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Casebooks, bias, and Information Literacy – Do law librarians have a duty?¹

Kathleen D. Fletcher

Abstract

The third principle of the American Association of Law Libraries' Principles and Standards for Legal Research Competencies states, "A successful researcher critically evaluates information." This evaluation includes evaluating legal information of material under criteria of "authority, credibility, currency, authenticity, relevance, and bias." Does this standard include information contained in legal casebooks? This article's goal is to show examples of case treatment in casebooks in Constitutional Law, Property, and Civil Procedure which demonstrate authors' biases in their selection and editing of cases. Under the AALL standards and the ACRL Standards and Framework for Information literacy, librarians should teach students how to think critically about all the legal information presented to them—including casebooks.

"Fake news is nothing new."² Our former president's Twitter feed preoccupation with the veracity of the news media aside,³ the fact is that most Americans believe that our news media has a bias.⁴ The popular literature is unsure if the media is biased toward liberalism⁵ or conservatism⁶, and scholarly authors seem unable to reach definite conclusions in the matter.⁷

Historically, shortly after the American Revolution the press was decidedly biased. It was not until after the American Civil War that newspapers "attempted to provide a less partisan view of public affairs."⁸ In the twentieth century, the removal of the Fairness Doctrine and the rise of the World Wide

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¹ Copyright 2021 by Kathleen D. Fletcher

² Eugene Kiely, and Lori Robertson *How to Spot Fake News*, FactCheck.org. (December 19, 2016), <https://www.factcheck.org/2016/11/how-to-spot-fake-news/>.

³ Matt Viser and Yan Wu, *11 months, 1 president, 2,417 tweets*, The Boston Globe, (December 2017), <https://apps.bostonglobe.com/opinion/graphics/2017/12/president-twitter/> ("The phrase "fake news" appeared in at least 159 tweets, more than almost any other.")

⁴ Michael Barthel, and Amy Mitchell, *Democrats, Republicans now split on support for watchdog role*, Pew Research Center's Journalism Project (October 5, 2017), <http://www.journalism.org/2017/05/10/democrats-republicans-now-split-on-support-for-watchdog-role/> ("When it comes to the perceived fairness of the news media, a strong majority of Americans continue to say news organizations tend to favor one side in presenting news on political and social issues: 72%, on par with the 74% in 2016.")

⁵ Jonathan Chait, *Victim Politics: the contradictions of conservative media criticism*, The New Republic, March 10, 2018 at 22

⁶ Eric Allmen, *What liberal media: the truth about bias and the news*, 11 (2008)

⁷ David Niven, *Tilt: the search for media bias*, 51 (2002)

⁸ James Fallows, *Breaking the news: how the media undermine American democracy*, 48 (1996)

Web, meant that sources of news and information were untethered from previous requirements that airtime be devoted to contrasting views of controversial topics in the public interest and “equal time” for opposing political candidates.⁹

Librarians, who “in a world that’s information rich, are information smart,”¹⁰ recognized early on that “information [was] expanding at an unprecedented rate,” and that, “people—as individuals and as a nation must be information literate.”¹¹ The ALA’s Presidential Committee on Information Literacy saw a need for librarians to be a potential antidote to the perceived problem of bias and fake news. In their words, “Information literacy, therefore, is a means of personal empowerment. It allows people to verify or refute expert opinion and to become independent seekers of truth. It provides them with the ability to build their own arguments and to experience the excitement of the search for knowledge.”¹² “The report was widely publicized and gained significant attention worldwide.”¹³

The Board of the Association of College and Research Libraries, a division of the American Library Association, established a Task Force on Information Literacy Competency Standards and charged it to develop competency standards in this area for higher education in 1998. The Task Force prepared a set of draft standards for review and comment in 1999. And, in January of 2000, the Information Literacy and Competency Standards for Higher Education were approved by the ACRL Board of Directors.¹⁴

The third of these standards is, “The information literate student evaluates information and its sources critically and incorporates selected information into his or her knowledge base and value

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⁹ Robert Keiner, *Media Bias*, CQ Researcher, (May 3, 2013), <http://library.cqpress.com>

¹⁰ American Library Association, *A Library Advocate’s Guide to Building Information Literate Communities*, 5 (2001)

¹¹ American Library Association Presidential Committee on Information Literacy, *Final Report*, 1 (1989)

¹² *Id.* at 2

¹³ Shirley A. Behrens, *A Conceptual Analysis and Historical Overview of Information Literacy*, 55 College and Research Libraries 315 (1994)

¹⁴ Association of College and Research Libraries, *Information Literacy and Competency Standards for Higher Education*, 61 College & Research Library News, 208 (2000)

system.”¹⁵ Outcomes under this standard indicate that the information literate student, “examines and compares information from various sources in order to evaluate reliability, validity, accuracy, authority, timeliness, and point of view or bias,”¹⁶ and, “recognizes prejudice, deception, or manipulation.”¹⁷ This standard, with its emphasis on “critical evaluation,” is one way, “librarians can play a vital role in helping everyone, of any age, become critical and reflective news consumers.”¹⁸

After the Standards were adopted, librarians developed a “flurry of campus initiatives,” and laid the groundwork for getting “buy in” from college and university administration in order that “IL should be understood as a coherent skill set worthy of being taught both in a classroom-type setting under the auspices of the library, or be seen as a set of general competencies to be integrated into existing courses.”¹⁹ The library literature from that time is full of success stories of librarians partnering with teaching faculty to teach and promote information literacy.²⁰

Information literacy soon found its way to accreditation standards. Six regional associations are charged with accreditation of institutions. “Regional accreditation has the dual purpose of both providing quality assurance for institutions of higher education in the United States and encouraging institutions to work toward improving their quality and increasing their effectiveness.”²¹ In the New England Region, the New England Commission of Higher Education (“NHCHE”) includes within its standards for accreditation Standard 4.12, “Expectations for student achievement, independent

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¹⁵ *Id.* at 212-213

¹⁶ *Id.* at 213

¹⁷ *Id.* at 213

¹⁸ Marcus Banks, *Fighting Fake News: How Librarians can Lead the Way on Media Literacy*, American Libraries, (December 27, 2016), <https://americanlibrariesmagazine.org/2016/12/27/fighting-fake-news>.

¹⁹ Michael Rogers and Norman Oder, *Information Literacy, Record Attendance Highlight ACRL Annual Meeting*, Library Journal, (April 15, 2001) 14.

²⁰ See, e.g. Lynn Lampert, “Getting Psyched” about Information Literacy: A Successful Faculty-Librarian Collaboration for Educational Psychology and Counseling, 89/90 Reference Librarian 5 (2005); Alexius Smith and Michael Fosmine, *A Blueprint for Progress: Collaborating with Faculty to Integrate Information Literacy into the Classroom*, 17 Information Networks 43 (2004); Marjorie M. White, *Information Literacy Programs: Successful Paradigms for Promoting Faculty Interest and Involvement*, 79/80 Reference Librarian 323 (2003)

²¹ Commission on Institutes of Higher Education, *Evaluation Manual*, 3 (2016)

learning, *information literacy*, skills in inquiry, and critical judgment are appropriate to the subject matter and degree level and in keeping with generally accepted practice.”²² Information literacy had gone from librarians to “generally accepted practice” in sixteen years. The American Bar Association the “recognized national agency for the accreditation programs leading to the J.D. degree,”²³ has not yet gotten the information literacy message as their Standard 302(b) includes, “A law school shall establish learning outcomes that shall, at a minimum include competency in legal analysis, legal reasoning, legal research, problem solving, and written and oral communication in the legal context.”²⁴

This apparent ambivalence about information literacy appears to be reflected in the American Association of Law Libraries work in this area. In 2009 and 2010, “a self-formed group of AALL members chaired by Dennis C. Kim-Prieto created a draft of Law Student Information Literacy Standards. The Standards were submitted to the Executive Board for adoption in April 2010.”²⁵ In response, the Board created the Law Student Research Competency Standards Task Force to develop competency standards. That task force presented the Board with a draft of “Law Student Research Competency Principles,” for adoption in 2011.²⁶ The Board did adopt them, and in July of 2013, the Board adopted the Principles and Standards for Legal Research Competencies.²⁷ Principle III stated, “A successful researcher critically evaluates information.”²⁸ The competencies listed under this principle included evaluating the

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²² New England Commission of Higher Education, *Standards*, (2021) https://www.neche.org/resources/standards-for-accreditation#standard_four

²³ American Bar Association, *2017-2018 Standards of Rules of Procedure for Approved Law Schools*, v (2017)

²⁴ *Id.* at 15

²⁵ Report, AALL Law Student Research Competency Standards Task Force for the AALL Executive Spring Board Meeting, March 29-31, 2011, <http://www.aallnet.org/main-menu/Leadership-Governance/committee/cmte-final-reports/2010-2011/law-stu-tf.pdf>

²⁶ *Id.* at 5

²⁷ Nancy B. Talley, *Are You Doing it Backward? Improving Information Literacy Instruction Using the AALL Principles and Standards for Legal Research Competencies, Taxonomies, and Backward Design*, 106 Law Library Journal 47, 53 (2013)

²⁸ American Association of Law Libraries, *Principles and Standards for Legal Research Competencies*, (2013) <https://www.aallnet.org/wp-content/uploads/2017/12/AALL2013PrinciplesStandardsLegalResearchCompetencyPrint.pdf>

information of material under criteria of “Authority, credibility, currency, and authenticity.”²⁹

Interestingly, AALL did not add “bias” to its standards of criteria until 2020.³⁰

In their first year of law school, students are trained to “think like a lawyer.” This thinking involves the “method of organizing and categorizing the arts of a legal problem that allows for its discussion and possible solution, using a logical reasoning process. Thinking like a lawyer in the traditional sense that is taught in most law schools encompasses finding, analyzing, and applying ‘the law.’”³¹ “Much of the focus of law study is on courses arising from common law rules, from a combination of common law rules and statutes, from procedural rules of court, and from constitutional law. Rather than using traditional textbooks that talk about the law, these courses expose students directly to the law itself through reading assigned in casebooks.”³² A casebook is a “compilation of abstracts from instructive cases on a particular subject, usually with commentary and questions about the cases, designed as a teaching aid.”³³ “These cases have been carefully selected and carefully edited by the casebook author *based on what the author wants you to learn*. [emphasis in the original]”³⁴ First year students must learn to read and understand case law. “Case briefing is an essential step in learning the individual legal principles necessary for success on final examinations.”³⁵ Students are encouraged, after noting the case name and citation, to note the facts of the case focusing on “the essential or critical facts as opposed to merely retelling the entire story contained within the case.”³⁶ In a casebook, the facts of the case have already been edited by the author “based on what the author wants you to

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²⁹ *Id.*

³⁰ *Id.*

³¹ Barbara Bantliff, From Creativity to Computerease: Thinking Like a Lawyer in the Computer Age, 88 Law Library Journal 338, 339 (1996)

³² Ruth Ann McKinney, *Reading Like a Lawyer*, 4 (2012)

³³ *Casebook*, Black’s Law Dictionary (7th ed. 1999)

³⁴ McKinney, *supra* note 30 at 5

³⁵ Herbert N. Ramo, *Succeeding in Law School*, 41 (2010)

³⁶ *Id.* at 50

learn.”³⁷ But, do all casebooks on the same subject edit the facts of the same cases the same way? That is, do the “essential” and “critical” facts remain the same from author to author? An examination of these questions is laid out below.

Constitutional Law Casebooks

For purposes of this examination, I first picked four constitutional law casebooks and highlighted how each author edited a specific case’s facts. The four casebooks are *Constitutional Law: Cases and Materials*, concise thirteenth edition by Jonathan D. Varat, William Cohen, and Vikram D. Amar (Foundation Press, 2009); *Modern Constitutional Law: Cases and Notes*, ninth edition, by Ronald D. Rotunda (West Publishing Co., 2010); *Constitutional Law*, fourth edition, by Erwin Chemerinsky (Wolters Kluwer, 2013); and *American Constitutional Law: Powers and Liberties*, fourth edition, by Calvin Massey (Wolters Kluwer, 2012). The case I picked to examine is *Kelo v. City of New London* 545 U.S. 469 (2005).

In *Kelo*, the city of New London, Connecticut had approved a development plan “projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.”³⁸ The city bought some of the land to be developed from willing property owners. The city proposed taking the property of unwilling owners by eminent domain. The unwilling owners appealed a ruling of the Supreme Court of Connecticut that the proposed taking was valid. Justice Stevens wrote the majority opinion of the Court holding that “promoting economic development is a traditional and long accepted function of government.” And, that a city plan which included a taking of petitioners’ land, was thoroughly deliberated before its adoption and thus, “unquestionably serves a public purpose” and, “satisf[ies] the public use requirement of the Fifth Amendment.”³⁹

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³⁷ *Supra.* note 30

³⁸ *Kelo*, at 472

³⁹ *Kelo*, at 484

The *Kelo* case is included in the constitutional law casebooks of Chemerinsky, Rotunda, and Massey. Varat does not include it at all. Each author edits the facts of the case. A visual of the facts included is helpful. I have used a picture of the case as reported in *West's Supreme Court Reporter* for purposes of this visual.⁴⁰

545 U.S. 475 KELO V. CITY OF NEW LONDON, CONN. 2659

particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1996, the State authorized a \$5.35 million bond issue to support the NLDC's planning activities and a \$10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a \$300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process. In May, the city council authorized the NLDC to formally submit its plans to the relevant state agencies for review.² Upon obtaining state-level approval, the NLDC finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

The Fort Trumbull area is situated on a peninsula that juts into the Thames River. The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility (Trumbull State Park now occupies 18 of those 32 acres). The development plan encompasses seven parcels. Parcel 1 is designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants

and shopping. This parcel will also have marinas for both recreational and commercial uses. A pedestrian "riverwalk" will originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U.S. Coast Guard Museum. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a 2.4-acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking, and water-dependent commercial uses. App. 109-113.

The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to "build momentum for the revitalization of downtown New London," *id.*, at 92, the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park.

The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. See Conn. Gen.Stat. § 8-

2. Various state agencies studied the project's economic, environmental, and social ramifications. As part of this process, a team of consultants evaluated six alternative development proposals for the area, which varied in extensiveness and emphasis. The Office of

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198 (2005). The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. § 8-193. The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.³

II

Petitioner Suetette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull—4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. After a 7-day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of the properties located in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space). App. to Pet. for Cert. 343-350.⁴

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 132, the State's municipal development statute. See Conn. Gen.Stat. § 8-196 *et seq.* (2005). That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest." 298 Conn., at 18-28, 843 A.2d, at 515-521. Next, relying on cases such as *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed2d 186 (1984), and *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions. 298 Conn., at 40, 843 A.2d, at 527.

Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public use, *id.*, at 82-84, 843 A.2d, at 552-553, and second, whether the takings were for "re-

development plan. Specifically, the NLDC was negotiating a 99-year ground lease with Corcoran Jonsson, a developer selected from a group of applicants. The negotiations contemplated a nominal rent of \$1 per year, but no agreement had yet been signed. See 268 Conn. 1, 9, 81, 843 A.2d 500, 509-510, 540 (2004).

3. In the remainder of the opinion we will differentiate between the City and the NLDC only where necessary.

4. While this litigation was pending before the Superior Court, the NLDC announced that it would lease some of the parcels to private developers in exchange for their agreement to develop the land according to the terms of the

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Fig. 1 Rotunda—Kelo

⁴⁰ *Kelo v. City of New London*, 125 S. Ct. 2655 (2005)

particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a \$5.35 million bond issue to support the NLDC's planning activities and a \$10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a \$300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process. In May, the city council authorized the NLDC to formally submit its plans to the relevant state agencies for review.¹ Upon obtaining state-level approval, the NLDC finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

The Fort Trumbull area is situated on a peninsula that juts into the Thames River. The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility (Trumbull State Park now occupies 18 of those 32 acres). The development plan encompasses seven parcels. Parcel 1 is designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants

and shopping. This parcel will also have marinas for both recreational and commercial uses. A pedestrian "riverwalk" will originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U.S. Coast Guard Museum. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a 2.4-acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking, and water-dependent commercial uses. App. 109-113.

The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to "build momentum for the revitalization of downtown New London," *id.*, at 92, the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park.

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Fig. 2 Chemerinsky—Kelo

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Fig. 3 Massey—Kelo

198 (2005). The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. § 8-195. The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.¹

II

Petitioner Suetette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull—4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the

Fifth Amendment. After a 7-day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of the properties located in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space). App. to Pet. for Cert. 343-350.¹

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 152, the State's municipal development statute. See Conn. Gen.Stat. § 8-186 et seq. (2005). That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest." 268 Conn., at 18-28, 843 A.2d, at 515-521. Next, relying on cases such as *Hawaii Housing Authority v. Midliff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), and *Herman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions. 268 Conn., at 40, 843 A.2d, at 527.

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In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the

Fifth Amendment. After a 7-day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of the properties located in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space). App. to Pet. for Cert. 343-350.¹

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 152, the State's municipal development statute. See Conn. Gen.Stat. § 8-186 et seq. (2005). That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest." 268 Conn., at 18-28, 843 A.2d, at 515-521. Next, relying on cases such as *Hawaii Housing Authority v. Midliff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), and *Herman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions. 268 Conn., at 40, 843 A.2d, at 527.

Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public use, *id.*, at 82-84, 843 A.2d, at 532-533, and, second, whether the takings were for "rea-

3. In the remainder of the opinion we will differentiate between the City and the NLDC only where necessary.
4. While this litigation was pending before the Superior Court, the NLDC announced that it would lease some of the parcels to private developers in exchange for their agreement to develop the land according to the terms of the development plan. Specifically, the NLDC was negotiating a 99-year ground lease with Corvian Junction, a developer selected from a group of applicants. The negotiations contemplated a nominal rent of \$1 per year, but no agreement had yet been signed. See 268 Conn. 1, 9, 843 A.2d 500, 509-510, 540 (2004).

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Figure 1 shows the facts included by Rotunda. Figure 2 are Chemerinsky's. Figure 3 are Massey's. The highlighting clearly shows that each author has selected different facts with which to introduce the reader to the *Kelo* case. Each author highlighted those facts which he felt were significant and influenced the court. Please note that, if all the facts selected were significant, Chemerinsky and Massey chose almost a completely opposite set.

Property Law Casebooks

Next, I examined three property law casebooks. The three books I chose for the examination are *Property*, eighth edition, by Jesse Dukeminier et al, (Wolters Kluwer, 2013); *Property law: principles, problems, and cases*, by Calvin Massey, (West, 2012); and, *Property law: rules, policies, and practices*, fifth edition, by Joseph William Singer, (Wolters Kluwer, 2010). The case I chose to examine was *Shelley v. Kraemer*, 334 U.S. 1 (1948). In *Shelley*, petitioners appealed a ruling of the Missouri Supreme Court which enforced a restrictive agreement between neighbors, "against the occupancy as owners or tenants, of any portion of said property for resident or other purpose by people of the Negro or Mongolian race."⁴¹ Additional petitioners, the Sipeses, purchased a property with a restriction that it was only "not to be used or occupied by a person or persons except those of the Caucasian race."⁴² The Supreme Court of Michigan "decided adversely to the petitioners' contentions that they had been denied rights protected by the Fourteenth Amendment."⁴³ The Court held that, "in granting judicial

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⁴¹ *Shelley*, at 5

⁴² *Shelley*, at 6

⁴³ *Shelley*, at 7

enforcement of restrictive covenants [based on race], the States have denied petitioners the equal protection of the laws, and that, therefore, the action of the State courts cannot stand.”⁴⁴

Messrs. Henry Gilligan and James A. Crooks, both of Washington, D. C. for respondents Sipes and others.

Mr. Philip E. Perlman, Sol. Gen., of Washington, D. C. for the United States, as amicus curiae, by special leave of Court.

Mr. Chief Justice VINSON delivered the opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

“... the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as [sic] not in subsequent conveyances and shall attach to the land, as a condition precedent to the sale of the same, that hereafter no part of said property or any

portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.”

The entire divorce described in the agreement included sixty-seven parcels of land.

¹ The trial court found that title to the property which petitioners Shelley sought to purchase was held by one Bishop, a real estate dealer, who placed the prop-

The thirty owners who signed the agreement held title to forty-seven parcels, including the particular parcel involved in this case. At the time the agreement was signed, five of the parcels in the district were owned by Negroes. One of those had been occupied by Negro families since 1882, nearly thirty years before the restrictive agreement was executed. The trial court found that owners of seven out of nine homes on the south side of Labadie Avenue, within the restricted district and “in the immediate vicinity” of the premises in question, had failed to sign the restrictive agreement in 1911. At the time this action was brought, four of the premises were occupied by Negroes, and had been so occupied for periods ranging from twenty-three to sixty-three years. A fifth parcel had been occupied by Negroes until a year before this suit was instituted.

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question.¹ The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in the Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and reverting title to the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

erty in the name of Josephine Fitzgerald, Bishop, who acted as agent for petitioners in the purchase, concealed the fact of his ownership.

The Supreme Court of Missouri sitting *en banc* reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution.² At the time the court rendered its decision, petitioners were occupying the property in question.

The second of the cases under consideration comes to this Court from the Supreme Court of Michigan. The circumstances presented do not differ materially from the Missouri case. In June, 1934, one Ferguson and his wife, who then owned the property located in the city of Detroit which is involved in this case, executed a contract providing in part:

“This property shall not be used or occupied by any person or persons except those of the Caucasian race.

“It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction.”

The agreement provided that the restrictions were to remain in effect until January 1, 1960. The contract was subsequently recorded, and similar agreements were executed with respect to eighty percent of the lots in the block in which the property in question is situated.

By deed dated November 30, 1944, petitioners, who were found by the trial court to be Negroes, acquired title to the property and thereupon entered into its occupancy. On January 30, 1945, respondents, as owners of property subject to the terms of the restrictive agreement, brought suit against petitioners in the Circuit Court of

Wayne County. After a hearing, the court entered a decree directing petitioners to move from the property within ninety days. Petitioners were further enjoined and restrained from using or occupying the premises in the future. On appeal, the Supreme Court of Michigan affirmed, deciding adversely to petitioners’ contentions that they had been denied rights protected by the Fourteenth Amendment.³

Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment.⁴ Specifically,

petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States. We pass to a consideration of those issues.

I.

(1) Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider. Only two cases have been decided by this Court which in any way have involved the enforcement of such agreements. The first of these was the case of Corrigan v. Buckley, 309 U.S. 283, 46 S.Ct. 521, 70 L.Ed. 969. There, suit was brought in the courts of the District of Columbia to enjoin a threatened violation of certain restrictive covenants relating to lands situated in the city of Washington. Relief was granted, and the case was brought here

¹ *Kramer v. Shelley*, 1946, 355 Mo. 814, 139 S.W.2d 679.
² *Sipes v. McGhee*, 1947, 316 Mich. 614, 30 N.W.2d 628.

³ The first section of the Fourteenth Amendment provides: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

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Fig. 4 Dukeminier—Shelley

⁴⁴ *Shelley*, at 20

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portion thereof shall be, for said term of Fifty years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."

The entire district described in the agreement included fifty-seven parcels of land.

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¹ *Kramer v. Shelley*, 1946, 350 Mo. 814, 168 S.W.2d 670.

² *Sipes v. McElhee*, 1947, 318 Mich. 614, 20 N.W.2d 624.

³ The first section of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

858 65 SUPREME COURT REPORTER

Messrs. Henry Gilligan and James A. Crooks, both of Washington, D. C. for respondents Sipes and others.

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On August 11, 1943, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in the Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and vesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

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859 SHELLEY v. KRAEMER
CIVIL RIGHTS CASE

The Supreme Court of Missouri sitting en banc reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution.¹ At the time the court rendered its decision, petitioners were occupying the property in question.

The second of the cases under consideration comes to this Court from the Supreme Court of Michigan. The circumstances presented do not differ materially from the Missouri case. In June, 1934, one Ferguson and his wife, who then owned the property located in the city of Detroit which is involved in this case, executed a contract providing in part:

"This property shall not be used or occupied by any person or persons except those of the Caucasian race."

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The agreement provided that the restrictions were to remain in effect until January 1, 1960. The contract was subsequently recorded; and similar agreements were executed with respect to eighty percent of the lots in the block in which the property in question is situated.

By deed dated November 30, 1944, petitioners, who were found by the trial court to be Negroes, acquired title to the property and thereupon entered into its occupancy. On January 30, 1945, respondents, as owners of property subject to the terms of the restrictive agreement, brought suit against petitioners in the Circuit Court of Wayne County. After a hearing, the court entered a decree directing petitioners to move from the property within sixty days. Petitioners were further enjoined and restrained from using or occupying the premises in the future. On appeal, the Supreme Court of Michigan affirmed, deciding adversely to petitioners' contentions that they had been denied rights protected by the Fourteenth Amendment.²

Petitioners have placed primary reliance on their contention, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment.³ Specifically,

petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States. We pass to a consideration of those issues.

I.

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¹ *Kraemer v. Shelley*, 1946, 350 Mo. 814, 138 S.W.2d 679.

² *Shelley v. McGhee*, 1947, 216 Mich. 614, 20 N.W.2d 628.

³ The first section of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

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Fig. 6 Singer—Shelley

Figure four shows *Shelley* as reported in *West's Supreme Court Reporter* with the facts of the case included in the Dukeminier case book, figure five those facts included by Massey, and figure six by Singer. Although not as dramatically different as the facts selected in the *Kelso*, the highlighting shows that each author selected different facts to introduce students to the Shelley case before including the Court's legal analysis.

Civil Procedure Casebooks

Finally, I examined a case included in three civil procedure casebooks. The three books I chose to use were *Civil procedure: doctrine, practice, and context* by Stephen Subrin, (Wolters Kluwer, 2012), *Civil procedure*, by Stephen Yaezell, (Wolters Kluwer, 2012), and *Civil procedure: pleading*, by Hillel Levin, (CALI, 2011). The case I chose to examine was *Ashcroft v Iqbal*, 556 U.S. 662 (2009). In *Iqbal*, Javaid Iqbal brought suit against the federal government and United States Attorney General John

Ashcroft and F.B.I. Director Robert Mueller for violations of his First, Fourth, Sixth and Eighth Amendment rights as well as other tort claims.⁴⁵ Iqbal was arrested and detained after the September 11th terrorist attacks. He argued that he was targeted “a person ‘of high interest’ on account of his race, religion, or national origin” for being an Arab and a Muslim⁴⁶ and “that Ashcroft was the policy’s ‘principal architect’ and Mueller was ‘instrumental’ in its adoption and execution.”⁴⁷ The Court held that, “Iqbal’s complaint fail[ed] to plead sufficient facts to state a claim for purposeful and unlawful discrimination” to survive the defendant’s motion to dismiss under Rule 8(a)(2) of the Federal Rules of Civil Procedure.⁴⁸

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⁴⁵ *Iqbal v Ashcroft*, 556 U.S. 662 (2009)

⁴⁶ *Iqbal* at 662

⁴⁷ *Iqbal*, at 662

⁴⁸ *Iqbal*, at 663

pled factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent's pleadings are insufficient.

1. *Id.*

Following the 2001 attacks, the FBI and other entities within the Department of Justice began an investigation of vast reach to identify the assailants and prevent them from attacking anew. The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor. By September 18 "the FBI had received more than 96,000 tips or potential leads from the public." Dept. of Justice, Office of Inspector General, 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 1, 11–12 (Apr. 2003), http://www.usdoj.gov/oig/special/0306/full.pdf#esec_sen_61072E; C074720AD=0 & bci_sen_61072E=full.pdf (as visited May 14, 2009, and available in Clerk of Court's case file).

In the ensuing months the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general. *Id.*, at 1. Of those individuals, some 762 were held on immigration charges, and a 184-member subset of that group was deemed to be "of high interest" to the investigation. *Id.*, at 111. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world. *Id.*, at 112–113.

Respondent was one of the detainees. According to his complaint, in November 2001 agents of the FBI and Immigration and Naturalization Service arrested him on charges of fraud in relation to identifica-

tion documents and conspiracy to defraud the United States. *Iqbal v. Hasty*, 490 F.3d 143, 147–148 (C.A.2 2007). Pending trial for those crimes, respondent was housed at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Respondent was designated a person "of high interest" to the September 11 investigation and in January 2002 was placed in a section of the MDC known as the Administrative Maximum Special Housing Unit (ADMAX SHU). *Id.*, at 148. As the facility's name indicates, the ADMAX SHU incorporates the maximum security conditions allowable under Federal Bureau of Prisons regulations. *Ibid.* ADMAX SHU detainees were kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort. *Ibid.*

Respondent pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan. *Id.*, at 149. He then filed a *Bivens* action in the United States District Court for the Eastern District of New York against 34 current and former federal officials and 19 "John Doe" federal corrections officers. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1990, 29 L.Ed.2d 619 (1971). The defendants range from the correctional officers who had day-to-day contact with respondent during the term of his confinement, to the wardens of the MDC facility, all the way to petitioners—officials who were at the highest level of the federal law enforcement hierarchy. First Amended Complaint in No. 04-CV-1809 (GGJAJ, V 10–11, App. to Pet. for Cert. 157a (hereinafter Complaint)).

The 21-cause-of-action complaint does not challenge respondent's arrest or his confinement in the MDC's general prison population. Rather, it concentrates on his

treatment while confined to the ADMAX SHU. The complaint sets forth various claims against defendants who are not before us. For instance, the complaint alleges that respondent's jailers "kicked him in the stomach, punched him in the face, and dragged him across" his cell without justification, *id.*, ¶ 113, at 170a; subjected him to "seral-strip and body-cavity searches when he posed no safety risk to himself or others," *id.*, ¶¶ 143–145, at 182a; and refused to let him and other Muslims pray because there would be "only prayers for terrorists." *Id.*, ¶ 154, at 184a.

The allegations against petitioners are the only ones relevant here. 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." *Id.*, ¶ 47, at 164a. 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." *Id.*, ¶ 69, at 168a. 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." *Id.*, ¶ 96, at 172a–173a. The pleading names Ashcroft as the "principal architect" of the policy, *id.*, ¶ 10, at 157a, and identifies Mueller as "instrumental in [its] adop-

tion, promulgation, and implementation," *id.*, ¶ 11, at 157a.

Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct. The District Court denied their motion. Accepting all of the allegations in respondent's complaint as true, the court held that "it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against" petitioners. *Id.*, at 136a–137a (relying on *Cosby v. Gilson*, 350 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Invoking the collateral-order doctrine petitioners filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit. While that appeal was pending, this Court decided *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), which discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.

The Court of Appeals considered *Twombly*'s applicability to this case. Acknowledging that *Twombly* retired the *Cosby* no-set-of-facts test relied upon by the District Court, the Court of Appeals' opinion discussed at length how to apply this Court's "standard for assessing the adequacy of pleadings." 490 F.3d, at 155. It concluded that *Twombly* called for a "flexible 'plausibility' standard," which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Id.*, at 157–158. The court found that petitioners' appeal did not present one of "those contexts" requiring amplification. As a consequence, it held respondent's pleading adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law. *Id.*, at 174.

plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent's pleadings are insufficient.

I.

Following the 2001 attacks, the FBI and other entities within the Department of Justice began an investigation of vast reach to identify the assailants and prevent them from attacking anew. The FBI dedicated more than 4,000 special agents and 1,000 support personnel to the endeavor. By September 18 "the FBI had received more than 96,000 tips or potential leads from the public." Dept. of Justice, Office of Inspector General, 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 11, 11–12 (Apr. 2005), http://www.oigdoj.gov/ig/special/9806/full.pdf?hes_loc=61072E09774750AD=0&_test_casid=flammas-full.pdf (as visited May 14, 2006, and available in Clerk of Court's case file).

In the ensuing months the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general. *Id.*, at 1. Of those individuals, some 762 were held on immigration charges; and a 184-member subset of that group was deemed to be "of high interest" to the investigation. *Id.*, at 111. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world. *Id.*, at 112–113.

Respondent was one of the detainees. According to his complaint, in November 2001 agents of the FBI and Immigration and Naturalization Service arrested him on charges of fraud in relation to identifica-

tion documents and conspiracy to defraud the United States. *Iqbal v. Hasty*, 400 F.3d 143, 147–148 (C.A.2 2007). Pending trial for those crimes, respondent was housed at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Respondent was designated a person "of high interest" to the September 11 investigation and in January 2002 was placed in a section of the MDC known as the Administrative Maximum Special Housing Unit (ADMASX SHU). *Id.*, at 148. As the facility's name indicates, the ADMASX SHU incorporates the maximum security conditions allowable under Federal Bureau of Prisons regulations. *Id.* ADMASX SHU detainees were kept in lock-down 22 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort. *Id.*

Respondent pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan. *Id.*, at 149. He then filed a *Bivens* action in the United States District Court for the Eastern District of New York against 34 current and former federal officials and 19 "John Doe" federal correcting officers. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). The defendants range from the correctional officers who had day-to-day contact with respondent during the term of his confinement, to the wardens of the MDC facility, all the way to petitioners—officials who were at the highest level of the federal law enforcement hierarchy. First Amended Complaint in No. 04-CV-1809 (GG/JA), ¶¶ 10–11, App. to Pet. for Cert. 157a (hereinafter Complaint).

The 21-cause-of-action complaint does not challenge respondent's arrest or his confinement in the MDC's general prison population. Rather, it concentrates on his

treatment while confined to the ADMASX SHU. The complaint sets forth various claims against defendants who are not before us. For instance, the complaint alleges that respondent's jailers "kicked him in the stomach, punched him in the face, and dragged him across" his cell without justification. *Id.*, ¶ 113, at 176a; subjected him to sexual strip and body-cavity searches when he posed no safety risk to himself or others. *Id.*, ¶¶ 142–145, at 182a; and refused to let him and other Muslims pray because there would be "little prayers for terrorists." *Id.*, ¶ 154, at 194a.

The allegations against petitioners are the only ones relevant here. 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." *Id.*, ¶ 47, at 164a. 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." *Id.*, ¶ 69, at 168a. 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." *Id.*, ¶ 95, at 172a–172b. The pleading names Ashcroft as the "principal architect" of the policy. *Id.*, ¶ 10, at 157a, and identifies Mueller as "instrumental in [its] adop-

tion, promulgation, and implementation." *Id.*, ¶ 11, at 157a.

Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct. The District Court denied their motion. Accepting all of the allegations in respondent's complaint as true, the court held that "it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against" petitioners. *Id.*, at 176a–177a (relying on *Cole v. Gibson*, 355 U.S. 41, 78 S.Ct. 59, 2 L.Ed.2d 80 (1957)). Invoking the collateral-order doctrine petitioners filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit. While that appeal was pending, this Court decided *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1956, 167 L.Ed.2d 859 (2007), which discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.

The Court of Appeals considered Twombly's applicability to this case. Acknowledging that Twombly retired the *Cole* no-set-of-facts test relied upon by the District Court, the Court of Appeals opined, discussed at length how to apply this Court's "standard for assessing the adequacy of pleadings." 400 F.3d, at 155. It concluded that Twombly called for a "flexible, 'plausibility' standard," which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Id.*, at 157–158. The court found that petitioners' appeal did not present one of "those contexts" requiring amplification. As a consequence, it held respondent's pleading adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law. *Id.*, at 174.

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(filed as 129 S.Ct. 1817 (2009))

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Following the 2001 attacks, the FBI and other entities within the Department of Justice began an investigation of vast reach to identify the assailants and prevent them from attacking anew. The FBI detained more than 4,000 suspect agents and 3,000 support personnel to the endeavor. By September 18 "the FBI had received more than 96,000 tips or potential leads from the public." Dept. of Justice, Office of Inspector General, 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 1, 11-12 (Apr. 2003), <http://www.usdoj.gov/oig/special/0306/full.pdf> (hereinafter "OIG Report").

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Respondent pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan. *Id.* at 149. He then filed a *Bivens* action in the United States District Court for the Eastern District of New York against 18 current and former federal officials and 19 "John Doe" federal corrections officers. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). The defendants range from the correctional officers who had day-to-day contact with respondent during the term of his confinement, to the warden of the MDC facility, all the way to petitioners—officials who were at the highest level of the federal law enforcement hierarchy. First Amended Complaint in No. 04-CV-1460 (RJA/JA), ¶¶ 10-11, App. to Pet. for Cert. 157a (hereinafter Complaint).

The 21-cause-of-action complaint does not challenge respondent's arrest or his confinement in the MDC's general prison population. Rather, it concentrates on his

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Fig. 9 Yaezell —Iqbal

The highlighted cases illustrate that each of the civil procedure casebook authors chose to include different facts from the *Iqbal* case. Figure seven is from Levin, figure 8 is Subrin, and figure 9 is Yaezell. While these differences are not as dramatically different as the *Kelso* case, differences in facts reported are significant as *Iqbal* is a case dismissed *specifically* for failing to "plead sufficient facts."⁴⁹ In each examined case, we have seen that each author has chosen to include different facts of the case with which to introduce it to his students. What is it that each author/professor brings to the selection? I would argue, it is bias.

The dictionary defines "bias" as, "an inclination or prejudice for or against one thing or person,"⁵⁰ In *Everyday bias: identifying and navigating unconscious judgments in our daily lives*, Ross

⁴⁹ *Iqbal* at 662

⁵⁰ The Concise Oxford Dictionary, (10th ed. 1995) 130

Howard states, “We are constantly making decisions that are influenced by unconscious biases. In fact, even when our biases seem conscious, they may be influenced by a pattern of unconscious assumption that we have absorbed throughout our lives.”⁵¹ Ross goes on to say that, “these may result from social conditioning, belief systems that we have been taught or exposed to, particular incidents that we remember, or any number of other assumed ‘truths’ that we have picked up along the way.”⁵² Nobel laureate, Daniel Kahneman describes most of the thoughts and decisions in our minds as arising, “without knowing how they got there...The mental work that produces impressions, intuitions, and many decisions goes on in silence in our mind.”⁵³ J. Davidson Frame of the University of Management and Technology concurs, “In making decisions, people do not operate in a vacuum. Their decisions are made in a social space...affected by a spectrum of social forces tied to an array of individuals, communities, politics, economics, and culture. These social forces impose constraints. Even the most independent decision-makers contend with them.”⁵⁴

Is it likely that the learned professors putting together casebooks have a bias? Yes. Mary Joe Frug examined a contracts casebook through a feminist lens in 1985 and opined that, “editors have a wide range of choice in their case selections, their comments, their notes, their problems, and their questions, and the choices they make are not inevitable. The choices could be different and, indeed, choices about content do differ among casebooks with particular subject areas.”⁵⁵ Kohm and Wardle state that “every casebook tends to possess its own angle, identity or theme, fighting for a share in the

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⁵¹ Howard Ross, *Everyday bias: identifying and navigating unconscious judgments in our daily lives*, (2020) 3

⁵² *Id* at 4

⁵³ Daniel Kahneman, *Thinking fast and slow*, 4 (2011)

⁵⁴ J. Davidson Frame, *Framing decisions: decision making that accounts for irrationality, people, and constraints*, 115 (2012)

⁵⁵ Mary Joe Frug, *Re-reading contracts: a feminist analysis of a contracts casebook*, 34 Am. Univ. Law. Rev. 1065, 1069 (1985)

marketplace of legal education.”⁵⁶

Chilton and Posner (2015) conducted an empirical study of law professors’ scholarly writing and their potential biases. The professors chosen were at top tier law schools. After studying the professors’ published writing, they discovered that, “law professors who donate to Democrats write articles that are on net liberal and law professors who donate to Republicans are on net conservative.”⁵⁷ And, although professors are highly educated, their writing may be more likely to show bias than others. Ross states that, “one of the many remarkable contradictions we see in [bias] research is that intelligent people with high self-esteem may be the most likely to develop blind spots about their biases. Dodgson and Wood found that people with high self-esteem ... may be less likely to internalize negative thoughts or ideas about themselves. Not only that, but intelligent people often can rationalize their own bias as justified.”⁵⁸

Duty of Librarians

It is not necessary for law librarians to determine and teach students whether the biases of casebook authors skew “liberal” or “conservative.” The point is that the standards for information literacy call for students themselves to be able, “to evaluate reliability, validity, accuracy, authority, timeliness, and point of view or bias.”⁵⁹ Nor, am I advocating for law librarians to advocate for the disuse of casebooks – though that may be an argument for another day. I do agree with Professor Frug, however, that, “a casebook is a powerful document. The editorial choices within a casebook determine how many readers think about the law of a doctrinal area, about lawyering in that field, about clients, and about legal reasoning...Because a casebook has such power, and because its contents are subject to

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⁵⁶ Lynne Marie Kohm & Lynn D. Wardle, *The echo-chamber effect in legal education: considering family law casebooks*, 6 U. St. Thomas J.L. & Pub Pol’y 104, 123 (2011)

⁵⁷ Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J. LEGAL Stud. 277, 300 (2015).

⁵⁸ Ross, *supra* note 49 at 16

⁵⁹ Association of College and Research Libraries, *supra* note 13 at 213

editorial choice, analyzing the biases of a particular casebook could challenge the effect of the casebook on its readers.”⁶⁰

Yasmin Sokkar Harker states that analytical skills are a crucial piece of legal research education. She states, “librarians must consciously and explicitly address the difference between teaching to evaluate sources of legal information and teaching them to analyze legal information itself.”⁶¹ I put forth that librarians, under Standards for Legal Research Competency III, should also be teaching students to critically evaluate the casebooks to which they are assigned. Nicholas Mignanelli, writing about AI in the *Law Library Journal* writes, “we [librarians] should use our pedagogy to instill in our students a healthy dose of skepticism about claims of objectivity and neutrality,” by, “emphasizing that all technologies are created by human beings with their own biases and that there is a power differential between the entities that create and shape these technologies and the individuals who use and rely on them.”⁶² The same can be added for the technology of print. Sokkar Harker states, “education must move beyond a functional understanding of information literacy and work to engage students with questions about how information is created, how it is published and the power structures that exist within the information world.”⁶³

In 2016, the ACRL replaced its *Literacy Competency Standards* with its *Framework for Information Literacy for Higher Education*.⁶⁴ Where the former *Competency Standards* “detail[ed] five major standards and twenty-two performance indicators [which] served as a guideline for librarians and

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⁶⁰ Frug, *supra* note 53, 1069

⁶¹ Yasmin Sokkar Harker, “*Information is Cheap, but Meaning is Expensive*”: Building Analytical Skill into Legal Research Education, 105 *Law Library Journal* 79, 88 (2013-4)

⁶² Nicholas Mignanelli, *Critical legal research: who needs it?*, 112 *Law Libr. J.* 327, 342 (2020)

⁶³ Yasmin Sokkar Harker, *Critical legal information literacy: legal information as a social construct*, in *Information Literacy and Social Justice: Radical Professional Praxis* 205, 208 (Lua Gregory and Shana Higgins, eds., 2013)

⁶⁴ Association of College and Research Libraries, *Framework for Information Literacy for Higher Education*, (2016)

educators in assessing information literacy skills and creating curricular content,”⁶⁵ the *Framework* is “based on a cluster of interconnected core concepts, with flexible options for implementation, rather than on a set of standards or learning outcomes or any prescriptive enumeration of skills.”⁶⁶ Baked in to these core concepts are the critical evaluation of authorities, “[N]ovice learners come to respect the expertise that authority represents while remaining skeptical of the systems that have elevated that authority and the information created by it.”⁶⁷ And, “Recognizing the nature of information creation, experts look to the underlying processes of creation as well as the final product to critically evaluate the usefulness of the information.”⁶⁸ How, and if, the American Association of Law Libraries might change its *Research Competency Standards* remains to be seen. In the meantime, we should continue to encourage our students and patrons to be critical in regard to authority, credibility, currency, and authenticity and *bias*.

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⁶⁵ Susan Ariew, *How we got here: a historical look at the academic teaching library and the role of the teaching librarian*, 8 *Communications in Information Literacy* 208, 214 (2014)

⁶⁶ *Framework*, *supra* note 64, 7

⁶⁷ *Id.* at 12

⁶⁸ *Id.* at 14