

The Vanishing Plaintiff

Brooke D. Coleman^{*}

I. INTRODUCTION

What if restrictive procedural rules operated in such a way that Alan Bakke, Jane Monell, and Ann Hopkins never got a chance to have their cases heard on the merits? In other words, imagine that *Regents of the University of California v. Bakke*,¹ *Monell v. Department of Social Services*,² and *Price Waterhouse v. Hopkins*³ never made it past an initial motion to dismiss and on to the Supreme Court.⁴ What would that world look like?

These cases were essentially the “first” in areas of law that we have come to take for granted—affirmative action, municipal liability,

^{*} Assistant Professor of Law, Seattle University School of Law; J.D., Harvard Law School; B.A., The University of Arizona. Many thanks to Arthur Miller, Norman Spaulding, Adam Steinman, and Suja Thomas for their invaluable feedback on this Article. I would also like to thank my colleagues Robert Chang, Maggie Chon, Lily Kahng, Jack Kirkwood, John Mitchell, Dean Spade, Thomas Antkowiak, Won Kidane, and Gillian Dutton for work-shopping this Article and providing me with continuous feedback and support. I am grateful to the 2010 Law & Society Work-In-Progress session, especially the incredible input and guidance of Christopher Whytock. Finally, many thanks to Evelyn Emanuel for her tireless research assistance.

¹ 438 U.S. 265 (1978) (striking down a medical school’s race-based admissions system, but holding that some consideration of race in school admissions may be constitutional).

² 436 U.S. 658 (1978) (holding that municipalities can be held liable for constitutional violations under § 1983).

³ 490 U.S. 228 (1989) (characterizing employment decisions made for lawful and unlawful purposes as “mixed motive” cases and recognizing gender stereotyping as a mode of proving discrimination).

⁴ In a companion piece, *What if?: A Study of Seminal Cases As if Decided in A Twombly/Iqbal Regime*, 90 OR. L. REV. 1147 (2012), I examined the original complaints in two of these cases, along with others, to consider whether those complaints would have survived in the current restrictive procedural regime. I found that, in both cases, the question of whether the complaints would survive a motion to dismiss is a close call, but there is a strong argument that a judge could legitimately dismiss these complaints under *Twombly* and *Iqbal*. *Id.* at 1158–63. Further, I determined that many of these complaints could not have simply been amended to meet the current pleading standards. *Id.* at 1160, 1163. The asymmetry in information between the parties would have meant that plaintiffs could not have garnered those now-required facts. *Id.*

and gender discrimination. Yet, without these first cases, that legal landscape might never have developed, or in the very least, would have developed on a completely different trajectory.⁵ Moreover, beyond the law itself, the absence of these cases might have changed the role of lawyers within our civil justice system and altered the possibility of utilizing courts as a vehicle for social change. Thus, regardless of what one might think about the merits of these cases, our collective legal consciousness would be impoverished if these plaintiffs had never had their paradigmatic day in court.

That world—the one without the *Bakkes*, *Monells*, and *Hopkins* among us—is exactly where the civil justice system is heading. Plaintiffs like these are simply vanishing, and restrictive procedural rules are largely to blame. While in the early 20th century procedural rules were animated by a “liberal ethos,” today’s procedural regime is undeniably more restrictive.⁶ This shift is well-documented in the literature⁷ and has been referred to as a movement reflective of a “restrictive ethos.”⁸ The articulated reason for this move is that frivolous claims undermine the civil justice system. They drain scarce judicial resources, and they force innocent defendants to settle, not because they are liable, but because they are worried about litigation costs.⁹

Yet, the departure from a liberal procedural regime is not just a complex response to a complex world. Were it only that, one might argue that the rules are maintaining their envisioned flexibility by adapting to an ever-changing litigation scene. This is not the case, however, because restrictive changes to procedure do not have a neutral effect. Judges, Congress, and the rulemaking bodies¹⁰ responsible for procedural changes are making trade-offs, and those trade-offs are made based on value judgments.¹¹ In other words, creating a sys-

⁵ For instance, without *Bakke*, there would have been no *Grutter v. Bollinger*, 539 U.S. 306 (2003) (affirming the consideration of race, but not racial quotas, in admissions systems).

⁶ See discussion *infra* Part II.A.

⁷ See, e.g., A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353 (2010).

⁸ *Id.* at 354.

⁹ See discussion *infra* Part II.A.

¹⁰ This Article will refer to rulemaking bodies generally, which includes the Standing Committee on the Federal Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Practice and Procedure or, as it is also known, the Civil Rules Committee.

¹¹ See generally Alan Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System* (Apr. 14, 2010) (unpublished manuscript), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Alan%20Morrison,%20The%20Necessity%20of%20Tradeoffs.pdf>.

tem that allows for less frivolous claims to survive is a goal that comes with a price. In this case, the price of a restrictive shift in procedural doctrine is that it marginalizes particular claims, and by extension, particular people.

This Article is concerned with such “particular people.” Who are the individuals who are most affected by the movement from a liberal to restrictive ethos? Some commentators have used the term social “out-groups,” meaning individuals who are outside of the political and social mainstream.¹² While this is a useful and quick articulation, a more developed definition of who these affected plaintiffs are has yet to emerge in the literature in a full-throated way. This piece endeavors to fill that gap. In order to effectively critique procedural doctrine, it is critical to know who is affected and how. To put it simply, generalized notions of marginalization do not capture the people who are most affected by this change. Thus, this Article proposes a new way of thinking about this phenomenon by giving a name and description to the plaintiff who is most negatively impacted by the restrictive procedural shift—the vanishing plaintiff.¹³

There are two basic factors that define the vanishing plaintiff: (1) her economic status and (2) her existence outside of social norms. Where a plaintiff is uniquely economically disadvantaged such that she cannot afford effective representation, and/or where a plaintiff is outside of mainstream conceptions of gender, sexuality, race, and/or culture, she becomes a vanishing plaintiff. This is because restrictive procedural rules uniquely marginalize a plaintiff with these characteristics. She is unable to access the necessary legal resources to overcome restrictive procedural barriers because of her low economic status. She is also less able to communicate her legal narrative because of her status as “other.”

¹² See, e.g., Spencer, *supra* note 7, at 370 (using social out-groups to describe this group with reference to Eric K. Yamamoto’s terminology—minorities asserting marginal claims).

¹³ A seminal piece by Marc Galanter provides an apt context for the term “vanishing” within the civil procedure literature. Marc S. Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). In his article, Galanter describes how the decline in civil trials in particular instances is the product of resource disparities between the parties. *Id.* While he takes a broader view of litigation and how resource disparities affect trial rates, he does not focus specifically on how procedural changes may differently impact particular kinds of plaintiffs. See *id.* Nonetheless, his focus on a phenomenon of the changes in litigation—and most notably the disappearance of an aspect of litigation—is apropos to this Article and its focus on the disappearance of a certain type of plaintiff and her claims.

While these two factors are inherently fluid, they are useful in focusing the bodies responsible for constructing procedural doctrine on how particular procedural changes may impact vanishing plaintiffs differently. Thus far, these institutions—the Court, Congress, and rulemaking bodies—have moved procedural doctrine toward a restrictive ethos without correctly evaluating and valuing the claims of vanishing plaintiffs. Without knowing whose meritorious claims are lost, it is difficult to weigh whether the policy choice of restricting procedural rules is a good one. We know that some meritorious litigation is sacrificed in a restrictive procedural regime, so the question becomes whether those lost claims are unique. If such lost claims were captured by successful litigation—meritorious litigation that could make it over restrictive procedural hurdles—then this might be a worthy trade-off. In other words, if it were the case that more restrictive procedural rules resulted in less frivolous litigation, with only a slight loss in unique meritorious claims, a restrictive procedural regime may make sense. The number of frivolous suits would be minimized, and there would be a broad benefit for the meritorious claims that survive. If it were determined, however, that a restrictive procedural regime filters out more meritorious claims than what is ultimately beneficial to society—meaning that the claims being lost are unique and not otherwise captured by successful litigation—then there is more room to question a procedural regime that is guided by a restrictive ethos.

The institutions creating procedural doctrine do not know the answers to these critical questions, and existing scholarship has yet to deeply explore them. Yet, the identities of the individuals who are acutely affected by restrictive procedural doctrine, and who are arguably losing the opportunity to air their meritorious grievances, have to be determined in order to reach an optimal procedural regime. Once the identities of those plaintiffs are revealed, the meritorious claims that are being lost are similarly identifiable. With that knowledge, the policy decision regarding whether such meritorious claims are a worthy trade-off for greater efficiency in the system is a more clearly defined one.

Part II of this Article briefly summarizes the shift in procedural doctrine from liberal to restrictive and highlights the beneficiaries of this shift—corporations, government entities, and other organizations. Part III describes the vanishing plaintiff in terms of her resource disparity and unique narrative challenges. Part III closes with a discussion of why vanishing plaintiff claims matter. It argues that such claims create path-breaking laws and that litigation by vanishing plaintiffs is often the only effective mode of enforcement. Finally,

Part IV applies two restrictive procedural changes—pleading and summary judgment—to the vanishing plaintiff and demonstrates how the vanishing plaintiff distinctly suffers.¹⁴ After considering these two examples, the Article concludes that when making procedural changes, Congress, the Court, and rulemaking bodies must fully account for the effect of such changes on vanishing plaintiffs. This account will often require a retreat from the trend toward a restrictive procedural regime.

II. THE RESTRICTIVE PROCEDURAL REGIME

A. *The Shift from a Liberal to Restrictive Procedural Regime*

Professor Richard Marcus first coined the term “liberal ethos” as a way to define the original rulemakers’ fundamental approach to procedural doctrine.¹⁵ He defined the liberal ethos as “a procedural system . . . in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.”¹⁶ This ethos and the rules that flowed from it were in response to a procedural regime that had become bogged down in technicalities.¹⁷ The 1938 Civil Rules and the general judicial philosophy implementing them allowed the plaintiff to form her case in a logical and prudent fashion.¹⁸ She

¹⁴ In this Article, I rely on a range of paradigmatic cases to identify the vanishing plaintiff. These case studies and empirical references help draw out features of the process that more traditional empirical analysis may not identify. Moreover, this close study is necessary to move beyond imperial judicial analysis and inferences. To discover who the vanishing plaintiff is, reliance on empirics alone is inadequate; thus, I use this mix of approaches to provide the full, complex picture.

¹⁵ Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986). The Federal Rules of Civil Procedure were adopted in 1938. Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 465 (1993). Their adoption was preceded by a forty-year-long battle both for the merger of law and equity and for the creation of a uniform set of procedural rules. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1035–98 (1982). The battle began with an argument that “technicalities” in procedural doctrine, and not the merits of a case, dictated whether a case succeeded. *Id.* at 1041–42; J. Newton Fiero, P.W. Meldrim & Francis B. James, *Report of the Committee on Uniformity of Procedure*, 21 A.B.A. REP. 454, 462 (1896). In 1905, Roscoe Pound’s famous “dissatisfaction speech” articulated these very concerns. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Address Delivered at the Annual Convention of the American Bar Association (1906), reprinted in 46 J. AM. JUDICATURE SOC’Y 55, 64, 65 (1962). Pound argued that uniform federal rules—rules that would provide the flexibility necessary to reach the merits of a legal claim—should be adopted so that cases could be properly adjudicated. *Id.*

¹⁶ Marcus, *supra* note 15, at 439.

¹⁷ *Id.* at 438–39.

¹⁸ See Spencer, *supra* note 7, at 355–56.

could discover facts, add claims, and join parties with great flexibility.¹⁹ Moreover, she was not called to “prove” her case until she was given due time to take all of these steps.²⁰ Philosophically, the focus was on the merits of the case because the procedures were permitted to work in service of the merits. In other words, the procedural rules were not viewed as tools for delay or for gamesmanship—they were tools for resolution of the substantive claim.²¹

Even when the Civil Rules were adopted in 1938, there was concern about abuse in the litigation system—abuse that would arise from too flexible a procedural regime.²² Ultimately, at the heart of this concern was the question of whether the liberality of the rules would allow frivolous claims to get through.²³ And of course, the correlative question was how to protect defendants from having to need-

¹⁹ Charles Clark, former dean of Yale Law School and eventual federal judge, drafted rules implementing notice pleading and liberal joinder. See CHARLES E. CLARK, *PROCEDURE—THE HANDMAID OF JUSTICE: ESSAYS OF JUDGE CHARLES E. CLARK* 43–68 (Charles Alan Wright & Harry M. Reasoner eds., 1965). Professor Edson R. Sunderland of the University of Michigan advocated for and created a flexible discovery regime and a summary judgment rule. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 710 (1998); Edson R. Sunderland, *The Theory and Practice of Pretrial Procedure*, 36 MICH. L. REV. 215, 216 (1937).

²⁰ Spencer, *supra* note 7, at 355–56.

²¹ The liberal ethos reflected the goals of the committee responsible for drafting the first Federal Rules of Civil Procedure. The committee was appointed pursuant to the Rules Enabling Act, which was adopted in 1934. Pub. L. No. 73-413, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2006)). The Act provided for the merger of law and equity and empowered the Supreme Court to promulgate procedural rules for the federal courts. *Id.* While there was debate about particular aspects of the rules themselves, there was little or no debate about their purpose. See Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 265–74 (2009). The committee members agreed that the rules should be flexible and give judges the necessary discretion to craft context-specific solutions to myriad pre-litigation and litigation problems. See CLARK, *supra* note 19, at 76 (explaining that the purpose of procedural rule reform was to “favor . . . less binding and strict rules of form . . . upon the litigants and their counsel”). Moreover, the committee members believed that uniformity among the federal courts was of great import. Minutes of Advisory Comm. on Rules of Civil Procedure 90–105 (June 20, 1935), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CR06-1935-min.pdf>. Finally, as I have argued in a previous article, the committee members (as well as proponents of the Enabling Act legislation) believed that the rules should facilitate access to the federal court system. See Coleman, *supra*.

²² For example, some committee members were quite skeptical of the liberal discovery rules. See generally Subrin, *supra* note 19, at 717–29.

²³ For more on the characterization of cases as “frivolous,” see Suja Thomas, *Frivolous Cases*, 59 DEPAUL L. REV. 633 (2010).

lessly defend against frivolous claims. It is at this tension point—the need to liberalize procedure to allow meritorious claims to survive versus the need to restrict procedure to filter out frivolous claims—that the ethos around procedural doctrine shifts from liberal to restrictive.

That shift has undoubtedly occurred as the current procedural doctrine is informed by a restrictive ethos.²⁴ Scholars may debate whether such a move is a positive or negative one, but the fact remains that much of the liberality of the procedural regime has been chipped away.²⁵ Recent procedural changes made by the Court,²⁶ the rulemaking committees,²⁷ and Congress²⁸ show pronounced move-

²⁴ Spencer refers to it as a “slide.” A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 201 (2009).

²⁵ See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the ‘Litigation Explosion,’ ‘Liability Crisis,’ and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984–87 (2003); Spencer, *supra* note 7, at 358; Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965, 996 (1998).

²⁶ For example, in 1986, the Supreme Court decided the “trilogy” of summary judgment cases—*Celotex v. Catrett*, 477 U.S. 317 (1986), *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Through these cases, the Court made critical changes to summary judgment practice. See discussion *infra* Part IV.B. More recently, the Court stunned most commentators with its decisions on pleadings. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); see also discussion *infra* Part IV.B. In those cases, the Court departed from notice pleading by “retiring” *Conley*’s “no-set-of-facts” language and by requiring plaintiffs to plead enough facts to state a “plausible” claim. *Ashcroft*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 570); see also discussion *infra* Part IV.A.

²⁷ For example, Rule 11 sanction amendments were adopted in 1983 to require mandatory sanctions for frivolous filings. See WALTER R. MANSFIELD, REPORT FROM THE ADVISORY COMMITTEE ON CIVIL RULES TO STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 3–4 (1982). Many commentators believe this rule had a chilling effect on plaintiffs’ claims and that it was unfairly applied to some substantive legal claims but not others. E.g., Melissa Nelkin, *Sanctions Under Amended Federal Rule 11—Some ‘Chilling’ Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Carl Tobias, *The 1993 Revision to Federal Rule 11*, 70 IND. L.J. 171 (1994). But see Richard Marcus, *Of Babies and Bathwater, the Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 797–99 (1993) (disputing some of the claims about the impact of Rule 11). Even with the softening of Rule 11 in 1993, some commentators assert that the rule continues to have a harsher effect on claimants with lower resources, claimants who tend to bring substantive claims like discrimination. See Stempel, *supra* note 25, at 994, 997 (“[B]oth the 1983 Amendment and the 1993 Amendment represent increased procedural hurdles and risk for litigants, resulting in a net shrinkage of access to courts We have seen that fraud, discrimination, and civil rights claims are subject to increasing resistance and procedural impediment [including, but not limited to, the changes to Rule 11].”); Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 897 (1992) (“Nevertheless, an incorrect balance was struck because the proposed [1993 version of the] Rule will insufficiently ameliorate the burdens for parties and attorneys, particularly poorer ones.”). Similarly, the rules have been

amended to restrict discovery. Mandatory initial discovery, which was intended to minimize the need to engage in the discovery process over documents that would ultimately be produced, became a battleground for further efforts to restrict the procedural rules. See STANDING COMM. ON RULES OF PRACTICE & PROCEDURE, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS 72–111 (1992). The initial Rule 26 provision required the mandatory initial production of material related to the subject matter of the litigation. Virginia E. Hench, *Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy, and Inexpensive Determination of Every Action*, 67 TEMP. L. REV. 180, 196 (1994). In many ways, this could have been viewed as the Brady Rule for civil litigation—a rule meant to equalize the asymmetry of information before litigating a claim. See Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 808–12 (1991). But, by 2000, the rule was amended to limit the obligation to make initial disclosures to those related to the party's claim or defense. See Jeffrey Stempel, *Politics & Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 549 (2001) (reviewing the then-proposed amendment's provisions). This change now allows defendants to withhold evidence that might help a plaintiff's claim until such time as she is skillful enough to properly request it. *Id.* at 570, 603.

²⁸ For example, Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.). For related changes, see also the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-352, 112 Stat. 3227 (1998) (codified in scattered sections of 15 U.S.C.). Among other things, the PSLRA required heightened pleading for securities violations, and it limited discovery for plaintiffs until a motion to dismiss was decided by the court. PSLRA § 101(a); see Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal-Information Standard on '33 and '34 Act Claims*, 76 WASH. U. L.Q. 537, 552–61 (1998) (providing an overview of the PSLRA). Commentators opined that the Act made it more difficult to bring securities violation claims. See Ho Young Lee & Vivek Mande, *The Effect of the Private Securities Litigation Reform Act of 1995 on Accounting Discretion of Client Managers of Big 6 and Non-Big 6 Auditors*, 22 AUDITING: J. PRAC. & THEORY 94 (2003) (“There is anecdotal and empirical evidence suggesting that the passage of PSLRA did make it more difficult for investors to bring securities-related lawsuits against parties with deep pockets, such as auditors and underwriters.”); Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903 (2002) (arguing that the PSLRA's heightened pleading requirements have eliminated litigation at the motion to dismiss stage, when in the very least, the litigation was better suited for summary judgment or trial). But see Kevin P. Roddy, *Nine Years of Practice and Procedure Under the Private Securities Litigation Reform Act of 1995*, SLO20 ALI-ABA 749, 756 (2005) (“[T]here has been no material decrease in the volume of securities fraud class actions filed in federal court since the passage of the PSLRA.”). More recently, Congress passed the CAFA, which confers federal subject matter jurisdiction over class actions where the amount in controversy exceeds \$5 million and at least one of the plaintiffs is diverse from the defendant. Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1617, 1620 (2006). The stated goal of the legislation was to curb litigation abuse in state courts, but many commentators believe the purpose was to ensure that class action defendants have a friendlier federal forum when sued. See e.g., Elizabeth J. Cabraser, *Apportioning Due Process: Preserving the Right to Affordable Justice*, 87 DENV. U. L. REV. 437, 448–49 (2010); see also Helen Norton, *Reshaping Federal Jurisdiction: Congress's Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003, 1038 (2006) (“Critics point out that CAFA has shifted bargaining power to defendants by denying plaintiffs access to the forum of their choice. Most corpo-

ment from rules that reflect a liberal procedural approach to rules that reflect a restrictive one.²⁹

Myriad justifications are given for the shift in procedural doctrine. For example, when Congress passed the Class Action Fairness Act of 2005 (CAFA), which expanded federal jurisdiction over class actions,³⁰ CAFA supporters warned of biased state-court judges and the need for a “neutral” forum for adjudication of class actions.³¹ Similarly, in *Ashcroft v. Iqbal*, when the Court altered the pleading requirements to require plaintiffs to meet a plausibility standard, it justified this change by asserting that implausible claims unnecessarily occupied the judicial system and defendants.³² The Court rejected the argument that judges could manage cases, specifically the discovery process, well enough to protect defendants from meritless claims.³³ While these are only two specific examples of restrictive procedural changes and articulated justifications, they reflect the same uniting principle that underlies the justifications for the recent procedural shift. The principle is that the goal of filtering out all—or nearly all—frivolous claims outweighs the goal of allowing all—or nearly all—meritorious claims to survive. In other words, the system is at the tension point discussed above, and judges, lawmakers, and rulemakers have determined that frivolous claims are the greater evil.

rate defendants prefer a federal forum, in large part because they win more often there.”).

²⁹ Spencer, *supra* note 7, at 358–66. The impetus for this move is largely due to the pressure borne by what commentators have called a “litigation explosion.” The idea of a litigation explosion took root in 1977 when Bayless Manning coined the term “hyperlexis” to describe what he believed was a dire situation in America’s civil litigation system. Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977). Like a disease, he argued, Americans were suing one another without due regard to the merits of their claims and, worse than that, the adjudicatory system could not properly control this litigation. *Id.* at 767–68. However, since that time, scholars have convincingly shown that the charge of a litigation explosion was both overstated and not supported by empirical data. *See generally* Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (questioning the alleged increase in civil litigation once one accounts for the changes in substantive law that created additional rights); Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 636 (1997) (finding that most of the punitive damages awards in civil litigation are in business litigation matters, not personal injury). But the damage had been done. Many in the public and private sector believed then, and still believe now, that the litigation system is in a state of disrepair. *See* Miller, *supra* note 25, at 984–87.

³⁰ *See supra* note 28 and accompanying text.

³¹ *See infra* note 227 and accompanying text.

³² 129 S.Ct. 1937, 1949–51, 1953–54 (2009).

³³ *Id.* at 1953–55.

B. The Beneficiaries of a Restrictive Ethos

Knowing that the civil justice system is now governed by a restrictive procedural regime, it is imperative to know and understand who benefits from such a regime. This analysis requires an understanding of what federal civil litigation looks like—who are the players, what are the claims, and who is winning?

In a 2000 study, Professor Gillian Hadfield determined that in over eighty percent of federal civil cases, the defendant was an organization, and in almost seventy percent of federal civil cases, the plaintiff was an individual.³⁴ Thus, the majority of cases filed in federal court pit an individual plaintiff against an organizational defendant. These statistics matter because organizational defendants approach litigation from a different perspective than individual plaintiffs. As defendants, for the most part, organizations are not as concerned with the public trial³⁵—access to a public forum is not as high a priority for them. To the contrary, organizations are generally concerned with lowering ultimate litigation costs—their concerns are economically driven.³⁶ Like all players who are in a conflict, organizational defendants will be satisfied when they win any litigation in which they are engaged. But, unlike individual plaintiffs, organizational defendants are at best neutral regarding when that win occurs. If the litiga-

³⁴ Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1298 (2005). In approximately sixty percent of federal civil cases, an individual plaintiff sued an organizational defendant; in approximately twenty-two percent of the cases, an organizational plaintiff sued an organizational defendant; in approximately ten percent of the cases, an individual plaintiff sued an individual defendant; and in approximately eight percent of the cases, an organization sued an individual. *Id.* For organizational defendant, I adopt Hadfield's definition, which includes businesses and government agencies. *Id.* at 1292. Finally, Hadfield's overall data excludes prisoner litigation and cases where the United States sues for recovery on a defaulted student loan. *Id.* at 1286–87, 1299.

³⁵ There are exceptions to this statement, of course. For example, a corporation may consider a public trial that ends in its favor to serve an important deterrent effect to future litigation. Or, an entity may wish to draw out a trial in order to run up costs for the plaintiff, incentivizing her to settle or drop the case. The point is that the public airing of grievances is generally not as profoundly valued by an organizational defendant as it is by an individual plaintiff.

³⁶ Hadfield, *supra* note 34, at 1311–12. This is not to say that plaintiffs and their attorneys are not concerned about litigation costs. They are. But, the calculus is different. Plaintiffs and their attorneys want to win, and to do so, that generally requires that they get their paradigmatic day in court. *See* discussion *infra* Part III.B. They want to conserve costs in order to get to that day, while defendants will generally be willing to spend more to avoid the risk of a trial. *See* discussion *infra* Part III.B. In other words, defendants are far more likely to spend a predictable amount in order to avoid the less predictable risk of a trial. In that sense, they are more allergic to the ultimate and unknowable litigation costs than plaintiffs.

tion ends before the merits are reached at trial, an organizational defendant will be satisfied with that result, whereas an individual plaintiff may have benefitted from a public trial even if she ultimately lost.³⁷ Because organizational defendants are not as concerned about reaching the merits in a public forum, they have a greater incentive to support a more restrictive approach to procedural doctrine.³⁸

And, these defendants have extensive resources with which to influence the development of procedural doctrine and with which to engage in litigation. As Elizabeth Cabraser explains, “most individuals do not possess the time or resources to maintain complex litigation at the trial and appellate levels against the large and well-capitalized corporate entities with which the vast majority of commercial, employment, and consumer transactions occur, and from which such litigation arises.”³⁹

First, unlike most individual plaintiffs, organizational defendants can hire monolithic premier law firms. Large law firms are a fairly recent development. In 1970, the largest law firms had a few hundred centralized lawyers, but now the largest firms have thousands of lawyers that span the globe.⁴⁰ The size of the law firm is not all that matters—what is equally critical is the focus of the kind of law practiced in those firms. A study of Chicago lawyers by John Heinz and Edward Laumann found that, from 1975 to 1995, the legal effort for

³⁷ These benefits include those that stem from participation. See E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 206–15 (1988). Even when the substantive result is not what she hoped for, the fact that an individual was able to participate lends credence to her perceptions of the legitimacy of the system and about the process by which her claim was adjudicated. See *id.* For the individual, this is critical because she feels heard. Professor Deseriee A. Kennedy has written that “[p]retrial dismissal means that not only are individual plaintiffs denied the opportunity to recover for their harms, but they are stripped of the right to publicly present their stories and have them ‘authenticated,’ create a public record of the events, and have their cases decided by a jury.” Deseriee A. Kennedy, *Processing Civil Rights Summary Judgment and Consumer Discrimination Claims*, 53 DEPAUL L. REV. 989, 996 (2004).

³⁸ For example, Hadfield determined in her study that organizational plaintiffs were more likely than individual plaintiffs to settle a case. Hadfield, *supra* note 34, at 1281. She suggested, “The higher settlement rate among organizational plaintiffs, which is basically the same whether an organization is suing an individual or another organization, may suggest that organizational plaintiffs are *less* interested in rule change or precedent than individual plaintiffs, despite the one-shot nature of many individual plaintiffs.” *Id.* at 1319 (emphasis added).

³⁹ See Cabraser, *supra* note 28, at 440. However, the effect of the economic decline on big law firms cannot be ignored. See generally Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749. The impact of that decline on defendants’ power, whether the trend continues or not, is unknown.

⁴⁰ See Hadfield, *supra* note 34, at 1284.

corporate and organizational clients rose from fifty-three percent to sixty-four percent.⁴¹ In contrast, legal effort devoted to what the scholars called “personal plight” (meaning family, employment, criminal defense, personal injury, etc.) fell from twenty-one percent to sixteen percent during the same period.⁴² In other words, the landscape of the kind of law handled by these large firms has changed significantly. Moreover, these law firms are “repeat players” in litigation, which means that they can use their experience, knowledge, and influence for a myriad of clients.⁴³ It is not just that an organizational defendant itself has greater economic and political resources than its adversary in litigation, it is that the law firm that such a defendant hires also has greater resources than its adversary’s counsel. This is because an individual plaintiff will generally hire a solo practitioner who, by virtue of the structure of her practice, will lack access to a large law firm’s collective knowledge and power.⁴⁴ As Hadfield explains, “These differences in the scale of practice have significant implications for the resources organizations and individuals bring to bear on litigation” Beyond economic resources, organizational defendants gain greater power because “lawyers with corporate and organizational clients also tend to have higher levels of influence and prestige within the profession.”⁴⁵ Organizational defendants’ legal counsel can therefore exercise their power and resources to push the development of procedural law in a direction that is most beneficial to their clients. When viewed in the context of a larger ideological movement that has won the rhetoric battle—one that speaks of “discovery costs” and “frivolous claims”⁴⁶—it is easier to see how the pressure that organizational defendants bring to bear on the structure of procedural rules has arguably resulted in cases like *Iqbal* and the broader move toward a restrictive procedural regime.⁴⁷

⁴¹ John P. Heinz & Edward O. Laumann, *The Changing Character of Lawyers’ Work: Chicago in 1975 and 1995*, 32 LAW & SOC’Y REV. 751, 765 (1998).

⁴² *Id.*

⁴³ Hadfield, *supra* note 34, at 1319.

⁴⁴ As Hadfield explains,

Overall, we know that lawyers serving individual clients tend to work in solo and small-firm practice settings, while those serving organizations and corporations either work within the organization itself as in-house counsel or in large, often multistate if not multinational, law firms.

Id. at 1285; *see also* Cabraser, *supra* note 28, at 454.

⁴⁵ Hadfield, *supra* note 34, at 1285. Hadfield further notes, “Indeed, ‘prestige’ is arguably defined within the legal profession as distance from serving individual clients.” *Id.*

⁴⁶ *See* Miller, *supra* note 25, at 984; Thomas, *supra* note 23, at 645.

⁴⁷ *See* discussion *infra* Part IV.

Second, beyond hiring prestigious law firms to litigate and shape procedural doctrine, organizational defendants can directly influence the development of procedural doctrine through Congress and the Civil Rules Committee. For example, business entities heavily influenced the adoption of recent restrictive procedural laws like the CAFA and the Private Securities Litigation Reform Act of 1995.⁴⁸ Lobbying efforts were waged on both sides, but one cannot ignore the influence that business interests had on these legislative efforts.⁴⁹ Business entities and their lobbying organizations have had a palpable impact on rules adopted by the Civil Rules Committee as well.⁵⁰ Moreover, due to its composition, the committee is incredibly receptive to the viewpoints of those organizations.⁵¹ Again, some individual plaintiff interests are similarly represented at the rulemaking level, but the influence of business interests is greater.⁵²

⁴⁸ See Stephen Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1441 (2008) (“Some of the political and social implications of the Class Action Fairness Act of 2005 (CAFA) are hard to miss. That statute, after all, resulted from years of intense lobbying (on both sides of the aisle by interest groups associated with both plaintiffs and defendants), partisan wrangling, and, following two successful filibusters, fragile compromises.” (footnotes omitted)); Leslie M. Kelleher, *Amenability to Jurisdiction as a “Substantive Right”: The Invalidity of Rule 4(k) Under the Rules Enabling Act*, 75 IND. L.J. 1191, 1194 (2000). Kelleher explains:

On occasion, lobbyists have convinced Congress to bypass the rulemaking process entirely, and provide special procedures for specific classes of cases by legislation, in order to favor certain interest groups. An obvious, and egregious, example is the Private Securities Litigation Reform Act of 1995 (“PSLRA”), enacted in response to intense lobbying efforts by accounting, securities, and high-tech firms, which perceived themselves as victimized by abusive securities lawsuits. Rather than alter the substantive standards for such suits, Congress in the PSLRA provided procedural rules favorable to defendants, to tilt the balance in securities litigation in favor of the defendant at virtually every juncture.

Id. (internal quotation marks and footnotes omitted).

⁴⁹ See Burbank, *supra* note 48 at 1441; Kelleher, *supra* note 48 at 1194; see also John F. Harris & William Branigin, *Bush Signs Class-Action Changes into Law*, WASH. POST (Feb. 18, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A35084-2005Feb18.html> (“Business groups sought the change because federal courts traditionally have been less sympathetic to class-action cases brought by plaintiffs who claim to have been victimized by corporate fraud or negligence.”).

⁵⁰ See Coleman, *supra* note 21, at 294–95.

⁵¹ The members of the committee who are defense lawyers well outnumber the members of the committee who are plaintiffs’ lawyers. *Id.* at 294. In addition, there is a large number of judges on the committee, which only adds to the sense that the committee itself is incredibly elite. *Id.* at 290.

⁵² See *id.* at 294.

Ultimately, organizational defendants are willing to invest time and effort in the development of procedural doctrine because it affects how litigation proceeds and whether those cases get to a jury trial. Hadfield's study found that, in 34.5% of the cases between an individual plaintiff and an organizational defendant, the case terminated in a non-trial adjudication, which means, in most cases, dismissal or summary judgment in favor of the defendant.⁵³ The cases terminated in a bench trial only 7.3% of the time and in a jury trial or directed verdict only 2.6% of the time.⁵⁴ These numbers demonstrate that organizational defendants know that the procedural rules governing what happens before trial are important. This is especially true because 53.1% of the cases between an individual plaintiff and an organizational defendant settle.⁵⁵ If the parties know that their case is more likely to be resolved in a pre-trial adjudication as opposed to a full-blown trial, the parties will certainly factor the effect of procedural rules into their settlement calculus.⁵⁶ In other words, the parties conduct their settlement negotiations not just in the shadow of a jury trial, but also in the shadow of pre-trial adjudication.

Through this expansive access to the institutions responsible for creating procedural doctrine, organizational defendants have influenced and driven the creation of a restrictive procedural regime. As explained above, they have every incentive to do so, and they have the resources with which to affect the change they desire. The question addressed in the next Part is who are the plaintiffs who, while equally incentivized, do not have the resources and organizational power to influence procedural changes in their favor?⁵⁷

⁵³ Hadfield, *supra* note 34, at 1317, 1322.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See generally Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990).

⁵⁷ One possible response to this litigation picture, specifically with respect to the movement from a liberal to a restrictive ethos, is that this movement is a correction. In other words, one could argue that the liberal ethos unduly benefitted individual (and vanishing) plaintiffs, and that the changes that have occurred over the past thirty years in procedural doctrine are a righting of that imbalance. There is no evidence to support this position, yet there is decidedly no hard evidence to the contrary either. It is by all accounts a matter of perspective. However, looking to those who originally drafted the rules, it is undeniable that they were guided by a liberal ethos. See generally Marcus, *supra* note 15. And that ethos was reflective of a desire to have equality and fairness in litigation. Clark wrote that "[r]egular procedure is necessary to secure equal treatment for all; it is necessary, too, for the quite as important factor of the *appearance* of equal treatment for all." CLARK, *supra* note 19, at 70 (emphasis added). In that sense, the drafters' intent for the procedural rules was neutrality—they desired a system that would not benefit either side. Neutrality and fairness, not

III. THE VANISHING PLAINTIFF DEFINED

As discussed above, a shift in procedural doctrine has occurred, and that shift benefits organizational defendants. The question then becomes who is negatively impacted by this change?⁵⁸ Defining the vanishing plaintiff is a difficult exercise, but there are two primary factors that guide an understanding of who this plaintiff is and why a restrictive procedural regime so disfavors her claims. First, the vanishing plaintiff is often economically disadvantaged—not so much that she must file *pro se*, but so much so that she cannot hire expensive legal services. Second, the vanishing plaintiff's social presentation is outside the dominant gender, sexual, racial, and/or cultural norms, resulting in an inability to effectively communicate a persuasive narrative.

A vanishing plaintiff may be affected by both of these factors or she may have just one. It is impossible to construct a durable description of this plaintiff that is one-dimensional. Instead, the defining factors are fluid and subject to great variation based on the interaction between the vanishing plaintiff, procedural rule(s), and substantive claims. The base assumption is that vanishing plaintiffs are marginalized in some way. They vanish when particular factors interact with restrictive procedural rules and push plaintiffs out of the system.

beneficial treatment of plaintiffs, was the goal of a liberal ethos. Yet, as argued in this Article, such fairness is not being achieved under a restrictive procedural regime. In the alternative, even if it were the case that the liberal ethos favored plaintiffs such that the last thirty years were a righting of sorts, any such “correction” should still take account of the vanishing plaintiff for the reasons discussed *infra* Part III.C.

⁵⁸ As discussed in the Introduction, Spencer argues that “social out-groups” are the victims of a restrictive ethos. Spencer, *supra* note 7, at 370. He borrows this concept from critical race theory literature, and to a degree, the label fits. See generally Erik K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990) (arguing that procedural reforms made for the sake of efficiency have negatively affected marginalized groups—what he refers to as “minorities asserting marginal rights claims”—more than mainstream plaintiffs). However, the term social out-groups does not completely capture the complexity of how particular people are marginalized by restrictive procedural rules. In other words, Spencer provides an attractive term, but he does not otherwise elaborate on how being outside of the social and political mainstream makes an individual more prone to suffer from a restrictive procedural regime than an insider. Moreover, this general term does not capture the fact that restrictive procedural rules may not equally affect those who are political and social outsiders. For example, when institutional plaintiffs represent such individuals, they will not suffer as much as similarly situated individuals represented by a solo practitioner. See discussion *infra* Part III.A. Thus, a more robust description of which plaintiffs are most affected is required.

A. Lack of Access to Legal Counsel

The disparity between legal services available to individual plaintiffs and organizational defendants is critical to understanding the vanishing plaintiff. As discussed above, organizations receive the lion's share of legal services in the United States. In a recent study, Gillian Hadfield determined that in 2005, the total expenditures made by Americans (individuals and organizations) on legal services reached \$277 billion.⁵⁹ Of that, about thirty-one percent was services provided to individuals who personally paid for these services, about one percent was provided by legal aid lawyers and public defenders, and another roughly eight percent was provided by government lawyers (who, the study assumed, provided services to individuals).⁶⁰ All told, about forty percent of the legal services provided in the United States go to individual citizens.⁶¹ The remaining sixty percent go to serving organizations.⁶² To break down the numbers even further, Hadfield determined that in 2005, on average, individuals in this country received 1.3 hours of legal services, or 3.34 hours per household.⁶³ This is a critically low number when one considers the legal needs that arise for individual citizens. A study conducted by the American Bar Association in 1993 found that approximately fifty percent of the households in the United States were experiencing an event that could be construed as a legal need.⁶⁴ Yet, the number of hours expended on legal services for these individuals cannot be meeting such a high level of necessity.⁶⁵

Therefore, the result must be that many individuals simply do not seek or cannot find legal services. For many, they cannot afford legal help. In 2005, a study determined that there were only 6,581

⁵⁹ Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 144 (2010). That is approximately \$226 billion in GDP terms. *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 146. And this number of hours declined by twenty percent from the number of hours in 1990, which was 1.6 hours per person and 4.15 hours per average household. *Id.* at 145.

⁶⁴ *Id.* at 135.

⁶⁵ This is true on a comparative basis as well. When Hadfield looked at the resources available to citizens in other countries versus citizens of the United States, she discovered that U.S. citizens have far fewer legal resources available to them. Hadfield, *supra* note 59, at 149. For example, in the United States, the amount of legal aid per capita was thirteen dollars, while in countries such as the Netherlands and the United Kingdom, it was twenty-nine dollars and seventy-six dollars, respectively. *Id.*

legal aid attorneys—only one-half of one percent of all United States attorneys—providing civil legal services.⁶⁶ Another study determined that there is only one lawyer for every 9,000 Americans who qualify for legal aid.⁶⁷ It comes as no surprise then that in 1994, a study found that thirty-eight percent of poor individuals with legal needs did not take any steps to remedy their situations.⁶⁸ The reality is that individuals in this country, especially poor individuals, simply do not have access to the legal services necessary to pursue their grievances or disputes. As Hadfield explained, “[T]he vast majority of the legal problems faced by (particularly poor) Americans fall outside of the ‘rule of law,’ with high proportions of people . . . simply accepting a result determined not by law but by the play of markets, power, organizations, wealth, politics, and other dynamics in a complex society.”⁶⁹ In point of fact, a recent study determined that the United States ranked lowest among eleven developed nations in providing access to justice for its citizens.⁷⁰ A major factor in this ranking is the inability of lower income individuals to procure legal assistance.⁷¹

With so many lawyers in our country, it might seem counterintuitive that there is a population with legal needs that are not being served. Much of the problem is one of economics for the lawyers themselves. In a recent article, Elizabeth Cabraser opines that many practitioners will not take “meritorious claims with damages of less than \$1 million” because claims less than \$1 million are “economically unfeasible to prosecute.”⁷² There are complex reasons as to why these claims are not economically feasible, but, Cabraser asserts, one of the contributors to the exorbitant cost of justice is “[t]he ability of a few citizens, notably corporate citizens, to afford due process at any

⁶⁶ *Id.* at 140.

⁶⁷ David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 211 (2003); see also DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 542–43 (1994).

⁶⁸ Hadfield, *supra* note 59, at 139. More recent studies have put that number even higher. *Id.* at 142.

⁶⁹ *Id.* at 143. (footnote omitted).

⁷⁰ MARK DAVID AGRAS ET AL., THE WORLD JUSTICE PROJECT RULE OF LAW INDEX 106 (2010), *available at* http://www.worldjusticeproject.org/sites/default/files/WJP%20Rule%20of%20Law%20Index%202010_2_0.pdf.

⁷¹ See Dan Froomkin, *Access to Justice in the U.S. at Third-World Levels, Says Survey*, HUFFINGTON POST (Nov. 14, 2010), http://www.huffingtonpost.com/2010/10/14/access-to-justice-in-us-a_n_762355.html.

⁷² Cabraser, *supra* note 28, at 440.

cost, and to insist upon all of the process they can afford.”⁷³ Presumably Cabraser is not just referring to the procedural rules, but that is certainly part of her critique. Her argument is that organizations, by virtue of their resources and power, can afford to make litigation cost-prohibitive for many individuals, even those individuals who have meritorious claims.

Many vanishing plaintiffs are economically marginalized. Thus, given this legal services landscape, when a vanishing plaintiff has a grievance, her first issue is whether she can afford a lawyer.⁷⁴ Assuming she has just enough to hire a lawyer, the vanishing plaintiff is likely to suffer differently in one of two ways. First, assuming she finds a well-qualified lawyer, that lawyer may not be able to expend the resources necessary to fully utilize and/or respond to the use of procedure. This is true even when the plaintiff has found a lawyer to take her case on a contingency-fee basis. In either case, a restrictive procedural regime may force a lawyer to forego a particular claim or

⁷³ *Id.*; see also THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 10 (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/\\$file/costciv3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/$file/costciv3.pdf). In this Federal Judicial Center survey, attorneys for both plaintiffs and defendants acknowledged that the billing mechanism that most defendant law firms follow is a driving force for the use of procedure. *Id.* An attorney for defendants stated,

Yes, the size of the law firm matters. Large firms are the worst. There's an element of the lawyers not having enough work to do and they do more than necessary. They staff up a case beyond its needs, for example, sending two or more lawyers to attend a deposition or any other proceeding.

Id. An attorney for plaintiffs added, “We have a saying in the plaintiffs’ bar that ‘You have to feed the tiger first’ before defendant attorneys will settle a case. Another simply said: ‘That’s how they get paid. They do not want to talk settlement until they get their hours in. That’s the system.’” *Id.* See generally William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1 (1991) (evaluating the effect of hourly billing rates for civil defense attorneys).

⁷⁴ The plaintiff can choose to file pro se as well. Procedurally, this may actually give her an advantage. As a pro se litigant, she is in large measure throwing herself on the mercy of the court. However, the common law rules construing pro se filings are fairly generous, so she may actually benefit from that status in her litigation. For example, a court must read pro se pleadings more liberally than those drafted by counsel. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Thus, the restrictive nature of procedural rules may not have as great an impact on pro se litigants because courts tend to give a more generous construction to the rules as applied to pro se filers. For example, in *Erikson v. Pardus*, the Court, following *Twombly*, appeared to apply the plausibility standard more liberally to the prisoner pro se litigant in that case than to the well-represented plaintiffs in *Twombly*. 551 U.S. 89, 94–95 (2007). So, while pro se litigants are no doubt presented with quite a challenging feat in attempting to litigate their own actions, restrictive procedural rules may not be the greatest of their worries.

claims because the procedural cost of pursuing that claim outweighs the potential benefit of success.⁷⁵ Moreover, a defendant's well-resourced team will capitalize on this resource disparity. As discussed earlier, if a defendant can eliminate a case on procedural grounds, before reaching the merits of the plaintiff's claim, he will absolutely do so. As counsel for R.J. Reynolds explained during tobacco litigation in 1993,

[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly solo practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s⁷⁶ money, but by making that other son of a bitch spend all of his.

Second, in some instances, the lawyer will not be qualified to address the complexity of federal civil procedure. The lawyer might only be versed in state procedural rules that may not reflect their federal counterparts. Worse yet, the lawyer may just not be that good. As Professor Marc Galanter noted, most individuals who litigate are likely to bring only one case in their lifetime—a category of people he referred to as “one-shotters.”⁷⁷ Galanter posited that the lawyers who represent these “one-shotters” are generally from the “‘lower echelons’ of the legal profession.”⁷⁸ In most cases, money will buy you a higher-quality lawyer; thus, a plaintiff with little means to bring her case may find herself out-spent and out-witted by a defendant who has a full array of resources. Stated differently, an individual with low economic resources who can scrape together enough to hire a lawyer will not find generous treatment by virtue of her financial status. By hiring a lawyer, the plaintiff allows the court and her adversaries to give her the same treatment that they would give any other well-represented plaintiff.

This raises the question of whether the well-regarded lawyer who takes claims on a contingency-fee basis can help the vanishing plaintiff. It is here where the vanishing plaintiff's existence outside of the social mainstream and her economic status may converge. The best option for a plaintiff with low economic resources is to find a good lawyer who will take her case on a contingency. However, the good

⁷⁵ See Cabraser, *supra* note 28, at 440.

⁷⁶ *Id.* at 461 (quoting *Haines v. Liggett Grp., Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993)) (alterations in original) (internal quotation marks omitted).

⁷⁷ Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974–1975).

⁷⁸ *Id.* at 116.

lawyer will consider both the merits of that plaintiff's claim and the potential recovery, as well as the plaintiff's social status, appearance, and other social cues. For example, even when the merits are good and, as Cabraser points out, even where the potential recovery worthwhile, the lawyer may still choose to turn down the case. The lawyer must ask herself an exhaustive list of questions: Does the plaintiff have a criminal record? Is she gainfully employed, and if so, where? Does she have children? How many? Is she married? These questions are all ones that jurors or a judge would ask themselves, and the answers categorize people in ways that while not fair, are undeniable. Good lawyers who are concerned with winning cases for their clients must ask themselves these questions before taking on a case. While many claims may not actually get to a jury, litigation happens with a view toward a potential jury trial, so in that sense, the lawyer must consider how the jury will view her potential client. The lawyer must also weigh the judge's perception of the client. So, if a potential plaintiff is a single mother, recovering addict, and ex-convict, a lawyer may not take that case—regardless of the quality of the claim—because a jury and/or judge will not be sympathetic to a person and may, in fact, sit in social judgment of that person.

This is especially true if another plaintiff with a similar claim and economic status, but without “negative” answers to these questions, is available. Given the choice between the two, the lawyer will take the potential client with the higher perceived social status. The same is true for institutional plaintiffs like the American Civil Liberties Union. These plaintiffs are powerful players, but even they engage in a “sifting” of sorts when selecting their clients. They have to take the best representative plaintiff, and this necessarily means eliminating plaintiffs who are somehow outside of mainstream norms.⁷⁹ In this way, the plaintiff who is an outsider is left with a choice of not pursuing her claim at all, filing pro se, or hiring a less qualified lawyer. This is not much of a choice, however. She either does not pursue her claim at all, subjects herself to the societal judgments of the judge who reviews her pro se petition, or pays a lawyer who cannot navigate

⁷⁹ See Margaret Talbot, *A Risky Proposal: Is It Too Soon to Petition the Supreme Court on Gay Marriage?*, NEW YORKER, Jan. 18, 2010, at 40, available at http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot. The author describes how the lawyers handling the litigation challenging California's referendum banning gay marriage carefully selected their representative litigants—two upstanding, white, and successful couples. *Id.* Talbot wrote, “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.” *Id.* at 44.

the fierce procedural waters of federal court. Any way she looks at it, her claim is unlikely to see the light of day. She is a vanishing plaintiff.

B. Inability to Effectively Communicate a Narrative

Along with the difficulties of accessing legal counsel, the vanishing plaintiff confronts another significant problem that is exacerbated by restrictive procedural rules. That problem is an inability to communicate her legal narrative. Because of the vanishing plaintiff's gender, sexuality, race, and/or culture, and the claims that will arise from those attributes, the vanishing plaintiff is often required to communicate a legal narrative that is outside of the norm. The best chance she has at effectively communicating that narrative is to be able to tell her whole story, most critically at a trial.⁸⁰ Yet, the reality of a restrictive procedural regime is that trials are a rarity.⁸¹ Moreover, even when she is able to tell her story in a non-trial event, such as in a motion for summary judgment, her audience is a person who likely has almost nothing in common with her—the judge. That combination—losing the narrative opportunity at trial and being limited to a homogenous audience—makes the vanishing plaintiff's claims much less tenable.

In other words, the result of a restrictive procedural regime runs completely counter to what a vanishing plaintiff needs to launch a successful claim. For example, motions to dismiss limit the narrative to a short pleading that only articulates the basic facts known to the plaintiff at the time. Moreover, she is unable to confidently articulate pertinent facts that she suspects are true because the defendant has those facts in its province.⁸² Restrictive discovery rules also limit the plaintiff's access to the full story. The defendant does not have to come forward with information pertinent to the plaintiff's claim until it is requested in an exacting and often exhausting process.⁸³ Finally, motions for summary judgment—a primary way in which claims are resolved—are decided by judges who only have access to the written,

⁸⁰ “Law, like every discipline and profession is constituted by its stories.” James R. Elkins, *From the Symposium Editor*, 40 J. LEGAL EDUC. 1, 1 (1990). Thus, in order to succeed under the law, the plaintiff must tell a convincing legal narrative.

⁸¹ See discussion *supra* Part II.B. For an argument that trials should be restored, see Stephen Burbank & Stephen Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 414 (2011).

⁸² See discussion *supra* Part IV.A.

⁸³ See *supra* note 27 (discussing the impact of changes to Rule 26).

often piecemeal story.⁸⁴ Thus, while the success of a vanishing plaintiff's claim will turn on her ability to communicate her complete and nuanced legal story, restrictive procedural doctrine works against that success.

For instance, scholars have repeatedly argued that when it comes to proving racial or sexual discrimination, restrictive procedural doctrines are difficult to overcome.⁸⁵ Because of the vanishing plaintiff's gender, sexuality, race, and/or culture, these are the kinds of claims that she will often bring. Yet, discrimination claims require a holistic understanding of the plaintiff's circumstances, and restrictive procedural rules do not allow for the creation of that picture. For example, summary judgment requires a judge to "slice and dice" the facts of a case into separate parts that can be independently assessed.⁸⁶ However, discrimination claims require, often legally but also practically, a weighing of the totality of the alleged victim's experiences. It is difficult to construct such a totality through the use of affidavits and selected sections of depositions, as is required in a procedure like summary judgment. Judges often view the case through its separate elements and that lends itself to a fragmentary view of the facts, not a collective one.

In addition, the make-up of the federal bench is decidedly different from the make-up of the vanishing plaintiff. The federal bench is largely composed of white men.⁸⁷ This is not to say that all white male judges are incapable of or insensitive to the substance of vanishing plaintiffs' claims, but it is to say that the worldview of these judges varies significantly from that of the plaintiffs who bring these

⁸⁴ See discussion *supra* Part IV.B.

⁸⁵ See, e.g., Theresa Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999); Kennedy, *supra* note 37; Natasha Martin, *Pretext in Peril*, 75 MO. L. REV. 313 (2010); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 766–67 (2007).

⁸⁶ See Schneider, *supra* note 85, at 722.

⁸⁷ See Carl Tobias, *Diversity on the Federal Bench*, NAT'L L.J. (Oct. 12, 2009), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202434429480&slreturn=1>.

Women and ethnic minorities have long been underrepresented in the federal judiciary compared with the U.S. population. Eighty-four percent of federal judges are white. Female jurists comprise twenty percent. African-Americans constitute eight percent. Out of the almost 1,300 sitting federal judges, a mere eleven are Asian-American and only one is a Native American. A significant percentage of the ninety-four federal districts has never had a jurist who is a woman or a person of color.

Id.

claims.⁸⁸ In that sense, being outside of a dominant mainstream perception of gender, sexuality, race, and/or culture means that as a plaintiff, that person has a more difficult task in communicating her story. This means that when the plaintiff and her claim are outside of that single judge's normative view of the world, it makes her case even more difficult to pursue.

Because cases are largely decided by (or settled based upon the anticipation of) one judge's view of the law, it is worth thinking about how that judge's normative viewpoints might be problematic. Individuals can disagree about the objective meaning of the law, and it is largely the case that those differences in understanding spring from differences in worldview, and thus differences in background (gender, sexuality, race, and/or culture).⁸⁹ When the decision-maker—in this case a judge—is so dominated by one race and one gender, it begs the question of how his view of the law and what he deems objective may differ from people who are differently situated. At least one study has shown that this difference in viewpoint cuts across gender, race, and class lines.⁹⁰ Given that the make-up of the judiciary is significantly dominated by one gender, race, and class, it should not

⁸⁸ Moreover, there is support for the argument that the “unconscious discrimination infecting American society infects its judiciary as well.” Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 940 (2006) (citing Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 561–62 (2001)).

⁸⁹ See Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2082 (footnotes omitted). Scheppele explained,

Social theorists have long known that people differently situated in the social world come to see events in quite distinct and distinctive ways. How people interpret what they see (or what people see in the first place) depends to a very large extent on prior experiences, on the ways in which people have organized their own sense-making and observation, on the patterns that have emerged in the past for them as meaningful in living daily life. And so it should not be surprising that people with systematically different sorts of experiences should come to see the world in systematically different ways.

Id.

⁹⁰ Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Ill-liberalism*, 122 HARV. L. REV. 837, 879 (2009). The authors noted,

Individuals (particularly white males) who hold hierarchical and individualist cultural worldviews, who are politically conservative, who are affluent, and who reside in the West were likely to form significantly more pro-defendant risk-perceptions. Individuals who hold egalitarian and communitarian views, whose politics are liberal, who are well educated but likely less affluent, and whose ranks include disproportionately more African Americans and women, in contrast, were significantly more likely to form pro-plaintiff views

Id.

come as a surprise that judges may have different ideas about legal concepts like reasonableness—different at least from individuals who are not white, male, and affluent. However, we often refuse to acknowledge this uncertainty in order to hold on to some semblance of objectivity in the law. There is a real fear of sacrificing a common thread of agreement regarding basic legal concepts like reasonableness for a multi-layered view that is less predictable. Yet, that fear does not change the stark reality that any confidence in the objectivity of such legal concepts is a false one.⁹¹

Once the notion that there is no such thing as objectivity is accepted, it still leaves a plaintiff with the reality that she must appeal to, and perhaps even change, the judge's perception of her and her claim. Gerald Lopez has addressed this issue by explaining that human beings see the world through "stock stories," by which he means the stories "that help us interpret the everyday world with limited information and help us make choices about asserting our own needs and responding to other people."⁹² These stories form the basis of the judge's understanding of the world. Thus, when a plaintiff's legal claim requires a modification of one of those "stock stories," she has a very difficult task.⁹³ This is especially true when her chances at communicating her narrative are so sparse and limited to a piecemeal paper record.

Compounding this problem of communicating her narrative is that the loss of a trial means the loss of an opportunity to tell her story to a jury of her peers. In essence, the plaintiff has one shot at convincing the judge of the validity of her claim, instead of the multiple appeals that she may be able to make to a multi-person jury. This has an impact on the litigation of innovative claims because the chances of changing one homogenous arbiter's view of the world, as opposed to a subset of some number of heterogeneous arbiters' views of the world, are significantly lower. Moreover, in a jury trial, the members

⁹¹ Khan, Hoffman and Braman also note:

Social psychology teaches us that our perceptions of fact are pervasively shaped by our commitments to shared but contested views of individual virtue and social justice. It also tells us that although our ability to perceive this type of value-motivated cognition in others is quite acute, our power to perceive it in ourselves tends to be quite poor.

Id. at 842–43.

⁹² Gerald Lopez, *Lay Lawyering*, 32 UCLAL. REV. 1, 3 (1984).

⁹³ *Id.* "To solve a problem through persuasion of another we therefore must understand and manipulate the stock stories the other person uses in order to tell a plausible and compelling story—one that moves that person to grant the remedy we want." *Id.*

of the jury are required to interact with one another and engage in a discussion of what the plaintiff is alleging. This means that they reach a consensus, one that is better because of all the minds that went into crafting the conclusion.⁹⁴ With a motion for summary judgment, a judge may discuss the issues with her clerks, but this is hardly the kind of deliberation and engagement that takes place in a jury room. Instead, it is a much more isolated experience. Thus, the lack of a jury trial means that the heterogeneous members of our populace—those who might serve on a jury—do not see or sit in judgment of the evidence that might be probative of a plaintiff's case.⁹⁵

However, the mere fact that a plaintiff is a woman or a person of color does not necessarily mean that she is a vanishing plaintiff. These characteristics are interactive, and the interaction depends on the substantive aspects of her case as well as the procedural doctrine applied. For example, assume that a woman brought an employment discrimination claim based on gender forty years ago. Further assume that she had a company document stating that she was fired because of her gender. Her claim would have been novel at that time, and if a procedural rule was restrictively applied to her, she might have been considered a vanishing plaintiff. That same woman today may not be considered as such. The evidence presented and the claim are not outside of our societal understanding of discrimination. Most people would (hopefully) agree that a company should not be able to fire a person just because she is a woman. In that sense, a woman making such a claim would not be a vanishing plaintiff. However, a woman making a discrimination claim today without a “smoking-gun” memo—a claim in which there must be an understanding of institutionalized sexism and how it works within a corporate context—will have a much harder time with her claim.⁹⁶ The conflicting narratives of her experience and how the company viewed her performance will lead to different interpretations of the events giving rise to her termination. As discrimination becomes more subconscious and less *de facto*, our societal understanding of something

⁹⁴ See Burbank & Subrin, *supra* note 81, at 402.

⁹⁵ There are, of course, problems with jury selection, and it must be acknowledged that a jury will not necessarily be reflective of the plaintiff's characteristics. However, there is greater probability of diversity on a jury than there is in the current state of the federal judiciary.

⁹⁶ See generally Selmi, *supra* note 88 (arguing that employment discrimination cases are hard to win because society has a misperception that employment suits are frivolous and because judges deciding the cases have an implicit bias against the claims).

like sexism is not collective. In other words, we do not necessarily agree about what is discrimination and what is not.

Thus, the farther an individual's claim locates the individual outside of societal understanding of her characteristics, the more likely she is to become a vanishing plaintiff. Consequently, an individual who might otherwise be considered part of the dominant, mainstream culture might still be a vanishing plaintiff if the nature of her claim is culturally peripheral. For example, where a man brings a hostile work environment claim on the basis of a female supervisor's advances, he may be a vanishing plaintiff.⁹⁷ Such a story does not fit within dominant views of how sexual harassment emerges in typical gender relations, and he will confront many difficulties in pursuing his claim. This shows that even where a person by virtue of his gender might have been considered part of the mainstream, his experiences and legal claims may instead make him an outsider, which means that anyone, depending on the interaction of their characteristics and claims and the impact of that combination on their narrative ability, may become a vanishing plaintiff.

C. *Social Benefit of Vanishing Plaintiff Claims*

Knowing the characteristics of the vanishing plaintiff is not enough to justify a retreat from a restrictive procedural regime. What is critical to know is whether her claims—if successful—would somehow benefit society. In short, they would. Vanishing plaintiffs' claims serve two important social functions. First, they create or reinforce path-breaking laws. Second, they provide a primary, if not sole, mode of enforcement. There is much to be lost by not allowing vanishing plaintiffs' claims into the system. There are advantages from airing these claims in a public forum, and these advantages stretch well beyond a plaintiff's potential victory.

First, vanishing plaintiffs' claims have historically created path-breaking laws. Those who are outside of dominant, mainstream categories are often politically powerless, and that lack of power translates into a lack of ability to pursue legislative change.⁹⁸ Moreover, even

⁹⁷ See, e.g., *Hosey v. McDonald's Corp.*, No. AW-95-196, 1996 WL 414057, at *2 (D. Md. May 17, 1996), *aff'd*, 113 F.3d 1232 (4th Cir. 1997) (granting summary judgment in defendant's favor by determining that such advances by his young female supervisor—which included telling the plaintiff that “she would like to know what it felt like to have [him] inside her” and pinching him—did not amount to a hostile work environment and were instead just “teenagers . . . asking each other for dates.”). For a more complete summary of *Hosey* as well as a host of other relevant cases, see Beiner, *supra* note 85, at 103–19.

⁹⁸ See Yamamoto, *supra* note 58, at 426.

when such legislative change is achieved, repeated litigation to reinforce that change is critical.⁹⁹ The civil justice system is still a viable vehicle for the pursuit of social change for those who are on the outside.¹⁰⁰ Moreover, vanishing plaintiff claims reinforce and push the development of path-breaking laws. For example, while discrimination laws are arguably the product of society's judgment about how we should treat one another,¹⁰¹ they certainly do not represent a universal agreement about that treatment. Through litigation, the public is able to witness what marginalized individuals experience, and that witnessing leads to a very public discussion about what is right and what is wrong. However, when discrimination claims are not brought or when they are resolved in a non-public way, society loses the benefit of this public dialogue.¹⁰² Thus, the procedures that govern litigation within our political system should be sensitive to the important function that the courts serve—that is, to provide a forum

⁹⁹ Where a person finds herself so far outside of dominant societal views, it is important to have a public forum where multiple claims by similarly situated plaintiffs can be repeatedly pursued. *See generally* Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51, 63–65 (2003).

¹⁰⁰ Yamamoto, *supra* note 58, at 426. As Yamamoto explains, “[R]epeated assertions of rights through litigation can help focus issues by compelling formal public statements of justification by those with decision-making power.” *Id.* at 412. Moreover, greater frequency of vanishing-plaintiff claims develops the law, taking those claims away from cases of “first impression” to cases where the law is deeply thought about and debated. *See, e.g.*, Kennedy, *supra* note 37, at 1002–03 (explaining that in consumer discrimination claims, the frequency of pretrial dismissals “hinders the growth and development of [§] 1981 to address these claims”). In other words, litigation develops rules and precedents that guide behavior, and this provides courts with a better set of standards with which to judge claims. *See* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622 (1995). Such public litigation also assures that these rules and precedents will be digested by society as a whole. *Id.*

¹⁰¹ This is a gross over-simplification of the purpose and effect of anti-discrimination laws. For a more detailed treatment and critique of this subject, see generally Allan Freeman, *Antidiscrimination Law: The View from 1989*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 121–50 (David Kairys ed., 1990); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

¹⁰² Hadfield, *supra* note 34, at 1285. Hadfield stated, “The substantial growth in civil rights litigation . . . reflects significant statutory changes over the last three decades: litigants in this category are showing up in federal court much more frequently because that is what the democratic process seceded should happen. These are clearly the cases in which the concerns raised by critics of ADR, about the loss of public adjudication and the expression of public values, are potentially powerful.”

Id. at 1290.

for individuals whose only access point into the public sphere may very well be the courts.¹⁰³

Second, vanishing-plaintiff claims serve a regulatory function. Many laws require private enforcement, and vanishing plaintiffs often take on that role; therefore, when claims by vanishing plaintiffs are effectively barred by a restrictive procedural regime, the benefit of that private enforcement is lost.¹⁰⁴ In recent history, federal and state governments have exercised less oversight over organizations.¹⁰⁵ One need only read recent headlines about individuals like Bernard Madoff and organizations like British Petroleum to see that the result of this laissez-faire approach is not always best for individuals or society.¹⁰⁶ In this way, private civil litigation serves an enforcement function by forcing organizations to abide by existing laws and social mores.¹⁰⁷ When vanishing plaintiffs' claims are lost, however, this critical benefit is largely sacrificed.

The Regents of the University of California v. Bakke provides a pertinent example of how this benefit might be lost.¹⁰⁸ *Bakke* is standard fare in law school constitutional law classes across the country. Its core holding, that quotas in school admissions' policies were uncon-

¹⁰³ See Yamamoto, *supra* note 58, at 429 ("A procedural system hospitable to minority claims at the margins facilitates not only the articulation of old rights in new contexts. It also facilitates the development of group power by encouraging the articulation and advocacy of new conceptions of rights responsive to the needs and aspirations of people unrecognized by the Constitution's framers and ignored by society's mainstream.").

¹⁰⁴ See Bryant Garth, Ilene H. Nagel & S. Jay Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 397 (1988) (asserting that the private attorney general idea "celebrates the power of attorneys to do good, to overcome structural obstacles to the vindication of legal rights, and therefore to bring justice to those who may be priced out of the market").

¹⁰⁵ See Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2520 (2008) ("Although class actions spark controversy, no one denies that a quiet government trend to privatize various regulatory aspects for the public good has been occurring for a while now.").

¹⁰⁶ See, e.g., Binyan Appelbaum & David S. Hilzenrath, *SEC Ignored Credible Tips About Madoff, Chief Says*, WASH. POST, Dec. 17, 2008, at D1; Ian Urbina, *Documents Show Earlier Fears About Safety of Offshore Well*, N.Y. TIMES, May 30, 2010, at A1.

¹⁰⁷ Judge Jerome Frank referred to the function of a private individual enforcing a public law as an action by a "private attorney general." See *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot* 320 U.S. 707 (1943) ("Such persons, so authorized, are, so to speak, private Attorney Generals."). But see John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 229 (1983) (arguing that perverse incentives have undermined some of the benefits that a private attorney general might create).

¹⁰⁸ 438 U.S. 265 (1978).

stitutional, but that race may generally be a consideration in such policies, gave rise to a slew of affirmative action cases.¹⁰⁹ Yet, if Bakke brought his case today, there is a good chance that his complaint would have been dismissed for failure to state a claim. His sparse complaint stated that he had not been admitted to medical school because other applicants had been admitted under a “special admission[]” process that used “separate standards.”¹¹⁰ Bakke even had some facts to back up these statements—an account that sixteen of the one hundred applicants admitted were from this “separate” pool.¹¹¹ However, Bakke’s claim of discrimination would have ultimately required 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.¹¹²

Given this unsupported conclusory allegation, if a court today were reviewing this complaint, it might very well dismiss it under *Bell Atlantic Corp. v. Twombly*¹¹³ and *Iqbal*. 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 whether there was a separate race-based admissions standard, Bakke himself had not suffered discrimination. A more plausible story is that he simply did not qualify under the medical school’s standards for admission.

Yet, when this case was brought in 1974, the defendants did not even file a motion to dismiss. Discovery proceeded; the trial court heard the case and determined that the admissions process was unconstitutional.¹¹⁴ On appeal, the Supreme Court affirmed this finding

¹⁰⁹ Harvery Gee, Book Review, 42 SANTA CLARA L. REV. 277, 280–81 (2001) (reviewing HOWARD BELL, *THE BAKKE CASE: RACE, EDUCATION, AND AFFIRMATIVE ACTION* (2000)).

¹¹⁰ ALLAN BAKKE VERSUS REGENTS OF THE UNIVERSITY OF CALIFORNIA 4–5 (Alfred A. Slocum ed., 1978).

¹¹¹ *Id.* at 4.

¹¹² *Id.* For a more detailed discussion of this analysis, see Coleman, *supra* note 4.

¹¹³ 550 U.S. 544 (2007).

¹¹⁴ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 279 (1978). It should be noted that the medical school actually stipulated that Bakke would have been admitted were it not for its special admissions policy. Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 GEO. L.J. 981, 981 (1999). The school did so in order to more quickly resolve whether its admissions policy was constitutional. *Id.* Under *Conley*, a motion to dismiss on this issue would have certainly been denied. However, had this case been brought after *Twombly* and *Iqbal*, there is an argument that

and laid the groundwork for a long line of cases regarding the consideration of race in admissions processes.¹¹⁵

Bakke was an individual whose claim put him outside of social norms—as a white male, he brought a case based on a claim of discrimination. What is now commonly referred to as reverse discrimination was not so easily articulated, at least in a legal sense, in the 1970s. Moreover, Bakke hired a solo practitioner, Reynold H. Colvin, who was a well-respected lawyer, but hardly a high-priced member of an international law firm.¹¹⁶ In this way, Bakke was, by this Article's definition, a vanishing plaintiff: his claim presented a narrative challenge and he did not have the economic resources necessary to access high-priced legal services. Nonetheless, Bakke was able to bring his case, be fully heard, and succeed.

And, while reasonable minds can differ as to the relative merits of his substantive claim, the bottom line is that Bakke's claim pushed the development of path-breaking legal doctrine (consideration of race in admissions policies), and it served a regulatory function that was not otherwise being provided (filling out the bounds of Title VI and the equal protection clause). Thus, *Bakke* had a strong social benefit. First, it helped the public become aware of the issues Bakke alleged he was facing, and individual members of our society, whether they agreed or disagreed with him, were able to see his case play out.¹¹⁷ Moreover, because the case did not even confront a motion to dismiss, it was publicly aired and discrimination law was propelled in a different direction. Finally, for that time, the law was enforced; thus, the regulatory benefit of his claim was felt.

If Bakke brought his case today, however, it would likely fail either because his case would be dismissed under *Twombly* and *Iqbal* or because a lawyer would not even be willing to take his case in the first instance (based on an assessment of that probable procedural failure). More critically, no one other than Bakke or someone *just like him* could bring such a claim. In other words, there would be no other claim, party, or mechanism that could fill the role that a plaintiff like Bakke played. As a result, the social benefits of his claim would be completely lost under today's regime. It is because of the import of these benefits—the ones previously fulfilled by plaintiffs like

the school might not have made such an early concession on that issue. Coleman, *supra* note 4, at 1159–60.

¹¹⁵ *Id.* at 310.

¹¹⁶ See Gee, *supra* note 109, at 286–87.

¹¹⁷ See Kennedy, *supra* note 37, at 1011.

Bakke—that the Court, Congress, and rulemakers must take heed of the plaintiffs who are vanishing before our very eyes.

IV. RESTRICTIVE PROCEDURAL CHANGES APPLIED

Having both defined the vanishing plaintiff and explained the import of her claims to our society, the discussion proceeds to demonstrate how particular procedural rules and doctrines—ones in which recent changes have led to more restrictive application—affect the vanishing plaintiff differently from other plaintiffs. Two specific examples of changes to procedural doctrine that were guided by a restrictive ethos—pleading and summary judgment—will be addressed.¹¹⁸

A. *Pleading*: *Twombly* & *Iqbal*

The standard for dismissing a complaint for failure to state a claim has been the subject of great debate for the last three years. The attention paid is due to two critical Supreme Court cases—*Twombly* and *Iqbal*. For the fifty years preceding *Twombly*, the standard for a Rule 12(b)(6) motion was thought to be well settled. Under *Conley v. Gibson*, the Court stated that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.”¹¹⁹ However, in *Twombly*, the Court “retired” this language, and held that in order to survive a motion to dismiss, a plaintiff’s claim must be plausible.¹²⁰ In *Twombly*, the plaintiffs, a group of local telecommunication companies, alleged that the Baby Bell telephone companies tacitly agreed not to compete in order to keep monopolies in their respective regions.¹²¹ The effect of this conspiracy, the plaintiffs alleged, was to prevent them from effectively competing in those same markets.¹²² The Court determined that the complaint was rightly dismissed because the bare allegation of parallel conduct by the telephone companies was not enough to show that the companies conspired.¹²³ The plaintiffs needed to state facts that would make the claim of conspiracy plausible.¹²⁴ The Court

¹¹⁸ For additional examples of restrictive procedural changes that have differently affected the vanishing plaintiff, see discussion *infra* note 227.

¹¹⁹ 355 U.S. 41, 45–46 (1957) (emphasis added).

¹²⁰ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

¹²¹ *Id.* at 551.

¹²² *Id.*

¹²³ *Id.* at 564–66.

¹²⁴ *Id.*

expressed concern about meritless cases, and it rejected the argument that judges could effectively manage discovery to prevent defendants from needlessly settling a case—the fear being that the high costs of discovery often coerce innocent defendants into settling.¹²⁵ Instead, the plaintiff must state a plausible claim at the outset; if she does not, then her complaint must be dismissed.

At first, some commentators believed that *Twombly*, while an important case, was one that could potentially be limited to its antitrust facts.¹²⁶ That hopeful speculation proved wrong, however, once *Iqbal* was handed down.¹²⁷ In *Iqbal*, the plaintiff alleged that he had been discriminated against by virtue of his arrest and detention following September 11th.¹²⁸ More specifically, he alleged that then-Attorney General John Ashcroft and then-FBI Director Robert Mueller created and implemented a policy of discriminating against people on the basis of religion, race, and/or national origin in response to the terrorist attacks.¹²⁹

The Court found that *Iqbal*'s complaint against Ashcroft and Mueller should have been dismissed because the allegations, while possible, did not contain enough facts to make them plausible.¹³⁰ The Court held that “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference the defendant is liable for the misconduct alleged.”¹³¹ Thus, a court reviewing a motion to dismiss must eschew all “mere conclusory statements” and then review the remaining “factual content” to “determine whether [it] plausibly give[s] rise to an entitlement to relief.”¹³² The determination of what might be reasonable inferences and what might be a plausible claim was, according to the Court, “a context specific task that requires the reviewing court to draw on its judicial experience and common sense.”¹³³ Finally, the Court clarified that the plausibility standard for motions to dismiss was trans-

¹²⁵ *Id.* at 558–60.

¹²⁶ See, e.g., J. Douglas Richards, *Three Limitations of Twombly: Antitrust Conspiracy Inferences in a Context of Historical Monopoly*, 82 ST. JOHN'S L. REV. 849, 852 (2008).

¹²⁷ *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

¹²⁸ *Id.* at 1942.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1950.

¹³¹ *Id.* at 1949.

¹³² *Id.* at 1949–50.

¹³³ *Iqbal*, 129 S. Ct. at 1950.

substantive—the test was not limited to antitrust cases, but was applicable to all cases in federal court.¹³⁴

Many commentators believe that *Twombly* and *Iqbal* are monumental cases, significantly changing existing precedent regarding motions to dismiss.¹³⁵ What troubles most commentators about *Twombly* and *Iqbal* is that in some cases, the plausibility standard requires the plaintiff to plead more than she can possibly know.¹³⁶ In other words, in particular substantive areas, there is an inherent information asymmetry between what the plaintiff knows (and must eventually prove in order to win her case) and what the defendant knows (and will end up producing through properly-conducted discovery). Under *Iqbal*, the plaintiff is required to plead these exact

¹³⁴ *Id.* at 1953.

¹³⁵ Since *Iqbal*, some members of Congress have proposed legislation to re-instate the *Conley* standard, some scholars have advocated for *Iqbal*'s repeal, and many have called for the rulemaking committee to amend the federal rules in an effort to soften the effect of the cases. See Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. § 2(a) (2009) (“A court shall not dismiss a complaint under [Rule 12] unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint . . . on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible . . .” (emphasis added)); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009) (“Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).”). Thus far, neither Congress nor the rulemaking committee has taken steps to change *Twombly* and *Iqbal*; instead, the rulemaking committee has explicitly adopted a “wait-and-see” approach to the cases. See Memorandum from the Hon. Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure for Report of the Civil Rules Advisory Committee 91 (2010) [hereinafter Kravitz Memorandum], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2010.pdf>.

¹³⁶ See, e.g., Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L. J. 597, 654 (2010) (arguing that the new pleading standards will make private antitrust cases harder to bring because, to be successful, the “plaintiff must learn what the defendant alone may know,” but no longer can because her complaint will be dismissed before discovery); Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 52 (2010) (arguing that in some cases, the facts necessary to pass the pleading threshold set forth in *Twombly* and *Iqbal* “may be solely in the hands of the defendants or hostile third parties,” which will necessitate discovery); Suzette Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 87–88 (2010) (arguing that civil rights claims are more vulnerable under *Twombly* and *Iqbal* because plaintiffs must allege intentional conduct—conduct that is often “consistent with both legal and illegal behavior” such that it cannot be confirmed at the pleading stage but that must instead be proven through facts found in discovery).

facts—the ones that make her claim seem plausible to a judge—before any discovery is conducted. However, without the opportunity to conduct discovery on the basis of pure notice pleading, the plaintiff cannot know these facts and must either forego that particular claim or, in some cases, give up her entire case.¹³⁷ Her other alternative is to spend untold numbers of hours and dollars on a pre-filing investigation so that she can obtain the facts necessary to state a plausible claim under *Iqbal*.¹³⁸ But even then, it is not clear that such an investigation would lead her to the facts that she might have otherwise obtained in discovery.¹³⁹

Though the data is limited, it appears that *Twombly* and *Iqbal* are having a significant impact on the frequency and outcome of motions to dismiss. In a recent study, Professor Patricia Hatamyar found that the number of motions to dismiss that are granted has increased from forty-six percent under *Conley* to forty-eight percent under *Twombly* and, ultimately, to sixty-one percent under *Iqbal*.¹⁴⁰ Moreo-

¹³⁷ See Scott Dodson, *supra* note 136, at 52–53. Dodson explains, “Some facts may be solely in the hands of the defendants or hostile third parties. Certain claims, especially those hinging on the defendant’s state of mind or secretive conduct, are particularly susceptible to that kind of ‘information asymmetry.’ Civil rights and discrimination claims, corporate wrongdoing, unlawful conspiracies, and intentional torts are all good examples.”

Id. at 52 (citations omitted). For those plaintiffs who cannot find this information before filing, their potentially meritorious claims will be dismissed. *Id.* at 53.

¹³⁸ See Malveaux, *supra* note 136, at 89–90 (discussing difficulties in presenting plaintiff’s case in light of plausibility standard). Rule 11(b)(3) requires that the plaintiff conduct an “inquiry reasonable under the circumstances” before filing her case, FED. R. CIV. P. 11(b)(3), but such an inquiry may still not unearth the facts now required to be plead under *Iqbal*. For example, if a plaintiff is beaten by a police officer and wants to file a § 1983 claim, she may not be able to determine—even after an exhaustive inquiry—the identity of her assailant.

¹³⁹ See Malveaux, *supra* note 136, at 89 (arguing that evidence of civil rights violations is often difficult to find before discovery because “evidence of illegal motive (intent) or institutional practices is often difficult to unearth absent discovery”). Malveaux proposes that courts should allow for pre-dismissal discovery in cases where there may be an asymmetry of information. *Id.* at 106–08; see also Dodson, *supra* note 136, at 52.

¹⁴⁰ Patricia Hatamyar, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 613 tbl.1, 614 (2012) [hereinafter Hatamyar, *Quantitative Study*]. Hatamyar concluded that these increases are statistically significant. *Id.* at 621. Moreover, these numbers track closely an earlier study conducted by Hatamyar. Patricia Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 49 AM. U. L. REV. 553, 601–02 (2010) [hereinafter Hatamyar, *Tao of Pleading*] (measuring the same increases from forty-six to forty-eight to fifty-six percent, respectively); see also JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*, REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2011), available at

ver, this increase has affected particular kinds of claims more profoundly than others. According to an ongoing study by the Administrative Office of the Courts, the number of motions to dismiss granted in civil rights employment cases has increased from fifteen to sixteen percent under *Twombly* and *Iqbal*.¹⁴¹ For all other civil rights cases, the rate of granted motions to dismiss increased from twenty to twenty-five percent.¹⁴² Similarly, in Hatamyar's study, she found that in constitutional civil rights cases the rate increased from forty-one percent under *Conley* to sixty-four percent under *Iqbal*.¹⁴³

The effect of *Twombly* and *Iqbal* is especially debilitating to a vanishing plaintiff because she will not have the resources necessary to find the required "factual content" in advance of filing her complaint. First, she may not be able to hire a lawyer at all. That may be because of her low economic status, but it will often be because, given the small chance of success for her claim both procedurally and sub-

[http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf). The Federal Judicial Center Study (FJC) found that, in its statistical sample, there was little or no increase in grants of motions to dismiss *without* leave to amend in civil rights and employment discrimination cases. CECIL ET AL., *supra*, at 14. However, the granting of motions to dismiss *with* leave to amend in civil rights cases increased from 21.1% to 32.8%, and in employment discrimination cases increased from 17.9% to 23.5%. *Id.* As discussed in this Part, there is often an information disparity between the plaintiff and defendant such that even with leave to amend, the pleading cannot be cured. In addition, the FJC study determined that its findings regarding the increased dismissal activity under *Twombly* and *Iqbal* were statistically insignificant, save its findings regarding financial instruments. *Id.* at 21. However, at least one scholar has questioned the impact of this determination by noting that statistical insignificance does not mean that *Twombly* and *Iqbal* had no effect, nor does it mean that the study can completely measure all the effects of the cases, including the chilling effect. Lonny Hoffmann, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 8–9 (2012), available at <http://www.fclr.org/fclr/articles/html/2010/Hoffman.pdf>. For a response from the FJC to Hoffmann and others' critique of this study, see Joe S. Cecil, *Of Waves and Water: A Response to Comments on the FJC Study Motions to Dismiss for Failure to State a Claim After Iqbal* (March 19, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026103. Cecil's response notes that the FJC, in response to a request from the Standing Committee on the Federal Rules of Practice and Procedure, is proposing a new "comprehensive and collaborative" study examining the effect of dispositive motions, including the motion to dismiss and summary judgment. *Id.* at 49.

¹⁴¹ See Kravitz Memorandum, *supra* note 135, at 90–91.

¹⁴² *Id.*

¹⁴³ Hatamyar, *Quantitative Study*, *supra* note 140, at 12; see also Hatamyar, *Tao of Pleading*, *supra* note 140, at 606–07 (finding that the dismissal rate increased from fifty to fifty-eight percent under *Iqbal*). Hatamyar notes that many of these dismissals are granted with leave to amend. Hatamyar, *Tao of Pleading*, *supra* note 140, at 607. Yet, as discussed in this Article, it is not clear that the vanishing plaintiff would be able to come up with the facts necessary to survive an additional motion to dismiss even if she were able to amend her complaint.

stantively, a lawyer will be unwilling to take her case. As discussed in Part III.A, plaintiffs generally hire solo practitioners, and their financial calculus for taking cases is very different from that of large law firms representing organizations. Moreover, even if a vanishing plaintiff can hire a lawyer, that lawyer is likely to be financially and/or intellectually ill-equipped to deal with a restrictive procedural regime, especially procedures like plausibility pleading under *Twombly* and *Iqbal*.

For example, in *Young v. Visalia*, the district court judge dismissed plaintiffs' *Monell*-liability claims against the City of Visalia.¹⁴⁴ In that case, fourteen defendant police officers allegedly knowingly executed a search warrant on a property that was not named on the warrant, detained the plaintiff at gunpoint for over five hours, and withheld fluids, bathroom facilities, and his medication.¹⁴⁵ Plaintiffs brought § 1983 and other state law claims against the individual defendants, but they also brought a claim for municipal liability against the City of Visalia.¹⁴⁶ In order to state that claim, plaintiffs had to allege a "policy or custom" that led to the violation.¹⁴⁷ More specifically, plaintiffs had to show that Visalia's failure to train its employees "amounted to a deliberate indifference to the [constitutional] rights of the persons with whom [its police officers] are likely to come into contact."¹⁴⁸ Deliberate indifference in this context means more than just an officer making a mistake—there has to be a pattern of conduct to which the municipality fails to respond.¹⁴⁹ Here, the court determined that plaintiffs did not state a plausible claim for municipal liability.

First, the court rejected prior Ninth Circuit precedent, which had held that in the *Monell* context "a claim . . . is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice."¹⁵⁰ Following *Iqbal*, the

¹⁴⁴ 687 F. Supp. 2d 1141, 1150 (2009).

¹⁴⁵ *Id.* at 1144.

¹⁴⁶ *Id.* at 1144, 1146.

¹⁴⁷ *Id.* at 1147. Municipalities cannot be held liable under a theory of respondeat superior. *Monell*, 436 U.S. at 691. They can only be liable where "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy" causes the constitutional violation to occur. *Id.* at 694.

¹⁴⁸ *Young*, 687 F. Supp. 2d at 1148 (internal quotation marks omitted) (alterations in original).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1149 (quoting *Whitaker v. Garcetti*, 486 F.3d 572, 581 (9th Cir. 2007)).

Young court determined, “the Ninth Circuit pleading standard for *Monell* claims (i.e., bare allegations) is no longer viable.”¹⁵¹ Next, applying *Iqbal* to *Young*, the court found that plaintiffs made only “threadbare” allegations of “inadequate training and hiring practices.”¹⁵² The court noted that the complaint did “not identify what the training and hiring practices were, how the training and hiring practices were deficient, or how the training and hiring practices caused [p]laintiffs’ harm.”¹⁵³ Yet, it is unclear how the plaintiffs could have obtained this kind of information before discovery. Presumably, the training and hiring practices of the city’s police department were not well known, and even if documents like manuals and training materials were available, they may not have reflected the reality of the training officers received. Before *Iqbal*, the court all but admitted that this claim would have survived a motion to dismiss, but in the wake of *Iqbal*, a claim like this is no longer viable, even if the claim has merit.¹⁵⁴

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Young*, 687 F. Supp. 2d at 1149. Other courts have noted the same. As the data discussed above shows, cases that would have survived a motion to dismiss under *Conley* are not surviving under *Twombly* and *Iqbal*. See, e.g., *Ocasio-Hernandez v. Fortunoburset*, 639 F. Supp. 2d 217 (D.P.R. 2009), *vacated in part*, 640 F.3d 1 (1st Cir. 2011). The *Ocasio-Hernandez* court stated:

The court notes that its present ruling, although draconianly harsh to say the least, is mandated by the recent *Iqbal* decision construing Rules 8(a)(2) and 12(b)(6). The original complaint [] filed before *Iqbal* was decided by the Supreme Court, as well as the Amended Complaint [], clearly met the pre-*Iqbal* pleading standard under Rule 8. As a matter of fact, counsel for defendants, experienced beyond cavil in political discrimination litigation, did not file a 12(b)(6) motion to dismiss the original complaint because the same was properly pleaded under the then existing, pre-*Iqbal* standard. . . . As evidenced by this opinion, even highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a section 1983 political discrimination suit without ‘smoking gun’ evidence. In the past, a plaintiff could file a complaint such as that in this case, and through discovery obtain the direct and/or circumstantial evidence needed to sustain the First Amendment allegations. If the evidence was lacking, a case would then be summarily disposed of. This no longer being the case, counsel in political discrimination cases will now be forced to file suit in Commonwealth court, where *Iqbal* does not apply and post-complaint discovery is, thus, available. Counsel will also likely only raise local law claims to avoid removal to federal court where *Iqbal* will sound the death knell. Certainly, such a chilling effect was not intended by Congress when it enacted Section 1983.

Id. at 226 n.4.

The same is true in another sample case, *Acosta Orellana v. CropLife International*.¹⁵⁵ In that case, a group of plaintiffs including crop-dusting pilots and banana plantation workers brought a suit against a number of fungicide producers and two industry groups, CropLife International and CropLife America (together, the “CropLife defendants”).¹⁵⁶ Plaintiffs alleged that Mancozeb, a fungicide that was used to treat bananas in Ecuador, was toxic for humans and unlawful.¹⁵⁷ While defendants promoted Mancozeb as non-toxic and “green,” plaintiffs alleged that the defendants knowingly mislead the public in Ecuador in order to sell greater amounts of this product.¹⁵⁸ The plaintiffs made multiple claims against the CropLife defendants.¹⁵⁹ Two of their most promising claims—negligent supervision and claims based on vicarious liability—were rejected by the court essentially because it determined that plaintiffs had not pled facts sufficient to show the corporate relationship between the entities.¹⁶⁰

For example, one of the plaintiffs’ theories of vicarious liability was that the CropLife defendants controlled CropLife Ecuador and “used CropLife Ecuador to initiate a campaign to falsely promote Mancozeb as a ‘green’ product . . . despite its known health hazards.”¹⁶¹ The court determined that this theory failed under *Twombly* and *Iqbal* because the argument that CropLife Ecuador was under the complete control of the CropLife defendants “[was] completely conclusory and lacking the necessary factual support to survive dismissal.”¹⁶² The plaintiffs’ complaint included facts stating that the CropLife representative in Ecuador was “aggressively promot[ing] the use of Mancozeb and its ‘green’ designation,” as well as facts indicating that subsidiaries of the CropLife defendants in Ecuador “were assisting CropLife Ecuador in promoting the use of Mancozeb.”¹⁶³ Yet, the court rejected the inference that the CropLife defendants controlled CropLife Ecuador.¹⁶⁴

¹⁵⁵ 711 F. Supp. 2d. 81 (D.D.C. 2010).

¹⁵⁶ *Id.* at 85–86.

¹⁵⁷ *Id.* at 86.

¹⁵⁸ *Id.* at 87.

¹⁵⁹ *Id.* at 90–115.

¹⁶⁰ *Id.* at 88, 103 n.24, 110–13.

¹⁶¹ *Acosta Orellana*, 711 F. Supp. 2d at 111.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

Again, like *Young*, additional facts that might have indicated the relationship between the various CropLife entities were unlikely to be easily available to plaintiffs. The entities are a complex network of trade associations, counting as members a number of incredibly powerful corporations like Monsanto and BASF.¹⁶⁵ The corporate structure and relationships of the different CropLife entities and their members are not easy to decipher, and the facts pled by the plaintiffs in this case arguably indicated that there was a relationship—one in which some of the entities controlled the activities of the entities in Ecuador. Yet the court, using *Twombly* and *Iqbal*, prevented the plaintiffs from moving forward on its vicarious liability theories because of their inability to plead more definitive facts that would make this claim plausible in the court's mind.

The substantive claims in *Young* and *Acosta Orellana* are very different; yet, the procedural problem in both cases is the same. The plaintiffs did not have the facts now required under *Twombly* and *Iqbal*. Further, the facts these plaintiffs needed were in the province of the defendants, so the plaintiffs were unlikely to garner those facts without discovery. Finally, and key to how a restrictive approach to pleading impacts vanishing plaintiffs, the plaintiffs in both cases were represented by small firms.¹⁶⁶ Assuming the lawyers were familiar with the federal doctrine and astute at assessing it, they were probably unable to expend the money necessary to do the pre-filing investigation that the pleading rules now require. For example, the solo practitioner who represented the plaintiff in *Young* may not have had the funds to investigate the City of Visalia's training practices. The same is true for the lawyers in *Acosta Orellana* who were unlikely to have the resources to expend on determining CropLife's complex corporate structure. Thus, even a plaintiff with enough resources to hire an attorney will often be unable to hire an attorney that is good enough to take on a restrictive procedural regime.

Finally, the critical question is what the social cost of losing cases like *Young* and *Acosta Orellana* on a motion to dismiss would be. If there is a systemic benefit, but also significant social costs when these cases are dismissed prematurely, then perhaps the move toward a re-

¹⁶⁵ See *Members*, CROPLIFE INT'L, www.croplife.org/public/our_members (last visited Feb. 17, 2012).

¹⁶⁶ The *Acosta Orellana* plaintiffs were represented by Conrad & Scherer, LLP, http://www.conradscherer.com/firm_profile.asp. See *Acosta Orellana*, 711 F. Supp. 2d at 85. The *Young* plaintiffs were represented by James C. Holland Jr., who was a sole practitioner at the time of this case, but is now a member of a small firm, Wist Holland & Kehlhof, L.L.P. (http://pview.findlaw.com/view/1689443_1). See *Young v. Visalia*, 687 F. Supp. 2d 1141, 1143 (2009).

strictive ethos should be reconsidered. With respect to these two cases, society has much to lose. In *Young*, premature dismissal means that laws intended to regulate the behavior of police officers are not enforced. The City of Visalia never has to define and defend its training policies and practices. And, with a pleading regime that now makes *Monell* claims incredibly difficult to bring, nationwide government officials' behavior will be largely unregulated. Similarly, the loss of a case like *Acosta Orellana* means that a potentially dangerous pesticide will continue to be used. That is because the case that could have exposed its danger to the immediate plaintiffs and an untold number of consumers will never be litigated. And going forward, CropLife's conduct will continue to be unregulated. More broadly, product liability cases—cases that will often be brought by a vanishing plaintiff—are more difficult to bring. The pertinent information about the product is largely in the hands of the defendant, and with premature dismissal under a restrictive pleading regime, the plaintiff will not have the ability to find information through discovery. Again, the regulatory effect is felt not just by the injured vanishing plaintiff, but also by the untold number of future victims. As discussed in Part III.C, when vanishing plaintiffs can no longer bring cases like *Young* and *Acosta Orellana*, the plaintiffs certainly lose, but so does society. When policymakers consider restrictive procedural changes, it is this loss that must be weighed more accurately against the benefit of less frivolous litigation.¹⁶⁷

¹⁶⁷ Contrary to these cases, in a sample case with similar facts that was decided well before *Twombly* and *Iqbal*, the motion to dismiss was denied. In 1993, the plaintiffs in *Doucet v. Wadja* brought a § 1983 action against the City of Westwego and some individual police officers. No. 92-4058, 1993 WL 92527, at *1 (E.D. La. Mar. 22, 1993). The plaintiffs alleged that while attending a family wedding, the police officers hired as security for the event used excessive force against them. *Id.* at *2. This alleged force included beating a paraplegic man, pointing a gun at a woman and her young child, and assaulting a senior member of the family. *Id.* Notably, the plaintiffs also alleged that the officers' conduct was a consequence of the City of Westwego's failure to train the officers. *Id.* at *3. Like the plaintiffs in *Young*, the *Doucet* plaintiffs alleged that the municipality had "a custom, policy, practice and procedure of negligently and inadequately hiring, training, supervising and retaining police officers with histories of police brutality" and that "the city condoned, ratified, approved or otherwise acquiesced in the actions of its officers." *Id.* The court in *Doucet* noted that under Rule 8's notice pleading requirements, this allegation was sufficient to survive a motion to dismiss. *Id.* (acknowledging the then-recent case of *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 169 (1993), where the Court struck down the Fifth Circuit precedent of requiring heightened pleading for claims against municipalities). Whether *Leatherman* has survived *Twombly* and *Iqbal* is a controversial question that cannot be answered with any certainty. In *Doucet*, the plaintiffs—individuals of little means represented by a sole practitioner—were able to see their case through the pleading stage and thus were able to regulate the behavior and conduct of the Westwego police officers and city gov-

B. Summary Judgment

Summary judgment is often explained as a paper trial—a term that insinuates a less-than-robust test of the merits of a plaintiff's case.¹⁶⁸ Many scholars have challenged summary judgment. They advocate for a jury trial, or even a bench trial, where witnesses testify in person and evidence is presented in a “live” setting.¹⁶⁹ Some scholars have even gone so far as to argue that summary judgment, as applied, is unconstitutional because it takes away one's right to a jury trial.¹⁷⁰ At the crux of these critiques, however, is not an argument that summary judgment is a bad procedural mechanism that ought to be completely jettisoned. Quite the contrary, most procedural scholars would probably agree that there is a time and a place for summary judgment—specifically, where the facts are settled and the only thing at issue is the law.¹⁷¹ It is the application of the standard that so many scholars find unsettling. Generally speaking, many commentators believe that judges make factual determinations in deciding motions for summary judgment even when those factual determinations are the province of the jury.¹⁷²

The ascendance of summary judgment as a procedural tool began in 1986 when the Supreme Court decided its “trilogy” of sum-

ernment. (The Doucets were represented by Douglas M. Schmidt of Douglas M. Schmidt, APLC.)

¹⁶⁸ See Miller, *supra* note 25, at 1062–73. In the section of his article discussing the use of summary judgment as a paper trial, Miller states, “Overly enthusiastic use of summary judgment means that trialworthy cases will be terminated pretrial on motion papers, possibly compromising the litigants’ constitutional rights to a day in court and jury trial.” *Id.* at 1071.

¹⁶⁹ See, e.g., *id.* at 984; Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988) (criticizing the court for its trilogy of cases).

¹⁷⁰ See e.g., Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007).

¹⁷¹ See, e.g., Miller, *supra* note 25, at 1021, 1041–44 (relying on the fact that Charles Clark, a member of the original Advisory Committee for the Federal Rules of Civil Procedure, supported the use of summary judgment, but only in cases “in which the material facts were not contested by either party,” to argue that current summary judgment practice is out of line with that original conception); Jeffrey W. Stempel, *Taking Cognitive Liberalism Seriously: Judicial Humility, Aggregate Efficiency, and Justice*, 43 LOY. U. CHI. L.J. 627, 636 (2012) (arguing that where facts are subject to different interpretations, and are therefore in dispute, summary judgment is not an appropriate mechanism for disposing of cases).

¹⁷² This is a bit of an over-generalization of the criticism levied at summary judgment, as there are more nuanced arguments to be made. But, many commentators, albeit in different terms, argue that judges make factual determinations in deciding summary judgment motions. See, e.g., Thomas, *supra* note 170, at 143.

mary judgment cases.¹⁷³ While each of these cases determined rather technical applications of summary judgment in three different substantive contexts,¹⁷⁴ the cases collectively communicated that summary judgment was a tool to be used with greater frequency by trial courts.¹⁷⁵ Courts responded to the trilogy by doing just that. In one recent study of six federal districts, researchers found that the number of summary judgment motions granted in whole or in part doubled between 1975 and 2000.¹⁷⁶ That same study determined that almost eight percent of cases were terminated at the summary judgment stage in federal court in 2000, an increase from the four percent terminated in 1975.¹⁷⁷ Moreover, a 2006 study of seventy-eight federal districts determined that when summary judgment motions are brought, sixty percent are granted in whole or in part.¹⁷⁸ In

¹⁷³ Miller, *supra* note 25, at 984. *But see* Stempel, *supra* note 169, at 160 (arguing that Rule 56 was used “frequently and often” even before the trilogy).

¹⁷⁴ *Matsushita* determined that plaintiff’s evidence had to be of a particular quality to allow her to survive summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597–98 (1986). *Liberty Lobby* held that the standard of proof at trial applied equally at the summary judgment stage. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 244 (1986). Finally, in *Celotex*, the Court determined that a moving party could carry its burden of production by pointing to the absence of evidence in the record. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party did not need to present affirmative evidence where it did not bear the burden of proof at trial. *Id.* at 323–25.

¹⁷⁵ Chief Justice Rehnquist wrote on behalf of the Court, “Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole.” *Celotex Corp.*, 477 U.S. at 327; *see also* Miller, *supra* note 25, at 1041 (“On a practical level, the three decisions collectively forge a new, stronger role for the motion.”).

¹⁷⁶ Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 883 (2007).

¹⁷⁷ *Id.* The study states that these changes, along with others in the study, were not “statistically significant.” *Id.* at 862. While this may be true as a statistical matter, the percentage of terminated cases undoubtedly increased. In addition, studies of summary judgment activity cannot accurately assess the chilling effect of changes to summary judgment practice. *See* Brooke D. Coleman, *Summary Judgment: What We Think We Know Versus What We Ought to Know*, 43 LOY. U. CHI. L.J. 707, 722 (2012); *see also* Kent Sinclair & Patrick Hanes, *Summary Judgment: A Proposal for Procedural Reform in the Core Motion Context*, 36 WM. & MARY L. REV. 1633, 1661–62 (1995). In this study, Sinclair and Hanes found that the percentage of summary judgment motions granted in federal court increased from fifty-four percent in 1955 to sixty-five percent in 1993. Sinclair & Hanes, *supra*, at 1660.

¹⁷⁸ Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Hon. Michael Baylson for Estimates of Summary Judgment Activity in Fiscal Year 2006, at 2–3 (2007) [Cecil & Cort Memorandum], *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/\\$file/sujufy06.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf).

sum, summary judgment is a paradigmatic example of the shift from a liberal to restrictive ethos in procedural doctrine.¹⁷⁹

A restrictive application of summary judgment affects the vanishing plaintiff differently from other plaintiffs because her narrative matters. As noted in Part III.B, the vanishing plaintiff stands outside of dominant mainstream constructions of race, gender, sexuality, and/or culture. Federal judges are inside that mainstream; thus, there is almost certainly a lack of “sameness” with the judge who is deciding her case.¹⁸⁰ Instead of presenting her case to a jury in an open court, the vanishing plaintiff is relegated to a paper presentation of her argument, often without oral argument or an otherwise open forum, in front of a judge who has a much lower chance of finding some commonality with her than a jury of her peers might. This collision of a paper record, a single adjudicator, and the marginalized nature of the vanishing plaintiff cause her to be affected differently from other plaintiffs when summary judgment is applied restrictively.

A recent case involving a vanishing plaintiff demonstrates this point. This case was decided on summary judgment at the district court level. In *Creed v. Family Express Corp.*, the plaintiff, Amber Creed, was employed by a small convenience store chain in Indiana called Family Express.¹⁸¹ Creed is a transgender woman.¹⁸² When she interviewed for a position at Family Express, she presented herself as a man and called herself Christopher Creed.¹⁸³ Over the course of the next few months, she began to feminize her appearance.¹⁸⁴ Creed

¹⁷⁹ See Issacharoff & Lowenstein, *supra* note 56, at 75 (“[S]ummary judgment fundamentally alters the balance of power between plaintiffs and defendants by raising both the costs and risks to plaintiffs in the pretrial phases of litigation while diminishing both for defendants.”); Miller, *supra* note 25, at 1016–57; D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court’s New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 37 (1988); Stempel, *supra* note 169, at 160 (arguing that the trilogy of cases made summary judgment more pro-defendants). But see Jack Achiezer Guggenheim, *In Summary It Makes Sense: A Proposal to Substantially Expand the Role of Summary Judgment in Nonjury Cases*, 43 SAN DIEGO L. REV. 319 (2006) (arguing that summary judgment is a valid and efficient procedure).

¹⁸⁰ See *supra* note 87.

¹⁸¹ No. 3:06-cv-465RM, 2009 WL 35237, at *1 (N.D. Ind. Jan. 5, 2009).

¹⁸² *Id.* I have modified the court’s language when it describes Creed because such language reflects a controversial approach to recognizing transgender individuals only when supported by medical authority. For a critique of this approach, see Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15 (2003).

¹⁸³ *Creed*, 2009 WL 35237, at *1.

¹⁸⁴ *Id.*

identifies as female and, at work, she began to wear a feminine hair-style, makeup, and nail polish.¹⁸⁵

Creed received exemplary employment evaluations from both her supervisors and customers.¹⁸⁶ However, as her appearance changed more drastically, some customers allegedly began to complain about Creed's appearance.¹⁸⁷ Around that time, her supervisors met with her and asked her to conform to the company's dress code and grooming policy.¹⁸⁸ That policy provided that all employees should "maintain a conservative, socially acceptable general appearance."¹⁸⁹ This included a requirement that males "maintain neat and conservative hair that is above the collar" and prohibited "earrings" or "body piercing[s]."¹⁹⁰ Her supervisors told her that they had to enforce this policy, meaning that she could no longer present herself as a woman at work.¹⁹¹ When Creed explained that she was transgender, going through the process of gender transition, and thus had to present as a woman, her supervisor responded by asking her if "it would kill [her] to appear masculine for eight hours a day."¹⁹² One supervisor also asked her why she had applied for the position when she knew she was going to start her gender transition.¹⁹³ Ultimately, Creed's supervisors presented her with an ultimatum—show up to work "as a man" or lose her job.¹⁹⁴ Creed refused their demands and was terminated.¹⁹⁵ Creed then filed a complaint in the District Court for the Northern District of Indiana.¹⁹⁶ The thrust of her complaint was that Family Express had discriminated against her on the basis of sex because it terminated her when "she failed to conform to stereotypes about how a man should appear."¹⁹⁷

Without going too deeply into the substantive background of Creed's claim, the germane issue in her case was whether she could

¹⁸⁵ *Id.* at *3.

¹⁸⁶ *Id.* at *2.

¹⁸⁷ *Id.* at *3.

¹⁸⁸ *Id.*

¹⁸⁹ *Creed*, 2009 WL 35237, at *2.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at *3.

¹⁹² *Id.* at *3, *4, *9.

¹⁹³ *Id.* at *3.

¹⁹⁴ *Id.*

¹⁹⁵ *Creed*, 2009 WL 35237, at *4.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at *7. Creed brought claims under Title VII and under Indiana's Civil Rights Act. *Id.*

present evidence that “she wouldn’t have been terminated but for her failure to conform to male stereotypes.”¹⁹⁸ To support her argument, Creed pointed to the discussions she had with her supervisors in which she was told to come to work “as a man,” asked if “it would kill her” to come to work as a man, and interrogated as to why she applied for the job knowing she was going to seek gender transition.¹⁹⁹ She also presented deposition testimony from one of her supervisors in which he admitted that he thought Creed looked different because of her “feminine appearance” and in which he stated that he did not “consider wearing makeup or having long hair to be masculine characteristics.”²⁰⁰ Moreover, Creed argued that the timing of her termination was suspect.²⁰¹ Family Express had alleged that it received numerous complaints about Creed; yet, she did not learn about them until the day of her meeting with the supervisors (the day she was terminated).²⁰² She argued that this showed discriminatory animus because she was terminated on the heels of her supervisors starting to notice her physical changes.²⁰³ Finally, she argued that the customer complaints and grooming policy were pretext for discrimination.²⁰⁴ She specifically pointed to Family Express’s inability to produce any copies of the alleged customer complaints.²⁰⁵ Family Express countered with evidence, by way of its supervisors’ deposition testimony, that it terminated Creed because she did not conform to its dress code and grooming policy, and not because she was not “male enough.”²⁰⁶

The court entered summary judgment in favor of Family Express.²⁰⁷ It found that “[t]he totality of Ms. Creed’s evidence creates

¹⁹⁸ *Id.* at *8.

¹⁹⁹ *Id.* at *3, *4, *9.

²⁰⁰ *Id.* at *9.

²⁰¹ *Creed*, 2009 WL 35237, at *9.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at *10.

²⁰⁵ *Id.* Family Express claimed that the complaints logged over the internet were deleted and that one of its supervisors could not find the notes he took to document the telephone complaints he received. *Id.* The court found no evidence of bad faith on the part of Family Express in failing to produce this evidence. *Id.* Moreover, the court found that the customer complaints did not motivate Creed’s termination—her failure to comply with the grooming policy did. *Id.*

²⁰⁶ *Id.* at *9–10.

²⁰⁷ *Creed*, 2009 WL 35237, at *9–10.

no genuine issue of material fact that Family Express terminated her based on her gender.”²⁰⁸ Here is a vanishing plaintiff.

In Creed’s case, her identity and substantive claims were firmly outside dominant mainstream culture’s awareness of what constitutes gender and gender discrimination.²⁰⁹ To begin with, the substantive claim itself was innovative. There is a split of authority regarding whether Title VII prohibits discrimination against transgender individuals based on sexual stereotyping, so Creed had an incredible substantive hurdle to overcome.²¹⁰ Even when the judge applied a generous construction of the substantive law, however, Creed’s claim failed on summary judgment.²¹¹ In the eyes of this particular judge, there was no genuine issue of material fact about why Family Express terminated Creed. In the judge’s mind, the business terminated her because she did not conform to the company’s dress code and grooming policy.²¹² Yet, when reading this case, it seems highly probable that reasonable jurors might disagree with the judge’s conclusion. The evidence presented—statements made to Creed by her supervisors, the timing of her termination, and the supervisors’ deposition statements—may have led a jury to an impression that

²⁰⁸ *Id.* at *10.

²⁰⁹ For more information about transgender individuals, see generally AM. PSYCHOLOGICAL ASSOC., ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION (2011), available at <http://www.apa.org/topics/sexuality/transgender.pdf>.

²¹⁰ Under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), an individual can state a Title VII claim if she alleges that she was discriminated against because she failed to conform to sex stereotypes. However, some courts have rejected the application of *Price Waterhouse* to transgender individuals altogether. See, e.g., *Etsitty v. Utah Transit Auth.*, No. 2:04CV616, 2005 WL 1505610, at *5 (D. Utah June 24, 2005) (“There is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman. Such drastic action cannot be fairly characterized as a mere failure to conform to stereotypes.”); *Underwood v. Archer Mgmt Servs., Inc.*, 857 F. Supp. 96, 98 (D.D.C. 1994) (rejecting the application of Title VII to claims of discrimination by transgender individuals); *Dobre v. Nat’l R.R. Passenger*, 850 F. Supp. 284, 286–87 (E.D. Pa. 1993) (same). But see *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (applying *Price Waterhouse* to discrimination case by transgender individual); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (same); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006) (same).

²¹¹ *Creed*, 2009 WL 35237, at *11.

²¹² *Id.* at *9.

there was an issue of fact regarding what motivated her termination. That issue of fact would have been best resolved by observing the witnesses and hearing all of the evidence. However, on summary judgment, no testimony is heard and the evidence is presented piecemeal. In this case, such a presentation led the judge to determine that there was no issue of fact for the jury to decide.²¹³

The judge's bias, if any, in this case cannot be known. However, it is possible that this claim was just not tenable to the judge—it was outside of the judge's (and much of society's) dominant views of gender. Thus, for the judge, it was easier to explain the defendant's behavior by pointing to an accepted grooming and dress code policy than it would be to delve more deeply into gender stereotypes. This is not to say that this judge did not understand the substantive claim or that the judge was not sensitive to the issues in this case. However, this claim undoubtedly pushes the boundaries of one's understanding of gender in a way that is difficult for many people, including judges, to accept.²¹⁴ It is when these boundaries are pushed that a vanishing plaintiff benefits from presenting her narrative before a jury in open court. Or put another way, it is at these boundaries where a vanishing plaintiff is distinctly disadvantaged by a restrictive application of summary judgment—where her claim is resolved by one adjudicator on a paper record.

Even assuming that the analysis so far is true, one could argue that all plaintiffs will be equally impacted by these observations in the context of summary judgment. In most cases, the plaintiff will have a different normative view than the judge reviewing her case—whenever the plaintiff loses, she could say that the judge does not agree with her worldview. In other words, summary judgment will impact all plaintiffs equally. This is not the case.

For instance, most discrimination claims require a fact-finder to weigh what a reasonable person would experience as discriminatory conduct.²¹⁵ With summary judgment, a judge can determine what a

²¹³ *Id.* at *11.

²¹⁴ In my search for cases, I did the following search in Westlaw's federal district court published and unpublished opinion database: "Summary Judgment" /s Grant! & Transgender! & discriminat!.. The search resulted in forty-eight cases. Forty-one of those were inapposite either because they were prisoner civil rights cases (ten) or because they did not deal with transgender individuals alleging employment discrimination (thirty-one cases). Of the remaining seven cases, the defendants' motion for summary judgment was granted (including Creed's case), and in one case the defendant's motion for summary judgment was denied in part and granted in part.

²¹⁵ See *Saxton v. Amer. Tel. & Tel. Co.*, 10 F. 3d 526, 537 (7th Cir. 1993) ("Whether the plaintiff's work environment meets that standard is determined from the view-

reasonable person might believe as a matter of law, when, by all accounts, this is a factually intensive question upon which reasonable—for lack of a better term—people could disagree. As Professor Elizabeth Schneider explains, “[W]hat if the judge does not realize the differences between those views—his or her perspective and those of a ‘reasonable juror’? What if a judge does not have the humility, self-awareness, or insight to recognize the limitations of his or her own perspective?”²¹⁶ As already discussed, judges may make determinations or value judgments about what a reasonable person might perceive and that determination may vary greatly from that of a jury’s.²¹⁷ On summary judgment, a judge may perceive the facts from a normative viewpoint that is different from the plaintiff’s and may separate out facts, thereby frustrating a holistic view of what a plaintiff might be experiencing.²¹⁸ As a consequence, that judge may be deciding a motion for summary judgment in a way that is different from how he or a jury might adjudicate the same set of facts following trial.²¹⁹ In this way, the vanishing plaintiff is impacted differently than other plaintiffs.

However, even accepting that this depiction of a vanishing plaintiff is true, there is another question to answer: Why should society care? There are a few reasons. For one, summary judgment matters. Given the number of cases that actually go to trial in our federal civil justice system, it is more accurate to say that litigation functions in the shadow of the summary judgment motion than in the shadow of a trial. When summary judgment is granted in favor of a defendant, it generally ends the case.²²⁰ In contrast, when a defendant’s motion for summary judgment is denied, defendants generally offer to settle on

point of a reasonable employee.”); M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN’S STUD. 311, 315 (1999).

²¹⁶ See Schneider, *supra* note 85, at 766–67. Schneider discusses *Gallagher v. Delaney*, where Judge Weinstein emphasized the need in sexual harassment cases for factual assessment by a “jury made up of a cross-section of our heterogeneous communities” instead of “a federal judge [who] usually lives in a narrow segment of the enormously broad American socioeconomic spectrum, generally lacking the current real-life experience required to interpret subtle dynamics of the workplace based on nuances, subtle perceptions, and implicit communications.” 139 F.3d 338, 342 (2d Cir. 1998).

²¹⁷ See discussion *supra* Part III.B.

²¹⁸ For a suggested set of summary judgment “safeguards” that may mitigate these effects, see Edward Brunet, *Six Summary Judgment Safeguards*, 43 AKRON L. REV. 1165 (2010).

²¹⁹ For empirical analysis of this phenomenon in a recent controversial Supreme Court case *Scott v. Harris*, 550 U.S. 372 (2007), see Kahan et al., *supra* note 90.

²²⁰ Unless, of course, the plaintiff decides to appeal and then wins on appeal, but appeals are both costly and risky propositions.

considerably more generous terms than they would have pre-motion.²²¹

This outcome effect is especially acute in the civil rights and employment discrimination context where summary judgment motions are granted with greater frequency than in other substantive areas. A 2006 study of summary judgment cases in federal courts found that in civil rights cases, seventy percent of defendants' motions for summary judgment were granted, and in employment discrimination cases, seventy-three percent of defendants' motions for summary judgment were granted.²²² This means that for a large number of these kinds of cases, they are over well before they have a chance to be argued to a jury. This is often fatal because, as at least one study has indicated, jury trials are the only way for a plaintiff, who has not otherwise settled, to win her case.²²³ For example, in a study conducted by Professor Wendy Parker, in the 656 cases she studied, 421 were resolved on the merits by the court, which means that the other 235 cases settled.²²⁴ Of those 421 cases, the plaintiffs won only six cases, and all six of those cases were tried before a jury.²²⁵

And, as discussed in Part III.C, the social benefit of vanishing plaintiffs' claims matter because of the path-breaking and regulatory benefits. Thus, in Creed's case, what does society lose when her claim is prematurely terminated? Namely, society loses the ability to regulate Family Express's behavior. Because Creed's case was not permitted to reach the trial to be fully and publicly adjudicated, employers like Family Express can more easily discriminate against transgender individuals. More broadly, if all vanishing plaintiffs' claims are sifted out through a restrictive procedural regime, discrimination laws will remain largely unenforced. These laws rely on a private right of action; therefore, to eliminate the kind of innovative claims brought by vanishing plaintiffs on procedural grounds is to render these laws unenforced.²²⁶

²²¹ See Issacharoff & Lowenstein, *supra* note 56, at 99–100.

²²² Cecil & Cort Memorandum, *supra* note 178, at 6. For contracts cases, the rate was fifty-three percent; for tort cases, the rate was fifty-four percent; for prisoner cases, the rate was sixty-four percent; and for "other" cases, the rate was fifty-three percent. *Id.* at 6–7.

²²³ Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 894 (2006).

²²⁴ *Id.* at 941.

²²⁵ *Id.*

²²⁶ As a counter to these cases, in a sample case with similar facts that was decided right before the summary judgment trilogy, the motion for summary judgment was denied. In 1984, a female Federal Highway Administration employee, Judy Carol

Getting a case before a jury does not mean that the plaintiff will win, nor does it mean that the summary judgment motions were wrongly decided. It could be that even a jury of one's peers would ultimately decide that plaintiff's claim is not a winning claim. The point is that when such a high number of summary judgment motions are granted by virtue of a restrictive approach to procedural doctrine, it must be assumed that some of those claims are meritorious. Knowing that some of those meritorious claims are brought by vanishing plaintiffs should lead those responsible for crafting procedural doctrines to consider what advantages might be gained from keeping those claims in the system. Stated another way, when considering whether to move to a restrictive procedural system, one should ask what might be lost systemically if vanishing plaintiff claims are differently impacted by such a move.²²⁷

Holland brought an employment discrimination action in a case called *Holland v. Dole*, 591 F. Supp. 983 (M.D. Tenn. 1984). Holland alleged that while she had been trained and groomed for a promotion for over three years, she was ultimately denied that position because, as she alleged, her immediate supervisor did not want a woman in the position. *Id.* at 988. The defendant moved for summary judgment in the case, providing evidence that the position Holland sought had been moved to a different geographic location; thus, Holland had not been hired simply because she was unwilling to relocate. *Id.* at 989. The defendant further argued that it did not discriminate against Holland based on her gender because it ultimately hired a female candidate for the position. *Id.* at 989–90. In spite of this evidence, the judge denied the motion for summary judgment, stating that “the credibility of the defendants’ agents’ assertions must be judged at trial.” *Id.* at 990.

²²⁷ In addition to the restrictive procedural changes that are highlighted in this Part, there are others. For example, Rule 11 sanctions and the CAFA. As discussed earlier, *supra* note 27, Rule 11 was amended in 1983 to require sanctions for “frivolous” filings. That amendment was softened in 1993 to give judges discretion to sanction parties and their lawyers, but many commentators have noted that, even under the revised rule, there is still a chilling effect on plaintiffs. *See supra* note 27 *supra*. For example, the FJC recently conducted a survey of plaintiffs’ and defendants’ attorneys in which the FJC solicited feedback about the federal civil justice system as a whole and about specific procedural rules. WILLGING & LEE III, *supra* note 73. One plaintiff’s attorney stated the following about current Rule 11 and why his small firm did not take on a particularly innovative claim, “Fortune 500 companies can afford to absorb Rule 11 sanctions but our firm and our clients cannot. That’s an imbalance.” *Id.* at 36. The claims that I discussed in the previous Part—vicarious liability claims against a trade association of pesticide manufactures or a sexual discrimination suit by a transgender individual—are claims that are innovative. As the lawyer in the survey above noted, these kinds of claims are often made in good faith, but it is difficult for small firms or solo practitioners to take on the risk associated with them when sanctions are threatened. The risk that a judge may find that the claim is not innovative, but instead is not supported by the law, is just too great for many practitioners. Yet, the solo practitioner or small firm is exactly the place where the vanishing plaintiff will seek counsel. *See discussion supra* Part III.A. In this way, the restrictive approach to sanctions disparately impacts the vanishing plaintiff.

V. CONCLUSION

A more liberal procedural regime fosters many social goods. Thus, the institutions responsible for procedural doctrine—the Court, Congress, and rulemaking bodies—should be mindful of how restrictive changes to the procedural regime affect the vanishing plaintiff. It may not be the case that a return to the pure ideals of the liberal ethos is achievable or even attractive. If the civil justice system is so burdened that it cannot efficiently adjudicate claims, this is not a good result for any litigant, especially the vanishing plaintiff. Yet, when constructing procedural rules, these institutions should be mindful of and weigh the impact of their decisions on vanishing plaintiffs. In other words, when these institutions are at the tension point of deciding whether the loss of some meritorious claims is a worthy sacrifice, they should consider whose meritorious claims these are. If the sacrificed claims are the vanishing plaintiffs', that factor should be heavily weighed when considering that particular procedural change. As shown in this Article, the civil justice system and society have much to gain from vanishing plaintiffs' claims, and these gains should not be undervalued.

Thus, at the very least, these institutions must consider the vanishing plaintiff and whether a restrictive change to procedure affects her. This must be done on a case-by-case basis, however. There are some procedural changes that may not impact the vanishing plaintiff at all.²²⁸ However, when deciding the inevitable case challenging *Iqbal*

Another restrictive change to procedural doctrine is CAFA. As already discussed, the Act essentially confers federal subject matter jurisdiction over all class actions seeking damages in excess of \$5 million. According to commentators, Congress passed this legislation at the behest of "business and manufacturers' groups." *See, e.g.,* Cabraser, note 28, at 448. While class actions are certainly not a plaintiff's panacea, they are a useful procedure for plaintiffs' attorneys because they allow the attorney to consolidate claims, thus exceeding that magic \$1 million filing benchmark. *Id.* at 440. Class actions are useful for individual plaintiffs as well because they incentivize plaintiffs who would not otherwise seek recourse on their own to pursue their legal claims collectively. *Id.* Yet, CAFA has affected the ability of individuals to seek redress through class actions. *Id.* at 448. This is because almost all class actions are now effectively federal court matters, and federal courts are less likely to certify class actions. *Id.*; *see also* Spencer, *supra* note 7, at 363. Thus, CAFA is like the restrictive procedural changes already discussed. Vanishing plaintiffs often benefit from class actions because the procedure allows individual plaintiffs with smaller claims to find a well-qualified lawyer to take their case. Moreover, class actions are often innovative claims, and in this way, some vanishing plaintiffs suffer from the inability to use the procedure. Finally, class actions often serve a private regulatory function. The decrease in class actions thus impacts both the vanishing plaintiff's ability to seek redress and society's ability to benefit from that litigation.

²²⁸ Ministerial or technical changes, for example, should not require policymakers to consider the vanishing plaintiff.

and its plausibility pleading standards, the Court should consider both the benefits of plausibility pleading (protection of defendants from frivolous claims) as well as the costs (the effect of such a pleading requirement on the vanishing plaintiff). Only when the vanishing plaintiff is considered can a truly fair and neutral procedural regime be constructed.

This means that we need to know more about the vanishing plaintiff. This Article is just the beginning of determining how to ensure that her claims are not lost. It gives this plaintiff a name and demonstrates her import to our civil justice system and society. But there is a need for a fuller picture of who she is. Empirical work will be required to determine how particular procedural changes affect the vanishing plaintiff differently from other plaintiffs. This kind of study should happen at the rulemaking level—the committees should endeavor to understand the impact of rule changes before making them. Moreover, the Court and Congress should do the same. But such analysis should also happen in the scholarly discourse. There is a dearth of work that explains and understands the true nature of how plaintiffs are affected by procedural doctrine. A more robust understanding and description of the vanishing plaintiff would go a long way toward helping create a better procedural regime.