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## What If?: A Study of Seminal Cases as if Decided Under a *Twombly/Iqbal* Regime

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**I**n the timeless classic, *It's a Wonderful Life*, an angel named Clarence shows main character George Bailey how the world

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would have looked without him in it.<sup>1</sup> It is the ultimate “what if” moment, and George discovers that if he had not been born, the world would have been a worse place. His brother would have died as a young boy, soldiers who his brother would have otherwise saved would have all passed away, and the town he grew up in would have been in ruins. It is a life-affirming movie, and perhaps that is why many of us catch at least a moment of it during December as it loops twenty-four hours a day on television. Wondering what our families’ and friends’ lives would be like without us is quite an exercise—one that makes us appreciate what we have suffered and enjoyed, how we have learned from those moments, and what we have to look forward to as life goes on.

Perhaps because of movies like *It’s a Wonderful Life*, we think of asking this “what if” question as a personal reflective experience. But, it need not be limited as such. The process of considering what life might be like without a particular moment or person can have broader application. Just as in the personal sphere, asking this question in the academic context forces us to consider what the effect—both good and bad—of a particular moment has been, how as a society we have benefited or suffered from that moment, and how life might have been different without that moment. Through this exercise, an angel may not necessarily earn its wings, but we will gain a more concrete understanding of what a particular moment has meant.

It is through a “what if” lens that this Essay tackles the already well-discussed cases of *Bell Atlantic Corp. v. Twombly*<sup>2</sup> and *Ashcroft v. Iqbal*.<sup>3</sup> But, unlike the scholarship that has addressed these cases so far, this Essay stakes out a completely different methodological approach.<sup>4</sup> Rather than predicting what courts might do with *Twombly* and *Iqbal* going forward, it asks what might have been had

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<sup>1</sup> *IT’S A WONDERFUL LIFE* (Liberty Films 1946).

<sup>2</sup> 550 U.S. 544 (2007).

<sup>3</sup> 129 S. Ct. 1937 (2009).

<sup>4</sup> Scholarship to date has been fairly predictive and descriptive, a necessity given how recently the cases came down. There has also been some empirical work about motions to dismiss under *Twombly* and *Iqbal*, but even those studies are in the very early stages. See, e.g., Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 601–02 (2010); Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603 (2012); see also JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* (2011). Only time will give us a better picture of how life will actually change under these cases.

*Twombly* and *Iqbal* existed decades ago. To engage in this exercise, this Essay looks at actual complaints in cases that are common fare in legal circles and applies the standards enunciated in *Twombly* and *Iqbal* to them. By doing so, this Essay attempts to concretely think about the consequences of a *Twombly/Iqbal* pleading regime by considering the potential impact that a successful motion to dismiss might have had on cases whose existence are taken for granted today.

Part I of this Essay briefly summarizes the two seminal Supreme Court cases that provide the backdrop for this study: *Regents of the University of California v. Bakke*<sup>5</sup> and *Price Waterhouse v. Hopkins*.<sup>6</sup> Part II applies *Twombly* and *Iqbal* to the original complaints filed in *Bakke* and *Price Waterhouse* and argues that there is a strong likelihood that the Court would have dismissed those complaints under a *Twombly/Iqbal* regime. Finally, Part III considers what the impact would have been if the Court had dismissed those cases. For example, the application of *Twombly* and *Iqbal* is likely to impact substantive claims historically brought by institutional plaintiffs. Even though institutional litigation has become so common over the past few decades, the *Twombly/Iqbal* regime may mark the beginning of its demise.

A consideration of what the law would be like had *Twombly* and *Iqbal* come earlier requires both micro- and macro-considerations. At the micro-level, it is worth thinking about whether the plaintiffs could have refiled the complaints so that they would have ultimately survived a motion to dismiss. At the macro-level, the exercise involves a broader consideration of what would have happened had the Court never decided the cases. In other words, how would the doctrines defined by that seminal case have been affected? And, even

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<sup>5</sup> 438 U.S. 265 (1978).

<sup>6</sup> 490 U.S. 228 (1989). I reviewed complaints in other seminal cases, including the following: *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Plyler v. Doe*, 457 U.S. 202 (1982); *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978); *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997); *J.A. Croson Co. v. City of Richmond*, 779 F.2d 181 (4th Cir. 1985); and *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *abrogated by Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). The issues presented in *Oncale* and *Plyler* were purely legal, and the complaints stated sufficient facts to arguably survive a motion to dismiss under *Twombly* and *Iqbal*. The complaint in *Jenson* contained explicit examples of the offending discriminatory statements and actions such that there was only an issue of law. However, the complaints in *Adarand*, *Croson*, *Hopwood*, and *Monell* were more difficult to predict. Like *Bakke* and *Hopkins*, there is a good argument that each of these complaints might not have survived a motion to dismiss in a *Twombly/Iqbal* regime.

more broadly, how might the development of particular kinds of law practice have changed and how might other modes of social change have been utilized? By considering the effect of *Twombly* and *Iqbal* in this way, this Essay offers yet another lens through which to consider the benefits and drawbacks of a *Twombly/Iqbal* regime.

## I

### BACKGROUND OF THE SEMINAL CASES

#### A. Regents of the University of California v. Bakke

Allan Bakke applied to the University of California at Davis School of Medicine in 1973 and 1974.<sup>7</sup> His Medical College Aptitude Test scores and his grade point average qualified him for an interview with the Davis admissions team both years.<sup>8</sup> Yet, he was not admitted as a medical student either time. Given the competitive nature of the medical school application process, this was not all that surprising. Of the 2644 applicants in 1973, only 814 made it to the interview stage, and of those, Davis admitted only one hundred.<sup>9</sup> Similarly, in 1974, there were 3737 applicants, of which Davis interviewed only 462 for the one hundred spots available.<sup>10</sup> In 1973, the year of his second application, thirty-two nonminority applicants who had scores higher than Bakke were also not admitted.<sup>11</sup> Of those thirty-two, twelve did not make it on the wait list.<sup>12</sup> So, Bakke was not the only well-qualified candidate that Davis rejected. Where some might see stiff competition, Bakke saw unfairness. Namely, he saw that medical school applicants of color were admitted, while he was not.

Bakke was not imagining that persons of color were gaining entry into the medical school to which he aspired. In 1969, Davis began a concerted effort to increase the number of minority students in its medical school. Initially, it set aside a certain number of the one hundred available spots in its entering class for applicants who were

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<sup>7</sup> Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 45 (1999).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

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

<sup>11</sup> Harvey Gee, Book Note, 42 SANTA CLARA L. REV. 277, 285 (2001) (reviewing HOWARD BALL, *THE BAKKE CASE: RACE, EDUCATION, AND AFFIRMATIVE ACTION* (2000)).

<sup>12</sup> *Id.*

“economically and/or educationally disadvantaged.”<sup>13</sup> In 1974, the school changed this program to provide spots for minority candidates.<sup>14</sup> Specifically, it set aside sixteen of its one hundred available spots. The move was an effort to combat institutional racism, an effort in which many public colleges and universities were engaged.

When Bakke was rejected in 1974, he did not see the Davis admission system as a righting of institutional racism. To the contrary, he saw the admission system itself as racist; he did not gain entry into medical school when he otherwise would have because less-qualified minority students were given priority admission. While the terminology of “reverse discrimination” had not made its way into common parlance quite yet, that is exactly what Bakke perceived. And Bakke found a lawyer to make a legal claim that he had suffered such discrimination. In 1974, Bakke filed a complaint in what became the landmark case of *Regents of the University of California v. Bakke*.

Bakke filed his case in the Superior Court of the State of California, alleging that the Davis admissions policies violated (1) the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, (2) the Privileges and Immunities Clause of the California Constitution, and (3) the Federal Civil Rights Act. He asked the court to require Davis to admit him into its medical school. His lawyer was a San Francisco-based practitioner named Reynold Colvin.<sup>15</sup> Colvin was a well-regarded trial lawyer, and he by all accounts handled the case well, but he was not a constitutional scholar.<sup>16</sup> However, at the beginning of Bakke’s case, it is likely that neither Bakke himself nor Colvin knew that the case would ultimately become a standard fixture in law school constitutional law courses. Bakke and Colvin cared only about getting Bakke into medical school.

At trial, Bakke did not find that success. While the trial court questioned the admissions policy and ultimately held that it was unconstitutional, the court did not order Davis to admit Bakke.<sup>17</sup> The

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<sup>13</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 274 (1978).

<sup>14</sup> Rush, *supra* note 7, at 44.

<sup>15</sup> Gee, *supra* note 11, at 286.

<sup>16</sup> Adolphus Levi Williams, Jr., *A Critical Analysis of the Bakke Case*, 16 S.U. L. REV. 129, 143 (1989).

<sup>17</sup> *Id.* at 154.

court did, however, order that Davis consider Bakke for admission along with other candidates without regard to his or their race.<sup>18</sup> Both parties immediately appealed this decision to the Supreme Court of California.<sup>19</sup> That court affirmed that the Davis admissions policy was unconstitutional.<sup>20</sup> This led Davis to appeal to the U.S. Supreme Court.

The Supreme Court's decision in *Bakke* is difficult to decipher because it contained so many separate opinions. The basic holding was that quotas are not allowed in admission policies but that the consideration of race more generally might be.<sup>21</sup> Thus, the Davis policy was unconstitutional, but the Court left open the possibility that admissions policies could consider race absent such quotas.<sup>22</sup> Finally, and most important to Bakke himself, he was admitted to Davis for medical school.<sup>23</sup> He is currently a practicing anesthesiologist in Minnesota.<sup>24</sup>

### B. Price Waterhouse v. Hopkins

Ann Hopkins was by all accounts a success, a woman who had an impressive, loving husband, three kids, and an enviable career at a major accounting firm. Her world came crashing down, however, when her firm denied her a partnership, her husband divorced her, and she lost one of her children in a drunk-driving accident.<sup>25</sup> Hopkins survived all of these moments and is still with us today. Most notably for purposes of this Essay, she also became the subject of one of the most defining Title VII cases involving gender discrimination in the employment context.<sup>26</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 162.

<sup>20</sup> *Id.* at 165–66.

<sup>21</sup> *Id.* at 208–09.

<sup>22</sup> *See id.* at 209.

<sup>23</sup> *Id.* at 220.

<sup>24</sup> *See* Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 GEO. L.J. 981, 981 (1999).

<sup>25</sup> Ann Hopkins, *Price Waterhouse v. Hopkins: A Personal Account of a Sexual Discrimination Plaintiff*, 22 HOFSTRA LAB. & EMP. L.J. 357, 360–61, 414 (2005).

<sup>26</sup> Cheryl A. Pilate, Comment, *Price Waterhouse v. Hopkins: A Mixed Outcome for Title VII Mixed-Motive Plaintiffs*, 38 U. KAN. L. REV. 107, 108 (1989) (“Amid the rapid razing of established civil rights law, one case, *Price Waterhouse v. Hopkins*, emerged as a lone victory.” (footnotes omitted)).

Hopkins was a successful career woman. She worked at IBM before joining Touche Ross & Co., which was then one of the “Big Eight” national accounting firms.<sup>27</sup> She met her husband at Touche, and when they married, she agreed to leave the firm to avoid any issues with the firm’s nepotism policy.<sup>28</sup> She joined a Touche competitor, Price Waterhouse, as a consultant.<sup>29</sup> In the meantime, her husband became a partner at Touche.<sup>30</sup> Hopkins worked in the Office of Government Services at Price Waterhouse.<sup>31</sup> She immediately set herself apart by being a key player in securing what was then the largest consulting project the firm had ever undertaken.<sup>32</sup> After five successful years at Price Waterhouse, Hopkins went up for partner.<sup>33</sup> She did not succeed.<sup>34</sup> At first, she was told that the firm would hold her partnership over for another year, but that next year, she was told that she would never make partner.<sup>35</sup> This rejection occurred in spite of deep support from the partners who had worked with Hopkins because the other partners strongly disapproved of her.<sup>36</sup> Their rejection of her partnership application was accompanied by comments like the following: she “overcompensated for being a woman,” was “macho,” and needed “a course at charm school.”<sup>37</sup> The partners also noted that she was “[o]verly aggressive, unduly harsh, difficult to work with and impatient with staff” and that she was “[u]niversally disliked.”<sup>38</sup> When she was told she was going to be held over, her strongest supporter advised that she “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>39</sup>

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<sup>27</sup> Hopkins, *supra* note 25, at 358.

<sup>28</sup> *Id.* at 359.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 360.

<sup>33</sup> Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL’Y 205, 211 (2007).

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

<sup>35</sup> *Id.* at 211–12.

<sup>36</sup> *Id.* at 211.

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

<sup>38</sup> Hopkins, *supra* note 25, at 361.

<sup>39</sup> Friedman, *supra* note 33, at 212.

Hopkins sued. She alleged that Price Waterhouse excluded her from partnership “because of her sex” and that such treatment led to her constructive discharge in violation of Title VII.<sup>40</sup> In federal court, the district judge presiding over Hopkins’s case determined that gender stereotyping had contributed to the denial of Hopkins’s bid for partnership; however, the judge also found that the firm had legitimate reasons for the denial.<sup>41</sup> Ultimately, the judge determined that reliance on even some of the partners’ sexist comments was enough to show Price Waterhouse’s liability under Title VII.<sup>42</sup> The problem for Hopkins was that the district court judge rejected her argument that she had been constructively discharged, so she did not receive back pay, nor was she rehired.<sup>43</sup> Instead, the judge ordered Price Waterhouse only to pay attorneys’ fees.<sup>44</sup> Both parties appealed.<sup>45</sup>

On appeal, the U.S. Court of Appeals for the D.C. Circuit agreed with the liability result. The D.C. Circuit took issue with how the district court had handled the burdens of proof, however.<sup>46</sup> The appellate court argued that if the defendant employer were able to prove by clear and convincing evidence that it would have made the same employment decision even without the discriminatory considerations, then that would be a complete defense to liability.<sup>47</sup> (The trial court had held that such a defense would act only as a limitation on the remedy a plaintiff could recover, not a complete defense.) Ultimately, this did not matter because the appellate court determined that regardless of whether the “same decision” defense was complete or not, Price Waterhouse had not met its burden in showing this defense.<sup>48</sup> Price Waterhouse appealed.

At the Supreme Court, the only issue for review was how the burden of proof would be allocated in what became known as “mixed-motive” employment discrimination cases.<sup>49</sup> Such cases

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<sup>40</sup> *Infra* Appendix B, p. 1177. Hopkins also alleged violations of the District of Columbia Human Rights Act. *Infra* Appendix B, p. 1178.

<sup>41</sup> Friedman, *supra* note 33, at 212.

<sup>42</sup> *Id.*

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

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

<sup>45</sup> *See id.*

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

<sup>47</sup> *Id.*

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

<sup>49</sup> *Id.* at 213.



involved a potentially legitimate reason for the adverse employment decision, as well as a discriminatory one.<sup>50</sup> The Supreme Court did not reach a definitive conclusion, but the Court did resolve some issues. Essentially, the Court determined that in mixed-motive cases, the plaintiff had to show that sex played a role in the adverse employment decision.<sup>51</sup> Once the plaintiff made that showing, the burden shifted to the defendant to show by a preponderance of the evidence that it would have reached the same decision even without that discriminatory consideration.<sup>52</sup> The most lasting effect of this case, however, was that the Court explicitly recognized that gender stereotyping could evidence discrimination.<sup>53</sup>

Following the Supreme Court's decision, Hopkins's case was remanded back down to the district court.<sup>54</sup> Hopkins won. Price Waterhouse rehired her as a partner and paid all of her back pay and attorneys' fees.<sup>55</sup> She remained a partner for seven years, then took a different position in the firm, only to retire about four years later.<sup>56</sup> She now writes and speaks around the world about her case.<sup>57</sup>

The case itself now has only limited precedential value.<sup>58</sup> In 1991, Congress passed the 1991 Civil Rights Act, which clarified the plaintiff's burden in mixed-motive cases<sup>59</sup> and reversed the Court's treatment of the employer's same decision defense.<sup>60</sup> Nonetheless, the case still stands as precedent for the notion that "nonconformity to

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<sup>50</sup> Pilate, *supra* note 26, at 114.

<sup>51</sup> The plurality would have required that the plaintiff show that the prohibited consideration of sex was a "motivating" factor in the employment decision while two concurring Justices would have required a showing that the prohibited consideration of sex was a "substantial factor" in the employment decision. *Id.* at 114–15.

<sup>52</sup> *Id.* at 114.

<sup>53</sup> Hopkins, *supra* note 25, at 364.

<sup>54</sup> *Id.* at 364–65.

<sup>55</sup> *Id.* at 365.

<sup>56</sup> *See id.* at 410–11.

<sup>57</sup> *Id.* at 414.

<sup>58</sup> Friedman, *supra* note 33, at 214. "[T]he case's precedential value appears to have evaporated." *Id.*

<sup>59</sup> Congress adopted the plurality's test requiring "that the plaintiff need only establish that sex or some other forbidden factor was a motivating factor for the employer's challenged action." *Id.* at 213–14.

<sup>60</sup> The defense is still shown by a preponderance of the evidence standard, but it does not operate as a complete defense. *Id.* at 213.

gendered expectations can constitute a form of statutorily proscribed sex-based discrimination.”<sup>61</sup>

## II

### THE ARGUMENT: *BAKKE* AND *PRICE WATERHOUSE* MIGHT NOT HAVE SURVIVED UNDER *TWOMBLY* AND *IQBAL*

Pleading under the *Federal Rules of Civil Procedure* had been in a fairly steady state for over fifty years when the Supreme Court decided the case of *Bell Atlantic Corp. v. Twombly*.<sup>62</sup> On its face, the case did not portend that it would reset procedural doctrine regarding pleading: it was an antitrust case brought by plaintiffs who believed that the “Baby Bells,” who in spite of being broken into separate regional companies, conspired with one another to keep out competitors.<sup>63</sup> The Court determined that the case should have been dismissed for failure to state a claim under Rule 12(b)(6).<sup>64</sup> Under antitrust law, the plaintiffs would ultimately have to prove more than mere parallel behavior.<sup>65</sup> They would have to show that the parties actively colluded, and because the allegations in the complaint did not allege more than the conclusory allegation of “unlawful conduct,” the complaint could not survive.<sup>66</sup> The Court refused to infer from the facts pled—simple parallel behavior—the possibility of an antitrust violation.<sup>67</sup> It raised the consequences of wasteful litigation and “in terrorem” discovery to argue that complaints, while still governed by Rule 8, required more than just conclusory allegations to move forward in litigation.<sup>68</sup> Most importantly, the Court “retired” the oft-relied-on “no set of facts” language from *Conley v. Gibson*.<sup>69</sup>

Less than two years after *Twombly* was decided, the Court came down with another pleading opinion, *Ashcroft v. Iqbal*.<sup>70</sup> In that case,

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<sup>61</sup> *Id.* at 219.

<sup>62</sup> 550 U.S. 544 (2007). The Court had in fact reaffirmed the basic tenets of notice pleading in two modern cases, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002), and *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

<sup>63</sup> *Twombly*, 550 U.S. at 550–51.

<sup>64</sup> *See id.* at 554.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 556.

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

<sup>68</sup> *Id.* at 557–58.

<sup>69</sup> *Id.* at 561–63 (discussing *Conley v. Gibson*, 355 U.S. 41 (1957)).

<sup>70</sup> 129 S. Ct. 1937 (2009).

the Court reaffirmed *Twombly*.<sup>71</sup> It found that Iqbal's allegations of discrimination by government officials like John Ashcroft and Robert Mueller were not plausible based on what was pled in Iqbal's complaint.<sup>72</sup> According to the Court, rather than actively discriminating against individuals of Arab and/or Muslim descent in the aftermath of 9/11, it was more plausible that these government officials were acting in good faith in their law enforcement capacity.<sup>73</sup> The Court also clarified the test for reviewing complaints. First, a court must strike all conclusory allegations that are not supported by well-pleaded facts; a court does not have to accept the allegations as true.<sup>74</sup> Second, a court must review what remains of the complaint in order to determine whether the well-pleaded facts state a plausible claim for relief.<sup>75</sup> Notably, plausibility is determined on the basis of a judge's "judicial experience and common sense."<sup>76</sup>

Following these two decisions, there has been continued and spirited debate about how the cases will be used by courts. There is substantial discretion built into the standard—"judicial experience and common sense" is an invitation to use one's own judgment about the plausibility of a claim. Thus, it is no surprise that district and appellate court decisions to date are all over the map.<sup>77</sup> In other words, across the judiciary, judges are reading and applying *Twombly* and *Iqbal* differently. It is with this discretion and variance in mind

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<sup>71</sup> *Id.* at 1949.

<sup>72</sup> *Id.* at 1951.

<sup>73</sup> *Id.* at 1951–52.

<sup>74</sup> *Id.* at 1949–51.

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

<sup>76</sup> *Id.* at 1950.

<sup>77</sup> *See, e.g.,* Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010) (interpreting the plausibility standard to mean that a "court will ask itself *could* these things have happened, *not* did they happen"); Ruston v. Town Bd. of Skaneateles, 610 F.3d 55, 59 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 824 (2010) (holding that plaintiffs bringing an equal protection claim failed to allege facts that "plausibly suggest an entitlement to relief" because they did not allege "specific examples" of superior treatment to those "similarly situated" with respect to housing development applications); Courie v. Alcoa Wheel & Forged Prods., 577 F.3d 625, 630 (6th Cir. 2009) (stating that "[e]xactly how implausible is 'implausible' remains to be seen, as such a malleable standard will have to be worked out in practice"); Mehrhoff v. William Floyd Union Free Sch. Dist., No. 04-CV-3850(JS)(MLO), 2009 WL 5219019, at \*3 (E.D.N.Y. Dec. 28, 2009) (finding a "plausible Section 1983 discrimination claim, although . . . 'actual proof of those facts is improbable, and . . . recovery is very remote and unlikely,'" when a plaintiff alleged that the defendants intentionally wrote false negative performance reviews and threatened to reveal her sexual orientation).

that this Essay analyzes the complaints in *Bakke* and *Price Waterhouse*.

#### A. Regents of the University of California v. Bakke

The complaint in *Bakke* is all of four pages in length. It contains only four paragraphs of factual allegations. His sparse complaint stated that he had not been admitted to medical school because other applicants had been admitted under “separate segregated admission procedures” that used “separate standards.”<sup>78</sup> He even had some facts to back up these statements—an account that sixteen of the one hundred applicants admitted were from this “separate” pool.<sup>79</sup> Yet, Bakke’s claim of discrimination would ultimately require him to prove that he was an otherwise-qualified applicant for admission to medical school. On that count, Bakke’s complaint stated an arguably conclusory allegation—he claimed that he was a “qualified” applicant without providing facts to make that a plausible claim.<sup>80</sup> In other words, he did not state his scores, nor did he articulate where he ranked in the admissions pool.

This statement that Bakke was a qualified applicant is similar to the allegation made in *Twombly*. In that case, the Court held that merely alleging parallel conduct, without more, was not enough. The plaintiff had to plead facts showing that there was collusion or an agreement to conspire.<sup>81</sup> The Court determined that the plaintiffs would ultimately have to prove the collusion, so in order to survive a motion to dismiss, plaintiffs similarly had to allege something more than just a conclusory allegation of collusion.<sup>82</sup> They had to give some facts.<sup>83</sup>

Like the plaintiffs in *Twombly*, Bakke also failed to provide any facts to back up his conclusory allegation that he was a “qualified” applicant. Given this unsupported conclusory allegation, if a court today were reviewing this complaint, it might very well dismiss the case. A court may have determined that Bakke had not stated a plausible claim because he had nothing but a bare allegation of his qualifications as a medical school candidate. Thus, regardless of

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<sup>78</sup> *Infra* Appendix A, p. 1172.

<sup>79</sup> *Infra* Appendix A, p. 1172.

<sup>80</sup> *Infra* Appendix A, p. 1172.

<sup>81</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

whether there was a separate race-based admission standard, Bakke himself had not suffered discrimination. Without any facts, a court might have determined that a more plausible story was that he simply did not qualify under the medical school's standards for admission. He might not have been admitted because he was just not good enough.

This, in fact, looks to be the case with Bakke. Almost fifty medical candidates with scores superior to Bakke were also denied admission, meaning that even if the sixteen spots had not been set aside for minority candidates, he still might not have been admitted.<sup>84</sup> In addition, some white students who had scores lower than Bakke had been admitted through the standard admissions process, so even assuming he was qualified, he was not necessarily pushed out by the minority applicants.<sup>85</sup> Thus, based on a judge's judicial experience and common sense, she might have determined that without any facts to show that Bakke might have otherwise been admitted, she could infer only that he was not admitted because he was not qualified. The conclusory statement that he was in fact qualified would not have to be accepted as true.

One notable wrinkle in this argument is that, in the actual case, Davis stipulated that Bakke would have been admitted were it not for its special admissions policy.<sup>86</sup> Davis apparently conceded this point so that it could quickly reach the merits of whether its admissions policy would survive constitutional scrutiny.<sup>87</sup> This is why the case never went to trial, but was instead decided by a judge based on stipulated facts.<sup>88</sup> So, it could be that even if *Twombly* and *Iqbal* were in effect in 1974, Davis would still not have moved to dismiss. If the purpose of the case was to resolve the constitutionality of its admissions policy, then perhaps Davis would not have bothered with such a motion. However, under *Conley*, there is no doubt that Bakke's complaint would have survived scrutiny, so if Davis wanted to challenge Bakke's qualifications for admission, that challenge would have come up much later, either on a motion for summary judgment or at trial. It is hard to know for sure, but Davis might have

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<sup>84</sup> See Selmi, *supra* note 24, at 986.

<sup>85</sup> See *id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

resisted pursuing the issue of Bakke's qualifications because of the cost associated with discovery and a summary judgment motion and/or trial. Davis's calculus might have been quite different if it could have successfully resolved the case much earlier on a motion to dismiss. Of course, if Davis were so set on testing the constitutionality of its admissions policy, it might still have stipulated that Bakke was qualified. There is an argument, however, that Davis might have moved to dismiss this case and "tested" its policy with a different plaintiff and a different set of facts.

Another wrinkle is that even if the complaint had been dismissed, Bakke may have been able to cure the complaint by amending it to add well-pleaded facts. After all, he knew what his test scores and past grade point averages were and presumably he could have included those qualifications in the complaint. Yet, it is unlikely that he knew his relative place in the applicant pool. He would have needed that information to ultimately prove that, were it not for the special admissions program, he would have been admitted. Davis held that information, and the easiest way for Bakke to obtain it was by filing his complaint and proceeding with discovery. If a judge used *Twombly* and *Iqbal* to argue that Bakke did not plead enough facts for her to plausibly infer that, without regard to race, Bakke was qualified to gain entry into Davis Medical School's one hundred spots, his complaint would have been dismissed. And, without the additional information that he would have found if he were allowed to conduct discovery, it is not clear that he could have cured his complaint. He would have needed discovery or access to information through other channels. He might have found that information through a friendly source on the admissions committee, but it is unlikely. Thus, there is a good argument that if his complaint were dismissed on these grounds, he would not have been able to cure it.

### B. Price Waterhouse v. Hopkins

When Hopkins filed her complaint, she had limited information. She believed that she had not been made a partner at Price Waterhouse because of gender stereotypes, but she had little evidence that this was the case. Her complaint demonstrates as much. She set the groundwork by detailing her accomplishments at Price Waterhouse and by noting that only five of the firm's six hundred partners were women.<sup>89</sup> But, when it came to noting why she thought

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<sup>89</sup> *Infra* Appendix B, pp. 1175–76.

she had been discriminated against on the basis of sex, the only fact she had was that an employee at Price Waterhouse had told her to “soften’ her image” by “wear[ing] make-up and styl[ing] her hair.”<sup>90</sup> In order to ultimately prove her case, she would have to show that improper gender stereotypes played some role in the decision not to elevate her to partner. The only fact she pleaded regarding a gender stereotype was the comment about softening her image.

Because *Price Waterhouse* was a discrimination case, it is most analogous to *Iqbal*. In that case, Iqbal alleged that he had been detained and treated poorly because of his national origin.<sup>91</sup> The majority in *Iqbal* rejected Iqbal’s argument that Ashcroft and Mueller had discriminated against Iqbal because he failed to allege facts making it plausible that such discrimination occurred.<sup>92</sup> Instead, the Court determined that the plausible (and legal) reason that Iqbal was arrested was because of a legitimate law enforcement response to a threat of terrorist attacks.<sup>93</sup> The fact that Iqbal had pleaded that a large proportion of the men arrested in this sweep were of Arab and/or Muslim descent, and that Iqbal was subject to torture and conduct that indicated discrimination against Arab and Muslim individuals, was not enough for the majority of the Court.<sup>94</sup> In the same way, a judge using *Twombly* and *Iqbal* to evaluate Hopkins’s complaint could have determined that the lack of facts pleaded regarding gender stereotypes meant that the more plausible reason for the denial of her partnership was merit based. One comment about softening her image did not necessarily mean that she was denied promotion because of gender stereotypes. In other words, a judge using her common sense and judicial experience might have determined that there were not enough well-pleaded facts to demonstrate the plausibility of Hopkins’s claim. Of course, a judge might have inferred that the comment regarding Hopkins’s image, when juxtaposed with her excellent qualifications, meant that she might have been denied partnership because of gender stereotypes. But, because the facts pleaded regarding gender stereotypes were thin, if not nonexistent, a judge could have refused to make this inference,

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<sup>90</sup> *Infra* Appendix B, p. 1177.

<sup>91</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942 (2009).

<sup>92</sup> *Id.* at 1952.

<sup>93</sup> *Id.* at 1951–53.

<sup>94</sup> *Id.*

instead opting for the more plausible inference that the promotion decision was legitimate.

This means that the issue of her qualifications for partnership would have been important. If she was so obviously qualified for partnership, then a judge might have determined that there was no legitimate reason for denying her promotion. Here, like Bakke's complaint, Hopkins alleged that she was "qualified" for partnership.<sup>95</sup> In fact, she took it one step further and alleged that she might have even been "more qualified" than some of the men who were promoted to partnership the same year that she was up.<sup>96</sup> Unlike Bakke, Hopkins did not rest on conclusory statements of her qualifications vis-à-vis other partnership candidates. The problem is that the facts she pleaded did not necessarily demonstrate anything definitive about her qualifications. She noted that "of the three men . . . who became partners in [Hopkins's] office [the year she applied], one had worked for [Price Waterhouse] for less time than [Hopkins] had, while another had served as [Hopkins's] subordinate."<sup>97</sup> These facts are interesting, but they did not necessarily lead to the conclusion that Hopkins was as or more qualified than the men who obtained partnership. Similarly, the sections of the complaint that directly quoted positive reviews of her work did not help. Two of the quotes are from partners who knew her and were on record as being supportive of her work.<sup>98</sup> The other quote is from a client, but it did not speak of Hopkins directly.<sup>99</sup> It lauded "all members of the project team."<sup>100</sup> Taking all of these facts as true, as a judge still must do even under *Twombly* and *Iqbal*, would not do any work for Hopkins. The facts do not lead to the conclusion that she was denied partnership because of gender stereotypes. They simply show that some partners thought she was qualified for partnership, while others did not.<sup>101</sup> Again, a judge using her judicial experience and common

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<sup>95</sup> *Infra* Appendix B, p. 1177.

<sup>96</sup> *Infra* Appendix B, p. 1177.

<sup>97</sup> *Infra* Appendix B, p. 1177.

<sup>98</sup> *See infra* Appendix B, p. 1176.

<sup>99</sup> *See infra* Appendix B, p. 1176.

<sup>100</sup> *Infra* Appendix B, p. 1176.

<sup>101</sup> In the partnership process at Price Waterhouse, there was no real formula. A candidate with a number of positive comments would not necessarily be granted a partnership and a person who had a number of negative comments was not necessarily defeated. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232–33 (1989). There were also no limits placed on the number of employees who could become partners. *Id.* at 233. The number varied year to year.



sense would know that in hiring and promotion decisions, people disagree about the merits of a candidate. Disagreement about the merits is not necessarily motivated by discriminatory intent, and without more facts showing such intent, a judge could conclude that the plausible reason for Hopkins's failed attempt for partnership was based only on merit.

As with Bakke's case, there is a question as to whether Hopkins might have been able to cure her complaint by amending it to add more facts. Those facts were out there—the comments about her being “macho” and needing a course in “charm school” were certainly probative of gender stereotypes. The question is whether she had access to those comments prior to filing her complaint. In Hopkins's own personal account, she wrote that many of these comments were read to her by a senior partner.<sup>102</sup> It is unclear from her account, however, whether she had physical custody of the partner reviews. It is also unclear from her personal account whether she remembered those statements from her meeting with her senior partner or whether she had remembered them from the entirety of the litigation process. Her lawyer certainly did not include any of those statements in the complaint, so it is likely that she did not remember the statements and even more likely that she did not have physical copies of them. Instead, she probably got the evaluations and statements through discovery. Thus, had her complaint not survived a motion to dismiss, she never would have gained access to this information. Again, like Bakke's complaint, if the court had granted a motion to dismiss in Hopkins's case, it is unlikely that she could have amended her complaint to add the well-pleaded facts necessary to successfully state a claim under *Twombly* and *Iqbal*.

### III

#### WHAT IF?

Like George Bailey, this Essay has been thrust into the “what if” scenario. Under *Twombly* and *Iqbal*, it is very possible that *Bakke*, *Price Waterhouse*, and other similarly seminal cases might not have survived a motion to dismiss. The next question is how would life be different if these kinds of cases were unsuccessful?

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<sup>102</sup> Hopkins, *supra* note 25, at 361.

A. *Elimination of Institutional Plaintiffs and Defendants?*

Litigation has become a tool for initiating and implementing social change. Because of the power of litigation, there are a number of interest groups, nonprofits, think tanks, and other organizations that have a vested interest in certain litigation matters. These interests have led to an institutionalization of litigants. In other words, there is a business aspect to all litigation, even litigation about social change. Organizations supporting such litigation often handpick the proper plaintiff or plaintiffs. For example, in the litigation challenging California's referendum banning gay marriage, the plaintiffs were carefully chosen.<sup>103</sup> They were two upstanding, white, gay couples, who would not distract from the substantive issues in the case, and if anything, would just help the cause. As one commentator described, "It isn't easy to find the right plaintiffs for a high-profile constitutional case. There have been plaintiffs before the Supreme Court who made moving and stalwart examples of the principle they were upholding, and plaintiffs who faltered on the job."<sup>104</sup>

The use of litigation to promote social change grew from the increasing success of such litigation from the mid-1950s and beyond.<sup>105</sup> Once it was clear that courts were a viable vehicle for such change, when legislation or some other mode of change might not have been, planning and, more importantly, money started to funnel toward litigation and litigation strategy. However, what if litigation like *Bakke's* had not been successful? What if *Bakke's* complaint had been dismissed and he had not been able to amend it? If that kind of litigation had not worked, perhaps groups like the ACLU or the Manhattan Institute would not be as powerful as they are today. And, even if those types of groups were relatively as prominent, they might not have been so in the litigation context.

*Bakke* presents an interesting case because it was solely defended by the lawyers hired by the public institution defendant, the

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<sup>103</sup> See Margaret Talbot, *A Risky Proposal*, NEW YORKER, Jan. 18, 2010, at 40.

<sup>104</sup> *Id.* at 44. Finding plaintiffs is a difficult task. For example, one of the most well-known and controversial plaintiffs is Norma McCorvey, the plaintiff in the landmark case of *Roe v. Wade*, 410 U.S. 113 (1973). McCorvey has since come out in opposition to legalized abortions and has most recently made a cameo appearance in film about abortion. See Paul Bond, *Roe v. Wade Plaintiff Stars in Abortion-Themed Film*, REUTERS, May 6, 2011, <http://www.reuters.com/article/2011/05/06/us-janeroe-idUSTRE7450D020110506>. Depending on one's ideological stance, McCorvey is now lionized or demonized.

<sup>105</sup> Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 444-46 (2001).

University of California at Davis. Interest groups like the NAACP Legal Defense and Educational Fund filed amici briefs, but the groups were not directly involved in the litigation in any meaningful way.<sup>106</sup> Thus, with *Bakke* on one side and the Davis Medical School on the other, the litigation was notably lacking in anyone to represent the real issue in the case, namely the interests of minorities who might benefit from Davis's (and other similar) admissions policies. Because of this lack of representation and because of some questionable moves by Davis,<sup>107</sup> Davis's integrity in the litigation was challenged.<sup>108</sup> Detractors argued that Davis did not pursue the case as well as others could, that Davis hoped it would lose, and that while Davis hired generalized constitutional experts, Davis did not hire those who specialized in civil rights litigation.<sup>109</sup> The "loss" of *Bakke* arguably motivated liberal interest groups to more carefully craft their litigation and select their representative plaintiffs. In other words, had interest groups been more involved in *Bakke* as the case developed, the groups might not have stipulated as to *Bakke*'s qualifications, waiting instead for a more "winnable" case against a different plaintiff.

A similar controversy has brewed over the gay marriage ban in California. Interest groups have heavily debated what the strategy for litigation should be, and many pro-gay-marriage groups have argued that challenging the California referendum all the way to the Supreme Court at this point in time is a grave mistake.<sup>110</sup> The difference between the California case and *Bakke*, however, is that the lawyers in the California case have actively listened to these groups. The lawyers and interest groups have largely agreed to disagree, but the strategy meetings and debates have taken place.<sup>111</sup> That was not the case with *Bakke*, and it is worth thinking about how the success of cases like *Bakke* and others have led to this "institutionalization" of litigation. Further, it is worth thinking about whether the way litigation is controlled by particular groups with broad agenda

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<sup>106</sup> See Selmi, *supra* note 24, at 988–91; Williams, *supra* note 16, at 181–82.

<sup>107</sup> For example, Davis never brought up the involvement of one of its employees, Peter Storandt. Storandt was an administrator in the medical school who all but encouraged *Bakke* to file his case. Williams, *supra* note 16, at 139. Some have alleged that this was an improper action for an agent of the medical school to take. *Id.* at 140–41.

<sup>108</sup> *Id.* at 182–84.

<sup>109</sup> *Id.*

<sup>110</sup> See, e.g., Chuleenan Svetvilas, *Challenging Prop. 8: The Hidden Story*, CAL. LAW., Jan. 5, 2010, <http://www.callawyer.com/story.cfm?eid=906575&evid=1>.

<sup>111</sup> *Id.*

motives is a good thing. And, finally, if cases like *Bakke* had not been successful and thus had not led to the creation of these litigation interests, how would those now-established litigation interests be affected? Will current *Bakke*-like cases be able to survive a motion to dismiss? And, if not, what will happen to the institutions that have become so powerful in the litigation context? Perhaps the institutionalization of litigation is so entrenched that it will survive the change to pleading standards. But, perhaps it will not.

*B. Substantive Differences in Development of the Law?*

One undeniable effect of the loss of cases like *Bakke* and *Price Waterhouse* is that the legal change they affected would have been lost. The question is whether another case would have filled that void, or whether the law would have developed on a completely different trajectory.

It is possible that had *Bakke* not been successful another white candidate for a spot in a graduate or post-graduate institution would have reached the same result through litigation. The real question is whether any such plaintiff would have had access to the information necessary to survive a motion to dismiss. It is possible that a plaintiff could have accessed that information by requesting the records directly from the institution, by hiring a private investigator, or by getting them from a disgruntled employee. But, the prospect of losing the motion or spending the time and money to get the information through other means might have actually chilled all litigation in this context.

So, how else might the *Bakkes* of the world have found relief? They might have been able to garner enough political strength to initiate legislative change. It is difficult to say whether they would have been successful and what such success might have looked like. Given that affirmative action is still a controversial and seemingly insurmountable issue, it seems unlikely that they could have obtained satisfactory relief. And, even if they could, it is similarly difficult to know what that relief would look like. Because a case like *Bakke* led to additional Supreme Court cases like *Grutter v. Bollinger* and others, Congress has seemed to stay out of the fray.<sup>112</sup> It might have

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<sup>112</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding that a law school admissions program that gave special consideration for being a certain racial minority did not violate the Fourteenth Amendment); *see also* Selmi, *supra* note 24, at 1019–20 (noting that despite an increasing hostility to affirmative action in recent years, “legislatures—

been different if the Court was unable to take on a case like *Bakke* or *Grutter*. In that situation, Congress may have been able to do something completely different, perhaps better clarifying how race could factor into admissions policies or perhaps muddying the waters even more.

### *C. Role of Lawyers as Elements of Social Change?*

It is common to think of lawyers as an integral element of social change—on the bench, in the courtroom, as lobbyists, and as legislators, lawyers move social policy.<sup>113</sup> Lawyers have used the civil justice system as a major mode of social change.<sup>114</sup> But, what if that mode was closed off because cases, at least many in the civil rights context, might not have survived a motion to dismiss? Lawyers work for social change beyond the courtroom, of course, but if this mode of change were closed to certain kinds of cases, how would lawyering be different?

As discussed earlier, institutions like the ACLU or the Manhattan Institute might not have developed such a presence in litigation. Lawyers are a part of these institutions, but if litigation were not a mode of social change, perhaps these institutions would be heavily populated by policymakers, not by lawyers. And perhaps many of those in the profession who chose that career path because of their potential role in moving social policy would have made different choices. It is difficult to say how the profession would have been affected. But in the very least, if litigation like *Bakke*'s and *Hopkins*'s had not been successful, lawyers might not have been viewed as professionals who could change social dynamics in our society. Thus, the profession might have had a very different self-identity without the ability to successfully pursue cases like *Bakke* and *Price Waterhouse*. Moreover, if similar cases are closed off today under a *Twombly/Iqbal* regime, the legal profession and its identity might transform into one that no longer values its impact on social change.

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particularly Congress—have expressed surprisingly little interest in revisiting or revising affirmative action programs”).

<sup>113</sup> Stephen C. Yeazell, Brown, *the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 2000–01 (2004).

<sup>114</sup> Cummings & Eagly, *supra* note 105, at 444–50.

#### *D. Access to Justice?*

If lawyers no longer facilitated social change, how might marginalized individuals have been affected? Many of the cases that were successful in a pre-*Twombly/Iqbal* regime were brought by individuals seeking relief against strong adversaries and with all the odds against them. Ideologically, one might agree or disagree with the positions taken in *Bakke* and *Price Waterhouse*, but because of a generous pleading standard, the plaintiffs were able to seek and find relief for their alleged grievances. Their success largely hinged on their ability to find lawyers to take their cases—lawyers who must have believed that the complaints they would draft would survive motions to dismiss. As already discussed, the regime is now one in which certain kinds of claims are significantly less likely to survive to a motion to dismiss. This means that similar claims today brought by similarly marginalized people are less likely to succeed and that lawyers today will be less likely to take a chance on such claims.

This is not meant to argue that access to justice is cut off simply because of *Twombly* and *Iqbal*. It is far more complicated than that—legal aid is dwindling, corporate power is growing, and a plethora of other factors contribute to this phenomenon. However, the pleading regime under *Twombly* and *Iqbal* has certainly contributed to the decline in access to justice. It is anecdotal at best, but as this Essay discusses, individuals who sought access to justice against many odds succeeded under a more generous regime. Today, those individuals would be unlikely to bring their claims and even less likely to find a lawyer to help them do so.

#### *E. More Nuanced Development of the Law?*

The effect of the institutionalization of litigation is that the law tends to develop in a forced fashion. In other words, there are not as many organic moments because institutionalized plaintiffs and defendants control the mainstays of litigation. Continuing on with the “what if” question, if cases like *Bakke* and *Price Waterhouse* would have failed, meaning institutionalized litigation would not have the force it does today, does that mean that all civil rights litigation would have ceased? Or, does it mean that the litigation would have developed more organically? Instead of one chosen case making its way to the Supreme Court, perhaps a number of different cases with nuanced facts would have percolated at the district court and appellate court level. The Supreme Court might have stepped in only once a

divide arose in the development of those cases. In other words, perhaps the development of the law might have been less orchestrated by institutional players.

A related effect of an organic development of the law might be greater societal trust in the institutions that produce that law. If a number of individuals are seeking and finding relief in the courts and nuanced legal doctrine flows from their cases, then individuals looking in on that litigation might have greater faith in the courts. People who look like them are seeking and finding relief; it is not a “representative” moment when a person who has nothing in common with them is chosen by an institution to represent a cause.

On the other hand, it is difficult to see how individuals could have succeeded in much of the seminal litigation over the last fifty years, even in a pre-*Twombly/Iqbal* regime. The resource disparities were, and still are, quite vast between an individual plaintiff and an organizational defendant. Moreover, many of these individuals are already marginalized and lack access to other modes of remedy like legislative change through Congress. Thus, the loss of cases like *Bakke* and *Price Waterhouse* might have instead meant the further marginalization of similarly situated people. In the current context of *Twombly* and *Iqbal*, it is even more difficult to see how an individual plaintiff would be able to surmount these challenges. So, while the use of those cases in the past might have prevented the development of institutionalized litigation, *Twombly* and *Iqbal* would have prevented success by individual plaintiffs as well. Time will tell what the impact of these cases will be on these types of plaintiffs going forward.<sup>115</sup>

#### CONCLUSION

This Essay is only the beginning of a longer and larger conversation about how cases like *Twombly* and *Iqbal* have changed the legal landscape. It is hardly an exhaustive treatment of the “what if” question, but it provides a place to start. In thinking about other seminal cases that are taken for granted, it is worth thinking further about whether those cases would survive if they were brought today. With respect to the group of cases that this Essay has collected, the answer is generally no. Cases that have defined rights for

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<sup>115</sup> See Brooke Coleman, *The Vanishing Plaintiff*, SETON HALL L. REV. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1908359](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1908359).

individuals—rights that many still hold dear, whether they consider themselves ideologically conservative or liberal—would likely not have been decided on the merits under a *Twombly/Iqbal* regime. The deeper and more disturbing question to ask now is, what cases and rights are going to be sacrificed in the future? This isn't *It's a Wonderful Life*, so Clarence cannot provide the answer. And, because the *Twombly/Iqbal* pleading standard is likely to defeat filed cases, or chill their filings from the outset, the answer might be unknowable.



APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA,  
IN AND FOR THE COUNTY OF YOLO

ALLAN BAKKE,	)	
	)	
Petitioner and	)	
Plaintiff	)	
	)	
vs	)	No. 31287
	)	
THE REGENTS OF THE UNIVERSITY)	)	COMPLAINT
OF CALIFORNIA	)	FOR
	)	MANDATORY
Defendants and	)	INJUNCTIVE,
Respondents	)	AND
	)	DECLARATORY
	)	RELIEF
_____	)	

FIRST CAUSE OF ACTION

Petitioner and plaintiff ALLAN BAKKE (hereinafter called plaintiff) alleges for a first cause of action:

I.

That plaintiff is a citizen of the State of California and of the United States of America.

II.

That defendants and respondents The Regents of the University of California (hereinafter called defendants) are public officers of the State of California, maintaining, operating and administrating the School of Medicine, University of California, Davis, Yolo County, California (hereinafter called said Medical School); that said Medical School is supported by public funds and tax monies and receives federal financial assistance.

## III.

That plaintiff duly and timely filed his applications with said Medical School for admission to the first-year classes of said Medical School commencing in September 1973, and September 1974; that in each year, respectively, plaintiff received notification from said Medical School that his applications were denied.

## IV.

That plaintiff was and is in all respects duly qualified for admission to said Medical School and the sole reason his applications were rejected was on account of his race, to-wit, Caucasian or white, and not for reasons applicable to persons of every race, as follows:

That a special admissions committee composed of racial minority members evaluated applications of special group of persons purportedly from economic and educationally disadvantaged backgrounds; that from this group a quota of 16%, or 16 out of 100 first-year class members, was selected; that in fact, all applicants admitted to said Medical School as members of this group were members of racial minorities; that under this admission program racial minority and majority applicants went through separate segregated admission procedures with separate standards for admissions; that the use of such separate standards resulted in the admission of minority applicants less qualified than plaintiff and other non-minority applicants who were therefore rejected.

## V.

That by reason of the action of defendants in excluding plaintiff from the first-year Medical School class under defendants' minority preference admission program plaintiff has been invidiously discriminated against on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause of the California Constitution (Art. 1, sec. 21), and the Federal Civil Rights Act (42 U.S.C. sec. 200(d)).

## VI.

That plaintiff has no plain, speedy or adequate remedy at law.

SECOND CAUSE OF ACTION

Plaintiff alleges for a second cause of action:

I.

Plaintiff realleges and incorporates therein by reference each and every allegation contained in Paragraphs I through VI of his first cause of action set forth above.

II.

That plaintiff will suffer substantial and irreparable harm by reason of the continued refusal of defendants to admit him to said Medical School.

THIRD CAUSE OF ACTION

Plaintiff alleges for a third cause of action:

I.

Plaintiff realleges and incorporates herein by reference each and every allegation contained in Paragraphs I through VI of his first cause of action set forth above.

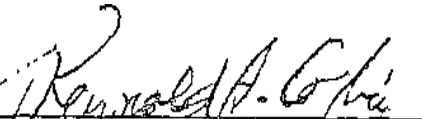
II.

That a bonafide and genuine dispute exists between Plaintiff, on the one hand, and, defendants, on the other hand, as to plaintiff's right to be admitted to said Medical School.

WHEREFORE, plaintiff prays:

1. That this Court issue its alternate writ of mandate directing defendants to admit plaintiff to said Medical School, or to appear before the above entitled Court and show cause why said admission to said Medical School may be denied plaintiff.
2. That the above entitled Court issue its order directing defendants to appear and show cause why they should not be enjoined during the pendency of this action and permanently from denying plaintiff admission to said Medical School.
3. That this Court enter its judgment declaring that plaintiff is entitled to admission to said Medical School; and, further declaring, that defendants are lawfully obligated to admit plaintiff to said Medical School.
4. For such other and further relief as to this Court may seem proper.

BY

  
Reynold H. Colvin

## APPENDIX B

UNITED STATES DISTRICT COURT DISTRICT OF  
COLUMBIA

ANN B. HOPKINS	)	
2134 Cathedral Avenue, N.W.	)	Civil Action No.
Washington, D. C. 20008	)	
	)	COMPLAINT FOR
v.	)	RELIEF FROM
	)	VIOLATIONS OF
PRICE WATERHOUSE	)	CIVIL RIGHTS
1801 K Street, N.M.	)	
Washington, D.C. 20006	)	

1. This is an action for relief from violations of rights secured by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*, and the District of Columbia Human Rights Act, D.C. Code 1-2501 *et seq.* This Court has jurisdiction over the Title VII claims under 42 U.S.C. 2000e- 5(f)(3) and has pendent jurisdiction over the District of Columbia claims.

2. Plaintiff Ann B. Hopkins is a female citizen of the United States and a resident of the District of Columbia.

3. Defendant Price Waterhouse is a partnership that operates nationwide, specializing in providing management and accounting services to private corporations and governmental agencies on a contract basis. Defendant engages in business and maintains offices within the District of Columbia. Defendant is an employer within the meaning of 42 U.S.C. 2000e-(b) and D.C. Code 1-2502(10).

4. In August 1978, defendant hired plaintiff as a manager in Washington, D.C. in the Office of Government Services within defendant's Department of Management Advisory Services. This office's mission is to secure and manage contracts with Federal agencies. At the time of her hire, plaintiff had extensive experience in the areas of management consulting, systems analysis and management.

5. After being employed by defendant, plaintiff was responsible for securing millions of dollars worth of new business for the firm. For example, plaintiff's work on her initial assignment resulted in the award of two contracts of approximately \$200,000 each from the Department of Interior, one of which she later managed. Plaintiff next turned to the Department of State, where she was responsible for developing a proposal that led to the award of a \$1.2 million contract to compete with another firm in designing State's financial management system. Plaintiff then successfully managed defendant's entry in this competition, and the result was a \$17 million contract with State to implement a financial management system worldwide. The partner-in-charge of plaintiff's office has estimated the long-term value of this contract at \$35 million.

6. Following the events outlined in Paragraph 5, plaintiff was responsible for developing the proposals that led to two other awards: a \$6 million contract with the Department of State to implement a worldwide real property management system, and a \$2.5 million contract with the Department of Agriculture to design an automated accounting system for recording and tracking loans to farmers. When the latter contract was awarded, the partner-in-charge of plaintiff's office wrote on December 2, 1982 to the head of defendant in New York that "Ann Hopkins has done it again!"

7. In 1982 plaintiff was assigned responsibility for managing the real property management system project that she had developed for the Department of State. In addition, she was assigned responsibility for managing the Word Processing Department within her office. Both assignments were at a level of responsibility customarily given to partners, although plaintiff remained a senior manager. Plaintiff handled both assignments in a fully satisfactory manner.

8. Defendant is a large firm with over 600 partners nationwide, including more than 30 in Washington, D.C. The firm also employs other professionals, such as plaintiff, as well as paraprofessional and clerical employees. As of July 1, 1983, five of defendant's partners were women, and there were no female partners in Washington, D. C. Of the approximately 100 partners in plaintiff's department nationally (Management Advisory Services), only one was a woman.

9. In the autumn of 1982, plaintiff was fully qualified for partnership with defendant, as is evident from evaluations that she received at that time from the partner-in-charge of her office and from another partner in her office: “terribly hard worker . . . always a perfect product . . . she’s unbelievable . . . [the State Department] could not be happier with her, and this is a tough, very demanding client . . . Ann has to be one of the very best . . . has to be better than many partners . . . there can’t be many of equal capability . . . intelligent . . . creative . . . hard working . . . decisive . . . self confident . . . a leader . . . Ann’s performance has been outstanding; she is bright, imaginative and assertive and is an asset to the firm.” These evaluations state without reservation that plaintiff should be promoted to partner as of July 1, 1983. For example, the partner-in-charge declared simply that “she’s ready!”

10. Candidates for partnership with defendant are nominated by their local offices and are then selected following consultation within the firm. In the autumn of 1982, plaintiff’s office nominated her for partnership. In late March 1983, however, she was notified that she had not been selected. Shortly thereafter, plaintiff was told that she would have the opportunity to be considered for partnership again in the selection cycle beginning in the autumn of 1983.

11. From March 1983 onward, plaintiff continued to perform in a fully satisfactory manner and continued to be fully qualified for partnership. For example, in September 1983 a State Department official wrote defendant a laudatory letter concerning the real property management project, for which plaintiff was responsible. The letter concluded that the “project is producing a high quality management tool which will meet the Department’s needs. I am very pleased with the performance of all members of the project team.”

12. Despite the continuing high quality of her performance, plaintiff was notified in August 1983 that her office would not be nominating her for partnership during the selection cycle beginning in the autumn of 1983. At that time, she was told that it was unlikely that she would ever become a partner and that she should seriously consider leaving the firm.

13. There is no legitimate basis for defendant’s refusal to admit plaintiff into membership with the firm by promoting her to partner,

and defendant has excluded plaintiff from membership because of her sex. Plaintiff is as qualified, or more qualified, for promotion to partner than men who have been promoted to partner in the recent past, both in Washington, D.C. and nationwide. For example, of the three men (and no women) who became partners in plaintiff's office in 1983, one had worked for defendant for less time than she had, while another had served as her subordinate. Defendant has never criticized plaintiff's performance; on the contrary, her evaluations have consistently been enthusiastic. The only suggestion made by defendant to plaintiff was that she "soften" her image. In this regard, it was suggested that she wear make-up and style her hair.

14. On August 30, 1983, plaintiff filed a charge with the Equal Employment Opportunity Commission, alleging that defendant had excluded her from membership in the firm because of her sex. As a result of filing her charge, plaintiff was subjected to retaliation and harassment, including intensive and unwarranted project reviews; efforts to elicit information from plaintiff's subordinates that would discredit her; and the assignment of her office to another employee.

15. As a result of defendant's actions described herein, plaintiff was subjected to constructive discharge by defendant effective January 17, 1984. On February 8, 1984, plaintiff filed a second charge with the Equal Employment Opportunity Commission, alleging that she had been subjected to retaliation and constructive discharge for filing the first charge. Defendant has continued to retaliate against plaintiff following her constructive discharge.

16. At the time plaintiff was hired by defendant, defendant contracted to consider her for partnership on the basis of her performance, and this contractual assurance induced plaintiff to accept employment with defendant. In addition, defendant routinely considers employees in plaintiff's position for partnership after they have served a period of "apprenticeship," and defendant explicitly uses the prospect of future partnership to induce new employees to join the firm. Consideration for partnership was a term, condition or privilege of plaintiff's employment with defendant.

COUNT ONE  
TITLE VII

17. Paragraphs 1-16 herein are realleged.
18. All prerequisites to suit under Title VII have been satisfied.
19. The acts of defendant in excluding plaintiff from partnership because of her sex, and in harassing her and subjecting her to constructive discharge, constitute violations of Title VII. Unless restrained by order of this Court, defendant will continue to pursue such unlawful practices.

WHEREFORE, plaintiff asks that this Court:

- 1) enjoin defendant from discriminating in partnership decisions on the basis of sex;
- 2) enjoin defendant from retaliation against individuals who have engaged in activities protected by Title VII;
- 3) require defendant to accord plaintiff partnership compensation and all accrued benefits;
- 4) award such other relief as the interests of justice may require, including payment of plaintiff's costs and disbursements herein and her reasonable attorneys' fees.

COUNT TWO  
D.C. HUMAN RIGHTS ACT

20. Paragraphs 1-16 herein are realleged.
21. All prerequisites to suit under the District of Columbia Human Rights Act have been satisfied.
22. The acts of defendant in excluding plaintiff from partnership because of her sex, and in harassing her and subjecting her to constructive discharge, constitute intentional, willful, wanton, reckless and malicious violations of the District of Columbia Human



Rights Act. Unless restrained by order of this Court, defendant will continue to pursue such unlawful practices.

WHEREFORE, plaintiff asks that the Court:

- 1) enjoin defendant from discriminating in partnership decisions on the basis of sex;
- 2) enjoin defendant from retaliating against individuals who have engaged in activities protected by the Human Rights Act;
- 3) require defendant to accord plaintiff partnership status effective July 1, 1983, with full retroactive compensation and all accrued benefits;
- 4) award plaintiff \$250,000 in compensatory damages for inter alia pain, suffering, humiliation and emotional distress caused by defendant's unlawful actions;
- 5) award plaintiff \$1,000,000 in punitive damages;
- 6) award such other relief as the interests of justice may require, including payment of plaintiff's costs and disbursements herein and her reasonable attorneys' fees.

## JURY DEMAND

Plaintiff requests trial by jury as to all issues in Count Two of this Complaint.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Douglas B. Huron", written over a horizontal line.

Douglas B. Huron

A handwritten signature in black ink, appearing to read "James H. Heller", written over a horizontal line.

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