising from police questioning of over two hundred black residents of Oneonta, New York, based on a victim’s vague description of a young male black attacker with a cut on his hand.<sup>397</sup> But *City of Oneonta* had been widely criticized, including in two forceful dissents from the full circuit’s decision not to reconsider the case en banc.<sup>398</sup> One of those dissents described the decision as “tell[ing] African-Americans that, sorry as we are, you must put up with demeaning treatment.”<sup>399</sup> In that context, the Supreme Court’s casual legitimation of the sweeping investigation in *Iqbal* provided cover for lower court judges who were well aware of such criticisms. Although the district court in *Monroe* had relied on *Oneonta*,<sup>400</sup> the Fourth Circuit chose not to rely on it on appeal, expressly acknowledging that judges and legal scholars had roundly criticized the decision.<sup>401</sup> Thus, *Iqbal* provided fresh legitimacy for a race-based mass investigation that might otherwise not sit comfortably with many lawyers and judges.

*Monroe* demonstrates the potential of *Iqbal* to color perceptions of racialized investigations even outside the national security context. The impact of *Iqbal* is likely to be greatest, however, where investigations relate directly to Muslims or terrorism. A striking example is a federal district court’s opinion summarily endorsing the New York Police Department’s (NYPD) systematic surveillance of New Jersey Muslims, while quoting *Iqbal* at length.<sup>402</sup> In *Hassan v. City of New York*, various Muslim individuals and organizations alleged that the NYPD

394. *Id.*

395. *Id.*

396. Dictionaries define “incidental” not just as “[o]ccurring by chance in connection with something else” but also as “[a]ccompanying but *not a major part of something*,” as in an “incidental detail” or “expense.” See *Incidental*, ENGLISH: OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/us/incidental> [<https://perma.cc/ABP5-MUGD>] (emphasis added).

397. See 221 F.3d 329, 333–34 (2d Cir. 2000).

398. See *Brown v. City of Oneonta*, 235 F.3d 769, 779–89 (2d Cir. 2000) (denying rehearing en banc) (Calabresi, J., dissenting); *id.* at 789–92 (Straub, J., dissenting).

399. *Id.* at 787 (Calabresi, J., dissenting).

400. *Monroe*, 579 F.3d at 387.

401. See *id.* at 387 n.4.

402. See *Hassan v. City of New York*, No. 2:12-3401, 2014 WL 654604, at \*6–7 (D.N.J. Feb. 20, 2014), *rev’d*, 804 F.3d 277 (3d Cir. 2015).

had launched a broad program to infiltrate and monitor Muslims in New Jersey after September 11, 2001, solely because they were Muslim and without reasonable suspicion of wrongdoing.<sup>403</sup> A Pulitzer Prize-winning series of articles by the Associated Press had exposed the sweeping program.<sup>404</sup> The plaintiffs alleged that the NYPD collected the license plate numbers of mosque congregants, sent undercover officers to monitor Muslim businesses and neighborhoods, and snooped in “bookstores, bars, cafes, and nightclubs” to document Muslim life.<sup>405</sup> Judge Martini found the equal protection claim in the case so flawed that he dismissed it in a seven-page opinion issued without oral argument.<sup>406</sup> He wrote that *Iqbal* was “particularly instructive” because it grew out of the “same tensions between security and the treatment of Muslims that is particular to the post-September 11 time period.”<sup>407</sup> Judge Martini quoted in full the paragraph in *Iqbal* that found an “obvious alternative explanation” for the widespread detentions of Muslims.<sup>408</sup> He concluded that New Jersey Muslims could not state a discrimination claim against the NYPD because “the motive for the Program was not solely to discriminate against Muslims, but rather to find Muslim terrorists hiding among ordinary, law-abiding Muslims.”<sup>409</sup> In a single sentence, Judge Martini dismissed the argument that surveilling an entire religious community was overinclusive, stating that the police “could not have monitored New Jersey for Muslim terrorist activities without monitoring the Muslim community itself.”<sup>410</sup> That logic would presumably have justified the monitoring of the entire population of New Jersey on suspicion that some criminals operated in the state. With little reasoning to justify such a bald conclusion, the district court read *Iqbal* to justify an even wider mass investigation that plaintiffs alleged was based solely on religious identity.

In addition, the district court took *Iqbal* to stand for a substantive proposition that the decision had not directly stated (let alone defended): a law enforcement practice that expressly classified people according to race or religion would not trigger heightened scrutiny unless plaintiffs could show an invidious motive.<sup>411</sup> Equal protection jurisprudence has developed in recent decades along two strands: in one strand, explicit racial classifications are entitled to strict scrutiny, regardless of governmental intent,<sup>412</sup> although in the second strand, facially

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403. 804 F.3d at 285, 294.

404. Press Release, Associated Press, AP Wins Pulitzer Prize for Investigative Reporting on NYPD Surveillance (Apr. 16, 2012), <http://www.ap.org/content/press-release/2012/ap-wins-pulitzer-prize-for-investigative-reporting-on-nypd-surveillance> [<https://perma.cc/MZ8U-FEHA>].

405. *Hassan*, 804 F.3d at 285 (quoting complaint).

406. *See Hassan*, 2014 WL 654604, at \*1.

407. *Id.* at \*6.

408. *See id.* at \*6–7.

409. *Id.* at \*7.

410. *Id.*

411. *See Hassan v. City of New York*, 804 F.3d 277, 297 (3d Cir. 2015).

412. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a

neutral policies receive strict scrutiny only if plaintiffs can establish an unlawful intent.<sup>413</sup> Judge Martini's decision apparently read *Iqbal* to mean that, even if an explicit classification existed, a state policy could trigger heightened scrutiny only if plaintiffs established an illegitimate motive. *Iqbal*, however, required a showing of an invidious motive in a context where the Court had rejected as conclusory the plaintiff's allegation that Ashcroft and Mueller agreed to confine him on account of his religion and/or race, presumably leaving no express classification at issue.<sup>414</sup>

The Third Circuit overturned Judge Martini's decision in an impassioned opinion that both refuted this interpretation of equal protection doctrine and affirmed the significance of the harm at stake. In finding that the plaintiffs had demonstrated an injury sufficient for legal standing, the decision noted that "those not on discrimination's receiving end can all too easily gloss over the 'badge of inferiority' inflicted by unequal treatment itself."<sup>415</sup> The decision also held that a facially discriminatory policy itself supplies evidence of discriminatory intent<sup>416</sup> and requires no further showing of an invidious motive to merit heightened scrutiny: "[w]hile the absence of a legitimate motive may bear on whether the challenged surveillance survives the appropriate level of equal-protection scrutiny, 'intentional discrimination' need not be motivated by 'ill will, enmity, or hostility' to contravene the Equal Protection Clause."<sup>417</sup> The decision invoked the internment of Japanese-Americans in noting that discrimination is sometimes fueled by unfounded fears, rather than true military need,<sup>418</sup> and quoted the Supreme Court's decision in *Ex parte Endo* for the proposition that "[l]oyalty is a matter of the heart and mind[,] not race, creed, or color."<sup>419</sup>

The Third Circuit opinion in *Hassan*, like the Second Circuit's decision allowing *Turkmen* to proceed, shows that some lower courts have felt free to challenge or sidestep the signals in *Iqbal* as to the Court's beliefs about the substantive legal standard. Indeed, the fact that *Iqbal*'s key holding is procedural enables courts to overlook its substantive reflections on profiling, where they could not so easily neglect a plainly substantive holding on equal protection law. A decision insinuating an objectionable view of the merits is in that respect less dangerous than one that explicitly reaches it.

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reviewing court under strict scrutiny"); see also *Johnson v. California*, 543 U.S. 499, 505 (2005) (requiring, with respect to racial classifications, "strict scrutiny in every context, even for so-called 'benign' racial classifications").

413. See *Washington v. Davis*, 426 U.S. 229, 239–42 (1976) (holding that, for a law or official act to trigger strict scrutiny under the Equal Protection Clause, it must have a discriminatory purpose rather than discriminatory effect alone); see also *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (requiring a showing that the government actor took a course of action "because of . . . its adverse effects" on a particular group).

414. See *Ashcroft v. Iqbal*, 556 U.S. 662, 680–81 (2009).

415. *Hassan*, 804 F.3d at 291.

416. *Id.* at 295.

417. *Id.* at 298.

418. See *id.* at 307.

419. *Id.* at 309 (alteration in original) (quoting *Ex parte Endo*, 323 U.S. 283, 302 (1944)).

But there are two respects in which a procedural decision insinuating a view of the merits may be more harmful than a substantive decision squarely reaching it. First, as in *Iqbal*, the substantive questions at hand may not have been briefed and argued by the parties, resulting in a decision that is especially thinly reasoned. In *Iqbal*, the briefs submitted to the Court and the oral argument in the case barely discussed the relevant equal protection standard or the legality of profiling.<sup>420</sup> Without the benefit of such discussion, the decision's assumptions and intimations about the substantive legality of the alleged profiling were especially shallow. The lack of reflection may be especially dangerous in cases, like *Iqbal*, where judges consider litigants of widely different backgrounds and experiences from their own, making it all the easier to decide cases based on unacknowledged biases. A second reason that a procedural decision signaling a view of the merits is especially problematic is that its substantive reflections may not result in the attention and critique that an avowedly substantive decision would generate. Without significant opposition from dissenting Justices, scholars, or commentators, the substantive messages can be more readily transmitted and absorbed by legal readers.

## 2. Effects of *Iqbal* on Legal Audiences

*Iqbal* has made it easier to justify the broad use of race and religion in law enforcement investigations and to minimize the impact on large numbers of people. Although only a few courts have expressly cited the decision on substantive grounds, other judges, lawyers, and law students may well have absorbed similar messages from reading and relying on it. That impact may be impossible to prove or quantify. But there are reasons to believe that *Iqbal* has had such an impact, beginning with the wide diffusion of the decision itself.

The starting point is to recognize the viral nature of a landmark procedural decision. As can only be expected for a Supreme Court decision that changed a fifty-year-old trans-substantive pleading standard, *Iqbal* has been quoted everywhere. As of 2016, over 100,000 federal court opinions have cited it.<sup>421</sup> The fact that *Iqbal* is a procedural decision, not one interpreting a particular area of substantive law, alone explains this wide diffusion; four of the five most cited Supreme Court decisions of all time, including *Iqbal*, are civil procedure decisions that modified the standard for pleading a case or obtaining summary judgment.<sup>422</sup>

Importantly, many lower court decisions have cited not just the new standard for assessing pleadings, but the particular language that the Supreme Court used to conclude that the complaint in *Iqbal* fell short. Thus, numerous lower courts

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420. For the extremely limited discussion of these issues in the briefs, see Brief for the Petitioners at 34–35, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 07-1015); Brief for Respondent Javaid Iqbal, *supra* note 36, at 50–53, 53 n.10. For the succinct discussion at oral argument of the legality of the use of race or religion in the investigation, see Transcript of Oral Argument, *supra* note 71, at 46–48, 52, 56–58.

421. See *supra* note 4.

422. See Steinman, *supra* note 5, at 389–93.

reproduced the Court's explanation for why the complaint did not support an allegation of discriminatory intent, including the assertion that lawful policies furnished an "obvious alternative explanation" for the detentions and that it should be "no surprise" that the detentions disproportionately affected Arab Muslims.<sup>423</sup>

The sheer repetition of these statements throughout lower court opinions suggests that the Court's narrative of the detentions may influence legal audiences: a statement repeated enough by federal judges may become to some readers an article of faith. But beyond their repetition, two other features of these statements give them particular resonance. First, the statements stand out rhetorically. Cutting through the technical language of "conclusory" allegations and "plausible" pleadings, they are perhaps the most memorable statements of the whole opinion. Indeed, media treatment of the *Iqbal* decision immediately after its issuance reflects this prominence: major newspapers covering the decision almost universally quoted the Court's statement that the detentions' effect on Arab Muslims should come as "no surprise."<sup>424</sup>

Second, with the allegations in the *Iqbal* complaint taken as the standard for implausibility, lower courts and litigants have powerful incentives to analogize or distinguish the facts before them from the facts of *Iqbal*. Lower court decisions sustain complaints by contrasting the pleaded facts to those in *Iqbal*, where they note that the Court found *Iqbal*'s contentions to be "drowned out by the 'obvious alternative explanation'"<sup>425</sup> and the defendants' conduct to be "easily . . . explained by legitimate law enforcement concerns."<sup>426</sup> Similarly, lower court decisions reject complaints by likening the defenses offered to the "obvious, common sense, and plausible alternative explanation" in *Iqbal*.<sup>427</sup> Thus, legal advocacy for other clients reinforces the conclusion that the detentions described in *Iqbal* were almost certainly lawful.

Of course, the lawyers who make these arguments and the courts that accept them do not necessarily believe the premise—that *Iqbal*'s allegations were

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423. See, e.g., *Starr v. Baca*, 652 F.3d 1202, 1214 (9th Cir. 2011); *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596–97 (8th Cir. 2009); *Major Tours, Inc. v. Colorel*, 720 F. Supp. 2d 587, 606 (D.N.J. 2010).

424. See Robert Barnes, *Court Says Detainee's Lawsuit Can't Proceed*, WASH. POST (May 19, 2009), [http://www.washingtonpost.com/wp-dyn/content/article/2009/05/18/AR2009051800966\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/05/18/AR2009051800966_pf.html) [<https://perma.cc/S8XW-MU8W>]; Jess Bravin, *Justices Reject Custody Claims*, WALL ST. J., May 19, 2009, at A4; Editorial, *Abuse and Accountability*, WASH. POST, May 19, 2009, at A18; Josh Gerstein, *Post-9/11 Discrimination Suit Blocked*, POLITICO (May 18, 2009, 1:21 PM), <http://www.politico.com/story/2009/05/post-9-11-discrimination-suit-blocked-022652> [<https://perma.cc/T95X-6M7L>]; Adam Liptak, *Justices Turn Back Ex-Detainee's Suit*, N.Y. TIMES (May 18, 2009), <http://www.nytimes.com/2009/05/19/us/19scotus.html> [<https://perma.cc/B3AM-R9G8>]; David G. Savage, *Former Detainee's Lawsuit Is Tossed*, L.A. TIMES, May 19, 2009, at A15.

425. *Chao v. Ballista*, 630 F. Supp. 2d 170, 177 (D. Mass. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009)).

426. *Am. Fed'n of State, Cty., Mun. Emps. Local 2401 v. District of Columbia*, 796 F. Supp. 2d 136, 141 (D.D.C. 2011).

427. *Osborne v. Long*, No. 1:11-cv-00070, 2012 WL 851106, at \*9 (S.D. W. Va. Mar. 13, 2012).

obviously implausible or that the detentions were obviously lawful. Rather, the nature of legal argumentation requires litigants to make arguments analogizing or distinguishing Supreme Court precedent, whatever their views on the rightness of the original decision. So for some of the lawyers and judges citing *Iqbal* in this fashion, doing so is purely instrumental. But for others, whose a priori views on the decision are unsettled, the mere act of repeating the narrative in legal briefs or judicial opinions may reinforce their perceptions of its basic validity.

In addition to proliferating through federal court opinions and legal briefs, the *Iqbal* narrative circulates through law school curricula. No civil procedure course would be complete without an explanation of the change in the pleading regime. The result is that, before most first-year law students take a course in constitutional law or equality jurisprudence, they learn *Iqbal*. Were *Iqbal* taught in constitutional law courses, perhaps it would be taught as part of a discussion of racial profiling, equal protection doctrine, or the withering critiques that the evolution of that doctrine has generated in recent decades.<sup>428</sup> As it is, *Iqbal* appears in courses on procedure—and there is only so much time to analyze the underlying facts or substantive law assumptions of the decision when the procedural doctrine itself demands attention and critique. In sum, federal judges, litigants, and law students read *Iqbal* for its transformation of procedural law, but without necessarily recognizing or critiquing its basic narrative.

*Iqbal* may provide many lawyers and law students their only, or at least primary, exposure to the post-9/11 immigrant detentions—just as *Korematsu* is the key source for many lawyers' understanding of the internment of Japanese-Americans.<sup>429</sup> The historical understanding they obtain from the decision—coupled with the Court's message that the detentions were likely legitimate—may predispose readers to view less suspiciously other calls for the profiling of immigrants in response to national security concerns. Views on how the government has responded in the past to security crises affect perspectives on contemporary questions. For instance, the view of most elites that the internment of Japanese-Americans was a grievous error continues to shape contemporary debates on racial and religious profiling, and some have argued that such views have prevented the government from engaging in new mass detentions of U.S. citizens after terrorist attacks.<sup>430</sup> Although *Korematsu* has been roundly condemned, *Iqbal* may contribute to the normalization of dragnet policies based on

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428. See generally Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

429. Of course, once the Supreme Court reviews *Turkmen*, the latter case will shape that account, as well.

430. See, e.g., Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 274 (2003) (arguing that “past examples of what come to be understood as incursions on civil liberties progressively reduce the scope of civil liberties violations in wartime”).

the race or religion of individuals, especially immigrants, at least until and unless that decision comes to be seen as flawed on substantive grounds.<sup>431</sup>

Moreover, although the lawyers and future lawyers who encounter *Iqbal* directly represent only a slice of the American public, their views may be particularly significant to contemporary debates on national security policy. Lawyers play a prominent role in making law and policy directly and in influencing public opinion. Since September 11, lawyers throughout the executive branch have exercised tremendous influence in the shaping of national security policy.<sup>432</sup> In addition, lawyers and legal scholars influence public opinion as members of influential elites. And public opinion operates as one of the few real constraints on national security policy in an era of increasing executive power.<sup>433</sup>

As the election of President Donald Trump raises the prospect of new dragnet programs to exclude or register Muslim immigrants, the perceptions of legal

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431. It is difficult to say how large the effect of *Iqbal* might be. Legal readers, like others, receive many sources of information, opinion, and influence within and beyond legal texts. Researchers have studied the related question of whether Supreme Court decisions affect public opinion for thirty years and continue to reach mixed conclusions. *See, e.g.*, James W. Stoutenborough et al., *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 POL. RES. Q. 419, 420 (2006) (citing research by numerous scholars with conflicting conclusions and arguing that gay civil rights cases provide evidence of such an effect); *see also* Katerina Linos & Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods* at 3, 6 (unpublished manuscript), [http://www.law.uchicago.edu/files/files/linos\\_twist\\_supreme\\_court\\_and\\_media.pdf](http://www.law.uchicago.edu/files/files/linos_twist_supreme_court_and_media.pdf) [<https://perma.cc/PB5X-CNC5>] (citing conflicting studies and arguing, based on original survey and experimental studies, that court decisions upholding policies as constitutional can increase support for those policies under certain conditions). Some theoretical literature suggests that the Court may influence public opinion because citizens look to the Court for confirmation of their own views or because citizens without set prior views may take cues from the Court. *See* Stoutenborough, *supra*, at 420. This literature also notes that the Supreme Court might be viewed as particularly trustworthy because it is well regarded compared to other political institutions. *Id.* But even scholarship supportive of Supreme Court influence on public opinion also points to its strongly conditional nature, noting that the influence of Court decisions may depend on whether citizens actually receive information about a decision, the strength of their pre-existing views, the extent that the issue is controversial, and the extent and bias of media coverage. *Id.* The ability of any Court decision to influence *legal* readers—a subset of the public that is presumably more informed as to the Court's decisions but also possibly more skeptical—is likely dependent on a range of analogous conditions. For instance, just as media coverage influences how many members of the public understand and respond to Court decisions, civil procedure professors' approaches to teaching *Iqbal* may influence how students respond to it. Thus, the effect of *Iqbal* on legal audiences' perceptions of the detentions and profiling almost certainly will be conditional and varying. I argue that there is reason to believe that there is an effect but do not purport to assess the size of that contribution.

432. *See, e.g.*, JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 129–32 (2007). There is considerable disagreement, however, as to whether lawyers have done more to constrain or facilitate executive action. For a sample of this literature, see BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 87–116 (2010); JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 122–60 (2012); Trevor W. Morrison, Book Review, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1688–1742 (2011).

433. *See* ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 3–5 (2010).

elites as to the legitimacy of the post-9/11 detentions may influence policymakers today.

#### CONCLUSION

In *Iqbal*, the Court presented the plaintiff as a foreigner suspected of terrorist activity and the post-9/11 detentions as resulting from neutral, legitimate law enforcement decisions. In the years since the decision, advocates, courts, and scholars have sometimes reinforced that narrative, including through well-meaning efforts: numerous lower courts, for instance, have repeated the *Iqbal* decision's finding of an obvious lawful explanation for the detentions in an effort to distinguish the relative plausibility of other plaintiffs' claims. Even where the story of *Iqbal* and the detentions has not been misrepresented, it has been neglected, with *Iqbal* the person rendered invisible behind the procedural symbol that his name has become. Against that background, this Article has sought to recover the lost story of *Iqbal*. As much as *Iqbal* is a case about procedure, it is also a case about substance—about the use of race and religion as proxies for suspicion in investigative and detention decisions. Oblivious to *Iqbal* as an individual, blind to the role of race and religion in the post-9/11 detentions, and indifferent to the harm of the practices it so casually legitimized, *Iqbal* calls for renewed substantive appraisal.