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THE DANGERS OF SUMMARY JUDGMENT: GENDER AND FEDERAL CIVIL LITIGATION

Elizabeth M. Schneider[*]

I. INTRODUCTION

The interconnections of procedure and gender have been the subject of much national attention, as many federal and state Gender Bias Task Force reports have documented ways in which gender bias impacts procedure.[1] These issues have also been the focus of considerable scholarship.[2] In this Article, I turn to one of the most

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1. According to the National Center for States Courts website, thirty-nine states, the District of Columbia, and nine federal circuits currently have a Gender Bias Task Force. *See* http://www.ncsconline.org/wc/CourTopics/FAQ.asp?topic=GenFai#FAQ476 (last visited Aug. 8, 2006). For two representative reports, see, e.g., *Final Report & Recommendations of the Eighth Circuit Gender Fairness Task Force*, 31 CREIGHTON L. REV. 9 (1997) [hereinafter *Eighth Circuit Report*]; *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force: The Quality of Justice*, 67 S. CAL. L. REV. 745 (1994) [hereinafter *Ninth Circuit Report*].

2. For gender and procedure scholarship generally, see Symposium, *Feminist Jurisprudence and Procedure*, 61 U. CIN. L. REV. 1139 (1993) (discussing critical ways in which gender influences procedure, including jurisdiction, jury selection, and gender bias in the courtroom).

important procedural devices in federal civil procedure—summary judgment—and examine its problematic application through a study of gender cases. Identifying a new dimension of the interrelationship between procedure and gender, I explore the ways in which summary judgment impacts cases involving gender and how gender impacts judicial decision making on summary judgment. I use these insights to analyze the dangers of current summary judgment practice and propose reforms.

Summary judgment in the federal courts is an area of civil practice in which there has been considerable change over many years.[3] Rule 56 of the Federal Rules of Civil Procedure (FRCP) provides that summary judgment can only be granted if there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."[4] Historically, summary judgment was disfavored, and was not to be granted liberally because of the preference for jury trial. Cases that presented issues of credibility and weight of evidence were deemed inappropriate for summary judgment. However, the trilogy of Supreme Court decisions in 1986—*Matsushita*,[5] *Liberty Lobby*,[6] and *Celotex*[7]—provided impetus and encouragement to district courts to grant summary judgment.[8] Federal trial judges are now more likely to grant summary judgment,[9] depriving litigants of the opportunity for jury

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3. *See generally* Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897 (1998).

4. FED. R. CIV. P. 56(c).

5. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

6. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

7. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

8. Some scholars argue that the trilogy merely reflected changes that were already taking place with respect to summary judgment practice and did not cause those changes. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004). A new empirical study of federal court summary judgment practice over the last twenty-five years "call[s] into question the interpretation that the trilogy led to expansive increases in summary judgment." Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPRICAL LEGAL STUD. 861, 862 (2007). But there is no dispute that the trilogy has encouraged district judges to view summary judgment as an appropriate and important vehicle to dispose of cases. For a full discussion of the history of summary judgment, see Burbank, *supra*, and Wald, *supra* note 3.

9. *See* Wald, *supra* note 3, at 1942.

> My review of the D.C. Circuit's summary judgment rulings over a six-month period suggests that judges will stretch to make summary judgment apply even in borderline cases which, a decade ago, might have been thought indisputably trial-worthy. It also suggests that appellate courts will, by and large, uphold these dispositions, unless they think the trial judge got the law wrong.

trial (and the chance to have the merits of their claims determined by a more diverse group of decision makers).[10] For this reason, the federal "summary judgment industry"[11] has been the subject of much recent scholarly attention.[12] Increasing concern with "the vanishing trial" in federal civil cases[13] makes summary judgment a particularly important subject of inquiry.

This trend toward more frequent granting of summary judgment has had troubling consequences. In 1998, Judge Patricia Wald, a

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Id. See also Arthur R. Miller, *The Pretrial Rush To Judgment: Are the "Litigation Explosion," "Liability Crisis" and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (arguing that courts value efficiency over litigants' rights to jury trials). Despite a widespread view that summary judgment motions have increased across the board and that they are more routinely granted, Joe Cecil and his colleagues suggest that "[a]lthough summary judgment motions have increased over this twenty-five year period, this increase reflects, at least in part, increased filings of civil rights cases, which have always experienced a high rate of summary judgment motions." Cecil et al., *supra* note 8, at 862.

10. Although state courts have their own rules, there are signs of similar changes on the state level. *See, e.g.*, Robert W. Clore, *Texas Rule of Civil Procedure 166a(i): A New Weapon for Texas Defendants*, 29 ST. MARY'S L.J. 813, 821 (1998) (analyzing changes to the summary judgment rule in Texas and comparing it to the federal rule); *see also* Kevin Livingston, *California May Shift Burden to Defense*, NAT'L L.J., June 18, 2001 (describing proposed California summary judgment bill that would require the defense to prove that a case is without merit).

11. Milton I. Shadur, *From the Bench: Trial or Tribulations (Rule 56 Style)?*, LITIG., Winter 2003, at 5 (describing "the growth of the summary judgment industry as a replacement for the civil trial").

12. *See* Miller, *supra* note 9; Wald, *supra* note 3; *see also* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007); Edward Brunet, *Markman Hearings, Summary Judgment, and Judicial Discretion*, 9 LEWIS & CLARK L. REV. 93 (2005); Burbank, *supra* note 8; Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91 (2002); 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); Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329 (2005); Adam N. Steinman, *The Irrepressible Myth of* Celotex: *Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81 (2006); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007).

13. In December 2003, the ABA Section of Litigation convened a meeting of federal and state judges, law professors, and lawyers to discuss "the vanishing trial" in both civil and criminal cases. *See* Adam Liptak, *U.S. Suits Multiply, But Fewer Ever Get To Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at A1. *See also* Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); *Vanishing Trial Symposium*, 2006 J. DISP. RESOL. 1; Margo Schlanger, *What We Know and What We Should Know about American Trial Trends*, 2006 J. DISP. RESOL. 35. Ironically, this project led to the development of the new ABA Principles Relating to Juries and Jury Trials. *See also* Terry Carter, *The Verdict on Juries*, A.B.A. J., April 2005, at 40 (describing the recommendations). Legal commentators have recently taken note of these developments. *See* Adam Liptak, *Cases Keep Flowing In, But The Jury Pool Is Idle*, N.Y. TIMES, Apr. 30, 2007, at A14.

former Chief Judge of the United States Court of Appeals for the D.C. Circuit, expressed concern about the development and direction of summary judgment in the federal courts.[14] She emphasized the importance of:

> [E]nsuring that summary judgment stays within its proper boundaries, rather than [of] encouraging its unimpeded growth. Its expansion across subject matter boundaries and its frequent conversion from a careful calculus of factual disputes (or the lack thereof) to something more like a gestalt verdict based on an early snapshot of the case have turned it into a potential juggernaut which, if not carefully monitored, could threaten the relatively small residue of civil trials that remain.[15]

Other scholars have also been critical of the "new" summary judgment[16] and proposed reforms of summary judgment.[17] Some recent scholarship has proposed that summary judgment should be abolished on the ground that it is unconstitutional and/or inefficient.[18] There are, of course, other views.[19] But regardless of one's view of summary judgment in theory or as a matter of policy, summary judgment is not going away. New decisions of the Supreme Court last Term on civil procedure underscore the Court's enthusiasm for and endorsement of summary judgment.[20] My read of the current procedural landscape, based on these and other decisions, presentations to and discussions with many federal judges, and the

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14. Wald, *supra* note 3, at 1917.

15. *Id.*

16. *See generally* Miller, *supra* note 9.

17. *See, e.g.*, Burbank, *supra* note 8; Friedenthal & Gardner, *supra* note 12; Redish *supra* note 12.

18. *See* Miller, *supra* note 9; Thomas, *supra* note 12; Bronsteen, *supra* note 12.

19. District Judge Shira Scheindlin has approached summary judgment more sympathetically and questioned the assumption that juries, not judges, should be evaluating sexual harassment cases. Shira A. Scheindlin & John Elofson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL'Y REV. 813, 852 (1999) ("For all their virtues, juries cannot contribute much to the effort to define sexual harassment better–by granting summary judgment in proper cases and carefully reviewing jury findings, however, judges can."). *See also* Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004) (proposing a new mandatory summary judgment procedure at the beginning of a lawsuit to dispose of "nuisance-value" claims).

20. In *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007) and *Scott v. Harris*, 127 S. Ct. 1769 (2007), the Supreme Court affirmed the importance of summary judgment. In *Bell Atlantic*, the Court suggested that there should be a heightened standard of pleading for Rule 12(b)(6) motions that would result in dismissal of cases even earlier than summary judgment. *See* discussion of *Bell Atlantic infra* note 48. In *Scott*, the Supreme Court reversed the lower court's denial of summary judgment in a 42 U.S.C. § 1983 action involving a claim for damages against the police for a car chase because of a video that the court watched, and found that there was no need for a jury determination. *See* discussion of *Scott infra* pp. 720-21.

scope of current Advisory Committee on Civil Rules consideration of Rule 56,[21] is that summary judgment is here to stay.

Summary judgment is necessarily a very case-specific and fact- and law-specific determination. Summary judgment decision making at the trial level, and appellate review of grants of summary judgment, involves subtle assessment of the strength of the plaintiff's case based on what may be a very abbreviated record—assessment of the plaintiff's legal case in the context of discovery. Traditional application of summary judgment meant that judges should not grant it if there were material issues of fact in dispute, for issues of fact and credibility were to be assessed by the jury. These days, however, federal judges, spurred on by the Supreme Court, pressure to clear dockets, and perhaps even dislike of or discomfort with certain claims—whether employment discrimination, sexual harassment, or Family Medical Leave Act cases—grant summary judgment. Summary judgment decision making necessarily involves a tremendous amount of discretion, and discretion can be the locus of hidden discrimination. Recent data suggest that seventy percent of summary judgment motions in civil rights cases and seventy-three percent of summary judgment motions in employment discrimination cases are granted—the highest of any type of federal civil case.[22] The question I ask is, where women plaintiffs are involved, or where gender is an issue in the case, how is summary judgment applied?

Several federal Gender Bias Task Force reports have suggested that the application of summary judgment, at least in employment

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21. Current Advisory Committee consideration of summary judgment is focusing on procedures by which a motion for summary judgment is made. "The Committee has been reluctant to reconsider the standard for deciding whether there is a genuine issue of material fact. But there is continuing interest in revising the procedures for considering a Rule 56 motion . . . ." Minutes of the Civil Rules Advisory Committee Meeting, May 2006, www.uscourts.gov/rules/Minutes/CV05-2006-min.pdf (last visited Feb. 25, 2007). "The [Advisory Committee on Civil Rules] is studying possible changes to Rule 56. Principally the committee is considering amendments that would standardize the processes of moving for and responding to summary judgment, such that summary judgment practice would be largely uniform across the federal districts." Posting of Steven Gensler, Professor of Law, University of Oklahoma Law School and member of the Advisory Committee on Civil Rules, to CIV-PRO@listserv.nd.edu (Sept. 12, 2006) (on file with author).

22. *See* JOE CECIL & GEORGE CORT, FEDERAL JUDICIAL CENTER, ESTIMATES OF SUMMARY JUDGMENT ACTIVITY IN FISCAL YEAR 2006 (2007) [hereinafter CECIL & CORT, ESTIMATES OF SUMMARY JUDGMENT ACTIVITY] (submitted to the Advisory Committee on Civil Rules on April 12, 2007). For civil rights cases, the national average of summary judgment grants was seventy percent and for employment discrimination cases it was seventy-three percent. *See id.* There were some judicial districts in which the grants of summary judgment in employment discrimination cases were as high as ninety-three percent. *See id.*

discrimination cases, is problematic.[23] These reports concluded that summary judgment was more likely to be granted to defendants in employment discrimination cases involving women plaintiffs.[24] For example, the *Eighth Circuit Report* and *Ninth Circuit Report* specifically discuss how gender plays a role in summary judgment in employment discrimination cases. The Eighth Circuit Task Force conducted a survey that revealed that "[o]ne-half of plaintiffs' attorneys and 10% of defendants' attorneys reported that summary judgment was granted too easily to defendants in discrimination cases."[25] In addition, "[j]udges reported that summary judgments were granted to defendants much more frequently than plaintiffs" and that "summary judgment in sex discrimination cases was relatively rare for plaintiffs."[26] The *Ninth Circuit Report* had similar findings and noted that judges were often impatient with sex-based employment discrimination claims.[27] Indeed, the *Ninth Circuit Report* found that a review of published opinions showed that "the majority of such claims filed over the past five years have been dismissed by the district courts, either by granting the defendant's motion to dismiss or for summary judgment."[28] Several scholars have documented and analyzed these developments on summary judgment in sex-based employment discrimination cases.[29] Racial and ethnic bias is an additional component for plaintiffs who are women of

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23. *See* Wald, *supra* note 3, at 1938-39.

24. The *Ninth Circuit Report* suggests that there is subtle gender bias at work in employment discrimination cases, working against female plaintiffs, witnesses, and lawyers. In addition to this gender bias, the *Ninth Circuit Report* suggests that there is a perception that judges dislike employment discrimination cases and are more dismissive of these cases, finding for the defendant far more frequently. Over a five year period, the Ninth Circuit reviewed twenty-six employment discrimination cases. Of these, the defendants had prevailed in twenty-three of them. Notably, more than half of these were reversed, either in full or in part, by the court of appeals. Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 126 (1999).

25. *Eighth Circuit Report*, *supra* note 1, at 73. Beiner also notes that the Second Circuit Task Force on Gender reported judicial impatience or stereotyped thinking in hostile work environment cases. Beiner, *supra* note 24, at 129 (citing PRELIMINARY DRAFT REPORT OF THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE COURTS 41-42 (1997)).

26. *Eighth Circuit Report*, *supra* note 1, at 74.

27. *Ninth Circuit Report*, *supra* note 1, at 885-89.

28. *Id.* at 886.

29. *See* Beiner, *supra* note 24; Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993); M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN'S STUD. 311 (1999); Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277.

color.[30] District Judge Jack Weinstein has cautioned that "[t]he dangers of robust use of summary judgment to clear trial dockets are particularly acute in current sex discrimination cases,"[31] and more recently, other judges have written decisions sharply criticizing summary judgment.[32]

This Article addresses "the dangers of robust use of summary judgment . . . in current sex discrimination cases," but expands the purview of Judge Weinstein's concern. I argue that these dangers are not just acute in sex discrimination cases, but in other cases involving women plaintiffs in federal court. There are many subtle ways in which judicial decision making with respect to summary judgment can be problematic: in judicial evaluations of female plaintiff credibility (which the Gender Bias Task Force reports and other studies have recognized as particular hurdles for women litigants and witnesses); in judicial assessment of the facts of the case or the strength of novel claims or rejection of novel arguments "as a matter of law"; in judicial determination of whether a "reasonable juror" could find for the plaintiff; and in judicial diminution and trivialization of the seriousness of harms suffered by women plaintiffs seeking redress in court.[33] These subtle problems of interpretation lurk in judicial assessment of both fact and law in the two prongs of summary judgment: whether there is a "genuine issue

30. *See* Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889 (2006); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001).

31. Gallagher v. Delaney, 139 F.3d 338, 343 (2d Cir. 1998). Judge Weinstein was sitting on a Second Circuit panel by designation.

32. *See* opinions discussed *infra* Parts III and IV, particularly recent decisions written by Judge Lay of the Eighth Circuit Court of Appeals. Numerous federal courts, in a range of employment discrimination cases, have picked up on Judge Weinstein's language and ideas concerning the dangers of overbroad use of summary judgment in *Gallagher v. Delaney*, and the preferred use of juries, as opposed to judges, in decision making. *See, e.g.*, Schiano v. Quality Payroll Sys., Inc., 445 F.3d 597, 605 (2d Cir. 2006); Thompson v. Conn. State Univ., 466 F. Supp. 2d 444, 451 (D. Conn. 2006); Murphy v. M.C. Lint, Inc., 440 F. Supp. 2d 990, 1015 (S.D. Iowa 2006); Schmidt v. State Univ. of N.Y. at Stonybrook, No. 02CV6083, 2006 WL 1307925, at *7-9 (E.D.N.Y. May 9, 2006); United States v. Shonubi, 895 F. Supp. 460, 482-88 (E.D.N.Y. 1995), *vacated*, 103 F.3d 1085 (2d Cir. 1997); *see also* Distasio v. Perkin Elmer Corp., 157 F.3d 55, 61 (2d Cir. 1998); Cunningham v. Town of Ellicott, No. 04CV301, 2006 WL 2921037, at *4 (W.D.N.Y. Oct. 11, 2006); Kendricks v. Erie County Med. Ctr., No. 02CV853, 2005 WL 3059086, at *2 (W.D.N.Y. Nov. 15, 2005); Scarbrough v. Gray Line Tours, No. 02CV203, 2005 WL 372194, at *1 (W.D.N.Y. Feb. 16, 2005); Cook v. Hatch Assocs., No. 02CV65A, 2004 WL 1396359, at *2 (W.D.N.Y. Mar. 19, 2004); Fagen v. Iowa, 301 F. Supp. 2d 997, 1010 (S.D. Iowa 2004).

33. *See generally Ninth Circuit Report*, *supra* note 1; *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 9 (1997); Lynn Hecht Schafran, *Credibility in the Courts: Why Is There a Gender Gap?*, JUDGES' J., Winter 1995, at 5.

as to any material fact" or whether "the moving party is entitled to a judgment as a matter of law."[34] The interpretation of what facts are "genuine" or "material" rests on the judge's broader understanding of the legal issues presented in the case. Law is inevitably malleable. Yet, these subtle aspects of bias may be invisible to the outside observer.

Why is the granting of summary judgment a problem? The first reason is that it ends the case for the plaintiff, and the plaintiff does not have the opportunity for a jury trial (in those cases where the plaintiff does have a right to jury trial).[35] But, of course, not every plaintiff should have the right to jury trial—for not every case is meritorious. The purpose of summary judgment is to separate out "necessary" trials from "unnecessary" trials, and the issue in any case in which a motion for summary judgment is made is whether trial is "necessary." However, in cases involving women plaintiffs where legal arguments are frequently novel and innovative, where subtle issues of credibility, inferences, and close legal questions may be involved, where issues concerning the "genuineness" or "materiality" of facts are frequently intertwined with law, a single district judge may be a less preferable decision maker than a jury. Juries are likely to be far more diverse and bring a broader range of perspectives to bear on the problem.[36]

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34. FED. R. CIV. P. 56.

35. Is there a difference between summary judgment and bench trials? The fact-finder is the same, but the nature of the proof, evidence, and procedural posture are different. *See* Guggenheim, *supra* note 12, at 324. *See* discussion of bench trials *infra* Part VII.

36. In *Gallagher,* Judge Weinstein observed that "[a] federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations," and that "a jury made up of a cross-section of our heterogeneous communities" is the best arbiter of such issues. 139 F.3d at 342. Judge Weinstein further observed that "[w]hatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications." *Id. See also* discussion of diversity of the judiciary *infra* Part VII.

Current statistics on the diversity of the federal judiciary support this view. Across all federal courts, there are 1288 sitting judges. Federal Judicial Center, http://www.fjc.gov/history/home.nsf (follow "Judges of the United States Courts" hyperlink; then follow "The Federal Judges Biographical Database" hyperlink to enter research terms for sitting judges by gender and/or race). Of these judges, only approximately eighteen percent are female. *Id.* Looking at both male and female judges, nine percent are African American, five percent are Hispanic, and less than one percent of judges are either Asian American or Native American. *Id.* Of the female judges, twelve percent are African American, seven percent are Hispanic, and only one female judge, less than one percent, is Asian American. *Id.* There are no Native American female judges. *Id.*

Even if we do not assume that a jury would reach a different conclusion on the facts of a particular case than a judge[37] (which, of course, we can never know), the presentation of live evidence before a jury and the telling of the full story in a public setting can make an important difference to a plaintiff, even if she ultimately loses. She will have had her "day in court," the facts of her case will have been heard, and arguably even authenticated. These issues of "process" can matter a great deal to plaintiffs.[38] Public disclosure of legal issues also matters in important ways to the evolution of the law. If women's experiences of harm that would otherwise be "invisible" are heard more frequently in courts and public settings, those experiences may ultimately be viewed by judges as constituting a legal claim, and take on legal "visibility." As others have argued, federal jurisprudence should be developed on a live record, with law shaped by facts, not on summary judgment.[39]

The critical role of summary judgment in cases involving women plaintiffs discussed in this Article is a new dimension of research on civil litigation, gender discrimination, and gender bias in the federal courts. As a teacher and scholar of procedure and gender and law, and a former civil rights lawyer, much of my teaching and writing has centered on the intersection of gender and procedure.[40] This

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Data seem to support this idea of juries being more diverse and bringing broader perspectives to bear. In one study of several major cities, women comprised 52.9% of federal court juries. Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 325 n.3 (1995). *See also* Nancy Marder, *Books of Interest*, ASS'N OF AM. LAW SCHOOLS SECTION ON CIVIL PROC. NEWSLETTER (Ass'n of Am. Law Schools), Fall 2006, at 11, 12 (summarizing JAMES SUROWIECKI, THE WISDOM OF CROWDS (2004)) ("Groups of people . . . tend to reach a more accurate answer than an individual decision-maker when the groups are large and diverse and when the members can draw from their individual knowledge or perspective and can hold their views independently without feeling the need to succumb to peer pressure.").

37. *See* discussion of judge versus jury decision making *infra* Part VII.

38. *See generally* Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355 (2003).

39. Miller, *supra* note 9; Wald, *supra* note 3.

40. I have long been interested in the way in which procedural disputes are a locus of "hidden" issues of gender. *See* Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 U. CIN. L. REV. 1223 (1993) (describing how insights derived from feminist legal theory can contribute to a richer understanding of procedure); *see generally* Symposium, *Feminist Jurisprudence and Procedure*, *supra* note 2. Conversely, my work on gender and law, and violence against women, has been shaped by sensitivity to procedural issues. ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000); ELIZABETH M. SCHNEIDER, CHERYL HANNA, JUDITH G. GREENBERG & CLARE DALTON, DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE (2d ed. 2008); CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW (2001).

Article details this intersection in the context of summary judgment in order to deepen understanding of both gender cases and procedure. Looking at summary judgment through the lens of gender focuses on the troubling operation of current summary judgment practice in concrete contexts. Examining cases of women plaintiffs through the lens of summary judgment offers new insights to analysis of gender discrimination litigation. Many major women's rights cases that have brought about important changes in the law were originally dismissed on summary judgment. Some of these cases were recuperated on appeal or in the Supreme Court, where there was ultimate recognition of the merits and, indeed, the significance, of the legal claim.[41] If the litigants had not been able to appeal, and there had not been reversal on appeal, those claims would have been lost. Many other innovative claims concerning issues of gender may have been lost because they were dismissed on summary judgment and were not appealed. Thus, as Judge Wald has cautioned, the role that summary judgment plays in cutting off the development of the law warrants concern.[42] In cases that involve subtle aspects of gender bias, there are special risks.

In this Article, I explore the way in which gender plays a role in cases involving summary judgment in federal court, utilizing both qualitative and quantitative analysis, and focusing on a range of cases involving women plaintiffs.[43] I argue that judicial decision

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41. *See infra* Part IV.

42. Wald, *supra* note 3 at 1897-98.

43. I could look at issues of gender more broadly than in cases of women plaintiffs since "gender bias" is a broader phenomenon that affects both women and men. *See* Ann C. McGinley, *Masculinities At Work*, 83 OR. L. REV. 359 (2004) (discussing grants of summary judgment in hostile environment cases on a broader theory of "masculinities" that comprises both a structure that reinforces the superiority of men over women, and a series of practices, associated with masculine behavior, performed by men or women, that aid men in maintaining their superior position over women). I decided to start with women plaintiffs, while recognizing that gender bias can also operate in many other contexts, particularly in cases involving same-sex relationships or other "gender nonconformity." *See* Julie A. Greenberg, *The Gender Nonconformity Theory: A Comprehensive Approach to Break Down The Maternal Wall and End Discrimination Against Gender Benders*, 26 T. JEFFERSON L. REV. 37 (2003); Julie A. Greenberg, *What Do Scalia and Thomas Really Think About Sex? Title VII and Gender Nonconformity Discrimination: Protection for Transsexuals, Intersexuals, Gays and Lesbians*, 24 T. JEFFERSON L. REV. 149 (2002); *see also* EEOC v. Grief Bros. Corp., No. 02-CV-468S, 2004 WL 2202641 (W.D.N.Y. Sept. 30, 2004) (denying summary judgment on gender conformity theory in sexual harassment case); Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002) (denying summary judgment motion in part because fact question existed as to whether co-workers discriminated against employee because of his sex). One commentator has observed that summary judgment is increasingly being used by district courts to dismiss cases where sexual orientation discrimination claims and gender nonconformity claims are made, despite "mixed motive" liability. Katie Eyer, Protecting Lesbian, Gay, Bisexual, and Transgender (LGBT) Workers: Strategies

making in gender cases illustrates the way in which current summary judgment practice permits subtle bias to go unchecked, and reveals the dangers of summary judgment generally. I do not suggest that cases involving women plaintiffs are the only, or even the worst, examples of these problems. My concern is with both the troubling development and use of summary judgment to dismiss cases involving gender claims and problems with summary judgment practice generally; the application of summary judgment in cases involving women plaintiffs in ways that suggest gender bias, as well as the implications of increased use of summary judgment for the American civil justice system.

In Part II, I begin with recent developments in the law and practice of summary judgment. In Part III, I turn to the role of summary judgment in cases involving women plaintiffs, introduce these issues with two contrasting cases involving gender claims and summary judgment, and describe my case research on gender and summary judgment. In Part IV, I discuss summary judgment in gender discrimination cases and in Part V, I briefly discuss tort cases. In Part VI, I describe empirical data compiled for this Article on whether summary judgment is granted disproportionately against women plaintiffs in federal court. In Part VII, I consider complex issues of judge and jury decision making that underlie concerns about summary judgment in general, and focus on these problems in the context of gender cases. In Part VIII, I discuss the special need for cases that present subtle problems of gender to be heard through live testimony and adversarial presentation in a public forum, and explain how summary judgment practice reinforces the troubling "privatization" trend in federal civil litigation. In Part IX, I conclude with thoughts on summary judgment in general and federal civil litigation involving gender issues in particular.

II. SUMMARY JUDGMENT IN PRACTICE

Today, summary judgment plays a major role in federal civil litigation.[44] For plaintiffs, summary judgment is the place of "do or

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for Bringing Employment Claims on Behalf of Members of the LGBT Community in the Absence of Clear Statutory Protections, http://www.acslaw.org/node/3008. *See* Schroer v. Billington, 424 F. Supp. 2d 203 (D.D.C. 2006) (dismissing claim of Title VII sexual stereotyping in transsexual employment case under Rule 12(b)(6)). Because this Article is the first piece of a larger project, I hope that it will lead to further exploration along these lines.

44. See Burbank, *supra* note 8, for a discussion of the history of summary judgment. For a general overview of summary judgment, see EDWARD BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE (3d ed. 2006). Judge Patrick Higginbotham has noted the change in the Administrative Office of the United States Courts definition of trial, which now includes "any contested matter in

die." Summary judgment lurks over pleading, Rule 12(b)(6) motions to dismiss, Rule 11, discovery, and mediation or dispute resolution if the case is diverted to a "neutral,"[45] for the question is always what will happen on summary judgment. It impacts upon and is intertwined with every aspect of litigation—ADR, pleading, discovery, and trial. The threat of summary judgment shapes settlement even in advance of a motion being filed. And when summary judgment is denied, lawyers and judges report that defendants immediately offer to settle, often with far more generous settlement offers than they might have otherwise considered. A shift in power from plaintiffs to defendants is the result.[46]

The language of Rule 56 concerning summary judgment is complex[47] and the actual process is often lengthy—a trial on paper, that is often linked to and confused with Rule 12(b)(6).[48] A

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which the judge takes evidence." Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1406 (2002).

45. Vivian Berger, Michael O. Finkelstein & Kenneth Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 46 (2005).

46. *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 100 (1990); *see also* Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 89-90 (2006).

47. The present version of Rule 56 is viewed as a rule that is not easy to understand. In the preliminary draft of the Proposed Style Revisions of the Federal Rules, Rule 56 has been revised to emphasize the language "no genuine issue as to any material fact." Though Rule 56(c) uses this language clearly, Rule 56(d), in its previous form, used "a variety of different phrases" to express the standard. By uniformly referring to the "no genuine issue as to any material fact" standard in Rule 56(d), the Advisory Committee Notes to the Proposed Style Revisions argues that the revised version of Rule 56 achieves consistency and eliminates ambiguity. Rule 56 has also been revised to emphasize the court's discretion in granting summary judgment where there is no genuine issue of material fact by replacing "shall" with "should." However, the Advisory Committee Notes recognize that this discretion is "seldom" used. Finally, Rule 56 has been simplified to refer to a "claiming party," replacing the previous litany of possible claimants, on the ground that the prior language was incomplete. ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE (2006), *available at* http://www.uscourts.gov/rules/Reports/CV06-2006.pdf.

The Proposed Style Revisions have been criticized for failing to achieve their goal of clarity. One scholar has argued that changing the text of the Federal Rules, with the intent of leaving meaning intact, opens the door for ambiguities in interpretation. Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155 (2006). The Proposed Style Revisions will become effective on December 1, 2007. See REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 25 (Sept. 2006), *available at* http://www.uscourts.gov/rules/Reports/ST09-2006.pdf.

48. For a discussion of judges confusing Rule 12(b)(6) motions to dismiss and summary judgment, see Wald, *supra* note 3, at 1930-35. *See generally* Gregory v. Daly, 243 F.3d 687 (2d Cir. 2001) (reversing dismissal on 12(b)(6) motion in woman plaintiff's Title VII sex discrimination and retaliation claim). The Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), which has made it easier for district judges to dismiss cases on 12(b)(6) motions, compounds the

memorandum of law and the results of discovery are usually filed in support of the summary judgment motion.[49] The motion is usually based on affidavits—and there are often questions concerning admissibility. Equivalent papers must be filed in opposition and lists of material facts in dispute must be submitted. Since summary judgment rests on discovery, discovery becomes even more crucial.[50] There are now many local rules for summary judgment.[51] In some jurisdictions, like the Southern District of New York, parties have to craft statements of material facts, which judges must look at first.[52] A pre-motion conference[53] and certification of prior consultation[54] might be required before the filing in order to narrow the issues in the case. There might even be a hearing and/or oral argument, and

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problem of summary judgment, and shows the Supreme Court's "hostility to litigation." *See* Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 121 (2007), *available at* http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf; A. Benjamin Spencer, *Plausibility Pleading* (Washington & Lee Legal Studies, Paper No. 2007-17, 2007) *available at* http://ssrn.com/abstract=1003874; Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN L. REV. (forthcoming 2008), *available at* http://ssrn.com/ abstract=1010062.

49. FED. R. CIV. P. 56 does not require a memorandum of law.

50. *See* Richard J. Gonzalez, *Depositions In the Age of Summary Judgment*, TRIAL, Aug. 2004, at 20 (arguing that in employment cases, the "old ways" of deposition taking are now ineffective in the face of summary judgment motions, and suggesting that the plaintiff's deposition answers should be lengthy and detailed). *See also* Hillary Richard & Deborah Shapiro, *How To Bring And Defend Summary Judgment Motions In Sexual Harassment Cases: An Overview Of Recent Trends*, PRACTICING L. INST., June 2005, at 227 (noting importance of plaintiff's development of deposition testimony in defending against a summary judgment motion).

51. For example, in the District of Connecticut, the district court requires that, in addition to a motion and memorandum of law, a statement of material facts must be submitted by a party moving for summary judgment. The opposing party must admit or deny the facts upon responding to the motion. D. CONN. R. 56. A similar statement of facts is required in the Northern District of Illinois; however, the local rules limit the number of material facts in the statement. Absent the court's permission for more, only eighty material facts are allowed to be submitted by the moving party, and no more than forty additional facts may be submitted by the opposing party. N.D. ILL. R. 56.1. A focus of current Advisory Committee on Civil Rules consideration of Rule 56 is uniformity of summary judgment practice across federal districts. *See* discussion *supra*, note 21.

52. S.D.N.Y. R. 56.1 (Statements of Material Facts on Motion for Summary Judgment); Patrick F. Dorrian, *Federal Judges Provide Insights On Summary Judgment Motions*, 23 EMPL. DISCRIMINATION REP. 516 (2004) (relating the discussion of S.D.N.Y. Judges Laura Taylor Swain and John F. Keenan on the application of summary judgment in their courtrooms).

53. Dorrian, *supra* note 52. Judge Keenan stated that he holds pre-motion conferences in employment cases on summary judgment, though he rarely does in other types of cases.

54. *Id.* Judge Swain stated that she requires a certification of prior consultation.

there could be submission of expert testimony.[55] Overall, there are many hoops for the parties to jump through. Summary judgment has become a trial on paper.

There is a difference between "law" and "fact" summary judgments. In a "law summary judgment," the district judge is ruling that there is no legal basis for the claim—a delayed Rule 12(b)(6) motion on legal sufficiency, which takes place after discovery. In "fact summary judgments," the district court rules on whether there are "genuine issues of material fact" so that the case should be heard by a jury. But these two types of summary judgment are not always distinct. "Law summary judgments" are shaped by the facts of the case, and the district judge will be deciding whether the plaintiff's claim can go forward as a matter of law based on a very particular factual record. And of course "fact summary judgments" are shaped by the district court's evaluation of the law, because it is the law that determines the relevance, weight, and significance of facts and possible factual disputes.[56]

In a ruling on summary judgment, the judge writes a decision in which, if there are material facts in dispute, the judge is often acting as fact finder, determining whether there is enough to get to a jury. The judge draws inferences from the record and then grants summary judgment if the court concludes that no "rational trier of fact" could find for the nonmoving party based on the showing made

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55. *See generally* Edward Brunet, *The Use and Misuse of Expert Testimony in Summary Judgment*, 22 U.C. DAVIS. L. REV. 93 (1988) (addressing only the use of affidavits of expert witnesses in summary judgment, and not the use of live "expert testimony"); Brunet, *supra* note 12 (discussing live summary judgment hearings).

56. I am grateful to Minna Kotkin for helpful discussion of these issues. In the early presentation of a new or innovative claim, "law summary judgments" are more common. The judge has to interpret the law and may get it wrong. The judge's interpretation of the law may be shaped by assessment of plaintiff or other witness credibility, and the judge may not be seeing the full picture. With a more "mature" claim the law is more developed, so factual issues are more likely to be the problem and "fact summary judgments" are more common. In either context, the judge's failure to see the whole picture, to see the way in which the plaintiff understands the harm in live testimony, may impact judicial determination of fact or law. And law is always interpreted and understood in light of concrete facts, not in the abstract. *See* Mandel v. Boston Phoenix, Inc., 456 F.3d 198 (1st Cir. 2006) (reversing verdict in defamation action because summary judgment on issue of public figure was decided prematurely without full factual development in the record). See also BRUNET & REDISH, *supra* note 44, for a discussion of "law" and "fact" summary judgment.

There are, of course, larger questions about what is "fact" and what is "law." Although the distinction between fact and law is basic to Rule 56, scholars have suggested that the notion that there is a clear distinction between the two is a "myth." *See, e.g.*, Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003). The distinction between fact and law in summary judgment is frequently confused by both judges and lawyers.

in the motion and response,[57] or to put it more directly, no reasonable juror could find for the nonmovant or disagree with the judge.[58] The determination of whether a "reasonable juror" could find for the plaintiff is key. On summary judgment, the judge is effectively sitting as a juror and deciding whether he or she could find for the plaintiff.

There is of course discretion on the part of the District Judge—but how much discretion?[59] One judge cites *Liberty Lobby* for the proposition that because summary judgment is a "drastic procedural weapon,"[60] "trial courts must act with caution in granting it and may deny it in the exercise of their discretion when 'there is reason to believe that the better course would be to proceed to a full trial,'"[61] but this is not the predominant view. But how much discovery will be allowed before summary judgment will be considered? Some district courts are granting summary judgment before discovery is closed and, in any event, before a factual record is developed.[62]

How much proof is enough to deny summary judgment? Most lawyers believe that the plaintiff has to convince the judge of the merits of the case—perhaps even that the plaintiff would win the case—to survive summary judgment, and that the primary impact of the trilogy is that it focuses judges entirely on the sufficiency and weight of the plaintiff's proof as developed in discovery.[63] But this proof is in the form of affidavits and depositions. While depositions are subject to cross-examination, affidavits are problematic because they are not. This should mean that affidavits are not very useful or

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57. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1988).

58. *See* Gonzalez, *supra* note 50, at 20-21.

59. *See* Brunet, *supra* note 12; Friedenthal and Gardner, *supra* note 12; Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231 (1990) (analyzing the implicit assumptions in language used by judges to justify discretionary decisions).

60. Lyons v. Bilco Co., No. 3:01CV1106, 2003 U.S. Dist. LEXIS 20319 at *2 (D. Conn. Sept. 30, 2003) (quoting Garza v. Marine Trans. Lines., Inc. 861 F.2d 23, 26 (2d Cir. 1988).

61. *Id.* (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (emphasizing the seriousness of summary judgment)).

62. *See* Mandel v. Boston Phoenix, Inc., 456 F.3d 198, 203 (1st Cir. 2006). In researching this issue of "prematurity" of summary judgment, I found many cases in which judges determined that the summary judgment motion was made too early. *See also* discussion of Smith v. City of Jackson, 544 U.S. 228 (2005) *infra* note 287.

63. But for a different view see the comments of Judge Laura Taylor Swain of the Southern District of New York, who suggests that in employment cases, plaintiffs "do not need to convince the court of the merits of the case, just that fact issues have been raised." Dorrian, *supra* note 52. Most lawyers would say that that was true in the "old" summary judgment framework, but not in the "new," and that in the "new," judges will grant summary judgment unless they think that plaintiff can win at trial.

persuasive.[64] "Snippets" of testimony from either party can be problematic because they are likely to be misleading.[65] Questions of proof may inevitably involve issues of admissibility and judicial determination of weight of the evidence.[66] Of course, it depends on the discovery that was completed and the substantive law requirements of the claims made. This presents a fundamental conundrum of summary judgment: issues of credibility are supposed to be decided by the jury, but in order to decide if the proof is enough for a "reasonable juror," the judge must implicitly decide issues of credibility.[67]

The Supreme Court's decision last Term in *Scott v. Harris*[68] provides a dramatic example of this problem. *Scott* involved a 42 U.S.C. § 1983 action brought by a motorist against the police and other officials claiming use of excessive force during a high-speed chase, in violation of his Fourth Amendment rights. The district court had denied summary judgment and the Eleventh Circuit affirmed. In the Supreme Court, seven justices reversed the denial of summary judgment and entered judgment for the defendants. The Justices watched a videotape of the chase and concluded that no "reasonable jury" could find for the plaintiff. Only Justice Stevens, writing a vigorous dissent, challenged this view. He criticized his colleagues for sitting as "jurors," rather than a reviewing court, in the following language:

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64. *See* Dorrian, *supra* note 52. Judge Keenan comments that since affidavits are not subject to cross examination, he generally "'approaches them as not as likely to be as persuasive' as a witness's deposition." *Id.*

65. *Id.*

66. *See, e.g.*, Rubens v. Mason, 387 F.3d 183 (2d Cir. 2004) (reversing district court grant of summary judgment because affidavit that was basis of district judge's determination that "no reasonable juror" could decide for the plaintiff was inadmissible).

67. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . . [T]rial courts should [not] act other than with caution in granting summary judgment."). In addition, in *Reeves v. Sanderson Plumbing Products., Inc.*, 530 U.S. 133, 147 (2000), the Supreme Court emphasized the importance of jury determinations of credibility. On the one hand, *Reeves* suggests that resolving issues of credibility, and which inferences to draw from the evidence, "is the job of the jury," and that courts are required to disregard such issues at summary judgment. Dorrian, *supra* note 52 (quoting Patricia Beuninger). On the other, *Reeves* "eliminated the assumption held by many that employment cases are uniquely appropriate for trial." Dorrian, *supra* note 52 (quoting Gary D. Friedman).

In theory, the judge should not be weighing credibility, must draw all reasonable inferences against the moving party, and should deny the motion if there is a genuine issue of material fact. But is this really possible when the judge has to weigh the evidence in order to decide whether the plaintiff has a chance of winning at trial?

68. 127 S. Ct. 1769 (2007).

> Relying on a *de novo* review of a videotape of a portion of a nighttime chase on a lightly traveled road in Georgia where no pedestrians or other "bystanders" were present, buttressed by uninformed speculation about the possible consequences of discontinuing the chase, eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are. The Court's justification for this unprecedented departure from our well-settled standard of review of factual determinations made by a district court and affirmed by a court of appeals is based on its mistaken view that the Court of Appeals' description of the facts was "blatantly contradicted by the record" and that respondent's version of the events was "so utterly discredited by the record that no reasonable jury could have believed him."[69]

Justice Stevens continues in the opinion to call the other Justices "my colleagues on the jury,"[70] criticizing the Court for having "usurped the jury's factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable."[71] Significantly, he notes that "[i]f two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events."[72]

If summary judgment requires so much discovery and is so fact intensive, there is a serious question as to whether it is worth it for a judge to do this much on paper, rather than just let the case go forward to trial,[73] and implicates old procedural disputes concerning the dichotomy between law and equity. In law, there is a presumption in favor of oral testimony, while equity favors paper trials.[74]

Finally, judicial opinions on summary judgment are often so mechanistic that they become "sliced and diced," a process that, as Stephen Burbank puts it, "sees less in the parts by subjecting the

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69. 127 S. Ct. at 1781 (Stevens, J. dissenting).

70. *Id.* at 1782.

71. *Id.* at 1784.

72. *Id.* at 1785.

73. *See* Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe,* 79 NOTRE DAME L. REV. 1981 (2004) (arguing that in the "parallel procedural universe" that operates underneath the summary judgment radar, summary judgment may not do a good job of integrating law and fact).

74. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,* 135 U. PA. L. REV. 909, 923-24 (1987); Subrin & Main, *supra* note 73, at 1988.

non-movant's 'evidence' to piece-by-piece analysis" and is not analyzed contextually.[75] Some have suggested that this is because law clerks are writing the opinions instead of judges.[76] There may also be similar problems with summary judgment cases sent to magistrates.[77]

A grant of summary judgment is subject to de novo review on appeal.[78] Appellate courts therefore can examine the whole case on the record. Since district court judges do not always fully explain the basis for their decisions,[79] it is often hard to know whether the district court is deciding summary judgment on the basis of law or fact. Thus, it is also unclear whether reversal is on law or fact, although it appears that reversals are generally on law.[80] Scholars have argued that de novo review does not serve as an appropriate safeguard for overzealous grants of summary judgment.[81] The

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75. Burbank, *supra* note 8, at 624-25 (calling this process "factual carving" and "legal carving"). Michael Zimmer has also used the phrase "slicing and dicing" to describe "the common practice of courts in slicing and dicing the evidence supporting plaintiff's case in order to grant motions for summary judgment and judgment as a matter of law." Michael J. Zimmer, *Slicing and Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 577 (2001). In this Article, I use the term "slice and dice" to include both factual and legal carving.

76. I am grateful to Susan Carle who raised this issue of law clerk decision making at the Law and Society Roundtable. Penelope Pether concludes that the de facto delegation of the vast majority of Article III judicial power to judicial clerks and staff attorneys has resulted in disproportionate decisions against "have-nots." Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. STATE L.J. 1, 65 (2007).

77. I am grateful to Laura Kessler who raised this question at the Law and Society Roundtable.

78. This raises interesting questions that go back to the distinction between law and fact. The de novo review standard assumes that the district judge is deciding the legal question of whether summary judgment was warranted, whether there are issues of material fact, and whether judgment should be granted as a matter of law. *See generally* Rebecca Silver, *Standard of Review in FOIA Appeals and the Misuse of Summary Judgment*, 73 U. CHI. L. REV. 731, 737 (2006) ("When an appellate court reviews a summary judgment decision, the court uses the de novo standard because summary judgment . . . implies there are no issues of fact in dispute . . . .").

79. *See, e.g.*, Caprio v. Bell Atl. Sickness & Accident Plan, 374 F.3d 217, 220-21 (3d Cir. 2004) (vacating and remanding the district court's grant of summary judgment on the ground that the district court had not explained the standard of review or the basis for its assessment of the merits of the claims, which contravened the circuit court's requirement that every summary judgment order contain an explanation of the ruling—the court of appeals suggested, in order to avoid future problems, that lawyers should bring such oversights to the court's attention).

80. Wald, *supra* note 3, at 1939; Cecil et al., *supra* note 8, at 5.

81. *See* 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, 178 (1988) (arguing that an appellate court reviewing de novo a trial court's grant of summary judgment is unlikely to review documentary evidence with

appellate court must make determinations based on documents "merely heaped before" them.[82] Jeff Stempel argues that, in the trial court, even "less than stellar trial counsel" will draw attention to certain documents or testimony and allow for clarification, whereas a cold record on appeal presents documents en masse for the court to review without this benefit.[83] Summary judgment adjudication does not allow for the fleshing out of the facts of a case and results in the appellate court necessarily ruling on a limited record.[84]

Summary judgment is widely viewed as the major procedural hurdle in federal civil litigation. Strict standards of summary judgment in federal court and the likelihood that summary judgment will be granted are viewed as reasons that plaintiffs would prefer to be in state court rather than federal court. Thus, in cases that could be filed in either state or federal court, summary judgment now plays a role in choice of forum.[85] And now, with the Class Action Fairness Act of 2005, more cases that would otherwise be heard in state court will be heard in federal court.[86]

Another important development is the significant interplay between summary judgment and *Daubert* on judicial determination of expert evidence.[87] *Daubert* plays a critical role in summary

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the same vigor as did the trial court); Friedenthal & Gardner, *supra* note 12, at 114-15.

82. *See* Stempel, *supra* note 81, at 177-78 ("[O]ne additional drawback of de novo appellate review of documents [is] that . . . it is usually a poorer quality of fact finding than that conducted by the trial court. At trial, the documents are not merely heaped before the trial judge . . . .").

83. Stempel, *supra* note 81, at 178.

84. Through the history of summary judgment, courts have exhibited a strong preference for affording issues the light of a live trial, and admonished lower courts for having "trial by affidavit." Miller, *supra* note 9, at 1061, 1063, 1090-91; *see also* Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 185-86 (2000) (arguing that due process favors a litigant's right to live testimony).

85. *See Roundtable Discussion: State/Federal Forums*, WIS. L.J., Feb. 2, 2005, *available at* http://www.wislawjournal.com/archive/2005/0202/roundtable-020205.html (reporting attorney John D. Finerty, Jr.'s assertion that state courts present defense attorneys with more control than do federal courts in getting a summary judgment motion heard).

86. JoEllen Lind, *"Procedural* Swift*": Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 717-19 (2004) (arguing that shifts in federal standards for summary judgment and class certification, and development of federal "summary judgment substitutes," have allowed federal judges to reshape state tort law).

87. In *Daubert v. Merrell Dow Pharmaceuticals., Inc.*, 509 U.S. 579 (1993), the Supreme Court directed federal judges to act as "gatekeepers" in examining the method or reasoning underlying proposed expert evidence, and to admit only evidence that is reliable and relevant. In this Article, I use *Daubert* as shorthand for the trilogy of cases that developed the procedural rules for admissibility of expert testimony,

judgment cases because if the judge gets rid of plaintiff's expert evidence, granting summary judgment becomes easier. *Daubert* is now viewed as a "summary judgment substitute."[88] *Daubert* has a more limited "abuse of discretion" standard of review, as compared with the more general summary judgment de novo standard of review; thus, *Daubert* may be the preferred method of district court resolution since there is greater play for district court judges and smaller chance of reversal on appeal.[89]

There is no question that *Daubert* has changed the way that federal district judges assess expert evidence in civil cases and has impacted summary judgment as well. A 2001 empirical study prepared for the Rand Corporation[90] found that "[t]he rise that took place in both the proportion of evidence found unreliable and the proportion of challenged evidence excluded suggests that the standards for admitting evidence have tightened."[91] The authors of the Rand study included a special section on the interplay between *Daubert* and summary judgment, and concluded that challenges to expert evidence increased summary judgments and case dismissals.[92] They noted that:

> This increased frequency of [summary judgment] requests may be due partly to *Daubert*, but it may be driven by broader

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including *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

88. Lind, *supra* note 86, at 771.

89. *See* Margaret A. Berger, *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court's Trilogy on Expert Testimony in Toxic Tort Litigation*, 64 LAW & CONTEMP. PROBS. 289, 324 (2001). The procedural interconnections and overlap between *Daubert* and summary judgment are troubling. A recent petition for certiorari in the United States Supreme Court in an antitrust case presented the following questions: (1) whether lower courts err when they meld the standards for summary judgment under FED. R. CIV. P. 56, and the relevance and reliability requirements for admissibility under FED. R. EVID. 702; (2) whether, in order to clarify the distinction between admissibility decisions and evidence sufficient to grant summary judgment, courts have an obligation to give reasons—which cannot include weighing testimony—why admissible expert evidence that reaches all material facts necessary to establish claim for relief under applicable law is not sufficient to avoid summary judgment. Kochert v. Greater Lafayette Health Servs., 463 F.3d 710 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 1328 (2007).

90. LLOYD DIXON & BRIAN GILL, RAND INST. FOR CIVIL JUSTICE, CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE DAUBERT DECISION (2001).

91. *Id.* at xiii, xv ("[Federal] judges scrutinized reliability more carefully and applied stricter standards in deciding whether to admit expert evidence."); *see also* Carol Krafka, et al., *Judge. and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL'Y & L. 309, 330-31 (2002) (reporting results from judge and attorney surveys that suggest greater scrutiny of scientific evidence in the wake of *Daubert*).

92. *See* DIXON & GILL, *supra* note 90, at 55-57.

> trends in litigation practices that have nothing to do with *Daubert*. For example, judges may have become more receptive to summary judgment requests in an attempt to resolve cases more quickly and at lower cost. But *Daubert* may have led challengers to expand the scope of their challenges to the point where they increasingly challenged the entire basis of the case and thus more frequently requested summary judgment.[93]

Although the primary impact of *Daubert* was thought to be in toxic tort cases, it now impacts a wide range of cases. *Daubert* has been applied to antitrust cases involving economic experts,[94] as well as cases involving social science experts, including gender discrimination and gender stereotyping cases.[95] But in the tort context, "[t]he resulting effects of *Daubert* have been decidedly pro-defendant."[96] Indeed, "In the civil context, *Daubert* has empowered defendants to exclude certain types of scientific evidence, substantially improving their chances of obtaining summary judgment and thereby avoiding what are perceived to be unpredictable and often plaintiff-friendly juries."[97]

Margaret Berger has detailed how *Daubert* has exacerbated the reallocation of power to defendants resulting from the prior summary judgment trilogy:

> Not only are district judges granting an increasing number of *Daubert* motions, but in doing so they escape the more stringent de novo standard of review that applies to grants of summary judgment, in favor of the more lenient abuse of discretion standard that governs evidentiary rulings on the admissibility of expert proof. If they have not abused their discretion in excluding all the plaintiffs' experts on causation, they cannot have erred in granting summary judgment, as no material facts remain in issue.[98]

Indeed, some scholars have argued that *Daubert* has effectively changed the substantive law of torts.[99] Others assert that *Daubert*'s

93. *Id.* at 56-57.

94. *See* Robert G. Badal & Edward J. Slizewski, *Economic Testimony Under Fire*, 87 A.B.A. J. 56 (2001).

95. For a collection of decisions organized by type of expert witness involved, see Peter Nordberg, *Daubert* Decisions by Field of Expertise, http://daubertontheweb.com/fields.htm (last visited Aug. 29, 2007).

96. *See* Edward K. Cheng & Albert H. Yoon, *Does* Frye *or* Daubert *Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 473 (2005).

97. *Id.*

98. Berger, *supra* note 89, at 324 (citations omitted).

99. *See* Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335 (1999) (stating that federal trial judges have used *Daubert* to make "substantive legal rules on causation" in product liability cases by requiring

elimination of jury deliberation for certain litigants has serious race and class consequences.[100] The interrelationship between *Daubert* and summary judgment is a crucial dimension of current summary judgment practice.[101]

From empirical work on summary judgment and the "vanishing trial," we have information on the actual practice of summary judgment in federal district courts. Longitudinal Federal Judicial Center studies on summary judgment show a high rate of termination by summary judgment in certain kinds of cases, particularly civil rights and employment discrimination cases.[102] It also appears that there is wide variation in practice between different district courts.[103] Although summary judgment is transsubstantive, like all federal procedural rules, scholars have reported the particular use of summary judgment to dismiss sexual

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plaintiffs to meet a higher standard of scientific proof in order to survive summary judgment).

100. *See* Frank M. McClellan, *Bendectin Revisited: Is There a Right to a Jury Trial in an Age of Judicial Gatekeeping?*, 37 WASHBURN L.J. 261, 264, 279-80 (1998) (asserting that *Daubert* has made it "substantially more difficult for plaintiffs to win product liability cases," and that this has a race and class impact on litigants).

101. Although I briefly discuss *Daubert* issues in the context of women's cases of gender discrimination and torts, *see infra* Parts IV and V, a close study of *Daubert* in these cases is beyond the scope of this Article. It is, however, a part of my larger project.

102. *See* Berger, *supra* note 89; Parker, *supra* note 30; JOE S. CECIL, ET AL., FEDERAL JUDICIAL CENTER, TRENDS IN SUMMARY JUDGMENT PRACTICE: A PRELIMINARY ANALYSIS (2001), http://www.fjc.gov/public/pdf.nsf/lookup/summjudg.pdf/$file/summjudg.pdf (revealing an increase in the rate of summary judgment motions filed since 1975); *but see* Cecil et al., *supra* note 8, at 4 (asserting that the number of summary judgment motions began to increase before the trilogy). *See also* Burbank, *supra* note 8, at 593 (concluding that the number of cases terminated by summary judgment has increased since 1956). In their recent study, Cecil, Eyre, Miletich, and Rindskopf did not find that the likelihood of a summary judgment motion or termination by summary judgment in "civil rights cases" had increased since the trilogy. They note:

> Such civil rights cases comprise an increasing proportion of the federal district caseload, and the impression of increasing summary judgments may be due to increasing numbers of civil rights cases, which have a traditional high rate of termination by summary judgment. Of course, we examined civil rights cases as a whole, and did not focus on the narrower category of employment discrimination cases, which may follow a different pattern.

Cecil et al., *supra* note 8, at 38. *See also* Burbank, *supra* note 8.

103. *See* Burbank, *supra* note 8, at 591; *see also* Dorrian, *supra* note 52, at 516 (quoting Judge Keenan of the S.D.N.Y. cautioning, "You have to be aware of your Circuit and its local rules," and contrasting Judge Keenan's practice of holding pre-motion e-conferences in employment discrimination cases to Judge William J. Martini of the U.S. District Court for the District of New Jersey's, noting that he was "not aware of the practice in the District of New Jersey"); *see also* Cecil et al., *supra* note 8.

harassment and hostile work environment cases,[104] race and national origin discrimination cases,[105] American with Disabilities Act (ADA) cases,[106] age discrimination cases,[107] toxic tort cases,[108] and prison inmate cases.[109] "Vanishing trial" statistics also suggest that jury trials are decreasing, but bench trials are increasing.[110]

There have been critiques of summary judgment by many scholars.[111] Arthur Miller argues that consideration of objective standards of "human behavior, reasonableness, and state of mind [are] matters historically considered at the core of the province of jurors."[112] There is serious concern whether district courts have abdicated their norm-developing roles.[113] Federal jurisprudence is now being made on summary judgment.[114] Judges are making summary judgment decisions without a full record; these decisions are "arid, [and] divorced from [a] full factual context.[115] District court judges are slicing and dicing issues of material fact and substantive legal context into smaller and smaller parts so that the decision

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104. *See* Beiner, *supra* note 24, at 129-30 (arguing that courts are increasingly granting summary judgment in employment discrimination cases based on lack of severity or pervasiveness of the harassment); *see also* Medina, *supra* note 29, at 313-14 (highlighting instances of judicial disbelief that harassment causes injury, which results in more frequent grants of summary judgment in employment cases).

105. *See* Parker, *supra* note 30, at 895 (arguing that race-based employment cases are more likely to be dismissed on summary judgment based on an empirical study of race, age, and gender cases). Parker's study found that plaintiffs won summary judgment motions in race discrimination cases only twenty-five percent of the time. *Id.* at 910 n.98.

106. *See* Ruth Colker, The *Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99-100 (1999) (arguing that courts may be abusing summary judgment in ADA cases); *see also* Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers In the Next Decade?*, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 363 (2000) (noting that employees face a Catch-22 when they are forced to demonstrate severe disabilities that do not simultaneously prevent them from doing their jobs, a situation that often leads to a grant of summary judgment for the defendant).

107. *See* McGinley, *supra* note 29, at 232-33.

108. *See* Berger, *supra* note 89, at 290-91.

109. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1594-95 (2003) (reporting that a great majority of inmate civil rights cases are resolved in favor of defendants at the pretrial stage).

110. *See supra* notes 12, 13, 102-109, and accompanying text.

111. *See supra* note 12 and accompanying text.

112. Miller, *supra* note 9, at 1132. Numerous district court judges concerned with summary judgment have cited Miller for this proposition. *See, e.g.*, Ziegler v. Inabata of Am., Inc., 316 F. Supp. 2d 908, 914 (D. Colo. 2004).

113. *See* Higginbotham, *supra* note 44, at 1419-20; Wald, *supra* note 3, at 1937-39.

114. *See* Wald, *supra* note 3, at 1897.

115. Burbank, *supra* note 8, at 625-26.

almost defies common-sense understanding of the full picture and the context.[116] District judges are now evaluating intent and credibility and acting as fact-finders. Determination of summary judgment almost completely rests on assessment of the plaintiff's case. District judges are often disinclined to find genuine material issues of fact or to "permit discovery to unearth them,"[117] and decide "on the basis of their predilections about the worthiness of the case [rather] than . . . [on] the principles encompassed in Rule 56."[118] Judges are demanding more evidence at summary judgment than would suffice to support a jury verdict.[119]

There are also new issues with the role of summary judgment in a "settlement" as opposed to a "trial" culture.[120] Among the most important concerns are docket pressures. Some district and circuit judges, such as Judge Richard Posner, have expressed their concerns regarding the use of summary judgment to alleviate "caseload pressures" and simply clear the civil calendar.[121] In a recent article, Judge Mark Bennett, Chief Judge of the United States District Court for the Northern District of Iowa, criticized judges for overuse of summary judgment.[122] He observed:

> I think that the trend away from jury trials toward a new focus on expensive discovery and summary judgment has been fueled by the complicity of federal trial and appellate judges. The rise

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116. *Id.*

117. Wald, *supra* note 3, at 1927.

118. *Id.*

119. *See* Burbank, *supra* note 8, at 624 (noting the phenomena in employment discrimination cases); *see also* Mike McKee, *California Justices Wary of Prison Trysts*, THE RECORDER, May 5, 2005, *available at* http://www.law.com (reporting that a California Supreme Court justice was incredulous at the amount of proof required of plaintiffs by the lower court to overcome defendant's motion for summary judgment in sexual harassment claim).

120. *See* Friedenthal & Gardner, *supra* note 12; *see also* Samuel R. Gross & Kent Syverud, *Don't Try: Civil Jury Verdicts in a System Geared Towards Settlement*, 44 U.C.L.A. L. REV. 1, 50-51 (1996).

121. Judge Posner's opinion in *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1397 (7th Cir. 1997) says it clearly:

> The expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial. The drift is understandable, given caseload pressures that in combination with the Speedy Trial Act sometimes make it difficult to find time for civil trials in the busier federal circuits. But it must be resisted unless and until Rule 56 is modified.

Id. (citations omitted). *See also,* Anthony v. BTR Auto. Sealing Sys., Inc., 339 F.3d 506, 517 (6th Cir. 2003); Door Sys., Inc. v. Pro-Line Door Sys., Inc., 83 F.3d 169, 172 (7th Cir. 1996).

122. Mark W. Bennett, *Judges' Views on Vanishing Civil Trials,* 88 JUDICATURE 306, 307 (2005).

> of summary judgment as a means of trial avoidance has been made easier by the U.S. Supreme Court's trilogy of decisions in 1986, so that summary judgment is now the Holy Grail of "litigators." In my view, trial and appellate judges engage in the daily ritual of docket control by uttering too frequently the incantation, "We find no material question of fact."[123]

One district judge described the dilemma of contemporary summary judgment practice in the following way: "[C]urrent practice mandates tedious analysis in factually complex cases, and rulings that avoid jury deliberations based on sheer guesswork or the popular appeal or unpopularity of the witnesses."[124] He concludes: "If a reversion toward historic hostility to summary judgment practice is desirable, I leave it to rule-makers and the appellate courts to provide guidance."[125]

III. GENDER AND SUMMARY JUDGMENT—AN INTRODUCTION

Cases that involve women plaintiffs and issues of gender underscore the problems of summary judgment. These cases inevitably involve judicial evaluation of credibility, which many social science studies and Gender Bias Task Force reports have identified as a serious problem for women litigants, particularly women plaintiffs (as well as women witnesses, expert witnesses, and lawyers).[126] These cases involve judicial assessment of what are frequently controversial, novel, or innovative claims, and they may raise questions of harm or bias with which many district judges are unfamiliar or uncomfortable. In ruling on summary judgment motions, judges frequently slice and dice law and fact in a technical and mechanistic way without evaluating the broad context on an arid record, a record that is limited to discovery.[127]

A. Ganzy *and* Declue

To introduce some of these issues, I turn to two decisions on gender and summary judgment written by two very different federal judges—Judge Richard Posner of the Seventh Circuit in *DeClue v. Central Illinois Light Co.*,[128] and Judge Jack Weinstein of the

123. *Id.*

124. Higareda v. Ford Motor Co., No. 01-1182-CV-W-HFS, 2003 U.S. Dist. LEXIS 16073, at *23 n.14 (W.D. Mo. Sept. 2, 2003) (granting summary judgment in employment discrimination case).

125. *Id.*

126. *See generally, Eighth Circuit Report, supra* note 1; *Ninth Circuit Report, supra* note 1.

127. *See* Burbank, *supra* note 8, at 624-26; *see also* Stempel, *supra* note 81, at 154.

128. 223 F.3d 434 (7th Cir. 2000).

Eastern District of New York in *Ganzy v. Allen Christian School*.[129] While both are employment cases, they provide a useful illustration of the subtle ways in which gender comes into play with summary judgment.

Audrey DeClue, a woman whom Judge Posner referred to as a female "lineman" for an electric company, alleged hostile environment sexual harassment, resting her claim on incidents that included "a coworker's deliberately urinating on the floor near where the plaintiff was working, repeated shoving, pushing, and hitting her, sexually offensive touching, exposing her to pornographic magazines," and what Posner called "failing to make adequate provision for restroom facilities."[130] Translated more directly, this meant there were no bathroom facilities because the male linemen (who were all the other workers) all went to the bathroom in public.[131] The plaintiff ran up against the 300-day statute of limitations rule on all the incidents except the bathroom claim.[132] The district court granted summary judgment, and Posner wrote an opinion for the Seventh Circuit majority affirming this decision.[133] Posner held that the plaintiff's claim for what he called "civilized bathroom facilities" constituted an arguable claim for "disparate impact" discrimination, because it impacted women more adversely, but was not a hostile environment claim.[134] The case, however, was not litigated as a "disparate impact" case. He therefore upheld summary judgment and dismissal of Audrey DeClue's bathroom claim, and her entire case, as a matter of law.

Judge Ilana Rovner wrote a stinging dissent.[135] She took a very different view of the seriousness of the bathroom claim.[136] She began her opinion with a personal story about bathroom facilities for women judges in her own court, and wrote that "[w]omen know that this disparity, which strikes many men to be of secondary, if not trivial, importance, can affect their ability to do their jobs in concrete and material ways."[137] She went on to detail this harm:

> As recently as the 1990s, for example, women elected to the nation's Congress—which had banned gender discrimination in the workplace some 30 years earlier—found that without careful planning, they risked missing the vote on a bill by

129. 995 F. Supp. 340 (E.D.N.Y. 1998).
130. *DeClue*, 223 F.3d at 435-36.
131. *Id.* at 436.
132. *Id.* at 435-36.
133. *Id.* at 435.
134. *Id.* at 436-37.
135. *Id.* at 437 (Rovner, J. dissenting).
136. *Id.*
137. *Id.* at 437.

heeding the call of nature, because there was no restroom for women convenient to the Senate or the House chamber.[138]

Judge Rovner argued that although DeClue's restroom claim could be viewed within a "disparate impact" framework, it could also be viewed as creating a hostile work environment:

> [W]hen, in the face of complaints, an employer fails to correct a work condition that it knows or should know has a disparate impact on its female employees–that reasonable women would find intolerable–it is arguably fostering a work environment that is hostile to women, just as surely as it does when it fails to put a stop to the more familiar types of sexual harassment. Indeed, the cases teach us that some employers not only maintain, but deliberately play up, the lack of restroom facilities and similarly inhospitable work conditions as a way to keep women out of the workplace.[139]

Rovner went on to closely analyze the evidence presented at trial concerning bathroom facilities within the framework of a hostile environment. She criticized Posner's technical and formalistic distinction between disparate impact and hostile environment claims on the ground that, as she put it, "Discrimination in the real world many times does not fit neatly into the legal models we have constructed."[140] She would have reversed the district court's grant of summary judgment on this claim as a matter of law.[141]

In *Ganzy*, we see a different scenario. Michelle Ganzy was an unmarried teacher in a church-affiliated school, who was fired when she became pregnant.[142] She sued the school under Title VII and state employment statutes.[143] The school took the position that the plaintiff was fired because of sexual activity outside of marriage, which violated the school's religious policy, and not because of pregnancy, which would constitute gender discrimination.[144] Plaintiff was offered reemployment following the birth of her child, which seemed to support the plaintiff's view that the basis of her termination was the pregnancy, not nonmarital sex.[145]

In considering summary judgment, Judge Weinstein wrote a lengthy opinion exploring the issues of pregnancy, sexuality, women's employment and discrimination in faith-based contexts, and placing

138. *Id.* at 437-38.
139. *Id.* at 438-39 (citation omitted).
140. *Id.* at 439 (citation omitted).
141. *Id.* at 440.
142. *Ganzy*, 995 F. Supp. at 344.
143. *Id.* at 345.
144. *Id.* at 345, 349.
145. *Id.* at 360.

these issues in a broader social and historical framework.[146] Weinstein emphasized that there was a sparse record; for example, there was no evidence as to whether any other teacher had been fired for sex outside of marriage.[147] But he effectively held that there were genuine issues of material fact as to "whether it was pregnancy or fornication that caused the Defendant to dismiss the Plaintiff" and went on to underscore the important role of the jury.[148] Weinstein ruled that:

> The complex history of women's rights, employment, and sexuality . . . as well as normal methods of determining witnesses' credibility, might lead different jurors to evaluate differently the veracity of the witnesses and the honesty of the Defendant's proffered reason for dismissal. Under such circumstances, a decision by a cross-section of the community in a jury trial is appropriate.[149]

Although both of these cases are employment cases raising explicit gender issues, and thus are cases that the Gender Bias Task Force reports warn may involve gender bias in the operation of summary judgment, they illustrate broader problems with judicial decision making with respect to summary judgment. In affirming the district court's dismissal on summary judgment in *DeClue*, Judge Posner trivializes the plaintiff's bathroom claim and rejects this claim as part of a broader problem of hostile environment, although the employer's failure to provide a bathroom could easily be understood as "hostility" that would send a message to a worker not to apply there. Here, summary judgment was used as a weapon to cut off plaintiff's redress and to stunt the development of the law (as well as penalizing the plaintiff for what may have been her counsel's inadequacy). Judge Rovner's dissent engages Posner on precisely this point—the destructive role that summary judgment can play in dismissing novel claims. In contrast, Judge Weinstein's affirmative use of historical and social context to elucidate and underscore the determination of "issues of material fact," and shape the need for jury consideration, utilizes a core insight of both feminist legal theory, and what I would argue is almost common sense—that history, social context, and broader themes of pattern and practice shape our understanding of the significance of "facts" and "law" in individual cases. Law is shaped by "facts" and fact determination is shaped by "law." These are crucial dimensions of judicial decision making in summary judgment that have a particular impact on gender cases.

146. *Id.* at 350-59.

147. *Id.* at 360.

148. *Id.*

149. *Id.* at 360-61.

Insights from feminist legal theory that help make visible the often hidden role of gender are useful in considering these two cases and the case studies that follow.[150] First, as already mentioned, gender claims cannot be assessed in any particular case without looking at larger context and patterns, for these patterns illuminate inequality that may be invisible in a particular case or set of facts.[151] This is the dispute between Judges Posner and Rovner in *DeClue*. Second, gender cases may shape the development of doctrine generally and "migrate" in ways that are problematic, so that more onerous requirements for proving legal claims can develop when the claim becomes cognitively associated with women and injuries linked to women.[152] Legal doctrine can be malleable and can highlight or suppress discrimination.[153] The exercise of discretion in any doctrinal area is an important place to look for the operation of patterns of race or gender bias that result from overt prejudice or subconscious perceptions.[154] Finally, procedure can be an important locus of hidden gender discrimination, for procedure shapes how substantive law is applied, but often looks more "neutral."

B. Case Studies On Gender and Summary Judgment

Because I wanted to examine summary judgment cases involving women plaintiffs, I have read many judicial decisions and reported cases on summary judgment. My purpose was to analyze the ways in which judges decided summary judgment cases involving women plaintiffs, looking for possible examples of subtle gender bias.[155] In

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150. A plenary session that I organized for the National Association of Women Judges (NAWJ) Annual Conference in October 2001 addressed the issue of "Feminist Insights for Everyday Cases." This panel discussed some generic insights from feminist legal theory to assist judges in determining the role of gender in "everyday cases," cases that might not appear to involve issues of gender. I am grateful to my co-panelists, Regina Austin, Martha Chamallas, Sylvia Law, and Carol Sanger, who helped develop the ideas reflected in this paragraph.

151. Regina Austin, Presentation at NAWJ Conference (Oct. 5, 2001); *see also* Regina Austin, *"Bad for Business": Contextual Analysis, Race Discrimination, and Fast Food*, 34 J. MARSHALL L. REV. 207 (2000) (arguing that attention to context exposes hidden discrimination embedded in contemporary social systems).

152. Martha Chamallas, Presentation at NAWJ Conference (Oct. 5, 2001); *see also* Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2118-22, 2180-87 (2007) [hereinafter Chamallas, *Discrimination and Outrage*].

153. Carol Sanger, Presentation at NAWJ Conference (Oct. 5, 2001).

154. Sylvia Law, Presentation at NAWJ Conference (Oct. 5, 2001).

155. I used a variety of different research approaches to find district court, circuit court, and Supreme Court published decisions on summary judgment involving women plaintiffs, and read many summary judgment decisions involving male plaintiffs as well. My searches included a general overview of summary judgment cases in the district courts and circuit courts from 2001-2005, district court cases granting

the next sections, I look at two different sets of cases involving women plaintiffs in federal court. First, I look at cases that raise explicit gender discrimination arguments, whether in employment discrimination or in some other context. Second, I look at tort cases in federal court where the plaintiff is a woman, but where gender discrimination is not the subject of the case. I chose these two areas because they involve different dimensions of gender claims.[156] In the first set of cases, gender is explicit and is central to the legal claim for which relief is sought; in the second, gender is in the background.

My thesis is not that the dangers of summary judgment arise only in cases of women plaintiffs, but that they are particularly acute in these cases and that we can learn a great deal about the dangers of summary judgment in general by examining them. Others have looked at cases involving racial discrimination and found similar problems.[157] We do not know how race and gender compare, although these are frequently overlapping categories rather than discrete cases. One scholar concludes that the situation is worse where race is concerned.[158] We do not know if gender-based claims are thrown out more often than comparable claims involving employment discrimination based on age and race.[159]

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summary judgment in which circuit courts reversed from 2001-2005, major gender discrimination cases at the Supreme Court level in which summary judgment had been granted by the district court and then the decision was reversed on appeal, and other searches.

I did not read these cases to assess whether there were disproportionate grants of summary judgment as between men and women plaintiffs, or to draw empirical conclusions. Summary judgment decisions on electronic databases do not provide a comprehensive picture of all summary judgment decision making. *See generally* Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgment Grants from Eight District Courts*, 2007 WIS. L. REV. 107. I am sensitive to the problems of relying on published cases as a basis to draw empirical conclusions, and I am not doing so here. *See* Burbank, *supra* note 8, at 492; Cecil et al., *supra* note 8, at 8-9; *infra* Part V.

156. Since earlier scholarship on gender and summary judgment focused on "hostile workplace" sexual harassment claims, I wanted to examine a fuller range of gender discrimination claims, as well as tort claims made by women plaintiffs that were not explicitly women's rights or gender discrimination claims.

157. *See* Deseriee A. Kennedy, *Processing Civil Rights Summary Judgment and Consumer Discrimination Claims,* 53 DEPAUL L. REV. 989, 996-1006 (2004) (discussing summary judgment in consumer discrimination claims and arguing that premature dismissal prevents fair application of the Civil Rights Act); Parker, *supra* note 30, at 910-12, 916 (discussing plaintiffs' likelihood of winning on summary judgment in race-based employment discrimination suits).

158. Parker, *supra* note 30, at 928.

159. As my colleague Larry Solan observed, "It may be that courts are generally hostile to employment discrimination cases, and since many are gender-based, this hostility impacts on women disproportionately. Or more strongly it may be that gender-based claims are thrown out more often than comparable claims involving

Before I turn to the case studies, I offer a number of caveats. First, I do not read these published opinions to draw empirical conclusions about the differential impact of summary judgment on the basis of sex, but solely to provide a "snapshot" of how judges handle summary judgment in cases involving women plaintiffs.[160] Second, reading and evaluating a district court decision on summary judgment based on a published opinion, or even a circuit court decision affirming or reversing a grant of summary judgment, is necessarily limited since the reader is not reviewing the entire record submitted to the district court. In addition to the actual record, affidavits, depositions, motions, and responses on summary judgment, there might be representations to judges by lawyers in conferences or off the record that could not be retrieved or evaluated. And in many of the cases in which the circuit court reverses a grant of summary judgment by a district judge, the district court opinion is not published. Here, with whatever published judicial materials I have available, I am necessarily interpreting the opinion (or opinions, if the case is appealed), sometimes reading between the lines to explore what is going on. Some of the cases that I discuss involve district court grants of summary judgment in which circuit courts reversed the dismissal on summary judgment, or in which they affirm but with a dissenting opinion. I discuss these cases because it is important to see the disagreement between the district court and the circuit court on what is presumably the same record. And in any event, district court decision making is significant and can have a broad impact, even if it is eventually reversed.

Finally, drawing conclusions based on summary judgment cases involving different substantive legal claims is arguably difficult because every summary judgment case involves different substantive legal issues. The summary judgment decision is particular to the specific legal claims and issues that are presented in the case, the facts of the case as developed in discovery and presented on summary judgment, and the procedural burdens that accompany the substantive law. One could argue that some of the problems that I

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discrimination based on age, race, etc." E-mail from Larry Solan, Professor of Law, Brooklyn Law School, to author (Oct. 24, 2001) (on file with author). This is a critical question that my research has not yet resolved.

160. Examples discussed here are from published district and circuit court decisions. Published district court cases are not reflective of the universe of summary judgment decisions because many are not published. *See* Lizotte, *supra* note 155. Not all circuit court decisions ruling on grants of summary judgment at the district court level are published. Stephen Burbank says that circuit court data is skewed in favor of reversal, since appellate court affirmances of summary judgment are not published—and denials of summary judgment by district courts are not published. Telephone conference call with Stephen B. Burbank, Professor of Law, University of Pennsylvania School of Law, and others (May 23, 2005).

describe in the context of summary judgment really reflect judicial discomfort or disagreement with substantive law in the particular area, rather than with the application of summary judgment. Clearly there is an intersection between the two. Judges frequently use procedural rules in general and summary judgment in particular to resist or make new rulings on substantive law.[161]

However, I purposely look at cases in a number of different substantive areas in order to explore whether there are common ways that gender may impact judicial decision making in summary judgment. The cases that follow are a rich source of information on judicial decision making; not empirical data to be sure, but more than anecdotal evidence, more than what District Judge Lee Rosenthal, Chair of the Standing Committee on Rules of Practice and Procedure, has called "anecdata."[162] I find common themes in summary judgment decision making, regardless of the different substantive legal and factual contexts. Summary judgment provides a "cross-cutting" framework for, and an important procedural perspective on, subtle dimensions of gender bias in the courts.

The case studies in the sections that follow illustrate important themes in summary judgment practice introduced by *DeClue* and *Ganzy*. First, they suggest that current summary judgment practice may allow revival of a narrow proceduralism that can foreclose the development of novel claims. Second, they reveal the importance of attribution of credibility to analysis of complex claims and matters involving gender: judicial determination of whether a "reasonable jury" might find for the plaintiff on summary judgment inevitably involves assessment of plaintiffs and other witnesses' credibility. Third, these cases highlight the elusive connections between the fact–law distinction, burden of proof, use of experts, and why these things matter, given the complex interrelationship of fact and law in summary judgment. They underscore the need for judges to bring a broader range of information to bear on summary judgment decision making and to interpret the law on the basis of a full factual record. They highlight the significance of who the decision maker is and the

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161. *See* Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 827-32 (1993); Finley, *supra* note 99, at 335-36.

162. Lee H. Rosenthal, et al., *Conference on Electronic Discovery, PanelEight: Civil Rules Advisory Committee Alumni Panel: The Process of Amending the Civil Rules*, 73 FORD. L. REV. 135, 136 (2004).

> Rick Marcus gave me a word to describe some of the nature of the kind of insight that we gain at these kind of conferences. What we are hearing is 'anecdata.' . . . It is not empirical data and the aura that that brings, but what it does bring are the varieties of experiences and difficulties and costs and burdens and harms that can arise if we don't understand what we are trying to do and don't appreciate the potential for mischief that can arise.

importance of public consideration and scrutiny in assessment of claims of gender discrimination.

DeClue and *Ganzy* illustrate issues that are especially problematic in these cases: 1) judges minimizing the harm that is claimed by the woman plaintiff; 2) judges making credibility determinations that accord less credibility to the woman plaintiff and frequently drawing inferences against the woman plaintiff; 3) judges doing fact-finding themselves and actually weighing the evidence, not simply determining if there are genuine issues of material fact that preclude summary judgment; 4) judges slicing and dicing plaintiffs' legal claims to decide that a claim is not cognizable as a matter of law when the law is not clear, or deciding that the facts do not support the legal claim as opposed to looking at the record as a whole; 5) judges demanding more proof from plaintiffs than what summary judgment requires (and what the plaintiff's proof would be at trial) in determining the issue of whether a "reasonable juror" would find for the plaintiff, and dismissing when that level of proof is not met; 6) judges confusing and failing to distinguish between law and fact; and 7) the role of *Daubert* decision making in strengthening and reinforcing dismissal on summary judgment. These issues are explored in the following Parts.

IV. SUMMARY JUDGMENT DECISION MAKING IN GENDER DISCRIMINATION CASES

In this Part, I examine a wide range of gender discrimination cases to see how summary judgment operates. I look at major women's rights cases that were dismissed on summary judgment and then reversed on appeal, leading to important decisions that changed the law and resulted in new understandings of sex discrimination. I examine innovative arguments that have been cut off at summary judgment. In many of these cases, district courts have thwarted the development of the law through rulings on summary judgment. Although in some cases circuit courts reversed problematic grants of summary judgment, in many cases they did not.

The specific area of gender discrimination litigation that has been most explored with respect to summary judgment is employment discrimination. These are the cases that several of the Gender Bias Task Force reports identified as problematic, both in terms of judicial attitudes and, specifically, summary judgment.[163] There is now extensive literature on problems of cognitive bias in gender discrimination cases in employment and analyses of how

163. *See supra* notes 1, 24, and accompanying text.

poorly employment discrimination plaintiffs fare in federal court.[164] Serious sex discrimination still exists—in overt forms in many areas— although some argue that it is subtler. "By 2000, employment discrimination cases constituted nearly 10 percent of federal civil cases."[165] Scholars such as Theresa Beiner,[166] Ann McGinley,[167] Isabel Medina,[168] and Eric Schnapper[169] have identified summary judgment as problematic in these cases, particularly in cases of sexual harassment. In the following sections I discuss how summary judgment impacts a wide range of gender discrimination cases in a number of different ways.

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164. *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIR. LEG. STUD. 429 (2004); Selmi, *supra* note 30; Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL'Y J. 1 (2005).

165. Clermont & Schwab, *supra* note 164, at 432. Clermont and Schwab suggest that "[n]ontrial adjudication, such as by pretrial motion, has stayed comparable over the years for employment discrimination and other cases, at about 20 percent of the cases overall. It seems to be gently increasing with time." *Id.* at 440. They also see employment discrimination cases as settling less frequently than other cases. "Employment discrimination plaintiffs have a tough row to hoe. They manage many fewer happy resolutions early in litigation, and so they have to proceed toward trial more often. They win a lower proportion of cases during pretrial and at trial." *Id.* at 429.

166. *See* Beiner, *supra* note 24; THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW (2005) [hereinafter BEINER, GENDER MYTHS]. Theresa Beiner's work has explored the problems of summary judgment in "hostile environment" sexual harassment cases. *See* Beiner, *supra* note 24; BEINER, GENDER MYTHS, *supra*. She has focused on the way in which judges decided the "severity" and "pervasiveness" requirement of "hostile environment" claims without hearing live witnesses, how the fact-specific inquiry that the case be decided on the basis of a "totality of the circumstances" is in conflict with resolution on summary judgment, and that the standard that harassment be judged on the basis of a "reasonable person" standard necessarily involves "norms of appropriate behavior that are better judged by a jury of the plaintiff's peers than a single judge." Beiner, *supra* note 24, at 133-34. She analyzes judges' failure to take "evidence of women's stories" into consideration in their analysis of sexual harassment. Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117 (2001) [hereinafter Beiner, *Women's Stories*]. Beiner suggests that there is a gap between what social scientists tell us about harassment and what courts believe. Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791 (2002) [hereinafter Beiner, *Let the Jury Decide*]. She argues that the conflict between "gender myths" and "working realities" drives the distortion of sexual harassment jurisprudence and summary judgment determination. *See* BEINER, GENDER MYTHS, *supra*.

167. *See* McGinley, *supra* note 29.

168. *See* Medina, *supra* note 29.

169. *See* Schnapper, *supra* note 29.

A. *District Court Assessment of Reasonableness*

In order for a district court to conclude that a case is inappropriate for summary judgment, the court has to decide that a "reasonable juror" could find for the plaintiff. Thus, a district court's assessment of what would be reasonable for a juror to find is crucial.

"Maternal wall" or "sex-plus" cases—cases in which there are allegations of caregiver discrimination—are cases where there are likely to be problems on summary judgment, because the claims are novel.[170] In *Back v. Hastings on Hudson Union Free School District*,[171] Elana Back, an elementary school psychologist, sued under 42 U.S.C. § 1983, claiming that she was denied equal protection when her superiors campaigned to deny her tenure. They questioned her commitment to the job when she returned to work after having a baby, despite the fact that she had received several outstanding performance reviews before and after giving birth. She alleged that as her tenure review approached in 2000, two superiors repeatedly questioned whether she would be able to work a full day. One allegedly said "she did not know how she could perform [her] job with little ones" and it was "not possible for [her] to be a good mother and have this job."[172] Her bosses also questioned whether she would show the same level of commitment once she had tenure, given that she was raising a family.[173] She alleged that they encouraged parents who had complained about her in the past to put their complaints in writing, and that she began getting negative evaluations of her performance, which she argued were a pretext for discrimination.[174] District Judge Brieant granted summary judgment for the defendants, finding in part that the superiors' comments were "stray remarks" that were not evidence of sex discrimination and that Back had failed to prove that the reasons given for denying her tenure were pretextual.[175]

The Second Circuit reversed the grant of summary judgment. Judge Calabresi noted that the case presented "a crucial question:

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170. *See* Joan C. Williams & Nancy Segal, *Beyond The Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003); Dee McAree, *'Sex-Plus' Gender Bias Lawsuits on the Rise*, NAT'L L.J., Mar. 2005, at 4, 4; Joan. C. Williams & Elizabeth S. Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of "Carers" in the Workplace*, 13 DUKE J. GENDER L. & POL'Y 31 (2006).

171. 365 F.3d 107 (2d Cir. 2004). *See* Mark Hamblett, *Judging Motherhood: Beware*, NAT'L L.J., Apr. 2004, at 4, 4.

172. *Back*, 365 F.3d at 120.

173. *Id.*

174. *Id.* at 116.

175. *Id.* at 117.

What constitutes a 'gender-based stereotype?'"[176] He stated that "it takes no special training to discern stereotyping in the view that a woman cannot 'be a good mother' and have a job that requires long hours, or in the statement that a mother who received tenure 'would not show the same level of commitment [she] had shown because [she] had little ones at home.'"[177] The court ruled that there was sufficient evidence in the record to show intentional discrimination on the part of her two direct supervisors, and remanded the case for trial with respect to them.[178]

In *Plotke v. White*,[179] Dr. A. Jane Plotke sued the Secretary of the Army under Title VII, alleging that the Army had unlawfully terminated her from her employment as a historian on the basis of her gender.[180] The district court dismissed her claims of gender discrimination and pretext on summary judgment and the Tenth Circuit reversed.[181] Judge Stephanie Seymour, writing for the court, carefully analyzed of all the evidence presented below and concluded that Dr. Plotke had "established a prima facie case of gender discrimination" and had also "demonstrated genuine issues of material fact as to pretext."[182]

Judge Seymour emphasized that a reasonable juror could find for Dr. Plotke in light of the following facts:

> Dr. Plotke was the first and only female historian hired at Fort Leavenworth and Dr. Lackey informed her she was hired largely because of administrative pressures to employ a woman at the facility. Likewise, in contrast to her male counterpart, Dr. Bernstein, Dr. Plotke's job duties were generally limited to clerical and manual tasks, and she was prohibited from engaging in higher-level functions within the CTC-WIN due to the unexplained delay in delivering her security clearance. Many of her male colleagues, at least one of whom had not achieved the same level of education as she had, referred to her as Jane while referring to other male staff members with their academic titles of "Dr."[183]

Judge Seymour highlighted these and other facts, such as Dr. Plotke being called a "femi-Nazi" and "wire-head," comments "advising her that she 'should be quiet and not make [her]self noticed,' remarking that her presence would prevent the all-male

176. *Id.* at 119-20.
177. *Id.* at 120.
178. *Id.* at 130.
179. 405 F.3d 1092 (10th Cir. 2005).
180. *Id.* at 1093.
181. *Id.*
182. *Id.* at 1108.
183. *Id.* at 1101.

group from 'sitting around drinking beer, smoking cigars and farting' on a professional staff ride," comments "disparaging Dr. Plotke's professional competence and yelling at her to 'keep her mouth shut' in the presence of her peers and supervisor."[184] Judge Seymour emphasized that "[o]n a motion for summary judgment, the district court is required to review the record 'taken as a whole,'"[185] and that "[a] reasonable jury could infer from the [evidence] that unlawful gender bias was a motivating factor in [the] Army's adverse employment decision."[186]

In *Hocevar v. Purdue Frederick Co.*,[187] a woman employee brought hostile work environment and retaliation claims against her employer. Marcia Hocevar was a pharmaceutical sales representative whose extremely abusive supervisor "distributed sexually explicit material at business meetings . . . made threats of violence towards female staff members . . . [and] *constantly* referred to women as bitches."[188] The district judge granted summary judgment on both claims, and the Eighth Circuit, in a divided opinion, affirmed summary judgment on the hostile environment claim and reversed on the retaliation claim.[189] In an opinion dissenting in part, Judge Lay argued that summary judgment was inappropriate because there were genuine issues of material fact on the hostile work environment claim.[190] Judge Lay's opinion carefully analyzes the proof submitted below and concludes that, under a totality of the circumstances test, there was sufficient evidence for the case to reach a jury.[191]

In three other opinions, Judge Lay continued to vigorously object to summary judgment decision making on gender cases in the Eighth Circuit. He wrote dissenting opinions in cases affirming grants of summary judgment against women plaintiffs in employment cases in the Eighth Circuit. In *Melvin v. Car-Freshener Corp.*,[192] Lucille Melvin claimed that she was "terminated in retaliation for suffering a work related injury and filing a workers' compensation claim."[193] The district court granted summary judgment and a panel of the Eighth Circuit affirmed.[194] Judge Lay, writing in dissent, found that the plaintiff had "presented sufficient evidence from which a

184. *Id.* at 1106 (citation omitted).
185. *Id.* (citation omitted).
186. *Id.* at 1107.
187. 223 F.3d 721 (8th Cir. 2000).
188. *Id.* at 723-24.
189. *Id.* at 726-27.
190. *Id.* at 728-29.
191. *Id.* at 734-35.
192. 453 F.3d 1000 (8th Cir. 2006).
193. *Id.* at 1002.
194. *Id.*

reasonable jury could infer that she was terminated because her injury qualified her for workers' compensation benefits."[195] He argued that there were inconsistencies in Car-Freshener's explanations, such as economic reasons for her firing.[196] He explained his decision with the following statement:

> Too many courts in this circuit, both district and appellate, are utilizing summary judgment in cases where issues of fact remain. This is especially true in cases where witness credibility will be determinative. In these instances, a jury, not the courts, should ultimately decide whether the plaintiff has proven her case. Summary judgment should be the exception, not the rule. It is appropriate "only . . . where it is quite clear what the truth is . . . for the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try."[197]

This theme of witness credibility continued in Judge Lay's dissenting opinion in *Guerrero v. J.W. Hutton, Inc.*,[198] where Marcie Guerrero sued her former employer, J. W. Hutton, in Iowa state court, claiming that "she was owed a bonus under the Iowa Wage Payment and Collection Act (IWPCA) and overtime under the Fair Labor Standards Act (FLSA)" after her employment as a subrogation analyst was terminated.[199] Hutton removed the case to federal court and counterclaimed for breach of a noncompete agreement.[200] The district court granted Hutton's motion for summary judgment and the Eighth Circuit affirmed summary judgment, with a dissent from Judge Lay.[201] Judge Lay began his opinion with the statement, "Credibility is the matrix of the factual dispute in this case. Specifically, genuine issues of material fact remain on Guerrero's IWPCA claim that preclude summary judgment."[202] He described conflicts in the evidence that he viewed as resting on credibility of the parties generally, and Marcie Guerrero's credibility specifically.[203] He described these credibility issues as "obvious" and concluded that the case was inappropriate for summary judgment.[204]

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195. *Id.* at 1003 (Lay, J., dissenting).
196. *Id.* at 1003-04.
197. *Id.* (citation omitted).
198. 458 F.3d 830 (8th Cir. 2006).
199. *Id.* at 831-32.
200. *Id.* at 831.
201. *Id.*
202. *Id.* at 836 (Lay, J., dissenting).
203. *Id.* at 836-37.
204. *Id.*

Finally, in *Green v. Franklin National Bank of Minneapolis*,[205] Linda Green alleged racial harassment and hostile work environment, discriminatory discharge, and retaliation under Title VII and 42 U.S.C. § 1981, and "whistle-blowing under the Minnesota Whistleblower Act for her reporting of discrimination at Franklin National Bank."[206] Green, an African American woman employed as a bank teller, worked with a white man, who, according to her deposition testimony, called her "monkey," "black monkey," and "chimpanzee," and told her that she should wear dreadlocks.[207] The majority affirmed the district court grant of summary judgment on all of Green's claims,[208] and Judge Lay "dissent[ed] on the issue of Green's federal retaliation and Minnesota state whistleblower claims."[209] Again, Judge Lay closely analyzed Green's deposition testimony and concluded that "a reasonable jury could easily infer pretext."[210]

Jennings v. University of North Carolina at Chapel Hill,[211] dealt with claims of sexual harassment under Title IX and 42 U.S.C. § 1983 were brought by two former University of North Carolina varsity women's soccer players against the women's soccer coach, Anson Dorrance, the assistant coach, the athletic trainer, and administrators at UNC–Chapel Hill.[212] At forty-five years old, Anson Dorrance was the most powerful intercollegiate women's soccer coach in the United States (because UNC was one of the best women's intercollegiate soccer teams in the country at the time).[213] He asked team members "who are you f—-ing?" and made comments to them regarding sexual partners.[214] He touched team members frequently and asked them questions and made comments that suggested his inappropriate interest in their sexual activities.[215] On a detailed record of truly shocking statements, the district judge granted the defendant's motion for summary judgment.[216] The Fourth Circuit first affirmed the grant of summary judgment, with a strong

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205. 459 F.3d 903 (8th Cir. 2006).
206. *Id.* at 906.
207. *Id.*
208. *Id.* at 917.
209. *Id.* (Lay, J., dissenting in part).
210. *Id.* at 918.
211. 444 F.3d 255 (4th Cir. 2006), *rev'd en banc*, 482 F.3d 686 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 247 (2007).
212. *Id.* at 255.
213. *Id.* at 283.
214. *Id.* at 263.
215. *Id.* at 260.
216. Jennings v. Univ. of N.C. at Chapel Hill, 240 F. Supp. 2d 492 (M.D.N.C. 2002).

dissenting opinion from Judge M. Blane Michael.[217] After rehearing en banc, in a decision written by Judge Michael, the Fourth Circuit vacated the district court's grant of summary judgment on the Title IX claim and on the § 1983 claims against some of the defendants.[218]

Jennings is a classic example of the problem of both district and circuit courts taking a slice and dice approach to summary judgment. The majority opinion, written by Judge James Dever, analyzes each part of the plaintiff's claims, but does not look at the evidence in a holistic way. Judge Dever focuses on the fact that Coach Dorrance did not have a sexual relationship with either of the individual plaintiffs, that his comments were part of ordinary locker-room banter, and that it was important to differentiate comments that were "merely vulgar and mildly offensive" from those that were "deeply offensive and sexually harassing."[219] Yet Judge Dever clearly recognized that the coach's comments were more than "mildly offensive" since his opinion does not cite the actual words that the coach spoke but disguises them with a series of asterisks.[220]

In his dissent in the first Fourth Circuit decision, and his majority opinion in the rehearing en banc decision, Judge Michael writes that Melissa Jennings was entitled to have her day in court.[221] He rejects the majority view that the coach's comments were locker-room language that was to be expected, and quotes the coach's "sexually charged comments" in full from the record below: his unflattering comments about the players' physical appearances, his views of their sex appeal, and his comments concerning sexual fantasies that he had about them.[222] He highlights the power imbalance between the coach and the players and the players' dependence on him for any future career in soccer to which they might aspire.[223] He concludes that the coach's comments and behavior raise serious questions about whether there were violations of gender equity and sexual harassment laws and that a reasonable juror could reach that conclusion on the record presented.[224]

District court attitudes on the "reasonableness" of jury determination on summary judgment not only affect judicial decision making on summary judgment, but can persist throughout a case and affect other procedural decisions. One example is the procedural

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217. *Jennings*, 444 F.3d at 283 (Michael, J., dissenting).

218. Jennings v. Univ. of N.C. at Chapel Hill, 482 F.3d 686, 702 (4th Cir. 2007).

219. *See Jennings*, 444 F.3d at 274 (majority opinion).

220. The majority opinion references such remarks as "f***of the week," "fat a**," and "who are you f***ing?" *Id.* at 260, 261, 263.

221. *Id.* at 283 (Michael, J., dissenting); *see also Jennings*, 482 F.3d 686.

222. *Jennings*, 482 F.3d at 691-93.

223. *Id.* at 696.

224. *See id.* at 697, 698, 700.

history of *Sorlucco v. New York City Police Department*,[225] involving employment discrimination claims by a woman police officer who was raped and sexually assaulted by another officer, and was subsequently terminated from her job.[226] District Judge Michael Mukasey first dismissed Karen Sorlucco's claims of gender discrimination in violation of § 1983 and Title VII on summary judgment,[227] but this decision was reversed by the Second Circuit.[228] After the case was remanded, went to jury trial, and the plaintiff won substantial damages, Judge Mukasey granted judgment as a matter of law to set aside the jury verdict and a motion for a new trial; he was again reversed by the Second Circuit.[229] Here, the judge's initial summary judgment determination and view of "reasonableness" permeated the entire case, shaping the decision to grant judgment as a matter of law.[230] Judge Mukasey's resistance to "reasonableness," first reflected in his summary judgment ruling, clearly persisted and shaped his ultimate decision to set aside the jury verdict.

B. Summary Judgment Decisions "On The Law"

There are many gender cases in which the district courts have dismissed on summary judgment as a matter of law, ruling that there really were no "legal" claims. Over the last forty years, as women's rights cases first began winding their way through the courts, many district courts granted summary judgment to these claims at the trial level. In many of these cases, district courts were narrow and cautious in their legal interpretation and held that plaintiffs had no cognizable claim as a matter of law. In some of these cases, the circuit court, the Supreme Court, or both ultimately reversed the district court. As mentioned earlier, these decisions should not be viewed as pure "law" cases because the district courts'

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225. 703 F. Supp. 1092 (S.D.N.Y. 1989).

226. *Id.* at 1093.

227. *Id.* at 1102.

228. Sorlucco v. N.Y. City Police Dep't., 888 F.2d 4, 8 (2d Cir. 1989).

229. Sorlucco v. N.Y. City Police Dep't., 780 F. Supp. 202, 216 (S.D.N.Y. 1992), *rev'd*, 971 F.2d 864, 875 (2d Cir. 1992).

230. *Id.* Other cases in which district court judges granted judgment as a matter of law to set aside jury verdicts entered for women plaintiffs in sexual harassment cases, where their decisions are affirmed by circuit courts, include *Duncan v. General Motors*, 300 F.3d 928, 934 (8th Cir. 2002) (affirming judgment as a matter of law for defendant because plaintiff failed to show that the workplace was "permeated with discriminatory intimidation, ridicule, and insult"), and *Ocheltree v. Scollon Products, Inc.*, 335 F.3d 325, 327 (4th Cir. 2003) (affirming district court judgment as a matter of law setting aside the jury verdict for plaintiff on sex-based employment discrimination claim on compensatory damages, and also affirming judgment as a matter of law to set aside the jury verdict on punitive damages because defendant employer did not have requisite knowledge of the harassment).

rulings on and assessments of the law, and the circuit or Supreme Court's reversal of these rulings, are inevitably shaped by the facts of each case.

Early examples of cases in this vein are *Mississippi University for Women v. Hogan*,[231] *California Federal Savings & Loan Ass'n v. Guerra*,[232] *International Union v. Johnson Controls, Inc.*,[233] *Burlington Industries, Inc. v. Ellerth*,[234] and *Jackson v. Birmingham Board of Education*.[235] All of these cases involved innovative claims of inequality in education or employment that district courts rejected on summary judgment as a matter of law, and were later reversed by circuit courts or the Supreme Court.

Nevada Department of Human Resources v. Hibbs[236] is a more recent example of this phenomenon. In *Hibbs*, a husband who was unable to take off from work to care for his severely ill wife sued the state of Nevada for denial of family leave under the Family Medical Leave Act (FMLA).[237] The district court dismissed the FMLA claim on summary judgment as a matter of law on the basis of Eleventh Amendment immunity and prior decisions of the Supreme Court interpreting the Eleventh Amendment.[238] The circuit court reversed the district court's grant of summary judgment and the Supreme Court affirmed.[239] Justice Rehnquist's decision for the Court emphasized the importance of the FMLA as a matter of law and policy in light of the compelling facts of the case.[240] He concluded that

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231. 458 U.S. 718 (1982) (affirming, but narrowing, circuit reversal).

232. 479 U.S. 272 (1987).

233. 499 U.S. 187 (1991).

234. 524 U.S. 742 (1998).

235. 544 U.S. 167 (2005).

236. 538 U.S. 721 (2003) (upholding the constitutionality of the application of the FMLA to state employees).

237. *Id.* at 725.

238. *Id.*

239. *Id.* at 725, 740.

240. Justice Rehnquist wrote:

> The FMLA aims to protect the right to be free from gender-based discrimination in the workplace. . . . The history of the many state laws limiting women's employment opportunities is chronicled in—and, until relatively recently, was sanctioned by—this Court's own opinions. . . . Congress responded to this history of discrimination by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964. . . . According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. . . . As the FMLA's legislative record reflects, a 1990 Bureau of Labor Statistics (BLS) survey stated that 37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies. . . . Congress also heard testimony that . . . 'Even . . . [w]here

because of the importance of the FMLA claim, precedent on Eleventh Amendment immunity was not applicable to these claims.[241] The Supreme Court's surprising decision on the immunity issue was shaped by its view of the importance of the FMLA and the factual record below.[242] Commentators have suggested that Justice Rehnquist's experience helping his daughter, a single mother who worked full time, with child care may have affected his view of family caretaking and the importance of the FMLA.[243]

Another recent Supreme Court case, *Pennsylvania State Police v. Suders*,[244] involved an analogous procedural context. Nancy Suders worked as a police communications expert for the Pennsylvania State Police (PSP).[245] She sued the PSP, alleging that the sexual harassment by her supervisors, which caused her to resign, constituted a constructive discharge.[246] The district court dismissed her claims on summary judgment, interpreting *Burlington Industries, Inc. v. Ellerth*[247] and *Faragher v. City of Boca Raton*[248] to preclude her action.[249] On appeal to the Third Circuit, Judge Julio Fuentes reversed on the ground that there were genuine issues of material fact that precluded summary judgment on Suders's claims of both hostile work environment and constructive discharge, and then ruled as a matter of law that constructive discharge was a "tangible employment action" within the meaning of *Ellerth* and *Faragher*; PSP was precluded from raising an affirmative defense to vicarious liability or damages for sexual harassment by supervisors.[250] Finally, the Supreme Court held that, as a matter of

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> child-care policies do exist, men, *both in the public and private sectors*, receive notoriously discriminatory treatment in their requests for such leave' . . . Many States offered women extended maternity leave that far exceeded the typical 4- to 8-week period . . . but very few States granted men a parallel benefit: Fifteen States provided women up to one year of extended maternity leave, while only four provided men with the same. . . . This and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work.

Id. at 728-31 (citations omitted).

241. *See id.* at 726.

242. Joan C. Williams, Hibbs *as a Federalism Case;* Hibbs *as a Maternal Wall Case*, 73 U. CIN. L. REV. 365, 371-73, 382 (2004).

243. Linda Greenhouse, *Justices, 6-3, Rule Workers Can Sue States Over Leave*, N.Y. TIMES, May 28, 2003, at A1.

244. 542 U.S. 129 (2004).

245. *Id.* at 134.

246. *Id.* at 133.

247. 524 U.S. 742 (1998).

248. 524 U.S. 775 (1998).

249. *Pa. State Police*, 542 U.S. at 137.

250. Suders v. Easton, 325 F.3d 432, 435 (3d Cir. 2003).

law, there was a constructive discharge and reiterated that the employer has the burden to demonstrate the existence of an effective remedial process and the employee's unreasonable failure to utilize that process.[251]

In *Jespersen v. Harrah's Operating Co.*,[252] the Ninth Circuit Court of Appeals, sitting en banc, affirmed and reversed a district court ruling granting summary judgment. Darlene Jespersen claimed that a Harrah's casino gaming policy, which required female, but not male, bartenders to wear makeup, violated Title VII.[253] The Ninth Circuit ruled that the relevant legal standard was whether the makeup policy imposed on the plaintiff created an unequal burden on the plaintiff's gender, and held that the plaintiff had failed to present sufficient evidence of such an unequal burden.[254] This is an example of summary judgment "on the law," in which a district court and the circuit court clarify legal standards in a controversial and developing area of the law.[255]

Another example of a grant of summary judgment as a matter of law where novel gender claims are involved is *EEOC v. National Education Ass'n, Alaska*.[256] In this case, the EEOC brought a Title VII action against the employer on behalf of three women employees, alleging that the employer created a sex-based, hostile work environment and constructively discharged one of the employees.[257] The sex-based harassment claim alleged that a supervisor, Thomas Harvey, was directing harassing conduct at women employees in violation of Title VII, including shouting, the use of foul language, and hostile physical actions, though the behavior was not explicitly sex- or gender-related.[258] In the majority's words:

> [T]he district court recognized that plaintiffs 'presented substantial evidence that Harvey is rude, overbearing, obnoxious, loud, vulgar, and generally unpleasant' but nonetheless held that because 'there is no evidence that any of the exchanges between Harvey and Plaintiffs were motivated by lust' or by 'sexual animus toward women as women,' his conduct was not discriminatory.[259]

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251. *Pa. State Police,* 542 U.S. at 150-52.
252. 444 F.3d 1104, 1106 (9th Cir. 2006).
253. *Id.* at 1105-06.
254. *Id.* at 1111.
255. *See generally,* Michael Selmi, *The Many Faces of Darlene Jesperson*, 14 DUKE J. GENDER L. & POL'Y 467 (2007).
256. 422 F.3d 840 (9th Cir. 2005).
257. *Id.* at 842.
258. *Id.*
259. *Id.* at 845.

The Ninth Circuit reversed, as a matter of law, the grant of summary judgment below, holding that "differences in subjective effects (along with, of course, evidence of differences in objective quality and quantity) is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex- or gender-specific."[260] The court also suggested that the record revealed "a debatable question as to the objective differences in treatment of male and female employees, and strongly suggests that differences in subjective effects were very different for men and women."[261] It concluded that the facts presented a triable issue as to whether the work environment that Harvey created was sufficiently severe to constitute illegal hostile work environment on the basis of sex under Title VII.[262]

These are cases in which judges have ruled on summary judgment as a matter of law in the context of novel claims. Yet the district courts' grant of summary judgments and the appellate courts' review of these decisions are made on a record based on discovery, not live testimony. Judge Wald emphasized the need for federal jurisprudence to be based on a full testimonial record that demonstrates the complexity of these legal questions in the context of the facts.[263] This was a serious problem for the women plaintiffs in these cases.

C. Determination Of Genuine Issues Of Material Fact

District court determinations of whether there are genuine issues of material fact presented in the case, so as to preclude summary judgment, are also problematic. In *Bryant v. Farmers Insurance Exchange*,[264] Judith Bryant sued Farmers Insurance Exchange for age and gender discrimination under Title V when she was fired from her job as claims director within the specialty claims unit of the western division of Farmers. The district court excluded substantial portions of her affidavit opposing summary judgment and then granted summary judgment.[265] In a careful opinion, the Tenth Circuit found that the district court had improperly excluded the affidavit and that Bryant had presented sufficient evidence calling into question the veracity of Farmers' nondiscriminatory reasons for firing her to establish pretext for summary judgment purposes.[266]

260. *Id.* at 846.
261. *Id.*
262. *Id.*
263. Wald, *supra* note 3, at 1941-45.
264. 432 F.3d 1114 (10th Cir. 2005).
265. *Id.* at 1120-22.
266. *Id.* at 1124-26.

Similarly, in *Watson v. Blue Circle, Inc.*[267] Lisa Watson sued Blue Circle, a company that provided ready-mix concrete in Georgia and Alabama, for hostile work environment sexual harassment under Title VII at the Athens, Georgia facility, where she was one of only three women employed as a concrete truck driver. The district court granted summary judgment for the defendant.[268] The Eleventh Circuit reversed on the ground that there were many genuine issues of material fact and that inferences had been drawn in favor of Blue Circle by the district court.[269] These issues included whether Blue Circle had actual notice of several alleged incidents of harassment; whether Blue Circle had an effective sexual harassment policy that precluded a finding of constructive notice, and if not, whether Blue Circle had constructive notice and thus reasonably should have known of several alleged incidents of harassment; and whether Blue Circle took immediate and appropriate corrective action in response to those incidents.[270] Judge Wald suggests that in many cases where there is reversal because of determinations that there are genuine issues of material fact in dispute, there are issues of law appended to them.[271] *Blue Circle* is such a case.

Simpson v. University of Colorado[272] is another good example of district court fact-finding. This case involved Title IX claims against the University of Colorado by two female students who were raped during football recruitment season where there was evidence that football recruits had been promised "a good time."[273] There was significant discovery concerning the University of Colorado's football program and sexual assault that took place over many years.[274] The University of Colorado moved for summary judgment and District Judge Blackburn granted the motion, finding that there were no genuine issues of material fact respecting the legal requirements of the defendants' actual notice and willful disregard under Title IX.[275] In a lengthy opinion, the district judge did extensive fact-finding based on discovery, drew inferences from the record, and concluded that there was not sufficient evidence to reach a jury.[276] This is a classic example of a district court slicing and dicing, analyzing the legal claims and breaking down the legal requirements so technically

267. 324 F.3d 1252 (11th Cir. 2003).
268. *Id.* at 1254-55.
269. *Id.* at 1262-63.
270. *Id.*
271. Wald, *supra* note 3, at 1939.
272. 372 F. Supp. 2d 1229 (D. Colo. 2005).
273. *See id.* at 1231-32.
274. *Id.* at 1242.
275. *Id.* at 1244-46.
276. *Id.* at 1246.

that the context and interrelated aspects of evidence that are relevant to the plaintiff's claims are lost. All of this work was done by the district court to keep the case from the jury.

On appeal, the Tenth Circuit reversed and vacated the district court's grant of summary judgment, with the following conclusions:

> In sum, the evidence before the district court would support findings that by the time of the assaults on Plaintiffs, (1) Coach Barnett, whose rank in the CU hierarchy was comparable to that of a police chief in a municipal government, had general knowledge of the serious risk of sexual harassment and assault during college-football recruiting efforts; (2) Barnett knew that such assaults had indeed occurred during CU recruiting visits; (3) Barnett nevertheless maintained an unsupervised player-host program to show high-school recruits "a good time"; and (4) Barnett knew, both because of incidents reported to him and because of his own unsupportive attitude, that there had been no change in atmosphere since 1997 (when the prior assault occurred) that would make such misconduct less likely in 2001. A jury could infer that "the need for more or different training [of player-hosts was] so obvious, and the inadequacy so likely to result in [Title IX violations], that [Coach Barnett could] reasonably be said to have been deliberately indifferent to the need."
>
> In light of the summary-judgment standard, and taking into account all favorable inferences for Plaintiffs, we conclude that they submitted sufficient evidence for "a reasonable jury [to] return a verdict for [them]." Summary judgment was therefore inappropriate.[277]

Finally, in *Williams v. General Motors,* a Sixth Circuit opinion reversing summary judgment in a "hostile environment" sexual harassment case,[278] Judge Martha Daughtrey used the phrase "impermissible disaggregation of incidents" to describe what the district court had done in its opinion, and why the grant of summary judgment should be reversed.[279] She argued that the district judge had isolated aspects of evidence of "hostile environment," rather than looking at the evidence in light of the "totality of the circumstances."[280] She also reversed the district court's determination that there was no "hostile environment" as a matter of law.[281]

277. Simpson v. Univ. of Colorado, 500 F.3d 1170, 1184-85 (10th Cir. 2007) (citations omitted).

278. 187 F.3d 553 (6th Cir. 1999).

279. *Id.* at 562-64.

280. *Id.* at 562-63.

281. *Id.* at 563.

These cases bear out Judge Wald's point regarding how summary judgment decisions distort the context of decision making and shape federal jurisprudence.[282] Although in several of these cases the plaintiff's claim was recuperated on appeal, who knows how many other cases existed involving novel claims or arguments made by plaintiffs in which district court judges dismissed the case on summary judgment as a matter of law, and the plaintiff did not appeal or the dismissal was not reversed? In light of what we know both about appeals of summary judgment generally and appeals in employment discrimination cases specifically, with their "anti-plaintiff effect,"[283] there is a huge impact on limiting the development of the law at the trial level. On the other hand, what are novel and innovative claims in the context of gender cases? Do Title VII or Title IX gender cases really continue to present novel or innovative issues, or is it arguable that they are cut and dry after all these years of litigation?[284].I think the cases presented here suggest there are new and innovative claims that are being developed all the time.

A change in substantive law standards in gender cases will also impact on summary judgment—Charles Sullivan and Michael Zimmer have discussed the impact of *Desert Palace* on Title VII and summary judgment.[285] Sullivan observes that although the Supreme Court may have read Title VII to permit a plaintiff to prove that discrimination was a motivating factor for a challenged decision without the need for direct evidence in *Desert Palace*, a doctrinal reformulation that was generally viewed as beneficial to individual plaintiffs, there may be downsides because of summary judgment.[286] He notes that in the new regime, "district judges will have even more discretion in summary judgment dispositions, as the central question will reduce to one determination of whether a reasonable jury can find discrimination. It is not so clear that, on balance, this will be exercised in allowing discrimination cases to go to trial."[287]

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282. Wald, *supra* note 3, at 1897-98.

283. Clermont & Schwab, *supra* note 164, at 451.

284. I am grateful to Nan Hunter who raised this question with me. My view is that Title VII and other employment claims do present novel and innovative issues. Law shaped by the development of new factual patterns continues to evolve.

285. *See generally* Joseph E. Slater et al., *Proof and Pervasiveness: Employment Discrimination In Law and Reality After* Desert Palace, Inc. v. Costa*: Proceedings of the 2005 Annual Meeting, Association of American Law Schools, Sections On Employment Discrimination, Civil Rights, Labor Relations and Employment Law, and Minority Groups,* 9 EMP. RTS. & EMP. POL'Y J. 427 (2005).

286. Charles A. Sullivan, *Circling Back To The Obvious: The Convergence of Traditional And Reverse Discrimination in Title VII Proof,* 46 WM. & MARY L. REV. 1031, 1128 (2004).

287. *Id.* at 1128. The Supreme Court case, *Smith v. City of Jackson*, 544 U.S. 228 (2005), involving age discrimination with women plaintiffs, is another example. The

D. The Importance of Jury Determination

In *Gallagher v. Delaney*,[288] Judge Weinstein, sitting on a panel of the Second Circuit, wrote an opinion reversing summary judgment in a sex discrimination case. In it, Judge Weinstein emphasizes the reasons why a district judge should not decide this type of case and the importance of having a jury decide these kinds of issues.[289]

Gender and employment scholars have a dark view of summary judgment in women's rights and employment discrimination cases because of their views of federal judges, their backgrounds and the kinds of work and life experiences they have had, and what they have observed concerning judicial attitudes toward these cases.[290] Mary Becker writes about the predominance of summary judgment in Title VII and maternal caretaking cases[291] and suggests that there is little hope for the future of Title VII as a remedy because of the prevalence of summary judgment. Michael Selmi details the problems of summary judgment in employment cases and explains why many federal judges don't "get" these cases.[292] Do judges have more than discomfort with these cases? Is it really judicial hostility?[293] Wendy Parker has highlighted a deeper problem of "anti-plaintiff ideology" in employment cases generally, and in race cases in particular, that is reflected in grants of summary judgment.[294]

E. Daubert

Experts are now widely used in gender cases, particularly in women's rights and employment cases.[295] Gender stereotyping is an

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district court dismissed on summary judgment, and the court of appeals affirmed the dismissal of plaintiffs' disparate impact claim as unavailable under the ADEA, but vacated summary judgment for defendant on the disparate treatment claim as "premature." *Id.* at 231. The Supreme Court found that there was a claim of "disparate impact" that was cognizable, although plaintiffs had not presented it properly. *Id.* at 232.

288. 139 F.3d 338 (2d Cir. 1998).

289. *Id.* at 342.

290. *See, e.g.*, Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1517-21 (2001); Beiner, *supra* note 24, at 119–20; Medina, *supra* note 29, at 361; Selmi, *supra* note 30.

291. Becker, *supra* note 290, at 1517-21

292. Selmi, *supra* note 30, at 568-69. Selmi describes the life circumstances, privileges, and attitudes toward working women of many federal judges, which make it difficult for them to see women's employment discrimination cases fairly.

293. I am grateful to Jeff Stempel who made this point at the Law and Society Roundtable.

294. *See* Parker, *supra* note 30.

295. Expert testimony in women's rights cases is now common. An early women's rights case involving expert testimony was *Price Waterhouse v. Hopkins*, in which social psychologist Susan Fiske testified as to the way in which sex stereotyping

issue that is at the heart of many cases, whether "maternal wall" or sexual harassment, and there has been considerable scholarship and expert testimony on cognitive bias in many gender discrimination contexts. Cognitive bias research examines the subtle, often unconscious biases that affect behavior and decision making.[296] Expert testimony on cognitive bias can address problems of sex discrimination in the workplace.[297] Joan Williams discusses the potential use of expert testimony on cognitive bias to defeat motions for summary judgment by shifting judicial inferences in "maternal wall" cases.[298] Theresa Beiner proposes the admission of social science evidence in sexual harassment cases to deal with the gap between the judge and the jury.[299] But, with *Daubert*, would this testimony even be admitted?[300]

There are *Daubert* issues now in a wide range of gender discrimination cases. Has social science evidence been admitted? Would admission of such evidence make a difference? Although more research on these questions is necessary to determine how *Daubert* is impacting gender cases, there is a practical conundrum here. The use of expert testimony might be advocated to provide a broader context to educate judges, but judges may be ruling on *Daubert* to prevent admission of this testimony, and that increases the use (and likelihood of grants) of summary judgment as well.

V. GENDER, TORTS, AND SUMMARY JUDGMENT DECISION MAKING

Over the last several years, there has been considerable recognition by tort scholars of the gendered nature of certain torts. Martha Chamallas,[301] Lucinda Finley,[302] Thomas Koenig and

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impacts employment decisions such as partnership selection. 490 U.S. 228, 235-37 (1989).

296. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995)

297. *Id.* Recently, this area of research has expanded to include "implicit bias," a scientific study of "unconscious mental processes" and their effects on sexual discrimination. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006).

298. *See* Williams & Segal, *supra* note 170, at 132 n.368 (citing Krieger, *supra* note 296, at 1238).

299. BEINER, GENDER MYTHS, *supra* note 166, at 12-14.

300. *See* Minna J. Kotkin, Book Review, 55 J. LEGAL EDUC. 613, 617 (2005) [hereinafter Kotkin, Book Review] (reviewing BEINER, GENDER MYTHS, *supra* note 166).

301. *See* Chamallas, *Discrimination and Outrage*, *supra* note 152; *see also* Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005) [hereinafter Chamallas, *Ordinary Tort Cases*]; Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); Martha Chamallas, *Questioning the Use of Race-Specific*

Michael Rustad,[303] Joan Steinman,[304] and Anita Bernstein,[305] among others, have examined the ways in which gender issues play out in torts. Tort cases in federal court are therefore an additional place to look at the interplay between gender and summary judgment.

Koenig and Rustad have argued "that tort remedies are bifurcated into 'his' and 'her' tort worlds based upon gender roles."[306] In their study of tort cases involving punitive damages, "women were more likely than men to receive punitive damage awards for injuries from household consumer products."[307] In contrast, the punitive damages awarded to males arose from accidents involving industrial and farm machinery, asbestos, chemicals, industrial containers and vehicles.[308] Two out of three plaintiffs receiving punitive damage awards in medical malpractice litigation were women who were seeking redress for mismanaged child birth, cosmetic surgery, sexual abuse, and neglect in nursing home gender-based injuries.[309] Other scholars have emphasized the cluster of sexual- and reproductive-based harms that are involved in women's tort cases.[310] As others have argued, tort cases can also involve civil rights issues.[311]

While many tort cases are litigated in state court, some tort cases are filed in federal court on the basis of diversity jurisdiction, or federal statutory or regulatory claims.[312] As in all tort cases,

and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument, 63 FORDHAM L. REV. 73 (1994); Martha Chamallas with Linda K. Kerber, *Women, Mothers and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

302. *See* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004); *see also* Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847 (1997).

303. *See, e.g.*, Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1 (1995).

304. *See, e.g.*, Joan Steinman, *Women, Medical Care, and Mass Tort Litigation*, 68 CHI.-KENT. L. REV. 409 (1992).

305. *See, e.g.*, Anita Bernstein, Hymowitz v. Eli Lilly & Co.: *Markets of Mothers, in* TORTS STORIES 151 (Robert L. Rabin & Stephen D. Sugarman, eds., 2003).

306. *See* Koening & Rustad, *supra* note 303, at 1.

307. *Id.* at 38.

308. *Id.* at 35-37.

309. *Id.* at 61-62.

310. *See* Finley, *supra* note 302; Carrie Menkel-Meadow, *Taking The Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender and Process*, 31 LOY. L.A. L. REV. 513 (1998) (discussing author's work on Dalkon Shield arbitrations). I am grateful to Margaret Berger and Aaron Twerski who encouraged me to develop this Part.

311. *See* Chamallas, *Ordinary Tort Cases*, *supra* note 301, at 1437; *see also* Richard Abel, *Civil Rights and Wrongs*, 38 LOY. L.A. L. REV. 1421 (2005).

312. Tort cases in federal court are only a segment of tort cases generally, since most tort cases are litigated in state court. My focus in this Article is federal civil litigation, so I am only interested in tort cases litigated in federal court. This Part only

expert witnesses are frequently required. Thus, in these federal cases, summary judgment is shaped by the role of *Daubert* hearings, in which judges have to assess the admissibility of the plaintiff's expert witnesses.

Since the majority of plaintiffs in these toxic torts cases are women, general judicial hostility to tort cases, "tort reform," and *Daubert* have had an impact on summary judgment involving women plaintiffs. Arthur Miller has described how "tort reform" plays into summary judgment.[313] There are special pressures on plaintiffs in tort cases raising questions about causation, and special pressure to put plaintiffs to their proof early on. "*Lone Pine* orders" in toxic tort litigation, which require plaintiffs to produce basic evidence supporting a prima facie case early in the discovery process,[314] are frequently used in conjunction with defense motions for summary judgment. Many of these cases involve claims concerning "female injuries," such as DES, breast implants, Parlodel, Dalkon Shield, and Bendectin.[315]

The devastating impact of *Daubert* means that many torts cases are not even getting past motions in limine or summary judgment motions because of expert testimony, the most efficient way for defendants to dismiss the case at an early stage. Most cases appear to be dismissed on summary judgment on *Daubert* issues and are not even reaching an arguably "discovery-based" or "merits-based" summary judgment determination. Yet the legal questions that are raised in these cases are classic issues of mixed law and fact, cases involving issues of negligence. Arthur Miller notes that "[n]egligence is the paradigmatic mixed question of law and fact," and where the legal standard is certain, "the [fact-finder] is not simply determining

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begins to explore the problem of summary judgment in federal tort litigation involving women plaintiffs. A full discussion is beyond the scope of this Article.

313. Miller, *supra* note 9, at 985-1007.

314. Lore v. Lone Pine Corp., No. L-33606-85, 1986 WL 637507 (N.J. Super. Law Div. Nov. 18, 1986); James P. Muehlberger & Boyd S. Hoekel, *An Overview of* Lone Pine *Orders in Toxic Tort Litigation*, 71 DEF. COUNS. J. 366, 366 (2004). *Lone Pine* orders typically require plaintiffs:

> [T]o provide an affidavit by a date certain stating: (1) the identity and amount of each chemical to which the plaintiff was exposed; (2) the precise disease or illness from which the plaintiff suffers; and (3) the evidence supporting the theory that exposure to the defendant's chemicals caused the injury in question.

Id. at 366-67. Other evidence can also be required, such as "the dates of the exposure to the substance, the method of exposure . . . , and affidavits from medical experts supporting causation." *Id.* at 367. Although these orders developed from *Lone Pine Corp.*, a New Jersey state court decision, they have also been used in federal court. *Id.* at 370-73.

315. *See* Koenig & Rustad, *supra* note 303.

'what happened'–the historical facts–it is also determining the legal effect of its findings as to 'what happened.'"[316] One district judge agreed that the legal questions in these cases are "appropriately answered not by a trial judge on summary judgment, but by a jury whose primary function is to make determinations about people's conduct based on objective standards,"[317] and emphasized that a decision by a district judge that no reasonable jury could make a particular determination "discount[s] (1) the importance of a jury's evaluation of witnesses, (2) the greater sensory impact on the trier of live testimony, and (3) the value of trial cross-examination based on . . . a full presentation of the evidence."[318]

Here, judges may not be dealing with cases that directly implicate attitudes relating to gender roles, work, and family in the same way that employment discrimination or other gender discrimination cases do. In tort cases, the gender issues are more subtle, more below the surface, because these cases do not allege gender discrimination as a legal claim. With women plaintiffs in tort cases, these general attitudes may be complicated by views of the credibility of the plaintiff, and judicial lack of understanding of, or discomfort with, reproductive or "women's harms." Where there are claims concerning harm to women's bodies and reproductive capacity, there may be special judicial minimization of these claims, which includes the possibility of disposition on summary judgment. For these reasons, aspects of gender bias on summary judgment may seem less obvious in federal tort cases. I now briefly discuss a few examples of problems of judicial decision making in tort that present problems that are similar to those discussed in the previous section.

A. Reasonableness

There are numerous examples of these issues in tort cases involving women plaintiffs. In a Parlodel case, *Johnson v. Sandoz Pharmaceuticals Corp.*,[319] the Sixth Circuit reversed a grant of summary judgment by the district court on the ground that there were genuine issues of material fact that existed as to when the plaintiff, in the exercise of due diligence, should have discovered the alleged association between her suffering a stroke and her taking Parlodel, for the purposes of the statute of limitations.[320] Judge Martha Daughtrey, writing for the court, noted that:

316. Miller, *supra* note 9, at 1083-84.

317. Baldwin v. Stonebridge Life Ins. Co., 283 F. Supp. 2d 1148, 1150 (D. Colo. 2003).

318. *Id.* (quoting Miller, *supra* note 9, at 1090).

319. 24 F. App'x. 533 (6th Cir. 2001).

320. *Id.* at 533-34.

> In products liability cases arising from exposure to allegedly harmful substances, Kentucky law requires that a plaintiff be given a reasonable opportunity to discover the causal relationship between the substance and her injury before the statute of limitations clock begins to run against her. Here, Johnson's ingestion of Parlodel and her subsequent stroke did not occur simultaneously, and the surrounding circumstances made the alleged causal relationship less than obvious to a lay person. Accordingly, we conclude that the case must be remanded for determination by a jury whether Johnson, at the time of her stroke, "in the exercise of reasonable diligence should have discovered not only that [she] ha[d] been injured but also that h[er] injury may have been caused by" her use of Parlodel.[321]

In *Smith v. Wal-Mart Stores, Inc.*,[322] the Sixth Circuit reversed the district court's grant of summary judgment to a disabled woman who sued Wal-Mart, for injury she suffered using a bathroom in a store, with claims for negligence per se, common law negligence, and ADA violations.[323] The Court held that summary judgment had been improperly granted on claims of common law negligence and negligence per se based on ADA claims which seemed to rest on the district court's assessment of the plaintiff's credibility.[324] And in *Adams v. Synthes Spine Co.*,[325] the Ninth Circuit affirmed the district court's grant of summary judgment to a woman who brought a products liability suit against a spinal plate manufacturer for a surgically implanted broken spinal plate.[326] The court held that the manufacturer's warning that the plate could break and that it should be removed following surgery were adequate warnings to the surgeons.[327] In dissent, Judge Ferguson argued that summary judgment should not have been granted because there were two genuine issues of material fact: 1) whether the doctor's reasonable expectations were met, and 2) whether Synthes Spine's warnings were adequate.[328]

A case in which the district court seems to minimize the harm experienced by the woman plaintiff is *Akers v. Alvey*,[329] a more explicit gender discrimination case. In this case, the plaintiff alleged

321. *Id.* at 538-39 (alternations in original) (citation omitted).
322. 167 F.3d 286 (6th Cir. 1999).
323. *Id.*
324. *Id.* at 290-93.
325. 298 F.3d 1114 (9th Cir. 2002).
326. *Id.* at 1116-17.
327. *Id.* at 1118.
328. *Id.* at 1119 (Ferguson, J., dissenting).
329. 338 F.3d 491 (6th Cir. 2003).

sexual harassment as well as a tort claim of outrage.[330] The district court granted summary judgment on the plaintiff's claims of "discrimination, retaliation, and tort-of-outrage."[331] The Sixth Circuit reversed on the tort of outrage claim, holding that material issues of fact existed that made summary judgment improper.[332] The plaintiff alleged many serious allegations of sexual harassment and the district court said that while these allegations were "crude," they did not rise to the level of outrageousness necessary to constitute the tort.[333] In reversing, the Sixth Circuit held that this was a jury question because the standard for outrageous behavior was to be determined by "an average member of the community."[334] The court noted "Alvey's behavior went far beyond the sexual jokes, comments, and innuendos that this court has previously found insufficient to withstand a motion for summary judgment on a tort-of-outrage claim."[335]

B. Daubert

As mentioned, *Daubert* has had a substantial impact on these cases. A particularly egregious example is *Rider v. Sandoz Pharmaceuticals Corp.*,[336] one of the Parlodel cases. In *Rider*, plaintiffs Bridget Siharith and Bonnie Rider sued Sandoz, "alleging that their postpartum hemorrhagic strokes were caused by ingestion of Parlodel," which had been prescribed to suppress lactation after childbirth.[337] After discovery, Sandoz moved, in limine, to exclude the opinions and testimony of the plaintiffs' experts on causation and for summary judgment.[338] Because the motions, documentary evidence, experts, and issues were the same in both cases, the district court addressed the motions together. The district court held a *Daubert* hearing to determine the admissibility of the evidence. In a three-day

330. *Id.* at 493.

331. *Id.* at 493-94.

332. *Id.* at 497.

333. *Id.* at 496.

334. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

335. *Akers*, 338 F.3d at 496. Under state law, plaintiff's claim of a tort of outrage had to show that defendant's behavior was, among other things, "so outrageous and intolerable so as to offend generally accepted standards of morality and decency." *Id.* According to the RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965), the standard for outrageous behavior should be determined by "an average member of the community." In reversing summary judgment for the defendants on the tort of outrage claim, the court determined that *Akers* was "just such a case" to be decided by a jury of average community members. 338 F.3d at 496.

336. 295 F.3d 1194 (11th Cir. 2002). I am grateful to Aaron Twerski who led me to this case.

337. *Id.* at 1195-96.

338. *Id.* at 1196.

hearing, the district court examined the evidence and found that the plaintiffs' claims were based on speculation and conjecture.[339] The district court excluded the evidence and granted summary judgment in favor of the pharmaceutical company.[340] On appeal, the Eleventh Circuit affirmed the opinion and held that the district court had not abused its discretion.[341]

As mentioned earlier, restrictive *Daubert* and summary judgment rulings in federal tort cases can have a considerable impact on choice of forum. Since the purpose of the recent Class Action Fairness Act is to allow class-action tort cases filed in state court to move to federal court,[342] where *Daubert* and summary judgment will apply,[343] it will be important to see what happens with these cases.

VI. DISPROPORTIONATE GRANTS OF SUMMARY JUDGMENT ON THE BASIS OF GENDER

This Article was animated by anecdotal data from the Gender Bias Task Force reports, and the work of other scholars on summary judgment in employment discrimination cases that identified issues of gender bias in judicial treatment of summary judgment claims.[344] In the two previous Parts, I examined problems of gender bias in judicial decision making in summary judgment cases involving women plaintiffs. My analysis raises the question of whether the problems that I have identified with judicial decision making on summary judgment in cases involving women plaintiffs actually lead to disproportionate granting of summary judgment against women plaintiffs compared to male plaintiffs in federal courts.

In order to explore the question of disproportionate granting of summary judgment, I worked with the Federal Judicial Center (FJC), which studies the operation of the federal courts and compiles data based on court records. As part of its ongoing study of summary judgment practice, the FJC has developed a dataset that includes information drawn from records of federal courts on cases terminated for six time periods from 1975 through 2000.[345] The FJC generously

339. *Id.*

340. *Id.*

341. *Id.* at 1203.

342. 28 U.S.C.A. §§ 1332(d), 1453, 1711-1715 (2006).

343. *See* Margaret Berger, *Evidence Law to Protect The Civil Defendant, but Not The Accused, in* LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR (P. Carrington and T. Jones, eds., 2006); *supra* note 86 and accompanying text.

344. Beiner, *supra* note 24; *see supra* notes 1, 24-25.

345. In 2002, I requested access to the FJC's summary judgment database from then-Director of the FJC, United States District Judge Fern M. Smith, in order to conduct the research on the impact of gender on summary judgment described in this Part. This request was supported by the National Association of Women Judges

provided me access to data from the most recent random sample of approximately 630 cases terminated in 2000 in each of eight federal district courts—Maryland, Eastern Pennsylvania, Southern New York, Eastern Louisiana, Central California, Northern Illinois, Massachusetts, and Southern Florida—and a supplemental nonrandom sample of civil rights cases and product liability cases from each of the courts, for a small study concerning differential grants of summary judgment on the basis of gender.[346] For each case, FJC researchers recorded the identification of the moving party,[347] the type of summary judgment motion made,[348] the court's ruling on the action,[349] and whether the action terminated the case. They also recorded the nature of the case (tort, contract, civil rights, other),[350] as well as the court and time period. Piggybacking on this data previously coded by the FJC, my research assistants coded the gender of the parties,[351] the parties' attorneys,[352] the judge presiding

(NAWJ), a national organization of women federal and state judges, with whom I am affiliated as Chair of NAWJ's Judicial-Academic Network, and to whom I had made an early presentation on this project. *See* National Association of Women Judges, http://www.nawj.org (last visited June 20, 2007). I am grateful to Senior Research Associate Joe S. Cecil and Research Associate Rebecca Eyre at the Federal Judicial Center for their work on this study, their thoughtful analyses of the data, and their commitment to this research project. For discussion of the FJC summary judgment database, see Burbank, *supra* note 8, at 611; *see also* JOE S. CECIL, DEAN P. MILETICH & GEORGE CORT, FED. JUDICIAL CTR., TRENDS IN SUMMARY JUDGMENT PRACTICE: A PRELIMINARY ANALYSIS (November 2001), http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage!openform&url=/library/fjc_catalog.nsf/DUnpublishedResearch!openform&parentunid=2E2FACB5102C8FAB85256D48006745BD. The Integrated Database is available at http://www.icpsr.umich.edu/cocoon/ICPSR/STUDY/08429.xml. I am also grateful to Chelsea Chaffee and Ashley Van Valkenburgh, who worked with the data.

346. For purposes of this analysis, the FJC excluded prisoner cases, social security cases, student loan repayment cases, and multidistrict litigation cases.

347. The moving parties were coded as plaintiff, defendant, or third party. FED. JUDICIAL CTR., MOTIONS FOR SUMMARY JUDGMENT IN FEDERAL COURT DOCKET SHEETS: CODING MANUAL 4 (2001).

348. The type of summary judgment motion was coded as summary judgment, partial summary judgment, summary judgment or motion to dismiss, summary judgment or remand, or other. *Id.* at 5.

349. The court's ruling on the action was coded as denied, granted in whole, granted in part, adopt the magistrate's report and recommendation, or uncertain/other. *Id.* at 6.

350. The "other" category of cases was comprised of all the cases that could not be fairly characterized as contract, torts, or civil rights cases. The most common type of case was recorded as "other statutory action."

351. Parties were separated into the following categories: male, female, corporate, multiple individuals (at least one male and one female), government, and unknown. If a party consisted of individuals and a corporation, the party was coded as corporate. Similarly, if a party consisted of individuals or a corporation and a government entity, the party was coded as government. If a party consisted of an individual being sued (or

over the case,[353] and, when applicable, the magistrate judge,[354] along with the cause of action and the statute cited, if applicable.[355]

The crux of this study was to examine and compare only summary judgment motions made against female and male plaintiffs, and the outcomes of these motions. Of the 1198 summary judgment-type motions[356] made against individual plaintiffs (as opposed to corporate or government plaintiffs), 395 were made against female plaintiffs and 518 were made against male plaintiffs; the rest were made against either multiple plaintiffs or plaintiffs coded as "unknown."[357] FJC researchers then performed several statistical analyses on this newly coded data.[358] They determined that, overall, the gender of the plaintiff had no statistically significant effect on the outcome of defendants' summary judgment-type motions.[359]

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suing) in her or his official capacity, the party was coded as corporate or government (whatever the case might be).

352. Attorneys were categorized as male, female, multiple individuals (at least one male and one female), or unknown.

353. Judges were categorized as male, female, or unknown.

354. Magistrates were categorized as male, female, or unknown.

355. Cases were classified by the following causes of action: employment discrimination (including ADA); civil rights (including prisoner civil rights); personal injury; breach of contract; employee benefits; product liability; habeas corpus; bankruptcy; labor (nonemployment); property rights (copyright, patent, trademark); property (personal/real); admiralty; uncertain/other. "Other" included claims such as the following: antitrust; forfeiture/penalty; banks & bankruptcy; Freedom of Information Act; taxes; and Securities and Exchange Commission. Social security cases and student loan cases were excluded from the random sample.

356. "Summary judgment–type motions" include motions for summary judgment, partial summary judgment, summary judgment or motion to dismiss, summary judgment or remand, and other.

357. Of the 1422 summary judgment–type motions made against all plaintiffs, 115 of the plaintiffs were represented by female attorneys, 1050 were represented by male attorneys, and 257 were represented by at least one female and one male attorney. Of those 1422 summary judgment-type motions, 323 of them were presided over by female judges and 1099 were presided over by male judges. Even at this beginning point in the study, it was evident that the small sample pool of female plaintiffs, attorneys, and judges might render the results inconclusive.

358. FJC researchers created a new variable based on the previously coded outcome of the motion, coding the outcomes as either granted (both in whole and in part) or denied. Furthermore, FJC researchers only included observations where the relevant variable could be coded as "male" or "female" (excluding "multiple," "corporate," "government," and "unknown").

359. According to FJC researchers, the gender of the defense attorney appeared to have a significant effect ($p = .001$) on the outcome of defendants' motions; indeed, female defense attorneys were more likely to receive grants of summary judgment than their male counterparts. Similarly, the gender of the judge had a marginal effect ($p = .089$) on the outcome; female judges may have been more likely to grant

While the results were not what was expected, they did show that gender may play at least some role in the outcome of summary judgment motions. The study, using a broad approach, did not detect

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defendants' summary judgment motions. In fact, female judges were even more likely to grant summary judgment motions overall, creating a significant effect (p = .0497).

FJC researchers next analyzed various interactions between the gender variables. They looked at the effects of having a female plaintiff and male defense attorney, or a male judge and female defense attorney, or a female plaintiff's attorney and male defense attorney. The confusing pattern of results makes such interactions difficult to interpret. The only two statistically significant interactions found were those of the gender of the plaintiff and the defense attorney, and the gender of the judge and the plaintiff's attorney for defendant's summary judgment motions. Within all summary judgment–type motions (not just motions made by defendants), there was a significant interaction (p = .013) between the gender of the plaintiff and the gender of the defense attorney. The likelihood of a summary judgment motion being granted was highest when both the plaintiff and the defense attorney were female, followed by when both the plaintiff and the defense attorney were male. In other words, more summary judgment–type motions were granted overall when the plaintiff and the defense attorney were the same gender.

Within defendants' summary judgment–type motions, there was a marginal interaction (p = .096) between the gender of the judge and of the plaintiff's attorney. The likelihood of a summary judgment motion being granted was highest when the judge was male and the plaintiff's attorney female, followed by when the judge was female and the plaintiff's attorney male. In other words, plaintiffs benefit (i.e., have fewer of the defendants' motions granted against them) when the judge and the plaintiff's attorney are the same gender.

FJC researchers next looked at specific causes of action and the effects of various gender variables on defendants' summary judgment–type motions. The only causes of action that showed any effect were employment discrimination cases, civil rights cases, contract cases, and products liability cases. In employment discrimination cases, there was a significant effect (p = .025) when the judge was female; female judges appeared to be more likely than male judges to grant defendants' summary judgment motions in employment discrimination cases. In civil rights cases, there was a significant effect (p = .008) when the plaintiff is male; male plaintiffs appeared to be more likely than female plaintiffs to have summary judgment motions granted against them in civil rights cases. This effect may be due to the large number of prisoner civil rights suits that were brought by male plaintiffs. In breach of contract cases, there was a significant effect (p = .026) when the defense attorney was female; female defense attorneys were more likely than male defense attorneys to have summary judgment motions granted in breach of contract cases. However, because there was a low sample size for female defense attorneys involved in breach of contract cases, these results have questionable reliability. Finally, in products liability cases, there was a significant effect (p = .012) when the plaintiff's attorney was male and a marginal effect (p = .097) when the magistrate judge was male. Male plaintiff attorneys were more likely than female plaintiff attorneys to have defendants' summary judgment–type motions granted against them in products liability cases, and male magistrate judges were more likely than female magistrate judges to grant summary judgment–type motions in products liability cases. However, in both instances, the low sample size for females in the respective categories renders the reliability of the results questionable. Moreover, the number of exploratory analyses conducted suggests that some of the findings reaching or approaching statistical significance may have occurred by chance.

a differential effect in the granting of summary judgment motions against women plaintiffs. My analytical interest appeared to outstrip the empirical data. Of course, the study was not initially designed to assess the effects of gender in specific types of cases, and for that reason did not permit a strong assessment of some of the proposed effects.[360]

The results of this study did not support the hypothesis that problems with summary judgment decision making resulted in summary judgment being granted disproportionately against women plaintiffs as compared with male plaintiffs, at least during this time period. The study also did not reveal significant disparities in summary judgment dispositions based on gender of the plaintiff.[361] However, there are many factors at play in judicial decision making, and it was difficult to isolate the subtle issues of gender bias that may be involved, and identify whether and how gender may play a role.

One reason why it is hard to test the hypothesis that there may be differences in the granting of summary judgment between men and women plaintiffs in a random sample is that women plaintiffs fall into certain categories of cases. Men and women do not appear to be equally involved as plaintiffs in the same kind of civil cases in federal court, so it is difficult to have a control group and know what results from case-type bias or gender bias.[362] Women plaintiffs are involved in many employment discrimination cases, and many medical malpractice and products liability cases, although not other kinds of torts, such as accidents. Some of the data that has been gathered concerning specific areas of discrimination litigation bear this out. In a recent empirical study of litigation under the Family Medical Leave Act—where eighty-six percent of the plaintiffs were

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360. To the extent that gender plays a role in summary judgment practice, the data suggested that it may be related to the gender of the attorney and the gender of the judicial officer. However, FJC researchers concluded "that there is great variation in summary judgment activity across districts, and perhaps even across judges in the same district. It may be difficult to detect any subtle effect of gender given the low numbers of women in some of the categories and great variation due to other factors." E-mail from Joe S. Cecil, Senior Research Associate, Federal Judicial Center, to author (August 2, 2006) (on file with author).

361. A recent study of published employment discrimination decisions in the Second Circuit found that forty-two percent of "sex claims" survived summary judgment. *See* Berger, Finkelstein & Cheung, *supra* note 45, at 60. It divided these cases between "gender discrimination" claims (where the survival rate was 33.3%) and "sexual harassment" claims (where the survival rate was 52%). *Id.* The authors suggest that Judge Weinstein's decision in *Gallagher v. Delaney*, 139 F.3d 338 (2d Cir. 1998) may have impacted the high rate of survival of sexual harassment claims. *See id.* at 61.

362. Women seem to be plaintiffs largely in civil rights and employment discrimination cases, and in reproductive harm tort cases. I am grateful to Joe S. Cecil for discussion of this issue.

women—sixty-eight percent of all cases resulted in summary judgment being granted to dismiss the claims, and seventy-six percent of all district court decisions were upheld by the court of appeals.[363] These claims are highly controversial. As I have discussed, there is wide recognition of the fact that judges are hostile to employment discrimination claims, and hostility to medical malpractice and products liability claims is part of the general wave of tort reform. Two different aspects of the purported "litigation explosion" are represented.[364] Gender dimensions of these decisions may very well relate to the types of cases that are involved. How much is gender specifically, and how much is judicial dislike of the substantive claims that women plaintiffs are likely to bring to court, such as employment discrimination? This is hard to know, and needs further research.

Is there a perception error in the Gender Bias Task Force reports, the case analyses, the sense that something is amiss with gender and summary judgment? I do not believe that the fact that this study does not show a disproportionate impact on the granting of summary judgment based on gender during this particular time period minimizes the significance of the prior case studies showing problems in judicial decision making. The empirical data cannot get at the subtlety of the bias. Although many of the problems with judicial decision making that I have identified lead to full grants of summary judgment by district judges, not all do. Some problems with judicial decision making lead to partial grants of summary judgments, or erroneous interpretations of the law, and some grants of summary judgment by district judges are reversed on appeal. It is judicial decision making that is the larger problem, and although these problems in judicial decision making often lead to dismissal, they do not always. This study did not and could not test for these more subtle issues.

Just as I argue that in many cases judges need a fuller record for decision making, before cutting off inquiry and granting summary judgment, we need a fuller record on which to analyze the interrelationship between gender and summary judgment. This

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363. Rafael Gely & Timothy D. Chandler, *Maternity Leave Under the FMLA: An Analysis of the Litigation Experience*, 15 WASH. U. J.L. & POL'Y 143, 162-63 (2004). This study looked at published cases. Significantly, although only a few cases went to trial, in those that went to trial, plaintiffs won at twice the rate of employers. See Parker, *supra* note 30, who concludes that race and national origin discrimination cases are treated worse than gender discrimination cases. In the category of race and national origin discrimination cases, Parker examined 467 federal court opinions and found that fifty-nine percent of plaintiffs were men and thirty-nine percent of plaintiffs were women. *Id.* at 897.

364. *See* Selmi, *supra* note 30, at 568; Miller, *supra* note 9, at 1062-74.

Article suggests that there are many different ways of trying to understand, or "know," this problem methodologically, just as we have seen that there is the need for a broader range of information and "knowledge" for judges in deciding summary judgment.[365] More quantitative data and qualitative analysis of judicial decision making on both gender and summary judgment are necessary in order to fill out the picture of the role of gender in summary judgment. This Article is only a first step in this effort.

VII. JUDGE AND JURY DECISION MAKING

The critical issue presented on summary judgment is the issue of judge versus jury determination. We differentiate the judge's decision-making role on summary judgment from the decision making that would be going on in jury trial. We focus on the importance of the jury for many reasons: the Seventh Amendment, the importance of the right to jury trial, the central role of juries as a democratic institution, the way in which juries bring a broader range of social and community norms to bear on subjects of importance, as well as their enhanced ability to do thoughtful fact-finding.[366] Summary judgment implicates all of these dimensions.[367] Although there are many ways of interpreting judicial grants of summary judgment, they can be viewed as "the jury snub".[368]

In theory, on summary judgment, district courts are deciding "legal" issues,[369] which are especially appropriate where a court can provide consistency, or infuse relevant policies, to a question. In contrast, they should be loath to decide issues where the jury can play a role in defining community values.[370] This means that the district judge has to decide what a reasonable jury could decide. But what if the judge does not realize the differences between those views—his or her perspective and those of a "reasonable juror"? What

365. I am grateful to Martha Minow for the insight that my methodological approach to research on summary judgment—that there are many sources of information to draw on for an assessment of the interrelationship between gender and summary judgment—echoes my argument here that judges should be ruling on a broader basis of information.

366. For a discussion of these various arguments in favor of jury determination, see Jason Mazzone, *The Justice and the Jury*, 72 BROOK. L. REV. 35 (2006) (discussing Justice Blackmun's views of juries).

367. *See* Miller, *supra* note 9, at 1019; Thomas, *supra* note 12.

368. Seth Rosenthal, *The Jury Snub: A Conservative Form of Judicial Activism*, SLATE, Dec. 18, 2006, http://www.slate.com/id/2155723 (arguing that increased grants of summary judgment are "a conservative form of judicial activism" that take cases away from juries).

369. *See* BRUNET & REDISH, *supra* note 44, at 20.

370. Beiner, *Let the Jury Decide*, *supra* note 166, at 819-21.

if a judge does not have the humility, self-awareness, or insight to recognize the limitations of his or her own perspective?[371]

Judge Weinstein highlights this issue in *Gallagher v. Delaney*.[372] With respect to interpretation of sexual harassment, he emphasizes the importance of the "jury made up of a cross-section of our heterogeneous communities" assessing the facts of the case versus "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 sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications."[373] Numerous other courts have followed his lead and relied on *Delaney* for this proposition.[374]

In addition, there is obviously room for widespread disagreement among judges on the question of "reasonableness." Judges on circuit panels in summary judgment cases frequently disagree with each other about what a "reasonable juror" could conclude, and circuit court judges reverse district court judges on this very issue.[375] Indeed, this is the very issue that was presented in the Supreme Court's decision last Term in *Scott v. Harris*,[376] where Justice Stevens criticized the majority for sitting as "jurors" because of their own viewing of a videotape, and reversal of the four district and circuit judges who had denied summary judgment below.[377] He argued that the conflict between the various judges who had heard the case necessarily showed that a "reasonable juror" could find for the plaintiff. Of course, judicial attitudes change on who a "reasonable juror" is and what a "reasonable juror" might think, depending on the type of case and the factual context.[378]

Is it so clear that a judge and jury would come to a different conclusion in a particular case? Some scholars say no.[379] However, in

371. Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767 (2005) (arguing for judicial "modesty" in decision making on the need for a jury).

372. 139 F.3d 338 (2d Cir. 1998).

373. *Id.* at 342.

374. *See supra* note 32 and accompanying text.

375. *See* Mollica, *supra* note 84, at 180–81.

376. See earlier discussion of *Scott v. Harris, supra* notes 20, 68 and accompanying text.

377. *Id.*

378. *See* Beiner, *supra* note 24, at 122-27.

379. *See* Kevin M. Clermont & Theodore Eisenberg, *Trial By Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992). *But see* Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663. In this study, the authors found that plaintiffs (both men and women) in employment discrimination cases had higher success rates in front of juries than in bench trials. *Id.* at 698. When

cases involving explicit issues of gender, or even more subtle issues of gender as in tort cases, it may make more of a difference who the decision makers are.[380] Although there is some increase in diversity of the federal judiciary,[381] there appears to be greater diversity on federal juries.[382]

Many studies have been conducted over the years in order to determine whether the gender of a judge plays a role in decision-making behavior,[383] and results have been inconsistent. Though some studies have found gender to play a role in judicial decision making,[384] other studies have found no perceptible effect.[385] A new study of federal appellate decision making in sex discrimination cases led by Lee Epstein, which seeks to "untangl[e] the causal effects of sex on judging," uses new statistical methodology. This study finds that male judges are much less likely to decide in favor of the party alleging discrimination than female judges, and that the probability of a judge deciding in favor of the party alleging discrimination decreases by about ten percentage points when the

before a jury, plaintiffs win 25.2% of the time; however, the plaintiff's success rate drops to 11% in front of a judge. *Id.*

380. *See* Selmi, *supra* note 30; Stempel, *supra* note 81.

381. *See* sources cited *supra* note 33.

382. *See* Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & LAW 113, 117–28 (1999); *see also Ninth Circuit Report, supra* note 1, at 783; *Second Circuit Report, supra* note 33, at 89-99.

383. For a survey of existing studies, see Theresa M. Beiner, *Female Judging*, 36 U. TOL. L. REV. 821, 821 (2005). *See also* Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005).

384. Though some studies have shown gender effects, even these results are conflicting. Some studies show that women judges are more likely to find for plaintiffs in discrimination and other cases. *See, e.g.*, Sarah Westergren, *Gender Effects in the Courts of Appeals Revisited: The Data Since 1994*, 92 GEO. L.J. 689, 696 n.49 (2004) (citing Donald R. Songer, Sue Davis & Susan Haire, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425 (1994) (suggesting that women judges vote differently in discrimination cases)). In contrast, another study found that male judges are more likely to find for women plaintiffs in "women's issue cases" involving claims such as gender discrimination and sexual harassment. Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 146 tbl.3 (2000). One study suggests that women federal judges are more likely to dispose of cases by settlement than their male colleagues. Christina L. Boyd, She'll Settle It: Judges, Their Sex and the Disposition of Cases in Federal District Courts (unpublished manuscript, on file with author).

385. Parker, *supra* note 30, at 918–19 (examining the effects of race and gender of judges in the race discrimination context); Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 21 n.43 (2001) (citing Orley Ashenfelter, et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 277-81 (1995); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 613-15 (1985)).

judge is male. It also finds that when a woman serves on an appellate panel with male judges, the male judges are significantly more likely to rule in favor of the sex discrimination litigant.[386] Another recent study of three-judge panels in federal appellate courts also found that the presence of a female judge on the panel increased the probability that plaintiffs in sexual harassment and discrimination cases would succeed.[387] Others suggest that other factors, including political affiliation, are more accurate predictors of how a judge will decide a case.[388] Some argue that these results are inconclusive because of the small number of women in the federal judiciary, and that the significance of gender in judging may show itself more clearly over time.[389] Though all of these studies do not consistently show that a particular judge's gender affects decision making, they do reinforce the importance of diversity for decision makers in these types of cases. Although they complicate an "essentialist" view of judging by gender on summary judgment cases (and the FJC data just discussed seems to raise questions about that),[390] these studies do underscore the significance of having a diverse group of decision makers.

There are many issues about gender and judging to consider in this context. Would the challenge of showing a legal or factual dispute have a gendered quality if what a woman plaintiff wants to

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386. Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging* (2nd Annual Conference on Empirical Legal Studies Working Paper, 2007), *available at* http://papers.ssrn.com/abstract_id=1001748. This study analyzes prior research on gender and judging and applies new methodology to a database developed by Cass Sunstein at the University of Chicago, including sex discrimination suits resolved between 1995 and 2002. The authors suggest that the differential effects of sex on judging in these cases "are so consistent and persistent that they may surprise even those scholars who have long posited the existence of gendered judging." *Id.* at 1.

387. Peresie, *supra* note 383, at 1778.

388. *See generally* Kotkin, Book Review, *supra* note 300 (citing Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004); *see also* Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1678–86 (1998).

389. *See e.g.*, Peresie, *supra* note 383, at 1764; Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium* [hereinafter *Diverse Bench*], 36 U.C. DAVIS L. REV. 597, 599 (2002).

390. An "essentialist" view of gender and judging would suggest that women judges would always rule differently than male judges in summary judgment cases involving issues of gender. The new study by Boyd et al., on gender and judging certainly seems to show a considerable gender impact in these cases. *See* Boyd et al., *supra* note 386. However, one judge has suggested that there is a problem with women judges becoming increasingly conservative and wanting to rule very cautiously, so as not to rule "too female." Joan Dempsey Klein, Presiding Justice, Cal. Ct. App., Comment at the NAWJ Annual Conference (Oct. 2004). *See* Beiner, *Female Judging, supra* note 383, at 840-44 (discussing Justice Klein).

dispute "requires imagination, appreciation of nuance, or developing evidence of harm or injury that itself requires a change in understanding, such as the movement to intentional infliction of emotional distress"?[391] Will the gender composition of the federal courts "favor defendant motions for summary judgment as male judges identify with defendants and appreciate the efficiency the motion offers while trials are more untidy and sprawling"?[392] We have to look to factors other than gender, such as political party affiliation, that also seem to make a difference.[393] Judge Weinstein, in *Gallagher*, assumes that there is a difference between what judges would see and how juries would bring different perspectives to bear.[394] Judge Rovner, in *DeClue*, suggests that gender and experience count in recognition of the seriousness of the "bathroom problem"—and underscores how the judge's "knowledge" and type of "knowledge" is important in evaluating gender claims.[395]

What about judge versus jury decision making generally—Judge Scheindlin's response to *Gallagher* that judges should be setting the boundaries of the law?[396] Are these "explicit" gender cases, or even "implicit" gender in tort cases—cases that juries, not judges, should be deciding? How does gender figure in there? What about other issues? Who gets to decide which issues are more appropriate for judge or jury? Should it be dependent on current "social issues"?[397] There is not necessarily a bright line between current "social issues," as in the gender cases, and other issues that may seem more mundane, as in the torts cases.

What about bench trials? A judge who is deciding summary judgment is effectively having a bench trial, but the trial is based on affidavits and depositions, not full live presentation. On bench trials

391. I am grateful to Martha Minow who characterized some of the possible gendered dimensions of summary judgment decision making in this way. E-mail from Martha Minow, Professor of Law, Harvard Law School, to author (Feb. 11, 2004) (on file with author); *but see* Segal, *supra* note 384 and accompanying text. The data about the gender of judges granting summary judgment from the study in Part VI do not seem to support this.

392. E-mail from Martha Minow, *supra* note 391. Christina Boyd's findings that women judges are more likely to dispose of cases by settlement suggests otherwise. *See* Boyd, *supra* note 384.

393. *See* Kotkin, Book Review, *supra* note 300, at 615-16.

394. Gallagher v. Delaney, 139 F.3d 338, 342-43 (2d Cir. 1998).

395. DeClue v. Central Ill. Light Co., 223 F.3d 434, 437-40 (7th Cir. 2000) (Rovner, J., dissenting in part).

396. Scheindlin & Elofson, *supra* note 19, at 822-24.

397. This standard has surfaced in discussions with federal judges about summary judgment. Of course, it is difficult to distinguish among many different cases that might implicate "social issues."

there is the requirement for findings of fact and conclusions of law,[398] and, although most grants of summary judgment are decided by a full opinion, a bench trial has more robust procedural requirements. Usually there is no oral argument on summary judgment, so there is no opportunity to really argue about possible inferences or interpretation of depositions and discovery except in written memoranda. There is certainly no opportunity to observe witnesses or have them subjected to cross-examination. When a judge would be the trier of fact at trial, such as in FTCA cases where there is no right to a jury trial, or where the parties have chosen a bench trial, summary judgment is more complex. In *Sullivan v. United States Department of Navy*,[399] the Ninth Circuit reversed a district court's grant of summary judgment in a case where a woman plaintiff, who had undergone breast reconstructive surgery at a navy hospital after a mastectomy, sued the government on the grounds of medical malpractice under the FTCA. The court held that genuine issues of material fact existed and precluded summary judgment, and that exclusion of the plaintiff expert surgeon's opinion was improper.[400] The court remanded the case for reassignment to a different district judge because the previous judge had demonstrated his commitment to the government's view of the facts.[401] Clermont and Schwab say that employment discrimination plaintiffs do much worse in bench trials than in jury trials.[402]

VIII. PREFERENCE FOR TRIAL, LIVE TESTIMONY, AND PUBLIC RESOLUTION

Part of our theoretical preference for trial is not just for the jury, but a preference for live testimony and public process so that the plaintiff can have her "day in court."[403] With the present operation of summary judgment, we are moving to a system of paper trials.[404] Live testimony and adversarial presentation make a difference in decision making; determinations of law should be shaped by the complexity of facts developed in a live forum.[405] The traditional reluctance for summary judgment rests on the notion that unforeseeable disclosures at trial or juror/judge perceptions of

398. Wald, *supra* note 3, at 1943; Guggenheim, *supra* note 12, at 331–33.

399. 365 F.3d 827 (9th Cir. 2004).

400. *Id.* at 832-34.

401. *Id.* at 834-35.

402. Clermont & Schwab, *supra* note 164, at 441-42.

403. Miller, *supra* note 9, at 1074-75.

404. I am grateful to Steve Burbank who made this point at the Law and Society Roundtable.

405. *See* Miller, *supra* note 9, at 1062.

witnesses may produce a stronger case.[406] Legal claims look different in "life"; the seriousness of harms that are claimed may be more substantial when plaintiffs and other witnesses testify, and testimony that seemed reasonable in a deposition transcript may seem less credible in court. After hearing live testimony, a judge may not see defendant's conduct as shaped by "stray remarks," but much more. As others have argued, the law should not be developed on "arid" records, but with the benefit of live testimony.[407]

Insights concerning the importance of listening to women's experiences of harm give additional weight to this general need for live testimony.[408] Judges may not see the relevance or interconnectedness of certain evidence in reviewing discovery for purposes of summary judgment, but might better understand the context and relevance after hearing live testimony. Perhaps this is true in all cases, and the idea that hearing live stories can make a difference has implications not just for cases involving women plaintiffs, but for summary judgment in general.[409] As fewer cases are heard in open court, and pressure to grant summary judgment increases (which may also have an impact on fewer cases being brought or making those that are brought more likely to settle even before summary judgment), judges may be losing perspective on the seriousness of plaintiffs' claims,[410] and are more likely to evaluate them based on a cold record. The increase in private settlements also makes discrimination invisible,[411] for there may be less law made in courts that is "available" to judges to decide these types of cases. This assumes, optimistically, that some judges grant summary judgment in gender cases because they don't understand the legal claims or see the relevance of or interrelatedness of certain evidence. Gender stereotypes may also be shaping and limiting their analyses of the seriousness of legal claims, their evaluation of evidence that has been proffered, and the harms that the plaintiff has suffered.

Another important impact of summary judgment is the absence of public resolution. In judges deciding cases on summary judgment, we have the loss of a "public dimension" to litigation. Through public

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406. *See* Wald, *supra* note 3, at 1903-04.

407. *Id.* at 1942-43. *See also* Burbank, *supra* note 8, at 625-26.

408. *See* Beiner, *Women's Stories*, *supra* note 166, at 117-18.

409. There is certainly much discussion in the general summary judgment literature to this effect. *See generally* Beiner, *supra* note 382.

410. *See generally* Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111 (2007); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927 (2006); Minna J. Kotkin, *Secrecy in Context: The Shadowy Life of Civil Rights Litigation*, 81 CHI.-KENT L. REV. 571 (2006).

411. Kotkin, *Invisible Settlements*, *supra* note 410, at 929.

airing, claims are heard, understood, and legitimized. They take on a life of their own and, through public and media attention, individuals who might have suffered harm, and judges who may be ruling on claims, may recognize claims as harms. Law is developed through the airing of those claims, which may validate them. Press coverage of sexual harassment, for example, links individual experiences and makes them common—think of Anita Hill and the impact of that case on sexual harassment. We now see patterns of newly reported cases on a host of women's rights issues where only individual claims were previously made.

While the civil litigation system is often viewed as only involving parties, there is an important "public dimension" to litigation.[412] The "public dimension" helps set norms and shapes laws, makes public education possible, and legitimizes litigants' claims. Summary judgment threatens to eliminate these vital aspects of our dispute resolution process since these claims are taken out of the public arena—they are decided in chambers instead of in the courtroom. By eliminating the opportunity for live trial and substituting a trial by motion, the public role is diminished.

Concern for the "public dimension" of federal civil litigation requires claims to be brought out in the open. For example, recent cases exposed widespread issues of sex discrimination and sexual harassment in the securities industry, which had occurred in silence for many years and had been taken for granted as the cost for women of participating in a "man's world."[413] However, as sexual harassment claims were filed in court, these issues were brought to light. As a result of litigation, there was widespread publicity, companies were forced to develop diversity and sensitivity training programs, and there were substantial settlements of these claims.[414]

Another key element of live trials is the opportunity for exposure, validation, and legitimization of the harms for both the parties and the public.[415] Many cases discussed in this Article

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412. Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 406 (1987); *see also* Judith Resnik, *Uncovering, Disclosing and Discovering How The Public Dimensions of Court-Based Processes Are At Risk*, 81 CHI.-KENT L. REV. 521 (2006).

413. *See, e.g.*, Rachel B. Grand, *"It's Only Disclosure": A Modest Proposal for Partnership Reform*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 389, 406 (2005); Lizzie Barmes & Sue Ashtiany, *The Diversity Approach to Achieving Equality: Potential and Pitfalls*, 32 INDUS. L.J. 274, 274 (2004) (discussing public attention to treatment of women in business after public airing of sexual harassment claims).

414. Notably, scholars have used these cases to call for more transparency into company practices. *See* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3 (2003).

415. Resnik, *Due Process: A Public Dimension*, *supra* note 412, at 413; Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors be*

describe horrendous aspects and experiences of gender discrimination, particularly in employment and education. In many of these cases, through summary judgment, judges are effectively censoring these stories and keeping the details of these cases invisible from public scrutiny.[416] In these cases, a public forum is particularly crucial. Not only should juries be playing a role in determining appropriate workplace behavior, but a larger public should be able to evaluate what is and is not discrimination. It may be difficult for a court, or the public, to determine what sex discrimination means in detail, or what a work environment is actually like "without hearing the witnesses describe it live."[417] Furthermore, the litigant, in telling her experience live, may experience validation of her claims.

In addition to the benefits conferred upon a litigant through expressing her story, there is a collective benefit to the public as a whole. The stories of litigants "may become the shared tales of a variety of citizens—across social and ethnic boundaries."[418] If there is no exposure to stories and claims made within litigation, public education cannot occur. Public access helps strengthen public and community rejection of certain practices. The public can then serve as a "check" on the judiciary, encouraging judges to apply these norms properly.[419]

The privatization dimension of summary judgment is part of a larger problem of privatization in federal procedural law. We can see this in the "increased use of alternative dispute resolution methods,"[420] including arbitration,[421] secret settlements,[422] and

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Open or Closed?, 18 YALE L. & POL'Y REV. 155, 180 (1999). *See also* Beiner, *Let the Jury Decide*, *supra* note 166, at 846.

416. The majority opinion in the first *Jennings* decision by the Fourth Circuit is a particularly egregious example of judicial censorship. *See supra* pp. 743-44.

417. Beiner, *supra* note 24, at 133.

418. Resnik, *Due Process: A Public Dimension*, *supra* note 412, at 413-14.

419. *See id.* at 418; *see also* Bazelon, *supra* note 415, at 180 ("Rather, a public presence helps ensure that courts will follow established norms.").

420. Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 16 (2004). *Accord* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 196 (2003); Deborah R. Hensler, *A Glass Half Full, Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1588 n.4 (1995); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 262-63. (1995). The move towards alternative dispute resolution, both through contracted arbitration clauses and a push for ADR methods in the courts removes cases even further from the public eye. *See generally* Larry J. Pittman, *infra* note 421; Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173 (2004); Resnik, *Many Doors*, *supra*. These processes are almost always without any public access, and often times even the outcome of the case is kept secret.

decisions to keep court opinions from being published.[423] A preference for public resolution does not mean that there should be no summary judgment. However, if it is a close case and important social issues or issues of public importance are involved, summary judgment should be denied.

IX. IMPLICATIONS FOR REFORM OF SUMMARY JUDGMENT

Although there is more quantitative and qualitative research to do on the interrelationship of gender and summary judgment presented in this Article, what does the material presented here tell us? What do the gender cases suggest about summary judgment generally? How do they help us assess the operation of summary judgment more broadly and consider proposed reforms?

First, they suggest that summary judgment can be "dangerous," and is likely to be more "dangerous" in particular contexts. Recent data on the high rate of grants of summary judgments in employment and discrimination cases support this view.[424] But the implications go beyond gender cases. The challenge is how to keep district court decision making on summary judgment within proper

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ADR also creates advantages for corporate "repeat offenders" and denies litigants a right to a jury of their peers—"especially a concern for women and minorities who may be forced to arbitrate." Jeremy Kennedy, *The Supreme Court Swallows a Legal Fly: Consequences for Employees As the Scope of the Federal Arbitration Act Expands*, 33 TEX. TECH. L. REV. 1137, 1159-60 (2002). Scholars have suggested that ADR should be brought within the "public civil justice" system to alleviate these privatization concerns. *See* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1017 (2000) (discussing the need to infuse constitutional protections into the alternative dispute resolution system to expand the public justice system).

421. *See* Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis and a Proposal for Change*, 53 ALA. L. REV. 789, 890 n.529 (2002) (citing a Tania Padgett article about belief that arbitration was detrimental to the resolution of the sexual harassment claims in the securities industry).

422. Settlement also takes controversial issues out of the public dimension. Often, settlements are kept entirely under wraps in order to avoid any appearance of culpability or bad press. Kotkin, *Invisible Settlements*, *supra* note 410, at 927.

423. *See, e.g.*, Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004). Judges are refusing to publish opinions, or by de-publishing them, stripping them of precedential authority. *Id.* at 1504. This change in the way law is recorded (or rather, not recorded) on the books presents a host of problems—unfair advantages to repeat offenders, race or gender bias, and stagnant development of the law (including the art of writing a principled and well-organized opinion). *Id.* at 1483-1514. This results in a situation where "the law is not responsive to the demands made of the law by citizen litigants because it is forcibly controlled in ways not visible to litigants, lawyers, and other citizens." *Id.* at 1504.

424. CECIL & CORT, ESTIMATES OF SUMMARY JUDGMENT ACTIVITY, *supra* note 22.

boundaries.[425] The legal standards for summary judgment in Rule 56 are not sufficiently determinate, so judicial decision making is bound to get out of control.[426] Now, there is nothing that constrains or limits district court judges' decision making on summary judgment.[427] How can judges be disciplined if they are not constrained by the Seventh Amendment or by reversal? In summary judgment, we are still playing out the classic tensions between efficiency versus fairness.[428] But efficiency goals are clearly not met by the new practice of summary judgment—more time may be spent on the processes of summary judgment than might be spent on trial.

What would make a difference? The gender cases suggest the importance of more research on the interrelationship of summary judgment and *Daubert*. In the gender cases, we see the need for judges to look more broadly and less mechanistically at the evidence presented in light of the law, and to base their decisions on a fuller record. More social science and expert testimony could illuminate the interrelationship of fact and law in gender cases, yet the admission of such evidence is limited by *Daubert*. These cases also highlight the limits of decision making by an individual judge. What about having more than one judge deciding any summary judgment motion, or even a three-judge court?[429] This would undercut the purported efficiency rationale for summary judgment, but it would increase the possibility of more nuanced and inclusive decision making. What about having a summary jury trial that would advise the judge on the decision on summary judgment?[430] That would also undercut efficiency, but expand the possibilities for broader input for decision making. Why not restrict summary judgment, and just have expanded judgment as a matter of law after the judge has heard the case? Even if summary judgment is here to stay, the picture of gender and federal civil litigation presented in this Article suggests the need for some "out of the box" rethinking of summary judgment.

At a minimum, this Article suggests that district judges should pause and reconsider before granting summary judgment. Judges

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425. Wald, *supra* note 3, at 1917.

426. Burbank, *supra* note 8, at 623.

427. *See* Miller, *supra* note 9, at 1063; *see also* Burbank, *supra* note 8. Even though district court summary judgment decisions were reversed in cases that I analyze in Parts IV and V, there were many that were not. *See supra* Parts IV.A–V.B.

428. David L. Shapiro, *The Story of* Celotex*: The Role of Summary Judgment in the Administration of Civil Justice*, *in* CIVIL PROCEDURE STORIES 343 (Kevin M. Clermont ed., 2004).

429. I am grateful to Jeff Stempel for this idea.

430. I am grateful to Linda Silberman for this idea. This could also promote efforts to settle in advance of the summary judgment decision, as opposed to after, although settlement would still likely be contingent on summary judgment. *See* Berger, Finkelstein & Cheung, *supra* note 45, at 46-48.

should exercise their discretion to deny summary judgment, even when it might be "technically appropriate"[431] or a "close case."[432] They should think carefully about the law and the evidence that is presented, look at the evidence holistically, resist the impulse to slice and dice the facts and the law, and consider the "public dimension" of federal civil litigation. Most significantly, they should try to get outside the limits of their own experiences in deciding whether no "reasonable juror" could support a determination in the plaintiff's favor. They should exercise all discretion in favor of trial. This historic presumption in summary judgment has been lost, and must be vigorously reasserted in the federal courts.

431. Friedenthal & Gardner, *supra* note 12, at 93.

432. Beiner, *supra* note 24, at 133.

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