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## Iqbal and the Slide Toward Restrictive Procedure

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*IQBAL* AND THE SLIDE TOWARD  
RESTRICTIVE PROCEDURE

by  
A. Benjamin Spencer\*

*Last term, in Ashcroft v. Iqbal, the Supreme Court affirmed its commitment to more stringent pleading standards in the ordinary federal civil case. Although the decision is not a watershed, since it merely underscores the substantial changes to pleading doctrine wrought in Bell Atlantic Corp. v. Twombly, Iqbal is disconcerting for at least two reasons. First, the Court treated Iqbal’s factual allegations in a manner that further erodes the assumption-of-truth rule that has been the cornerstone of modern federal civil pleading practice. The result is an approach to pleading that is governed by a subjective, malleable standard that permits judges to reject pleadings based on their own predilections or “experience and common sense.” Such an approach undermines consistency and predictability in the pleading area and supplants, in no small measure, the traditional fact-finding role of the jury. Second, the Court struck a blow against the liberal ethos in civil procedure by endorsing pleading standards that will make it increasingly difficult for members of societal out-groups to challenge the unlawful practices of dominant interests such as employers, government officials, or major corporations. Thus, although Iqbal ultimately does not go much further than Twombly in reshaping civil pleading standards, the decision is an important milestone in the steady slide toward restrictiveness that has characterized procedural doctrine in recent years.*

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## I. INTRODUCTION

In 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*,<sup>1</sup> a case that portended significant alterations to federal civil pleading standards under Rule 8.<sup>2</sup> Specifically, *Twombly* did away with the “no set of facts” standard of *Conley v. Gibson*<sup>3</sup> and introduced the notion that Rule 8 requires a claimant to plead facts showing plausible entitlement to relief in order to survive a motion to dismiss.<sup>4</sup> Thus was born plausibility pleading.<sup>5</sup> However, after *Twombly* there was some uncertainty regarding whether the case signaled a new era in pleading similar to the seismic shift in how courts approached pleading before and after the advent of the Federal Rules of Civil Procedure in 1938. Many observers argued that *Twombly* did not represent a major change in pleading doctrine and in any event merely reflected the approach to pleading that was prevalent among the lower federal courts.<sup>6</sup> Others, including this writer, suggested that *Twombly* was much more consequential than the Court itself was letting on,<sup>7</sup> at least from a doctrinal perspective if not also from a practical perspective.<sup>8</sup>

That debate has been settled. Last term, in *Ashcroft v. Iqbal*, the Supreme Court made it abundantly clear that we are indeed in a new era of pleading by ruling that, in a civil complaint, so-called well-pleaded (read: non-conclusory) substantiating facts are essential to support allegations of wrongdoing and convince a judge of the plausibility of claims contained therein.<sup>9</sup> One thing that is remarkable about this case is the Court’s decision to permit judges to disregard certain alleged facts and use their “experience and common sense” to evaluate the plausibility of a claim,<sup>10</sup> rather than holding them to the traditional and more objective approach of determining whether the alleged facts, taken as

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<sup>1</sup> 127 S. Ct. 1555 (2007).

<sup>2</sup> FED. R. CIV. P. 8(a).

<sup>3</sup> 355 U.S. 41, 45–46 (1957).

<sup>4</sup> *Twombly*, 127 S. Ct. at 1555, 1566–67.

<sup>5</sup> A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431–32 (2008).

<sup>6</sup> See, e.g., Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1098 (2009).

<sup>7</sup> See, e.g., Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 137–38 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf>; Spencer, *supra* note 5, at 441–42; *Leading Cases, Federal Jurisdiction and Procedure, Civil Procedure, Pleading Standards*, 121 HARV. L. REV. 305, 310–11 (2007); Posting of Michael C. Dorf on Law, *The End of Notice Pleading*, <http://michaeldorf.org/2007/05/end-of-notice-pleading.html> (May 24, 2007, 7:35 AM) (“[*Twombly*] will likely do great damage in the lower courts.”).

<sup>8</sup> A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 157 (2008).

<sup>9</sup> 129 S. Ct. 1937, 1950 (2009).

<sup>10</sup> *Id.*

true, entitle the pleader to relief.<sup>11</sup> Another remarkable aspect of the decision is the Court's blatant departure from the role of neutral arbiter to that of a pro-defendant gatekeeper, at least in the civil context. Both of these developments are troubling because they foster an environment that is increasingly hostile to civil claimants, particularly those seeking to challenge the unlawful conduct of societal elites such as government officials, large corporations, or employers. Below, this Article briefly looks at the road to *Iqbal*, followed by a discussion of some of the unfortunate legal developments that follow in *Iqbal*'s wake.

## II. PLEADING DOCTRINE THROUGH *IQBAL*

The history of federal civil pleading standards has been told too many times to be repeated here.<sup>12</sup> Suffice it to say that the 1938 Federal Rules of Civil Procedure, coupled with the Court's decision in *Conley v. Gibson* that a claim may not be dismissed unless there was "no set of facts" that the plaintiff could offer to prove his or her claim,<sup>13</sup> established a system referred to as "notice pleading" in federal civil cases.<sup>14</sup> Under notice pleading, a claimant was not required "to set out in detail the facts upon which he bases his claim,"<sup>15</sup> all of the claimant's factual allegations were to be accepted as true at the pleading stage,<sup>16</sup> and the plaintiff was entitled to all reasonable inferences that could be drawn from the picture presented by those facts.<sup>17</sup> Further, as the Court most recently affirmed in *Swierkiewicz v. Sorema*,<sup>18</sup> requiring particularized pleading, as some lower courts at times had been doing, was inconsistent with the official forms appended to the rules and the fact that the Rules expressly

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<sup>11</sup> *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002) ("Because we review here a decision granting respondent's motion to dismiss, we must accept as true all of the factual allegations contained in the complaint.")

<sup>12</sup> See, e.g., Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439–40, 445–52 (1986); Spencer, *supra* note 5, at 434–39.

<sup>13</sup> 355 U.S. 41, 45–46 (1957).

<sup>14</sup> *Id.* at 47 ("To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." (quoting FED. R. CIV. P. 8(a))). I have previously remarked that notice truly has little to do with determining whether a statement of a claim is sufficient. See A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 19 (2009).

<sup>15</sup> *Conley*, 355 U.S. at 47.

<sup>16</sup> *Swierkiewicz*, 534 U.S. at 508 n.1.

<sup>17</sup> *Cal. Pub. Employees' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 143 (3d Cir. 2004) ("A motion to dismiss pursuant to [Rule] 12(b)(6) may be granted only if, accepting all well pleaded allegations in the complaint as true, and drawing all reasonable factual inferences in favor of the plaintiff, it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would warrant relief.")

<sup>18</sup> 534 U.S. 506 (2002).

provided for such heightened pleading for fraud cases.<sup>19</sup> It was also inconsistent with the established process for changing the substance of the Federal Rules, which was to be through rulemaking amendments and not judicial interpretation.<sup>20</sup>

Then came the *Twombly* decision. The Court in *Twombly* abrogated the “no set of facts” language in *Conley* and presented a new interpretation of Rule 8’s pleading standard that seemed to undo much of what was previously understood about pleading doctrine.<sup>21</sup> Instead of disclaiming the need to plead detailed facts, the *Twombly* Court indicated that stating a claim “requires a complaint with enough factual matter (taken as true) to suggest” that the allegations of wrongdoing are true and that “[f]actual allegations must be enough to raise a right to relief above the speculative level.”<sup>22</sup> The Court spoke of “[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with)” liability, pushing the claim past “the line between possibility and plausibility.”<sup>23</sup> As I have written elsewhere, offering such facts before discovery begins seems particularly problematic for claimants alleging concealed wrongdoing,<sup>24</sup> and there may be some evidence to that effect.<sup>25</sup> Ironically, the tightening of pleading standards in *Twombly* was motivated by a desire to prevent plaintiffs with unsubstantiated claims from accessing the discovery process and its attendant costs,<sup>26</sup> even though such discovery is the very thing that might enable plaintiffs to adduce facts that support their legal claims.<sup>27</sup> Ultimately, notwithstanding a subsequent seeming nod to the continuing vitality of notice pleading<sup>28</sup> and the effort of some scholars to downplay *Twombly*’s significance,<sup>29</sup> *Twombly* was a landmark decision that signaled a turn away from the liberal ethos that simplified pleading was meant to reflect, toward a more

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<sup>19</sup> *Id.* at 513 & n.4.

<sup>20</sup> *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

<sup>21</sup> *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1968–69 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

<sup>22</sup> *Id.* at 1965.

<sup>23</sup> *Id.* at 1966.

<sup>24</sup> Spencer, *supra* note 5, at 481–82.

<sup>25</sup> Spencer, *supra* note 8, at 102, 141–42; Kendall W. Hannon, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1815 (2008) (“[T]he one area in which this study *does* show a significant departure from previous dismissal practice is the civil rights field.”).

<sup>26</sup> *Twombly*, 127 S. Ct. at 1966–67.

<sup>27</sup> See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (“Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case.”).

<sup>28</sup> *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007).

<sup>29</sup> See Smith, *supra* note 6, at 1097–98.

restrictive sentiment that saw access to court as something that needed to be constrained for some number of plaintiffs.<sup>30</sup>

With the arrival of *Iqbal*, we now have our first opportunity to see how the Court interprets and applies what it wrought in *Twombly*. *Iqbal* involved an action by a Pakistani national and member of the Muslim faith who was arrested in the wake of the attacks of September 11, 2001, and subsequently detained and designated as a “person of high interest” to the federal government’s investigation of the attacks.<sup>31</sup> *Iqbal* alleged that his designation and subsequent harsh treatment while in detention were unconstitutionally discriminatory and that then-Attorney General John Ashcroft and FBI Director Robert Mueller were personally and overtly complicit in developing and imposing the policy underlying his treatment:

The complaint contends that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that “the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11.” It further alleges that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.” Lastly, the complaint posits that petitioners “each knew of, condoned, and willfully and maliciously agreed to subject” respondent 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.” The pleading names Ashcroft as the “principal architect” of the policy and identifies Mueller as “instrumental in [its] adoption, promulgation, and implementation.”<sup>32</sup>

Ashcroft and Mueller, who, as high-level government officials, were entitled to raise the defense of qualified immunity, moved to dismiss these claims on the ground that *Iqbal* had failed to offer sufficient allegations establishing their personal involvement in clearly unconstitutional conduct.<sup>33</sup>

The district court rejected their motion, but did so based on the *Conley* “no set of facts” standard that was subsequently repudiated by the

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<sup>30</sup> A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. (forthcoming 2010) (manuscript at 101, 116–17), available at <http://ssrn.com/abstract=1343129>; Spencer, *supra* note 5, at 433.

<sup>31</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1943 (2009).

<sup>32</sup> *Id.* at 1944 (citations omitted) (quoting First Amended Complaint and Jury Demand at ¶¶ 10–11, 47, 69, 96, *Elmaghraby v. Ashcroft*, No. 04-CV-01809-JG-SMG, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005)).

<sup>33</sup> *Id.*

Supreme Court in *Twombly*.<sup>34</sup> The Second Circuit thus had to resolve whether the motion to dismiss should be granted under the revised pleading standards articulated in *Twombly*. The circuit court upheld the rejection of the motion, finding that Iqbal did offer direct factual allegations of Ashcroft's and Mueller's personal assent to the discriminatory policy, and added:

[T]he allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the Plaintiff alleges satisfies the plausibility standard without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated "of high interest" in the aftermath of 9/11.<sup>35</sup>

In other words, the allegation that Ashcroft and Mueller condoned and agreed to the discrimination was a factual allegation, and it was plausible because these officials are likely to have been involved with the formulation of that policy, if such a policy is indeed shown to have existed.

The Supreme Court reversed, holding that Iqbal had failed to satisfy the pleading burden described in *Twombly*. The Court embraced the core components of *Twombly* that established plausibility pleading, to wit:

- [T]he pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.
- A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."
- To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."
- A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.
- The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.
- Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"<sup>36</sup>

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<sup>34</sup> *Elmaghraby v. Ashcroft*, No. 04-CV-01809-JG-SMG, 2005 WL 2375202, at \*29 (E.D.N.Y. Sept. 27, 2005).

<sup>35</sup> *Iqbal v. Hasty*, 490 F.3d 143, 175–76 (2d Cir. 2007).

<sup>36</sup> *Iqbal*, 129 S. Ct. at 1949 (bullet points added) (internal citations omitted) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007)).



In this manner, the new statements that will now comprise the prelude to any federal civil pleading analysis were recited and enshrined.

The *Iqbal* opinion then turned to setting forth the components of the “two-pronged approach” of *Twombly*. First, only “well-pleaded factual allegations” are entitled to the assumption of truth.<sup>37</sup> Such allegations, said the court, are to be contrasted with “legal conclusions” or “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” which a court is free to disregard.<sup>38</sup> Thus, the initial step in the *Twombly* analysis is for the court to identify those allegations that are not well pleaded and set them to the side.<sup>39</sup> Second, the court then determines whether the well-pleaded factual allegations plausibly give rise to an entitlement to relief.<sup>40</sup> How are courts to make this latter determination? The Court explained:

Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not “show[n]”—“that the pleader is entitled to relief.”<sup>41</sup>

Applying the first prong of this test to *Iqbal*’s complaint, the Court determined that the following allegations were not “well pleaded”: that Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to subject [him]” 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” and that “Ashcroft was the ‘principal architect’ of this invidious policy and that Mueller was ‘instrumental’ in adopting and executing it.”<sup>42</sup> In the Court’s view, these were “bare assertions” that “amount to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim.”<sup>43</sup> Thus, the Court concluded, “the allegations are conclusory and not entitled to be assumed true.”<sup>44</sup>

Having disposed of *Iqbal*’s core allegations personally connecting Ashcroft and Mueller with the alleged unlawful policy, the Court turned to the matter of whether *Iqbal*’s remaining allegations plausibly showed entitlement to relief. Those remaining allegations that the Court accepted as “well pleaded” were as follows:

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<sup>37</sup> *Id.* at 1950.

<sup>38</sup> *Id.* at 1949.

<sup>39</sup> *Id.* at 1950 (“[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.”).

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

<sup>41</sup> *Id.* (internal citations omitted).

<sup>42</sup> *Id.* at 1951 (internal citations omitted).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*



[T]he [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11. . . . [and] [t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.<sup>45</sup>

The Court found these allegations to be merely consistent with—rather than suggestive of—wrongdoing by Ashcroft and Mueller, since, in its view, there were “more likely explanations” for the disparate impact of the law enforcement actions Iqbal challenged in his complaint.<sup>46</sup> Thus, the Court concluded that Iqbal “has not ‘nudged [his] claims’ of invidious discrimination ‘across the line from conceivable to plausible.’”<sup>47</sup>

### III. FACT SKEPTICISM: ACCEPTING ONLY PLAUSIBLE FACTUAL ALLEGATIONS AS TRUE

Although *Iqbal* involves the application of pleading standards developed previously in *Twombly*, the *Iqbal* Court’s rejection of Iqbal’s core allegations as too conclusory to be entitled to the assumption of truth reflects a disturbing extension of the *Twombly* doctrine in the direction of increased fact skepticism. *Twombly* resulted in many changes to federal civil pleading standards, including the retirement of *Conley*’s “no set of facts” standard, the revival of the need to plead substantiating facts that show entitlement to relief, and the formulation of plausibility as the relevant measure of a complaint’s sufficiency.<sup>48</sup> But it did not cast aside the assumption-of-truth rule, which holds that a claimant’s factual allegations are entitled to be believed and accepted at the pleading stage,<sup>49</sup> though it arguably opened the door for a weakening of that rule.<sup>50</sup>

*Iqbal* is a clear challenge to the continuing vitality of the assumption-of-truth rule given the Court’s poorly explained rejection of what were undeniably allegations that were non-conclusory and factual in nature. After detailing a discriminatory policy that the FBI was alleged to have adopted and implemented, Iqbal asserted that it was Ashcroft who was the “principal architect” of the policy and he claims that Mueller was

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<sup>45</sup> *Id.* (citations omitted).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (citations omitted).

<sup>48</sup> *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964–69 (2007).

<sup>49</sup> *Id.* at 1965. (“Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” (citations omitted)).

<sup>50</sup> Spencer, *supra* note 14, at 8–9 (discussing cases suggesting that “the *Twombly* Court’s statements regarding plausibility have given some courts a basis for applying more skepticism to factual allegations than the assumption-of-truth principle would seem to allow”).

“instrumental in [its] adoption, promulgation, and implementation,” adding that both “approved” and “agreed to” the policy.<sup>51</sup> These are not conclusory assertions but rather plain-English descriptions of the phenomena they attempt to describe. There can be no question that if I were to say “Mr. Smith was the ‘principal architect’ of the Chrysler building,” that would be a non-conclusory factual claim, as would the statement that “Ms. Smith ‘approved’ the design plans for the Chrysler building.” These statements are factual because they make claims about what transpired and who took certain actions. Thus, the Court had no problem accepting as factual and non-conclusory Iqbal’s allegation that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER.”<sup>52</sup>

To see through the Court’s attempt to classify Iqbal’s allegations about Ashcroft and Mueller’s relationship with the alleged discriminatory policy as conclusory, we need to have a clear sense of what a conclusory or “bald” allegation is. A conclusory claim is one that uses legal terminology to describe conduct rather than factual statements. That is, rather than describing what happened from a reporter’s perspective—the who, what, when, where, and how—a conclusory assertion takes the desired legal conclusion one wants attached to the occurrence and uses it to describe the occurrence itself. For example, a conclusory way to allege that “the defendant crossed over the yellow line and collided with my vehicle, causing the plaintiff various injuries” would be to assert that “the defendant negligently caused injury to the plaintiff.”<sup>53</sup> In the discrimination context, a conclusory assertion might be that “the defendant discriminates in hiring decisions,” rather than, “the defendant systematically rejects Hispanic applicants with qualifications similar to those of non-Hispanic applicants that it hires.” The latter statement reports facts; the former statement substitutes a legal characterization of those facts and dispenses with factual reportage. Non-conclusory factual claims make assertions about what happened without regard to the legal characterization or consequences of those occurrences or omissions: the defendant “purchased” this product; the defendant “did not attempt to assist the plaintiff”; the defendant “fired” the plaintiff, et cetera. In other words, allegations comprised of subjects and verbs, not just legal adjectives and adverbs are non-conclusory.

The question for one scrutinizing *Iqbal* is whether an assertion that a person “agreed” to do something, or “approved” of something, is conclusory or factual. If those terms are used to report the fact that the individual in question gave her assent, there would not appear to be a

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<sup>51</sup> First Amended Complaint and Jury Demand, *supra* note 32, at 4–5, 17, 33.

<sup>52</sup> *Iqbal*, 129 S. Ct. at 1951.

<sup>53</sup> Form 11, which sufficiently alleges a simple negligence claim, goes beyond this by describing how the defendant injured the plaintiff: by hitting him with a vehicle. FED. R. CIV. P. Form 11 (“On date, at place, the defendant negligently drove a motor vehicle against plaintiff.”).

more specific, non-conclusory, way to communicate such information other than to use the terms common to that purpose, such as “approval” or “agreement.” Alleging that a defendant “approved” something is non-conclusory because it does not make a claim about the legal character or consequences of the defendant’s assent, but rather simply reports its presence. Thus, again, when the *Iqbal* majority accepts *Iqbal*’s allegation that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was *approved* by Defendants ASHCROFT and MUELLER,”<sup>54</sup> it is acknowledging that claims of approval are not conclusory per se.

How then should we understand the Court’s prior rejection of *Iqbal*’s allegations connecting Ashcroft and Mueller to the discriminatory policy given the use of similar terms of “agreement” or equally factual and non-conclusory terms such as “principal architect” or being “instrumental” in the policy’s development and implementation?<sup>55</sup> It cannot be, as the Court claims, that these statements are too “bald” and conclusory to be accepted as true given that the allegations describe what is alleged to have occurred in similar fashion as the accepted allegation that those defendants “approved” the policy of holding detainees in highly restrictive conditions.<sup>56</sup> In other words, the statement “the defendants approved the policy of holding post-September-11th detainees in highly restrictive conditions of confinement” and the statement “the defendants approved the policy of subjecting defendants to harsh conditions of confinement solely based on their race, religion, and/or national origin” are offered at equal levels of specificity; one cannot be deemed too bald and conclusory, and the other well pleaded, based on any sensible understanding of those concepts, given the statements’ common reliance on the term “approved.”<sup>57</sup>

Since the conclusory label cannot credibly be applied to *Iqbal*’s rejected allegations as a valid rationale for discarding them, something

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<sup>54</sup> *Iqbal*, 129 S. Ct. at 1951 (emphasis added).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> This is the point made by Justice Souter in his *Iqbal* dissent when he wrote: “[T]he majority’s holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory. For example, the majority takes as true the statement that ‘[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were “cleared” by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.’ . . . If, as the majority says, these allegations are not conclusory, then I cannot see why the majority deems it merely conclusory when *Iqbal* alleges that (1) after September 11, the FBI designated Arab Muslim detainees as being of ‘high interest’ ‘because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees’ involvement in supporting terrorist activity,’ and (2) Ashcroft and Mueller ‘knew of, condoned, and willfully and maliciously agreed’ to that discrimination. By my lights, there is no principled basis for the majority’s disregard of the allegations linking Ashcroft and Mueller to their subordinates’ discrimination.” *Id.* at 1961 (Souter, J., dissenting) (citations omitted).

else must be at play. I submit that what the Court is revealing in its rejection of *Iqbal*'s factual allegations regarding the involvement of Ashcroft and Mueller in shaping the policy is that it wants to know *Iqbal*'s basis for making such factual claims about those two officials.<sup>58</sup> That is, the Court is seeking evidence to substantiate the factual assertion of Ashcroft and Mueller's design of, and assent to, the discriminatory policy. Had *Iqbal* made allegations identical to those that the Court rejected but also referred to, and attached, a memo to the complaint from Mueller describing and imposing the discriminatory policy, the Court certainly would not have still treated *Iqbal*'s allegations as inadequate.<sup>59</sup> Indeed, a recent Ninth Circuit opinion applying *Iqbal* suggests as much, noting that *Iqbal*'s complaint failed because "*Iqbal*'s complaint contained no factual allegations detailing statements made by Mueller and Ashcroft regarding discrimination."<sup>60</sup> The *Iqbal* majority is thus not using "conclusory" to mean legalistic allegations lacking factual content, but rather has defined a conclusory assertion as one that lacks evidence under circumstances in which the Court feels that such evidence is required.

This is where context comes into play. In certain contexts, the Court does not feel that additional evidence is required because the factual assertion is not controversial, it is expected, or it is self-evident from the

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<sup>58</sup> Justice Scalia vocalized this interest during oral argument of *Iqbal*, stating, "I don't know on what basis any of these allegations against the high-level officials are made." Transcript of Oral Argument at 39, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015).

<sup>59</sup> Clearly, plaintiffs would not have access to such a "smoking gun" document prior to discovery absent a whistleblower or leak of the document to the press or the public. Indeed, it is plaintiffs facing such information asymmetry who will be burdened most significantly by the fact skepticism endorsed in *Iqbal*.

<sup>60</sup> *Al-Kidd v. Ashcroft*, 580 F.3d 949, 975 (9th Cir. 2009). "Here, unlike *Iqbal*'s allegations, *al-Kidd*'s complaint 'plausibly suggest[s]' unlawful conduct, and does more than contain bare allegations of an impermissible policy. While the complaint similarly alleges that Ashcroft is the 'principal architect' of the policy, the complaint in this case contains specific statements that Ashcroft himself made regarding the post-September 11th use of the material witness statute. Ashcroft stated that enhanced tactics, such as the use of the material witness statute, 'form one part of the department's concentrated strategy to prevent terrorist attacks by taking suspected terrorists off the street,' and that '[a]ggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks.' Other top DOJ officials candidly admitted that the material witness statute was viewed as an important 'investigative tool' where they could obtain 'evidence' about the witness. The complaint also contains reference to congressional testimony from FBI Director Mueller, stating that *al-Kidd*'s arrest was one of the government's anti-terrorism successes—without any caveat that *al-Kidd* was arrested only as a witness. Comparatively, *Iqbal*'s complaint contained no factual allegations detailing statements made by Mueller and Ashcroft regarding discrimination. The specific allegations in *al-Kidd*'s complaint plausibly suggest something more than just bare allegations of improper purpose; they demonstrate that the Attorney General purposefully used the material witness statute to detain suspects whom he wished to investigate and detain preventatively, and that *al-Kidd* was subjected to this policy." *Id.* (citations omitted).

perspective of the Court.<sup>61</sup> Conversely, when the factual assertion is thought to be “unrealistic,” “nonsensical,” or “extravagantly fanciful,”<sup>62</sup> more evidentiary facts must be offered to make the factual assertion in question believable or “plausible.” Thus, when the *Iqbal* majority accepts the allegation that Mueller “approved” the policy of holding post-September-11th detainees in highly restrictive conditions of confinement, but rejects the allegation that Ashcroft and Mueller “approved” the discriminatory policy, the former assertion is consistent with the *Iqbal* majority’s understanding about what the FBI Director and Attorney General would approve, while the latter is inconsistent with their settled expectations. As such, the latter assertion requires additional evidence to be taken seriously and accepted as true.

At bottom, then, the Court’s rejection of certain factual allegations as “too conclusory” is really a statement that (1) the allegations are factual claims that assert the unexpected, particularly about certain kinds of defendants—government officials (*Iqbal*) or major corporations (*Twombly*) for example; (2) as such, the allegations require additional supporting facts to be believed; and (3) such facts are lacking in the claimant’s statement of his claim. Needless to say, this attitude towards factual allegations is inappropriate; rejecting facts because they report occurrences that members of the Court would find to be out-of-step with their expectations regarding an official’s behavior is a complete violation of the assumption-of-truth rule. The whole point of the rule is to obligate courts to accept factual claims regardless of how fanciful or far-fetched they might be,<sup>63</sup> and then make an assessment of whether the defendant is entitled to relief. If what he says happened, happened, there will be subsequent opportunities to put the plaintiff to proof.<sup>64</sup> Lawsuits are all

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<sup>61</sup> See Spencer, *supra* note 14, at 13–18 (explaining how presumptions of propriety or impropriety attach to various factual circumstances based on their consonance with our ordinary understandings about such occurrences).

<sup>62</sup> *Iqbal*, 129 S. Ct. at 1951. It is interesting that the Court felt the need to expressly clarify that it was not discarding *Iqbal*’s claims on the basis that they were “unrealistic,” “nonsensical,” or “extravagantly fanciful,” suggesting some insecurity on its part regarding the credibility of its stated rationale.

<sup>63</sup> *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (“[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very remote and unlikely.’” (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974))).

<sup>64</sup> See, e.g., FED. R. CIV. P. 56 (permitting litigants to seek judgment on claims that lack factual support after the opportunity for discovery). See also *Twombly*, 127 S. Ct. at 1976 (Stevens, J., dissenting) (“Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial.”); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512–13 (2002). “This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. . . . The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues

about claiming the unexpected and seeking redress for deviations from legal norms and acceptable standards of conduct. A pleading standard that permits courts to disbelieve factual claims because they are felt to be extremely atypical deviations, is fundamentally at odds with our norms regarding access to court and presents a cruel and seemingly insurmountable obstacle to certain claimants at the outset of litigation.

By making the ultimate plausibility of a claim depend in part on the credibility of underlying factual allegations, the *Iqbal* Court is also treading on the traditional province of the jury. One of the bases for the assumption-of-truth rule is that it is for the jury to determine questions of fact, including making determinations about which facts to believe and which factual claims to discredit, based on the evidence presented at trial. By permitting courts to refuse to accept factual allegations by labeling them conclusory, simply because they lack additional evidentiary details that would render them more believable, the Court empowers judges to preempt the jury's assessment and substitute their own judgments regarding the credibility of factual claims. This is not consistent with the jury right, as Professor Thomas has argued elsewhere.<sup>65</sup>

#### IV. PATRICIAN BIAS: *IQBAL* AND THE RESTRICTIVE ETHOS IN CIVIL PROCEDURE

Beyond constituting a violation of the assumption-of-truth rule and interfering with the jury right, the *Iqbal* majority's new fact skepticism is problematic because it derives from, and gives voice to, what appears to be the institutional biases of the Justices, as elite insiders with various presumptions about the conduct and motives of other fellow societal elites. This bias reveals itself when plaintiffs draw factual inferences that the Justices feel are less likely explanations than inferences that their own experience would suggest. For example, in *Iqbal*, although the majority acknowledges that the alleged facts are consistent with "petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin," they assert that there are "more likely

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detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." *Id.* (citations omitted) (quoting 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 76 (2 ed. 1990)).

<sup>65</sup> See Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1882 (2008). "Where the Court first strays from the requirements of the Seventh Amendment in *Twombly* . . . is where it permits courts to consider only *plausible* inferences from the facts that favor the plaintiff. This determination necessarily permits a court to assess the plausibility of the inferences that arise from the facts alleged by the plaintiff. This was not permitted under the common law. Next, the Court also strays from the Seventh Amendment's command when it has told the courts to also review plausible inferences that favor the defendant and weigh those against plausible inferences that favor the plaintiff. These were all decisions that were reserved for the jury at common law." *Id.* (citations omitted).



explanations” of the officials’ conduct.<sup>66</sup> The *Iqbal* majority goes on to explain that the “obvious alternative explanation” for the challenged arrests is that because the perpetrators of the September 11th attacks were “Arab Muslim hijackers,” the arrests “were likely lawful and justified by [Mueller’s] nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts,” and that “[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims.”<sup>67</sup>

Beyond the fact that *Iqbal* is Pakistani, not Arab—a distinction the Court does not bother to notice—what makes this alternative explanation “obvious” and “more likely”? Does the Court actually know that Director Mueller had a “nondiscriminatory intent” as it asserts in *Iqbal*? Clearly the Court is drawing on its “experience and common sense,” as it indicated would be necessary.<sup>68</sup> But what needs to be understood is that the Court’s “experience and common sense” is not universal but rather is shaped by their perspective and bias as societal elites who suppose that such discrimination is rare.<sup>69</sup>

This insider or patrician bias has revealed itself in other cases as well. In *Twombly*, although the Court accepted that the facts described were consistent with the presence of an unlawful agreement to restrain trade, its perspective led it to prefer the alternate possibility that “natural” market forces explained the behavior,<sup>70</sup> or as the *Iqbal* Court put it, “unchoreographed free-market behavior” was the “more likely” explanation.<sup>71</sup> *Scott v. Harris*—a case involving claims of a police officer’s use of deadly force to end a high-speed vehicle chase—presents another example of this bias.<sup>72</sup> There, the Court sidestepped the traditional requirement of accepting the plaintiff’s versions of the facts, in the context of a defendant’s motion for summary judgment, by ruling that its

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<sup>66</sup> *Iqbal*, 129 S. Ct. at 1951.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1950.

<sup>69</sup> See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1154 (2008) (“[T]he courts tend to reflect the insider view that discrimination is rare and that most claims are meritless, rather than the opposing view that discrimination is pervasive.”); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 937 (2006) (“[I]n addition to deference and a commitment to employment at will, courts also have an ideology that discounts the possibility of discrimination in race and national origin cases.”).

<sup>70</sup> *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1971–73 (2007).

<sup>71</sup> *Iqbal*, 129 S. Ct. at 1950. The Court also betrayed similar pro-corporate presumptions in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), when it endorsed the following sentiment: “The predation-recoupment story . . . does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the first place. They were just engaged in hard competition.” *Id.* at 591 n.15 (quoting Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 27 (1984)).

<sup>72</sup> 127 S. Ct. 1769 (2007).



own view of the record conclusively demonstrated the falsity of the plaintiff's factual claims.<sup>73</sup> Specifically, the *Scott* majority said that a factual dispute is not "genuine" if the plaintiff's version of the facts "is blatantly contradicted by the record, so that no reasonable jury could believe it."<sup>74</sup> The majority went on to base its rejection of the plaintiff's claim—that he was not driving in a manner that endangered human life—on its interpretation of a videotape that captured a police chase involving the plaintiff.<sup>75</sup> Taking up Justice Breyer's invitation—to view the tape and judge Scott's conduct for themselves<sup>76</sup>—three researchers conducted a study in which 1,350 diverse members of the public were asked to view the tape and share their perspectives.<sup>77</sup> Not surprisingly, although a majority of respondents reached similar conclusions as the *Scott* majority after viewing the tape, others reached conflicting conclusions, with respondents' interpretation of the videotape tending to vary according to an array of demographic and personal characteristics including race, socio-economic status, and political party identification.<sup>78</sup>

What we see in these opinions is the Justices' willingness to prefer their own interpretation of facts over other interpretations, leaving no room for the possibility that other understandings may have validity. Further, these Justices appear to not be cognizant of<sup>79</sup> (or concerned with) the fact that their own views are connected to the biases they have as relatively well-to-do societal elites who lack the diversity and experiences that a civil jury might better represent.<sup>80</sup> Indeed, an important function of the jury is to screen out this institutional bias,<sup>81</sup>

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<sup>73</sup> *Id.* at 1776.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1780 (Breyer, J., concurring).

<sup>77</sup> Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009).

<sup>78</sup> *Id.*

<sup>79</sup> I should note that at least Justice Scalia seems to have acknowledged the elite bias of the Court: "When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn." *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

<sup>80</sup> As one scholar has noted, "[a]ll nine of the Justices of the late Rehnquist Court were graduates of elite schools with either little practice experience or practice experience largely limited to constitutional litigation or defense-side civil litigation." Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1117 n.66 (2006). Others have similarly commented. See, e.g., Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 146, 188–92 (1998) ("[J]udicial review is systematically biased in favor of culturally elite values. . . . Justices of the United States Supreme Court, indeed of any state or federal appellate court, are overwhelmingly upper-middle or upper-class and extremely well educated, usually at the nation's more elite universities.").

<sup>81</sup> Alexandra Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 589 (2008) ("The jury trial . . . helps avoid the systemic bias that might develop if all cases were

making it even more disconcerting that the *Iqbal* decision gave judges more power to scrutinize facts at the pleading stage.

This insider bias and its affirmation in *Iqbal* are quite dangerous and alarming developments in the civil justice arena. In previous writings, I have suggested that the *Twombly* decision reflected a shift toward a restrictive ethos in civil procedure,<sup>82</sup> meaning an ethos oriented more towards protecting the interests of defendants—particularly those from the dominant or commercial class—against the civil claims of members of societal out-groups.<sup>83</sup> For example, employees who may have suffered unlawful discrimination will find it more difficult to state a claim under *Twombly* when the facts needed to satisfy the plausibility standard are unavailable to them. The circumstance is similar for putative plaintiffs seeking to pursue conspiracy claims if they lack particulars that might substantiate the claim of an agreement. Put simply, the *Twombly* approach to pleading represents a move in a restrictive direction because it makes it more difficult for claimants to get their claims into court.

*Iqbal* ratifies the Court's commitment to a more restrictive approach to pleading but it also portends something darker and more ominous. *Iqbal* reflects a certain judicial mood toward litigation, an attitude of hostility and skepticism toward supplicants with alleged grievances against the government or against the powerful who make up the dominant class.<sup>84</sup> Increasingly, members of the Court in cases like *Iqbal* and *Twombly* appear to see allegations not through the lens of detached, impartial observers, but rather through the eyes of conforming social elites. Thus, corporations are presumed to operate in legitimate ways motivated only by the quest for lawful profit; law enforcement and other government officials are presumed to operate by-the-book in a focused mission to protect innocents from the multitude of deviants; and employers are presumed to make hiring, firing, and promotion or transfer decisions based wholly on merit rather than on prejudice against members of various protected classes. Such a perspective ends up favoring civil defendants, at least when they are arrayed as adversaries

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decided by professional judges. . . . [T]he introduction of democratic decisionmakers avoids the bias of an entrenched judicial elite.”).

<sup>82</sup> Spencer, *supra* note 30, at 116–17; Spencer, *supra* note 5, at 433.

<sup>83</sup> Spencer, *supra* note 30, at 117–19.

<sup>84</sup> Professor Siegel, in a study of the Court's hostility to litigation during the Rehnquist era, made the following observation: “In myriad ways, the Court has made life very difficult for civil plaintiffs. To take but a few examples, the Court has narrowly construed statutes and case law to reduce and eliminate remedial options. It has protected governments and governmental officials from financial liability through expansive immunity doctrines and cramped interpretations of the federal fee-shifting statutes. It has consistently enforced form arbitration agreements that shift cases from courts to alternative forums without regard for the practical consequences to potential plaintiffs. And it has birthed novel constitutional limitations on the scope of recoverable damages.” Siegel, *supra* note 80, at 1117–18 (citations omitted).

against members of various societal out-groups.<sup>85</sup> Such a perspective is also inappropriately naïve about the very real existence of corporate and official misconduct that has existed in the past,<sup>86</sup> and that may be reflected in some of the complaints the Court's stricter pleading standard will tend to reject.

## V. CONCLUSION

The charges of bias leveled against the *Iqbal* Court herein will certainly be decried and denied by most. But it seems apparent that the Court is treating clearly factual allegations as conclusory solely on the ground that it does not believe them, absent additional supporting information. Further, the Court's skepticism with respect to certain factual allegations derives from their worldview and perspective as societal elites with various presumptions regarding the conduct of other members of the dominant or governing class, particularly when opposed by members of social out-groups. Beyond that, *Iqbal* also gives us a whiff of the duplicity of the Justices in the *Iqbal* majority and their true approach to judging at the Supreme Court level. Popular myth regarding the role of Supreme Court Justices holds that they are to be like umpires—simply calling balls and strikes—not making the rules. “Judges should interpret the law, not make the law” is the partisan mantra offered in supposed contradistinction to the notion of the “activist” judge, who molds the law as she sees fit to suit her own substantive aspirational ends. Well, in *Iqbal*, we see the Justices offering their own version of activism in service of what can only be surmised to be their own hostility to litigation in general, and challenges to government authority in particular. That is unfortunate, but not new. But so long as decisions like *Iqbal* are recognized for what they are—subversions of law to achieve the restrictive ends of societal elites—there is some hope that the complete slide toward restrictive procedure can be abated and avoided.

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<sup>85</sup> See Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 949 (2002). “Appellate courts are indeed more favorable to defendants than are trial judges and juries. . . . [T]he defendants’ advantage grew as the case better fit the format of little victim against big defendant, just as it grew when the case had been decided by a jury. We found these tendencies in personal injury cases, as well as in cases involving nongovernmental, noncorporate, nonforeign, and in-state plaintiffs. These tendencies supported our theory that the appellate courts were striving to undo trial level favoritism toward plaintiffs, which the appellate judges were imagining.” *Id.* But see Harry T. Edwards & Linda Elliot, *Beware of Numbers (and Unsupported Claims of Judicial Bias)*, 80 WASH. U. L.Q. 723 (2002).

<sup>86</sup> See, e.g., Karen Blumenthal, *How I Got Burned by Beanie Babies*, WALL ST. J., Aug. 26, 2009, at D1. “More than three years after the crash of 1929, a Senate investigation unveiled one jaw-dropping misbehavior after another. The head of Chase National Bank had been selling his own bank’s stock short while publicly urging others to buy. The former chief of National City Bank—now Citigroup—was secretly receiving a huge annual salary in retirement. Senate investigator Ferdinand Pecora called it ‘a shocking disclosure of low standards in high places.’” *Id.*