

DRAFT: March 5, 2007

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THE DANGERS OF SUMMARY JUDGMENT: GENDER AND FEDERAL CIVIL LITIGATION

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INTRODUCTION

The interconnections of procedure and gender have been a subject of much national attention, as many federal and state Gender Bias Task Force Reports have documented ways in which gender bias impacts on procedure.¹ These issues have also been the focus of considerable scholarship.² In this Article, I turn to one of the most important procedural devices in federal civil procedure – summary

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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, <http://www.ncsconline.org/WC/FAQs/GenFaiFAQ.htm#What%20is%20a%20Gender%20Bias%20Task%20Force> (last visited Aug. 8, 2006). Most federal circuit courts have as well. See, for example, *Final Report and 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) (discussion of critical ways in which gender influences procedure, including jurisdiction, jury selection, and gender bias in the courtroom).

judgment – and examine the problematic application of summary judgment 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 on cases involving gender and gender impacts on judicial decisionmaking 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 F.R.C.P. 56 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 easily. A motion for summary judgment was to be construed in favor of the non-movant, because of the preference for jury trial. Findings of genuine issues of material fact, so as to preclude the entrance of summary judgment, were determined on issues such as credibility and weight of evidence. But the trilogy of Supreme Court decisions in 1986 – *Matsushita*,⁵ *Liberty Lobby*⁶ and *Celotex*⁷ – has given impetus and encouragement to trial judges to grant summary judgment.⁸ Federal trial judges are now more likely to grant summary judgment and dismiss cases,⁹ depriving litigants of the opportunity for jury trial (and more diverse decision makers).¹⁰

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

4. F.R.C.P. 56(c).

5. *Matsushita Electric Industrial 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. Although some scholars argue that the trilogy reflected changes that were already going on with summary judgment practice and didn't cause those changes. Stephen B. Burbank, *Vanishing Trials and Summary Judgment In Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004); Joe S. Cecil, Rebecca Eyre and Dean Miletich, *A Quarter Century of Summary Judgment Practice in Six Federal District Courts* (available at <http://ssrn.com/abstract=914147>). There is no dispute that the trilogy has encouraged District Judges to view summary judgment as an 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.”); 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 courts value efficiency over litigant’s rights to jury trials).

10. Although state courts have their own rules, there are signs of similar changes on the state level. See, e.g., Robert Clore, *Texas Rule of Civil Procedure 166a(1): A New Weapon for Texas Defendants*,

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 cases¹³ makes summary judgment a particularly important subject of inquiry.

This move to summary judgment has had troubling consequences. In 1998, Judge Patricia Wald, then Chief Judge of the D.C. Circuit, expressed concern about the development and direction of summary judgment in the federal courts.¹⁴ She emphasized the importance of:

ensuring 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

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, *Trial or Tribulations: Rule 56 Style*, 29 LITIGATION 5 (2003) (describing “the growth of the summary judgment industry as a replacement for the civil trial”).

12. Miller, *supra* note 9; Wald, *supra* note 3; *see also* Edward Brunet, *Markman Hearings, Summary Judgment, and Judicial Discretion*, 9 LEWIS & CLARK L. REV. 93 (2005); Stephen B. 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); 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. (forthcoming 2007); John Bronsteen, *Against Summary Judgment*, 75 GEO WASH. L. REV. (forthcoming 2007); 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).

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* Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004), Vanishing Trial Symposium, 2006 J. DISP. RES. 1, Margo Schlanger, *What We Know and What We Should Know about American Trial Trends*, 2006 J. DISP. RES. 35 (2006). Ironically, this project led to the development of the new ABA Principles Relating to Juries and Jury Trials, *see* Terry Carter, *The Verdict on Juries*, ABA JOURNAL (April 2005) at 41 (describing the recommendations).

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

15. *Id.*

Other scholars have also been critical of the “new” summary judgment¹⁶ 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. My read of the current procedural landscape, based on presentations to and discussions with many federal judges, and the scope of current Advisory Committee on Civil Rules consideration of Rule 56,²⁰ is that summary judgment is here to stay.

Summary judgment is necessarily a very case-specific and fact and law-specific determination. Summary judgment decisionmaking at the trial level and appellate review of grants of summary judgment involves subtle assessment of the strength of the plaintiff’s case on what may be a very abbreviated record – assessment of the plaintiff’s legal case in the context of discovery. Although 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 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,

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

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

18. 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 Eloffson, *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. Current Advisory Committee consideration of summary judgment is focusing on improvement of the operation of summary judgment. “The Committee has been reluctant to reconsider the standards 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 Advisory Committee on Civil Rules 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.” (Email from Steven Gensler, Professor, University of Oklahoma Law School and member of the Advisory Committee on Civil Rules to Civil Procedure listserve, Sept. 12, 2006).

sexual harassment or Family Medical Leave Act cases in federal court – grant summary judgment. Summary judgment is an area where there is a tremendous amount of discretion, and discretion can be the locus of hidden discrimination. 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 there is a problem in the application of summary judgment at least in employment discrimination cases.²¹ These reports concluded that summary judgment was more likely to be granted to defendants in employment discrimination cases involving women plaintiffs.²² For example, the Eighth and Ninth Circuit Task Force Reports 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 “one-half of plaintiffs’ attorneys and 10% of defendants’ attorneys reported that summary judgment was granted too easily to defendants in discrimination cases.”²³ In addition, judges 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.”²⁴ The Ninth Circuit Gender Bias Task Force had similar findings as the Eighth Circuit, and reported that judges were impatient with sex-based employment discrimination claims. 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

21. See discussion in Wald, *supra* note 3, at 1938-39.

22. The Ninth Circuit Task Force Report suggested that there is subtle gender bias at work in employment discrimination cases, working against female plaintiffs, plaintiffs and lawyers. In addition to this gender bias, the 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 26 employment discrimination cases. Of these, the defendants had prevailed in 23 of them. Notably, more than half of these were reversed, either in full or in part, by the Circuit Court. Theresa M. Beiner, *The Misuse of Summary Judgment In Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 126 (1999).

23. *Ninth Circuit Report*, *supra* note 1, at 886. Beiner also notes that the Second Circuit Task Force on Gender reported judicial impatience or stereotyped thinking in hostile work environment cases. See Beiner, *supra* note 22, at 129 (citing PRELIMINARY DRAFT REPORT OF THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE COURTS 42).

24. *Id.* at 74.

summary judgment.”²⁵ Several scholars have documented and analyzed these developments on summary judgment in sex-based employment discrimination cases.²⁶ Racial and ethnic bias is an additional component for plaintiffs who are women of color.²⁷ 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,”²⁸ and more recently, other judges have written decisions sharply criticizing summary judgment that concur.²⁹

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 decisionmaking on summary judgment can be problematic: in judicial evaluations of female plaintiff credibility (which the 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”

25. *Ninth Circuit Report*, *supra* note 1, at 886. Beiner also cites the Second Circuit Task Force on Gender as demonstrating judicial impatience or stereotyped thinking in hostile work environment cases, *see* Beiner, *supra* note 22 at 129.

26. *See* Beiner, *supra* note 22; Eric Schnapper, *Some of Them Still Don’t Get It: Hostile Work Environment Litigation In the Lower Courts*, 1999 U. CHI. LEGAL F. 277 (1999); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: 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).

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

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

29. *See* opinions discussed in Parts II and III, *infra*, 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 decisionmaking. *See e.g.*, *Murphy v. M.C. Lint, Inc.*, 440 F.Supp.2d 990, 1015 (S.D.Iowa, 2006); *United States v. Shonubi*, 895 F. Supp. 460, 482-88 (E.D.N.Y. 1995); *Schmidt v. State University of New York at Stonybrook*, 2006 WL 1307925, *7+ (E.D.N.Y. May 09, 2006); *Schiano v. Quality Payroll Systems, Inc.*, 445 F.3d 597, 605 (2nd Cir. 2006); *Thompson v. Connecticut State University*, 2006 WL 3702271 *6 (D.Conn. Dec 18, 2006). *See also* *Fagen v. Iowa*, 301 F.Supp.2d 997, 1010 (S.D.Iowa Feb 11, 2004); *Cunningham v. Town of Ellicott*, 2006 WL 2921037, *4 (W.D.N.Y. Oct 11, 2006); *Kendricks v. Erie County Medical Center*, 2005 WL 3059086, *2 (W.D.N.Y. Nov 15, 2005); *Scarborough v. Gray Line Tours*, 2005 WL 372194, *1 (W.D.N.Y. Feb 16, 2005); *Cook v. Hatch Associates*, 2004 WL 1396359, *2 (W.D.N.Y. Mar 19, 2004); *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 61 (2d Cir.1998).

could find for the plaintiff; and in judicial diminution and trivialization of the seriousness of harms suffered by women plaintiffs seeking redress in court.³⁰ These subtle problems of interpretation lurk in judicial assessment of both fact and law in the two prongs of summary judgment: whether there are “genuine issues of material fact” or “judgments as a matter of law.”³¹ 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 to have a jury trial (in those cases where the plaintiff does have a right to jury trial).³² But, of course, not every plaintiff should have the right to jury trial – for every case is not 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.³³

30. 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. 1 (1997); Lynn Hecht Schafran, *Credibility in the Court: Why Is There a Gender Gap?*, 34 *Judges Journal* 5 (1995).

31. Fed. R. Civ. P. 56.

32. Is there a difference between summary judgment and bench trial? The factfinder 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 in Part VI, *infra*.

33. In *Gallagher v. Delaney*, 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. *Gallagher v. Delaney*, *supra* note 28, at 341. Judge Weinstein observes that “[w]hatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socioeconomic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, perceptions and implicit communications.” *Id.*

Current statistics on the diversity of the federal judiciary support this view. Across all federal courts, there are 1285 sitting judges. Of these judges, only 18% are female. Looking at both male and female judges, 9% are African American, 5% are Hispanic, and less than 1% of judges are either Asian American or Native American. 12% of women judges are African American, 7% are Hispanic, and

Even if we do not assume that a jury would reach a different conclusion on the facts of a particular case than a judge,³⁴ 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 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.³⁵ 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, they may ultimately be viewed by judges to constitute 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.³⁶

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 been at the intersection of gender and procedure.³⁷ This Article details this intersection in the context of summary judgment in order to deepen

only one female judge, less than 1%, is Asian American. There are no Native American female judges. *History of the Federal Judiciary*. <http://www.fjc.gov> (last visited Feb. 4, 2007).

Data seems 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, n.2 (1995). See also JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004) (arguing that 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.” Nancy Marder, *Books of Interest*, Association of American Law Schools Section on Civil Procedure, Fall 2006 Newsletter at 12).

34. See discussion of judge-jury decisionmaking in Part VI, *infra*.

35. 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).

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

37. 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 a sensitivity to procedural issues. ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000); CLARE DALTON AND ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* (2001).

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.³⁸ 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 since they were dismissed on summary judgment and not appealed. Thus, as Judge Wald has cautioned, the role that summary judgment plays in cutting off the development of the law warrants concern.³⁹ 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, focusing on a range of cases involving women plaintiffs.⁴⁰ I argue that judicial decisionmaking in

38. See *infra* at Part III.

39. Wald, *supra* note 3.

40. 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 ORE. L. REV. 359 (2004) (discussing granting 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 to maintain 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 non-conformity". 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 *Equal Employment Opportunity Comm'n v. Greif Bros.*, No. 02-CV-468S, 2004 WL 2202641 (W.D.N.Y. Sept. 30, 2004) (District Judge denies summary judgment on gender conformity theory in sexual harassment case); and *Centola v. Potter*, 183 F.Supp.2d 403 (D.Mass. 2002) (District Judge denies 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 claims of both sexual orientation discrimination and gender non-conformity claims are made, despite "mixed motive" liability. Katie Eyer, *Protecting Lesbian Gay Bisexual and Transgender (LGBT) Workers: Strategies for Bringing Employment Claims on Behalf of Members of the LGBT Community in the Absence of Clear Statutory Protection* (posted on www.acs.org, July 2006). See *Schroer v.*

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

I. SUMMARY JUDGMENT IN PRACTICE

Today, summary judgment plays a major role in federal civil litigation.⁴¹ For plaintiffs, summary judgment is the place of “do or die.”

Billington, 424 F. Supp.2d 203 (D.C. 2006) (dismissing claim of Title VII sexual stereotyping in transsexual employment case under 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.

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

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,”⁴² for the question is always what will happen on summary judgment. It impacts on and is interrelated 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 has resulted.⁴³

The language of Rule 56 concerning summary judgment is complex⁴⁴ and the actual process is often lengthy – a trial on paper, that is often linked to and confused with Rule 12(b)(6).⁴⁵ A memorandum of law and the results of discovery are usually filed in support of the summary judgment motion.⁴⁶ The motion is usually based on affidavits – and there are lots of issues about admissibility. Equivalent papers must

matter in which the judge takes evidence”. Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts*, 55 S.M.U. L. REV. 1405, 1406 (2002).

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

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

44. 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 to the Revisions 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/Appendix_D.pdf.

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

45. See discussion of judges confusing Rule 12 (b)(6) motions to dismiss and summary judgment in 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).

46. Fed. R. Civ. Pro. 56 does not require a memorandum of law.

be filed in opposition and lists of material facts must be submitted in dispute. Since summary judgment rests on discovery, discovery becomes even more crucial.⁴⁷ There are now many Local Rules for summary judgment.⁴⁸ In some jurisdictions, like the Southern District of New York, parties have to craft statements of facts, which is what judges may look at first.⁴⁹ A pre-motion conference⁵⁰ and Certification of Prior Consultation⁵¹ 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 might be submission of expert testimony.⁵² 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 “law summary judgments,” the District Judge is ruling that there is no legal basis for the claim – a kind of later R.12(b)(6) motion on legal sufficiency, but most often 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

47. See Richard J. Gonzalez, *Depositions In the Age of Summary Judgment*, 40 TRIAL 20 (2004) (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 Hilary Richard & Deborah Shapiro, *How To Bring And Defend Summary Judgment Motions In Sexual Harassment Cases: An Overview Of Recent Trends*, 727 PLI/Lit 213 (June 2005) at 227 (importance of plaintiff’s development of deposition testimony in defending against a summary judgment motion).

48. 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. Local Rules of United States District Court of Connecticut, LR 56, <http://www.ctd.uscourts.gov/toppage5.htm> (as amended Jan. 2007). 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, 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. Local Rules of United States District Court of Northern District of Illinois, LR 56.1, <http://www.ilnd.uscourts.gov/LEGAL/NewRules/locrules.htm> (as amended Apr. 2006). Indeed, a focus of the current Advisory Committee on Civil Rules consideration of Rule 56 is uniformity of summary judgment practice across federal districts. See discussion *supra* note 20.

49. 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. (BNA) 516 (2004). (S.D.N.Y. Judges Laura Taylor Swain and John F. Keenan discuss the application of summary judgment in their courtrooms).

50. *Id.* Judge Keenan stated that he holds pre-trial conferences in employment cases on summary judgment, though he rarely does in other types of cases.

51. *Id.* Judge Swain stated that she requires a Certification of Prior Consultation.

52. See Edward Brunet, *The Use and Misuse of Expert Testimony in Summary Judgment*, 22 U.C. DAVIS. L. REV. 93 (1988) (although Brunet discusses only the use of affidavits of expert witnesses in summary judgment not the use of live “expert testimony”); see also Brunet, *Markman Hearings*, *supra* note 12 (discussing live summary judgment hearings).

types of summary judgment are not always distinct and have to be understood as on a continuum. Even “law summary judgments” are shaped by factual records, 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.⁵³

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, deciding whether there is enough to get to a jury. The judge makes her or his own 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 in the motion and response,⁵⁴ or to put it more directly, no reasonable juror could find for the nonmovant, or disagree with the judge.⁵⁵ The determination of whether a “reasonable juror” could find for the plaintiff is key.

There is of course discretion on the part of the District Judge – but how much discretion?⁵⁶ One judge cites *Liberty Lobby* for the proposition that because summary judgment is a “drastic procedural weapon,” “trial courts must act with caution in granting it and may deny

53. I am grateful to Minna Kotkin for helpful discussion of these issues. In the presentation of an early 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 problems of credibility, and the judge may not be seeing the full picture. In 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 on 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*, No. 05-1230, 2006 WL 2169269 (1st Cir., Jul. 11, 2006), *rehearing denied* (Aug. 2, 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 & REITER, *supra* note 41, for 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,” Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 N.W. U. L. REV. 1769 (2003). The distinction between fact and law is frequently confused by judges and lawyers in summary judgment.

54. *Matsushita v. Zenith Radio*, 475 U.S. at 587.

55. See Gonzalez, *supra* note 47, at 20-21.

56. See Brunet, *Markman Hearings*, *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).

it in the exercise of discretion when “there is reason to believe that the better course would be to proceed to a full trial,”⁵⁷ but this is not the predominant view. How much discovery must have been allowed as a basis – some District Courts are granting summary judgment before discovery is closed and in any event before a factual record is developed.⁵⁸

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.⁵⁹ But this proof is in the form of affidavits and depositions. Affidavits are problematic because they are not subject to cross-examination, although depositions are. This should make affidavits not very useful and persuasive;⁶⁰ “snippets” of testimony from either party can be problematic because they are likely to be misleading.⁶¹ Questions of proof may inevitably involve issues of admissibility and judicial determination of weight of the evidence.⁶² 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 has to implicitly reach and decide issues of credibility.⁶³

57. *Lyons v. The Bilco Company*, 2003 U.S. Dist. LEXIS 20319 (D. Conn., Sept. 30, 2003), citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (emphasizing the seriousness of summary judgment).

58. See *Mandel v. Boston Phoenix*, *supra* note 53. In researching this issue of “prematurity” of summary judgment, I found many cases in which judges had determined that summary judgment was too early. See also discussion of *Smith v. City of Jackson*, 544 U.S. 288 (2005), *infra* note 194.

59. But for a different view see the comments of District Judge Laura Taylor Swain of the SDNY 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 49. Most lawyers would say that that was true in the “old” summary judgment framework, but not in the “new”, and in the “new”, judges will grant summary judgment unless they think that plaintiff can win at trial.

60. See Judge Keenan’s comment that since “affidavits are not subject to cross examination” as a general proposition he approaches them as not likely to be as persuasive as a witness’s deposition. Dorrian, *supra* note 49.

61. *Id.*

62. See *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).

63. *Liberty Lobby* clearly held that credibility determinations were for the jury: “Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts and jury functions, not those of a judge ... (and) trial courts should (not) act other than with caution in

This raises important questions as to whether it is really worth it to the judge to do this much on paper, rather than just let the case go forward to trial,⁶⁴ and implicates old procedural disputes concerning the dichotomy between law and equity – in law, there is a presumption in favor of oral testimony; in equity, paper trials.⁶⁵ Judicial opinions on summary judgment are often so mechanistic, “sliced and diced” – a process that as Stephen Burbank puts it “sees less in the parts by subjecting the nonmovant’s ‘evidence’ to piece-by-piece analysis” and is not analyzed contextually – is that because law clerks are writing the opinions instead of judges?⁶⁶ Also cases that are sent to magistrates – what about the impact of that?⁶⁷

Summary judgment on appeal is *de novo* review.⁶⁸ Appellate courts can examine the whole case on the record. Since District Court

granting summary judgment.” *Anderson v. Liberty Lobby*, *supra* note 6, at 255. In addition, in *Reeves v. Sanderson*, 530 U.S. 133 (2000), the Supreme Court emphasized jury determination 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. Lawyer Patricia Breuninger in *Dorrian*, *supra* note 49. On the other, *Reeves* “eliminated the assumption held by many that employment cases are uniquely appropriate for trial.” Lawyer Gary D. Friedman in *Dorrian*, *supra* note 3.

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 how is that possible? The judge has to weigh evidence to decide whether the plaintiff has a chance of winning at trial.

64. 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) (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).

65. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); Subrin & Main, *supra* note 64.

66. Burbank, *supra* note 8, at 624 (calling this process “factual” 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 (2001). In this Article, I use the term “slice and dice” to include both factual and legal carving. I am grateful to Susan Carle who raised this issue of law clerk decisionmaking 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, *Sorcerer’s Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. STATE L.J. (forthcoming 2007) (available at SSRN: <http://ssrn.com/abstract=936630>).

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

68. This raises interesting questions that go back to the law/fact distinction. 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 judgment should be granted as a matter of law. See generally, Comment, *Standard of Review in FOIA Appeals and The Misuse of Summary Judgment*, 73 U. CHI. L. REV. 731 (2006).

judges don't always explain their basis fully in their decision,⁶⁹ it is often hard to know whether the District Court is deciding on the basis of a law or fact summary judgment, so it is also unclear whether reversal is on law or fact, although it appears that reversals are mostly on law.⁷⁰ Scholars have argued that *de novo* review does not serve as an appropriate safeguard for overzealous grants of summary judgment.⁷¹ The appellate court must make determinations based on documents "merely heaped before" them. 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.⁷² If a case is adjudicated solely through summary judgment, the information does not get fleshed out and the appellate court is ruling on a limited record.⁷³

Summary judgment is widely viewed as the major procedural hurdle for 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, for cases that could be filed in either state or federal court, summary judgment now plays a role in choice of forum.⁷⁴ 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.⁷⁵

69. See *Caprio v. Bell Atlantic Sickness and Accident Plan*, 374 F.3d 217 (3d Cir. 2004), where the Third Circuit vacated and remanded a District Court 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's requirement that every summary judgment order contain an explanation of the ruling. The Circuit suggested in order to avoid future problems, lawyers should bring such oversights to the court's attention.

70. Wald, *supra* note 3; Cecil, *supra* note 8.

71. Jeffrey 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); Friedenthal and Gardner, *supra* note 12.

72. *Id.* at 179.

73. 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, 1091. See also Paul Mollica, *Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 185-6 (arguing that due process favors a litigant's right to live testimony).

74. See Roundtable Discussion: *State/Federal Forums*, WIS. L.J. (Feb. 2, 2005).

75. Jo Ellen Lind, "*Procedural Swift*": *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717 (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).

Another important development is the significant interplay between summary judgment and *Daubert* on judicial determination of expert evidence.⁷⁶ *Daubert* plays a critical role in summary judgment cases because if the judge gets rid of plaintiff's expert evidence it makes granting summary judgment easier. *Daubert* is now viewed as a "summary judgment substitute."⁷⁷ *Daubert* has a more limited standard of review, "abuse of discretion" as compared with the more general summary judgment standard of review, "*de novo*" – so *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.⁷⁸

There is no question that *Daubert* has changed the way that federal district judges assess expert evidence in civil cases and has impacted on summary judgment. A 2001 empirical study prepared for the Rand Corporation⁷⁹ 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."⁸⁰ The authors of the Rand study included a special section in the report on the interplay between *Daubert* and summary judgment, and concluded that challenges to expert evidence increasingly

76. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court directed federal judges to act as "gatekeepers", to examine the method or reasoning underlying proposed expert evidence and to admit only evidence that was reliable and relevant. *Daubert* here refers in shorthand to the trilogy of cases that developed the procedural rules for admissibility of expert testimony, including *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

77. Lind, *supra* note 75.

78. 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) Do lower courts err when they meld standards for summary judgment under Fed.R.Civ.P. 56 and relevance and reliability requirements for admissibility under Fed.R.Evid. 702? (2) In order to clarify distinction between admissibility decisions and evidence sufficient to grant summary judgment, do courts have 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?" Petition for Certiorari in *Kochert v. Greater Lafayette Health Services*, 463 F.3d 710 (7th Cir. 2006), No. 06-822 (filed 12/12/06), *cert denied*, 75 U.S.L.W. 3322 (Feb. 22, 2007).

79. Lloyd Dixon & Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision*, Rand Institute for Civil Justice (2001).

80. *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*).

resulted in summary judgments and case dismissals.⁸¹ They noted that the frequency with which summary judgment was requested:

may be due partly to *Daubert*, but it may be driven by broader 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.⁸²

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,⁸³ as well as other cases involving social science experts, including gender discrimination and gender stereotyping.⁸⁴ But in the tort context,

the resulting effects of *Daubert* have been decidedly pro-defendant. 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.⁸⁵

Margaret Berger has observed that the reallocation of power to defendants from the summary judgment trilogy that occurred even prior to *Daubert* has been exacerbated by *Daubert*.

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 plaintiff's experts on causation, they cannot

81. See Dixon & Gill, *supra* note 79, at 56.

82. *Id.* at 56-57.

83. See Robert G. Badal & Edward J. Suzewski, *Economic Testimony Under Fire*, ABA Journal, Nov. 2001 at 56.

84. See, e.g., *Daubert* Decisions by Field of Expertise, <http://daubertontheweb.com/fields.htm> (last visited Aug. 15, 2006) (collection of cases organized by type of expert witness involved).

85. 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).

have erred in granting summary judgment, as no material facts remain in issue.⁸⁶

Indeed some scholars have argued that *Daubert* has effectively changed the substantive law of torts.⁸⁷ Others have argued that there are serious race and class consequences in *Daubert*'s elimination of jury determination for certain litigants.⁸⁸ The interrelationship between *Daubert* and summary judgment is a crucial dimension of current summary judgment practice.⁸⁹

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 – civil rights cases and employment discrimination cases.⁹⁰ It also appears that there is wide variation in practice by different District Courts.⁹¹ Although summary judgment is trans-substantive like all federal procedural rules, scholars have reported the particular use of summary judgment to dismiss sexual harassment and hostile work environment cases,⁹² race and national origin

86. Berger, *supra* note 78, at 324.

87. See Lucinda 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).

88. See Frank M. McClellan, *Bendectin Revisited: Is There A Right to Jury Trial In An Age of Judicial Gatekeeping?* 37 WASHBURN L.J. 261 (1998).

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

90. See Joe S. Cecil, et al., *Federal Judicial Center, Trends in Summary Judgment Practice: A Preliminary Analysis*, Nov. 2001 (revealing an increase in the rate of summary judgment motions filed since 1975); *But see* Cecil, Eyre & Miletich, *supra* note 8; *see also* Burbank, *supra* note 8; Berger *supra* note 78; Parker *supra* note 27. In their recent study, Cecil, Eyre and Miletich 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 whole, and did not focus on employment discrimination cases, which may follow different patterns.

91. See Burbank *supra* note 8; *see also* comments of SDNY Judges on Second Circuit decisionmaking (Keenan: “I think the Second Circuit reverses summary judgment in employment discrimination cases more than any other circuit. . . . They like to tinker, they're always looking for intent”; Swain: the “Second Circuit has flown the flag on the difficulty of summary judgment” in employment discrimination cases), Dorrian *supra* note 49.

92. See Beiner, *supra* note 22, at 29 (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 26 (highlighting instances of judicial disbelief that

discrimination cases,⁹³ American with Disabilities Act cases,⁹⁴ age discrimination cases,⁹⁵ toxic tort cases,⁹⁶ and prison inmate cases.⁹⁷ “Vanishing trial” statistics also suggest that jury trials are decreasing but bench trials are increasing.

There have been critiques of summary judgment by many scholars.⁹⁸ Arthur Miller argues that consideration of objective standards of “human behavior, reasonableness, and state of mind (are) matters historically considered at the core province of jurors.”⁹⁹ There are serious questions about what District Courts are doing – the role of District Courts in terms of norm development seems to be abdicated.¹⁰⁰ Federal jurisprudence is now being made on summary judgment.¹⁰¹ Judges are making summary judgment decisions without a full record; these decisions are “arid,” and divorced from a full factual context.¹⁰² District Court judges are slicing and dicing issues of material fact and substantive legal context into smaller and smaller parts so that the decision almost defies common sense understanding of the full picture and the context.¹⁰³ District judges are now evaluating intent and credibility and acting as factfinders. 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

harassment causes injury, which results in more frequent grants of summary judgment in employment cases).

93. See Parker, *supra* note 27 (examination of empirical studies on race, age, and gender cases that demonstrates race-based employment cases are more likely to be dismissed). Parker’s study found that plaintiffs won summary judgment motions in race discrimination cases only 25% of the time. *Id.* at n.98.

94. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999) (arguing that courts may be abusing summary judgment in ADA cases) and Louis 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 (2000) (noting that employees face a “Catch 22” situation when they are forced to demonstrate a severe disability that does not simultaneously prevent them from doing their job, a situation which often leads to the grant of summary judgment for the defendant).

95. See McGinley, *supra* note 26.

96. See Berger *supra* note 78.

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

98. See *supra* text accompanying notes 12 and 26.

99. 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 America, Inc.*, 2004 U.S. Dist. LEXIS 7260 (D. Colo., Apr. 12, 2004).

100. Higginbotham *supra* note 41, Wald, *supra* note 3.

101. See Wald, *supra* note 3.

102. Burbank, *supra* note 8.

103. *Id.*

fact or to permit discovery to unearth them¹⁰⁴ and decide on the basis of “their predilections about the worthiness of the case rather than the principles encompassed in Rule 56.”¹⁰⁵ Judges are demanding more evidence at summary judgment than would suffice to support a jury verdict.¹⁰⁶

There are new issues with the role of summary judgment in a “settlement” not “trial” culture.¹⁰⁷ Most important are docket pressures. Some District and Circuit Judges, such as Judge Posner who has recognized “the drift [towards substituting summary judgment for trial] as understandable given caseload pressures” have expressed their concerns.¹⁰⁸ 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. He observed:

I think that the trend away from jury trials toward a new focus on extensive discovery and summary judgment has been fueled by the complicity of federal trial and appellate judges. The rise 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.”¹⁰⁹

One District Judge described the dilemma of contemporary summary judgment practice in the following way: “Current practice mandates tedious analysis in factually complex cases and rulings that avoid jury deliberations based on sheer guesswork or the popular appeal

104. Wald, *supra* note 3.

105. *Id.*

106. See Burbank, *supra* note 8, see also Mike McKee, *California Justices Wary of Prison Trysts*, The Recorder, May 5, 2005, at www.Law.com (reporting California Supreme Court oral argument in which some judges are incredulous at the amount of plaintiff’s proof required to overcome summary judgment in sexual harassment claim).

107. See Friedenthal & Gardner, *supra* note 12; see also Kent Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared Towards Settlement*, 44 U.C.L.A. L. REV. 1 (1996).

108. Judge Posner’s opinion in *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1397 (7th Cir.1997) says it clearly: “[t]he 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. . . .” *Wallace* at 1397. See also *Anthony v. BTR*, 339 F.3d 506, 517 (6th Cir. 2000); *Door Systems, Inc. v. Pro-Line Door Systems, Inc.*, 83 F.3d 169, 172 (7th Cir. 1996).

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

or unpopularity of the witnesses.”¹¹⁰ He concludes: “If a reversion toward historic hostility to summary judgment practice is desirable, I leave it to the rule-makers and the appellate courts to provide guidance.”¹¹¹

II. GENDER AND SUMMARY JUDGMENT-AN INTRODUCTION

Cases which involve women plaintiffs and issues of gender underscore the problems of summary judgment. They inevitably involve judges in 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, especially women expert witnesses, and women lawyers).¹¹² 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 and/or with which they may be uncomfortable. In summary judgment decisionmaking in these cases, 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.¹¹³

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.*,¹¹⁴ and Judge Jack Weinstein of the Eastern District of New York in *Ganzy v. Allen Christian School*.¹¹⁵ 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 who Judge Posner refers to as a female “lineman” for an electric company, alleged hostile environment sexual harassment and rested her claim on incidents including “a coworker’s deliberately urinating on the floor near where the plaintiff was working,

110. *Higareda v. Ford Motor Co.*, 2003 U. S. Dist. LEXIS 16073, *23 (W.D. Mo. 2003) (granting summary judgment in employment discrimination case).

111. *Id.*

112. See generally *Eighth and Ninth Circuit Task Force Reports*, *supra* note 1.

113. Burbank, *supra* note 8, at 624; Stempel, *supra* note 71, at 154.

114. *DeClue v. Central Illinois Light Co.*, 223 F. 3d. 434 (7th Cir. 2000).

115. *Ganzy v. Allen Christian School*, 995 F. Supp. 340 (E.D.N.Y. 1998).

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.”¹¹⁶ 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. The plaintiff ran up against the 300-day statute of limitations rule on all the incidents except the bathroom claim. The District Court granted summary judgment, and Posner wrote an opinion for the Seventh Circuit majority affirming this decision. 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. 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 thus her entire case, as a matter of law.

Judge Ilana Rovner wrote a stinging dissent. She had a very different view of the seriousness of the bathroom claim. 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 job in concrete and material ways.”¹¹⁷ 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 heeding the call of nature, because there was no restroom for women convenient to the Senate or the House chamber.¹¹⁸

Judge Rovner argued that although the restroom claim could be viewed within a “disparate impact” framework, it could also be viewed as a form of hostile environment:

When, 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

116. *DeClue v. Central Illinois Light Co.*, 223 F.3d at 435-36.

117. *Id.* at 437.

118. *Id.* at 437-38.

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.¹¹⁹

Rovner goes on to closely analyze the evidence presented at trial concerning bathroom facilities within a framework of hostile environment. She criticizes Posner's technical and formalistic distinction between disparate impact and hostile environment on the ground that, as she puts it, "discrimination in the real world many times does not fit neatly into the legal models we have constructed."¹²⁰ She would reverse the District Court's grant of summary judgment on this claim as a matter of law.

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. She sued the school under Title VII and state employment statutes. The school took the position that the plaintiff was fired because of sexual activity outside of marriage which violated the school's religious policy – not because of pregnancy, which would run afoul of the Pregnancy Discrimination Act. Plaintiff was offered reemployment on the termination of her pregnancy which seemed to support the plaintiff's view that the basis of her termination was pregnancy, not non-marital sex.

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 these issues in a broader social and historical context. He emphasized the fact that there was a sparse record – for example, no evidence as to whether any other teacher had been fired for sex outside of marriage. But he effectively held that there were genuine issues of material fact on the question of "whether it was pregnancy or fornication that caused the [d]efendant to dismiss the [p]laintiff" and went on to underscore the important role of the jury.¹²¹ He 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

119. *Id.* at 438-39.

120. *Id.* at 439.

121. *Ganzy v. Allen Christian School*, 995 F. Supp. at 360.

to evaluate differently the veracity of the witnesses and the honesty of the [d]efendant's proffered reason for dismissal. Under such circumstances, a decision by a cross-section of the community in jury trial is appropriate."¹²²

Although both of these cases are employment cases raising explicit gender issues – and thus are cases that the Task Force Reports warn may involve gender bias in the operation of summary judgment – they illustrate broader problems with judicial decisionmaking on summary judgment. In his affirmance of the District Court's dismissal on summary judgment, 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. Here, summary judgment is 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 inadequacies). Judge Rovner's dissent engages with Posner precisely on 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 decisionmaking in summary judgment that have a particular impact on gender cases.

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.¹²³ First, as already mentioned, gender claims cannot be assessed in any particular case without looking at larger context and patterns, for larger context and patterns illuminate inequality

122. *Id.* at 360-361.

123. A plenary session that I organized for the National Association of Women Judges (NAWJ) Annual Conference in September 2001 addressed the issue of "Feminist Insights for Everyday Cases". This panel discussed some generic insights from feminist legal theory to assist judges in determination of 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 the following discussion.

that may be invisible in a particular case or set of facts.¹²⁴ 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.¹²⁵ Legal doctrine can be malleable; it can highlight or suppress discrimination.¹²⁶ 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.¹²⁷ Finally, procedure can be an important locus of hidden gender discrimination, for procedure shapes how substantive law is applied, but often looks more “neutral.”¹²⁸

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.¹²⁹ In 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

124. Regina Austin presentation at NAWJ panel; *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).

125. Martha Chamallas presentation at NAWJ panel; *see also* Martha Chamallas, *The Architecture of Bias: Deep Structures In Tort Law*, 146 U. PA. L. REV. 463, 500 (1998)

126. Carol Sanger presentation at NAWJ panel.

127. Sylvia Law presentation at NAWJ panel.

128. *See* discussion *infra* note 136 and accompanying text.

129. 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 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 decision was reversed on appeal and other searches.

I am not reading 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 decisionmaking. Brian Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgment Grants from Eight District Courts*, <http://ssrn.com/abstract=912284> (June 26, 2006). 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; Cecil, Eyre and Miletich, *supra* note 8. *See infra* Part IV.

some other context. Second, I look at tort cases in federal court where the plaintiff is a woman but gender discrimination is not the subject of the case. I chose these two areas because they involve different dimensions of gender claims.¹³⁰ In the first cases, gender is explicit and is involved in the legal claim for which relief is sought; in the second, gender is more 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 by examining them. Others have looked at cases involving racial discrimination and found similar problems.¹³¹ We do not know how race and gender compare, although these are frequently overlapping categories, not discrete cases. One scholar concludes that race is worse.¹³² We don't know if gender-based claims are thrown out more often than comparable claims involving employment discrimination based on age and race.¹³³

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 “get a snapshot” of how judges handle summary judgment in cases involving women plaintiffs.¹³⁴ Second, reading and evaluating a District Court decision on summary judgment based on a published opinion or even a Circuit Court decision affirming

130. 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.

131. See Deseriee A. Kennedy, *Processing Civil Rights Summary Judgment and Consumer Discrimination Claims*, 53 DEPAUL L. REV. 989 (2004) (discussing summary judgment in consumer discrimination claims and arguing that premature dismissal prevents fair application of the Civil Rights Acts); Parker, *supra* note 27.

132. Parker, *supra* note 27, at 928.

133. This is a critical question that my research has not yet resolved. “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 discrimination based on age, race, etc. This is an empirical question.” (Larry Solan email to author, Oct. 24, 2001).

134. 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 129. 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. (Conference call planning Law and Society Roundtable, May 23, 2005).

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 and evaluated. And in many of the cases in which the Circuit 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 decisionmaking is significant and can have a broad impact even if it is eventually reversed.

Finally, looking at summary judgment cases in different legal areas could be argued to be a difficult basis on which to draw conclusions 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 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.¹³⁵ 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.¹³⁶

However, I purposely look at cases in a number of different substantive areas in order to explore if there are common ways in which gender may impact on judicial decisionmaking in summary judgment. The cases that follow are a rich source of information on judicial

135. BRUNET & REDISH, *supra* note 41.

136. See Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827 (1993), Lucinda Finley, *supra* note 87.

decisionmaking, not empirical data to be sure, but more than anecdotal evidence, more than what District Judge Lee Rosenthal, Chair of the Judicial Conference Advisory Committee on the Civil Rules, calls “anecdota.”¹³⁷ I find common themes in summary judgment decisionmaking, regardless of the different substantive legal contexts 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 the 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 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 decisionmaking, and to interpret the law on the basis of a full factual record. They highlight the significance of who the decisionmaker is and the importance of public consideration and scrutiny in assessment of claims of gender discrimination.

These cases signal 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 factfinding themselves, not simply determining if there are genuine issues of material fact that preclude summary judgment but weighing the evidence; 4) judges slicing and dicing plaintiff’s legal claims to decide that a claim is not

137. Hon. Lee H. Rosenthal et al., *Panel Eight: Civil Rules Advisory Committee Alumni Panel: The Process of Amending the Civil Rules*, 73 *FORD. L. REV.* 135 (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 ‘anecdota’ ... 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 burden 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.”).

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 plaintiffs' 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* decisionmaking in strengthening and reinforcing dismissal on summary judgment. These issues are explored in the following Parts.

III. SUMMARY JUDGMENT DECISIONMAKING IN GENDER DISCRIMINATION CASES

In this Part, I examine a wide range of gender discrimination cases to see the way that 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 opened 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 Task Force Reports identified as problematic, both in terms of judicial attitudes and specifically summary judgment.¹³⁸ There is now an extensive literature on problems of cognitive bias in gender discrimination cases in employment and analyses of how poorly employment discrimination plaintiffs "fare in federal court."¹³⁹ Serious sex discrimination still exists, in overt forms in many areas, although some argue that it is more subtle. By 2000, employment discrimination cases constituted nearly 10 percent

138. See *supra* 4-6, 22.

139. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIR. LEG. STUD. 429 (2004); Selmi, *Hard to Win?*, *supra* note 27; Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMPLOYEE RTS. & EMP. POL'Y J. 1 (2005).

of federal civil cases.¹⁴⁰ Scholars such as Theresa Beiner,¹⁴¹ Ann McGinley,¹⁴² Isabel Medina¹⁴³ and Eric Schnapper¹⁴⁴ 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.

A. DISTRICT COURT ASSESSMENT OF REASONABLENESS

In order for the 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, the District Court’s assessment of what would be reasonable for a juror to find is crucial.

“Maternal wall” or “sex-plus” cases – where there are allegations of caregiver discrimination – are an area where there are likely to be problems on summary judgment, because the claims are novel.¹⁴⁵ In

140. Clermont & Schwab, *supra* note 139, at 434. Clermont and Schwab suggest “that nontrial 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”. 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.”

141. See Beiner, *supra* note 22; THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* (2005). Theresa Beiner’s work has explored the problems of summary judgment in “hostile environment” sexual harassment cases. See Beiner, *The Misuse of Summary Judgment*, *supra* note 22; Beiner, *GENDER MYTHS*, *supra*. She 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, *The Misuse of Summary Judgment*, *supra* note 22, at 133-134. She analyzes how judges do not take “evidence of women’s stories” into consideration in their analysis of sexual harassment, Theresa Beiner, *Using Evidence of Women’s Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117 (2001). Beiner suggests that there is a gap between what social scientists tell us about harassment and what courts believe. Theresa Beiner, *Let The Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791 (2002). 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*.

142. See McGinley *supra* note 26.

143. See Medina, *supra* note 26.

144. See Schnapper, *supra* note 26.

145. 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. 7, 2005) at 4., Joan C.

Back v. Hastings-on-Hudson Free School District,¹⁴⁶ Elana Back, a school psychologist at an elementary school, sued under section 1983 claiming that she was denied equal protection when her superiors campaigned to deny her tenure after making comments about her commitment to the job when she returned to work after having a baby, although 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.” Her bosses also questioned whether she would show the same level of commitment once she had tenure, given that she was raising a family. 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. 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.

The Second Circuit reversed this decision granting summary judgment. Judge Calabresi wrote that the case presented “a crucial question: what constitutes a “gender-based stereotype?”¹⁴⁷ 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.”¹⁴⁸ 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.

In *Plotke v. White*,¹⁴⁹ 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 an historian on the basis of her gender. The

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).

146. *Back v. Hastings-on-Hudson Free School District*, 365 F.3d 107 (2d Cir. 2004). See Mark Hamblett, *Judging Motherhood: Beware*, NAT’L L.J. (Apr. 12, 2004).

147. *Id.* at 119-20.

148. *Id.* at 120.

149. *Plotke v. White*, 405 F.3d 1092 (10th Cir. 2005).

District Court dismissed her claims of gender discrimination and pretext on summary judgment and the Tenth Circuit reversed. Judge Stephanie Seymour, writing for the court, did a careful analysis 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.¹⁵⁰

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 that 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 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."

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 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. Judge Seymour emphasized that "[o]n a motion for summary judgment, the district court is required to review the record 'taken as a whole,'"¹⁵¹ 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.

In *Hocevar v. Purdue Frederick Co.*,¹⁵² a woman employee brought a hostile work environment and retaliation claim against her employer. Marcia Hocevar was a pharmaceutical sales representative whose extremely abusive supervisor distributed sexually explicit

150. *Id.* at 1108.

151. *Id.* at 1106.

152. *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721 (8th Cir. 2000).

material at business meetings, made threats of violence toward female staff members and constantly referred to women as “bitches”. The District Judge granted summary judgment on both claims, and in a divided opinion, the Eighth Circuit affirmed summary judgment on the hostile environment claim and reversed on the retaliation claim. 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. Judge Lay’s opinion carefully analyzes the proof submitted below and concluded that, under a totality of the circumstances test, there was sufficient evidence for the case to get to the jury.

In three other opinions during this past year, Judge Lay has continued to vigorously object to summary judgment decisionmaking on gender cases in the Eighth Circuit. In each of these cases he has written dissenting opinions in cases affirming grants of summary judgment against women plaintiffs in employment cases in the Eighth Circuit. In *Melvin v. Car-Freshener*,¹⁵³ Lucille Melvin claimed that she had been terminated in retaliation for suffering a work-related injury and filing a workers compensation claim. The District Court granted summary judgment and a panel of the Eighth Circuit affirmed. Judge Lay writing in dissent found that the plaintiff had presented sufficient evidence from which a reasonable jury could infer that she was terminated because her injury qualified her for workers compensation benefits. He argued that there were inconsistencies in Car-Freshener’s explanations such as economic reasons for her firing. 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 to trial by jury if they really have issues to try.”¹⁵⁴

153. *Melvin v. Car-Freshener*, 453 F.3d 1000 (8th Cir. 2006).

154. *Id.* at 1004.

This theme of witness credibility was continued in Judge Lay's dissenting opinion in *Guerrero v. J.W. Hutton*¹⁵⁵ where Marcie Guerrero sued her 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. Hutton removed the case to federal court and counterclaimed for breach of a non-compete agreement. The District Court granted Hutton's motion for summary judgment and the Eighth Circuit affirmed summary judgment, with a dissent from Judge Lay. He began his decision 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."¹⁵⁶ He described conflicts in the evidence presented below that he viewed as resting on credibility of the parties generally, and Marcie Guerrero's credibility specifically. He described these credibility issues as "obvious" and concluded that the case was inappropriate for summary judgment.

Finally, in *Green v. Franklin National Bank of Minneapolis*,¹⁵⁷ Linda Green alleged racial harassment and hostile work environment, discriminatory discharge and retaliation under Title VII and 42 USC 1981 and a claim of whistleblowing under the Minnesota Whistleblower Act for her reporting of discrimination at Franklin National Bank. Green, an African-American woman who worked 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. The majority affirmed the District Court grant of summary judgment on all her claims, and Judge Lay dissented on the issue of Green's federal retaliation and Minnesota whistleblower claims. Again, Judge Lay closely analyzed Green's deposition testimony and concluded that "a reasonable jury could easily infer pretext."

In *Jennings v UNC at Chapel Hill*,¹⁵⁸ claims of sexual harassment under Title IX and 42 USC 1983 were brought by two former University of North Carolina varsity women's soccer players against the women's soccer coach, Anson Dorrance and administrators at UNC Chapel Hill. At 45 years old, Anson Dorrance was the most powerful intercollegiate

155. *Guerrero v. J.W. Hutton*, 458 F.3d 830, 836 (8th Cir. 2006).

156. *Id.* at 836.

157. *Green v. Franklin National Bank of Minneapolis*, 459 F.3d 903 (8th Cir. 2006).

158. *Jennings v. University of North Carolina at Chapel Hill*, 444 F.3d 255 (4th Cir. 2006).

women's soccer coach in the United States (because UNC was one of the best women's intercollegiate soccer teams in the country) and he repeatedly asked team members "who are you f---ing?" and made comments to them regarding sexual partners such as "Do you make them get in line?"¹⁵⁹ He touched team members frequently and asked them questions or made comments that suggested his inappropriate interest in their sexual activities. On a detailed record of truly shocking statements, the District Judge granted the defendant's motion for summary judgment.¹⁶⁰ The Fourth Circuit affirmed the grant of summary judgment, with a strong dissenting opinion from Judge M. Blane Michael.

Jennings is a classic example of the problem of both District and Circuit Court 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." 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.¹⁶¹

In his dissent, Judge Michael wrote that Melissa Jennings was entitled to have her day in court. He rejected 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. 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. He concludes that the Coach's comments and behavior raise serious questions about whether there were violations of gender-equity

159. *Id.* at 263.

160. *Jennings v. University of North Carolina at Chapel Hill*, 240 F. Supp.2d 492 (M.D.N.C. 2004).

161. The majority opinion references such remarks as "f-- of the week," "fat a--," and "who are you f---ing?" *Jennings*, 444 F.3d at 260, 261, 263.

and sexual harassment laws and that a reasonable juror could reach that conclusion on the record that was presented.¹⁶²

District Court attitudes on the “reasonableness” of jury determination on summary judgment do not only affect judicial decisionmaking on summary judgment, but can persist throughout a case and affect other procedural decisions. The procedural history of *Sorlucco v. New York City Police Department*,¹⁶³ 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 is one example. District Judge Michael Mukasey first dismissed Karen Sorlucco’s claims of gender discrimination in violation of section 1983 and Title VII on summary judgment,¹⁶⁴ and this decision was reversed by the Second Circuit.¹⁶⁵ Then after the case was remanded, went to jury trial and plaintiff won substantial damages, Judge Mukasey granted judgment as a matter of law to set aside the jury verdict and a motion for new trial and was again reversed by the Circuit.¹⁶⁶ 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.¹⁶⁷ 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 Court has dismissed on summary judgment as a matter of law, where the District Court rules that there really was no “legal” claim. Over the last forty years, as women’s rights cases first began wending their ways through the courts, many District Courts granted summary judgment to these

162. *Id.* at 288-92.

163. *Sorlucco v. N.Y. City Police Department*, 703 F. Supp. 1092 (SDNY 1989).

164. *Id.*

165. *Sorlucco v. N.Y. City Police Department*, 888 F. 2d. 4 (2d Cir. 1989).

166. *Sorlucco v. N.Y. City Police Dept.* 780 F. Supp. 202 (SDNY 1992), *rev’d*, 971 F. 2d. 864 (2d Cir. 1992).

167. For other cases in which District Court judges grant judgment as a matter of law to set aside jury verdicts entered for women plaintiffs in sexual harassment cases and their decisions are affirmed by Circuit Courts, *see Duncan v. General Motors*, 300 F.3d. 928, (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”); *Ocheltree v. Scollon Productions*, 335 F. 3d. 325 (4th Cir. 2003) (affirming jury verdict for plaintiff on sex-based employment discrimination claim, but affirming judgment as a matter of law to set aside the jury verdict on punitive damages because defendant employer did not have requisite knowledge about the harassment).

claims at the trial level. In many of these cases, District Courts were narrow and cautious in their legal interpretation and held that the plaintiff had no cognizable claim as a matter of law. In some of these cases, either the Circuit Court and/or the Supreme Court ultimately reversed the District Court. But as mentioned earlier, these decisions should not be viewed as pure “law” cases because the District Court’s ruling on and assessment of the law (and the Circuit or Supreme Court’s reversal of that ruling) is inevitably shaped by the facts of the case.

Early examples of cases in this vein are *Mississippi University for Women v. Hogan*,¹⁶⁸ *California Federal Savings and Loan v. Guerra*,¹⁶⁹ *Troupe v. May Department Stores*,¹⁷⁰ *Burlington Industries v. Ellerth*¹⁷¹ and *Jackson v. Birmingham Board of Education*.¹⁷² All of these cases involved innovative claims of equality in education or employment which District Courts rejected on summary judgment as a matter of law and then were ultimately reversed by Circuit Courts or the Supreme Court.

Nevada v. Hibbs is a more recent example of this phenomenon.¹⁷³ In *Hibbs*, a husband who was unable to take off from work to take care of his wife, who was severely ill, sued the state of Nevada for denial of family leave under the FMLA. 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. The Circuit Court reversed the District Court’s grant of summary judgment and the Supreme Court affirmed. Justice Rehnquist’s decision for the Court emphasized the importance of FMLA as a matter of law and policy in light of the compelling facts of the case.¹⁷⁴ He concluded that because of the

168. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (affirming but narrowing Circuit reversal).

169. *California Federal Savings and Loan v. Guerra*, 479 U.S. 272 (1987).

170. *Troupe v. May Department Stores*, 20 F.3d 734 (7th Cir. 1994).

171. *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).

172. *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005).

173. *Nevada v. Hibbs*, 538 U.S. 721 (2003) (upholding the constitutionality of the application of the FMLA to state employees).

174. 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 limited 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 the evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment

importance of the FMLA claim, precedent on Eleventh Amendment immunity would not apply to these claims. The Supreme Court's surprising decision on the immunity issue was shaped by its view of the importance of FMLA and the factual record below.¹⁷⁵ 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 FMLA.¹⁷⁶

Another recent Supreme Court case, *Pennsylvania State Police v. Suders*,¹⁷⁷ involved an analogous procedural context. Nancy Suders had worked as a police communications expert for the Pennsylvania State Police (PSP) and sued them alleging that the sexual harassment by her supervisors which caused her to resign constituted a constructive discharge. The District Court dismissed her claims on summary judgment, interpreting *Ellerth* and *Faragher* to preclude her action. In a decision for the Third Circuit, Judge Julio Fuentes reversed on the ground that there were both genuine issues of material fact that precluded summary judgment on Suders' claims on 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* and that PSP was precluded from raising an affirmative defense to vicarious liability or damages for sexual harassment by supervisors.¹⁷⁸ The Supreme Court held that as a matter of law on the constructive discharge issue, the employer should have the burden to demonstrate the existence of an effective remedial process and the employee's unreasonable failure to utilize the process.

context, specifically in the administration of leave benefits. . . . As the FMLA's legislative record reflects, a 1990 Bureau of Labor Statistics 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 heard testimony that . . . 'Even . . . [w]here 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 very few States granted many 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 721.

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

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

177. *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

178. *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003).

In *Jespersen v. Harrah's Operating Co.*,¹⁷⁹ the Ninth Circuit Court of Appeals, sitting *en banc*, affirmed and reversed a District Court ruling granting summary judgment. Darlene Jespersen claimed that Harrah's casino gaming policy that required female, but not male, bartenders to wear makeup violated Title VII. 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 that the plaintiff had failed to present sufficient evidence of such an unequal burden. This is an example of summary judgment "on the law" – the District Court and the Circuit Court are clarifying legal standards in a controversial and developing area of the law.¹⁸⁰

Another example of summary judgment as a matter of law with novel gender claims is *EEOC v. National Education Association, Alaska*¹⁸¹. 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. The sex-based harassment claim was that harassing conduct by a supervisor, Thomas Harvey, which was directed at women employees – shouting, screaming, the use of foul language and hostile physical actions, violated Title VII, although it was not explicitly sex or gender-related. In the majority's words, the 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.¹⁸² The Circuit Court reversed, 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."¹⁸³ The Circuit Court reversed the summary judgment below as a matter of law, and suggested that the record revealed "a debatable question as to the objective differences in treatment of male and female

179. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006).

180. See generally Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL'Y 465 (2007).

181. *EEOC v. National Education Association, Alaska*, 422 F.3d 840 (9th Cir. 2005).

182. *Id.* at 845.

183. *Id.*

employees and strongly suggests that differences in subjective effects were very different for men and women.” It concluded that the facts present 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.

These are cases in which judges are ruling on summary judgment as a matter of law in the context of novel claims. Yet the District Court’s determination of summary judgment, and appellate court’s review of these decisions, are doing so on a record based on discovery, not live testimony. Judge Wald emphasized the need for federal jurisprudence to be based on a full factual record that demonstrates the complexity of these legal questions in the context of facts.¹⁸⁴ This is 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*,¹⁸⁵ 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. 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 Farmer’s nondiscriminatory reasons for firing her to establish pretext for summary judgment purposes.

Similarly in *Watson v. Blue Circle*,¹⁸⁶ Lisa Watson sued Blue Circle, a company that provides ready-mix concrete in Georgia and Alabama, for hostile work environment sexual harassment under Title VII in their Athens, Georgia facility, where she was one of only three women hired as a concrete truck driver. The District Court granted summary judgment. The Eleventh Circuit reversed the grant of summary judgment on the ground there were many genuine issues of material fact and that inferences had been drawn in favor of Blue Circle by the

184. Wald, *supra* note 3 at 1941-46.

185. *Bryant v. Farmers Insurance Exchange*, 432 F.3d 1114 (10th Cir. 2005).

186. *Watson v. Blue Circle*, 324 F.3d 1252 (11th Cir. 2003).

District Court. 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.¹⁸⁷ Judge Wald suggests that in many cases in which there is reversal because of determinations that there are genuine issues of material fact in dispute, there really are issues of law that are appended to them. *Blue Circle* is one example.

Simpson v. University of Colorado is a good example of District Court factfinding.¹⁸⁸ This case involves Title IX claims against the University of Colorado by two women students who were raped as part of the football recruitment process. There was a huge amount of discovery over many years. The University of Colorado moved for summary judgment and District Judge Blackburn grants summary judgment saying that there are not genuine issues of material fact respecting the legal requirements of the defendants' actual notice and willful disregard under Title IX. In a lengthy opinion, the District Judge does extensive factfinding based on discovery, draws inferences from the record, and concludes that there is not sufficient evidence to get to a jury. This is a classic example of a District Court slicing and dicing, analyzing the legal claims and breaking down the legal requirements so technically that the context and interrelated aspects of evidence that are relevant to the plaintiff's claims are lost. All of this work is to keep the case from the jury.

In a Sixth Circuit opinion in *Williams v. General Motors*, reversing summary judgment in a "hostile environment" sexual harassment case,¹⁸⁹ Judge Martha Daughtrey used the phrase "impermissible disaggregation of incidents" to describe what the District Court had done and why the grant of summary judgment should be reversed. 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". She also reversed the District

187. *Id.* at 1262.

188. *Simpson v. University of Colorado*, 372 F. Supp.2d 1229 (D. Colo. 2005).

189. *Williams v. General Motors*, 187 F.3d 553 (6th Cir. 1999).

Court's determination that there was no "hostile environment" as a matter of law.

These cases bear out Judge Wald's point about how summary judgment decisions distort the context of decisionmaking and shape federal jurisprudence. Although in several of these cases the plaintiff's claim was recuperated on appeal, who knows how many cases there were 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 on summary judgment was not reversed on appeal. 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,"¹⁹⁰ 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 gender cases really continue to present novel or innovative issues or is it arguable that they are cut and dried after all these years of litigation?¹⁹¹

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.¹⁹² 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.¹⁹³ 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 a determination of whether a reasonable jury can find discrimination ... (i)t is not so clear

190. Clermont & Schwab, *supra* note 140.

191. 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 which continue to evolve.

192. See generally, *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 EMPLOYEE RTS. & EMP. POL'Y J. 427 (2005).

193. See 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 (2004).

that, on balance this will be exercised in allowing discrimination cases to go to trial.”¹⁹⁴

D. THE IMPORTANCE OF JURY DETERMINATION

In *Gallagher v. Delaney*, Judge Weinstein, sitting on a panel of the Second Circuit, writes a decision reversing summary judgment in a sex discrimination case. He emphasizes the reasons why a District Judge should not decide this case and why it important for a jury to decide these kinds of issues.

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 and judicial attitudes in these cases, based on who most judges are and the kinds of work/life experiences that they have had.¹⁹⁵ Mary Becker writes about the predominance of summary judgment in Title VII and maternal caretaking cases¹⁹⁶ and suggests there is little hope for the future of Title VII as a remedy because 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.¹⁹⁷ Do judges have more than discomfort with these cases, is it really judicial hostility?¹⁹⁸ Wendy Parker has highlighted a deeper problem of “anti-plaintiff ideology” in employment cases and particularly in race cases, reflected in summary judgment.¹⁹⁹

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194. *Id.* at 1128. The *Smith v. City of Jackson* case in the Supreme Court on age discrimination with women plaintiffs is another example. The District Court dismissed on summary judgment, and the Circuit Court affirmed the court below on its dismissal of plaintiffs’ disparate impact claim as unavailable under the ADEA, but vacated summary judgment for defendant on the disparate treatment claim as “premature” – summary judgment had been granted too early, and the Supreme Court said that there was a claim on “disparate impact” that was cognizable, although plaintiffs hadn’t properly presented it. *Smith v. City of Jackson*, 544 U.S. 288 (2005).

195. Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495 (2001); Beiner, *The Misuse of Summary Judgment*, *supra* note 22, at 119–20; Medina, *supra* note 26, at 361; Selmi, *Why Hard to Win?*, *supra* note 27.

196. Becker, *supra* note 195, at 1517-21.

197. Selmi, *supra* note 27, at 568-70. Selmi describes the life circumstances, privileges and attitudes toward working women of many federal judges that make it difficult for them to see women’s employment discrimination cases fairly.

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

199. See Parker, *supra* note 27.

Issues of experts come up frequently now in gender cases, particularly in women's rights and employment cases.²⁰⁰ Gender stereotyping is an 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. Expert testimony on cognitive bias can address problems of sex-discrimination in the workplace.²⁰¹ 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.²⁰² Theresa Beiner proposes the admission of social science evidence in sexual harassment cases to deal with the gap between the judge and the jury. But, with *Daubert*, would this testimony even be admitted?²⁰³

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.

IV. GENDER, TORTS AND SUMMARY JUDGMENT DECISIONMAKING

Over the last several years, there has been considerable recognition by tort scholars of the gendered nature of certain torts.

200. Beginning with such early cases as *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which social psychologist Susan Fiske testified on the way in which sex stereotyping impacted on employment decisions such as partnership selection, expert testimony in women's rights cases is now common.

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

202. See Williams & Segal, *supra* note 145, at 132 n.368, citing Krieger, *The Content of Our Categories*, *id.*

203. See Minna Kotkin, *Gender Myths v. Working Realities: Using Social Science to Reformulate Sexual Harassment Law*, 55 J. LEG. EDUC. 613 (2005) (book review).

Martha Chamallas,²⁰⁴ Lucinda Finley,²⁰⁵ Thomas Koenig and Michael Rustad,²⁰⁶ Joan Steinman²⁰⁷ and Anita Bernstein,²⁰⁸ 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. In their study of torts cases involving punitive damages, nearly half of the punitive damages verdicts awarded to women stemmed from injuries caused by household consumer products and dangerously defective drugs or medical devices. In contrast, the punitive damages awarded to males arose from accidents involving industrial and farm machinery, asbestos, chemicals, containers and vehicles. Two out of three plaintiffs receiving punitive damages awards in medical malpractice litigation are women who are seeking redress for mismanaged child birth, cosmetic surgery, sexual abuse, and neglect in nursing home-gender-based injuries.²⁰⁹ Other scholars have emphasized the cluster of sexual and reproductive-based harms that are involved in women’s tort cases.²¹⁰ As others have argued, tort cases can also involve civil rights issues.²¹¹

While many tort cases are litigated in state court, some number of tort cases involving women plaintiffs, like all tort cases, are filed in federal court on the basis of diversity jurisdiction with corporate

204. See, e.g. Martha Chamallas, *The Architecture of Bias; Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); Martha Chamallas with Linda K. Kerber, *Women, Mothers and the Law of Fear*, 88 MICH. L. REV. 814 (1990); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation*, 63 FORD. L. REV. 73 (1994); Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005).

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

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

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

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

209. Koenig & Rustad, *supra* note 206, at 6, 23-24, 33-38, 61.

210. See Lucinda Finley, *supra* note 205; 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.

211. Chamallas, *Civil Rights in Ordinary Tort Cases*, *supra* note 204 at 1437; see also Richard Abel, *Civil Rights and Wrongs*, 38 LOY L.A. L. REV. 1421 (2005).

defendants or because of federal statutory or regulatory claims.²¹² And of course, as in all tort cases, expert witnesses are frequently required. Thus in these cases in federal court, 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.²¹³ There are special pressures on plaintiffs in tort cases raising questions about causation, and special pressure to also put plaintiffs to their proof early. "Lone Pine orders" in toxic tort litigation, which require plaintiffs to produce basic evidence supporting a prima facie case early in the discovery process,²¹⁴ are frequently used in conjunction with defense motions for summary judgment. Many of these cases involve claims concerning "female injuries": DES, breast implants, Parlodel, Dalkon Shield and Bendectin.

The devastating impact of *Daubert* means that many torts cases are not even getting past motions in limine and summary judgment motions on experts, the most efficient way for defendants to get rid of the case at an early stage. Most cases appear to be dismissed on summary judgment on *Daubert* issues and are not even getting to 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 ... in this context (i.e. where the legal standard is certain) the (fact-finder) is not simply determining 'what happened' – the historical facts –

212. 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 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.

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

214. James P. Muehlberger & Boyd S. Heckel, *An Overview of Lone Pine Orders in Toxic Tort Litigation*, 4 Defense Counsel Journal 366 (October 2004). Lone Pine orders typically require a plaintiff to 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. Other evidence can also be required such as dates of exposure to the substance, the method of exposure and affidavits from medical experts supporting causation. Although these orders developed from a New Jersey case, *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N. J., Super., Nov. 18, 1996), reported at 1 Tox. Law. Repr. (BNA) 726, they have also been used in federal court.

it is also determining the legal effect of its findings as to ‘what happened.’²¹⁵ 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 upon objective standards,²¹⁶ 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.”²¹⁷

Here judges may not be dealing with cases that directly implicate attitudes relating to gender roles, work and family in a way that employment discrimination cases 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. 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 decisionmaking in tort 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*,²¹⁸ 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. Judge Martha Daughtrey, writing for the court noted that

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

216. *Baldwin v. Stonebridge Life Insurance Co.*, 283 F. Supp. 2d. 1148, 1150 (D.Colo. 2003).

217. *Id.*, citing Miller, *supra* note 9, at 1090.

218. *Johnson v. Sandoz*, 24 Fed. Appx. 533 (6th Cir. 2001).

[i]n product 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.²¹⁹

In *Smith and Smith v. Walmart*,²²⁰ the Sixth Circuit reversed the district court's grant of summary judgment to a disabled woman who sued Walmart for damage she suffered using a bathroom in a store with claims for negligence per se, common law negligence and ADA violations. 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. And in *Adams v. Synthes Spine*,²²¹ the Ninth Circuit affirmed the District Court's grant of summary judgment to a woman plaintiff who brought a products liability suit against a spinal plate manufacturer for a surgically implanted broken spinal plate on the ground that the manufacturer's warning that the plate could break and that the manufacturer recommended removal after surgery was an adequate warning to surgeons. 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.

A case in which the District Court seems to minimize the harm experienced by the woman plaintiff is *Akers v. Alvey*,²²² a more explicit gender discrimination case. In this case, the plaintiff alleged sexual

219. *Id.* at 538-39.

220. *Smith and Smith v. Walmart*, 167 F.3d 286 (6th Cir. 1999).

221. *Adams v. Synthes Spine*, 298 F.3d 1114 (9th Cir. 2002).

222. *Akers v. Alvey*, 338 F.3d 491 (6th Cir. 2003).

harassment as well as a tort claim of outrage.²²³ The District Court granted summary judgment on all claims. The Sixth Circuit reversed on the tort of outrage claim holding that material issues of fact existed which made summary judgment improper. 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. In reversing, the 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.” The Court noted that “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.”²²⁴

B. *DAUBERT*

As mentioned, *Daubert* has had a substantial impact on these cases. A particularly egregious example is *Rider v. Sandoz Pharmaceutical Corp.*,²²⁵ 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. After discovery, Sandoz moved, in limine, to exclude the opinions and testimony of the plaintiffs’ experts on causation and for summary judgment. 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 whether the evidence was admissible. In a three-day hearing, the district court examined the evidence and found that the plaintiffs’ claims were based on speculation and conjecture. The court excluded the evidence and granted summary judgment. On appeal, the Circuit affirmed the opinion and held that the District Court had not abused its discretion.

223. *Id.* at 493.

224. *Id.* at 496. Under state law, plaintiff’s claim under 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 decency and morality.” *Id.* The Restatement (Second) of Torts required that the standard for outrageous behavior be determined by “an average member of the community.” Restatement (Second) of Torts § 46 cmt. d (1965). 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. *Id.*

225. *Rider v. Sandoz Pharmaceutical Corp.*, 295 F. 3d. 1194 (11th Cir. 2002). I am grateful to Aaron Twerski who led me to this case.

One area that needs additional research is the impact in tort cases of restrictive *Daubert* and summary judgment rulings in federal court on choice of forum. Since one impact of the new Class Action Fairness Act is to move state tort cases to federal court, where *Daubert* and summary judgment will apply,²²⁶ it will be important to see what happens with these cases.

V. 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 which identified issues of gender-bias in judicial treatment of summary judgment claims.²²⁷ In the two previous Parts, I examined problems of gender bias in judicial decisionmaking in summary judgment cases involving women plaintiffs. My analysis raises the question of whether the problems that I have identified with judicial decisionmaking 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 researches 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 2000.²²⁸ The FJC generously

226. 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). See *supra* note 74 and accompanying text.

227. Beiner, *supra* notes 21 and 241; Medina, *supra* note 26; Schnapper, *supra* note 26; McGinley, *supra* note 26.

228. In 2002, I requested access to the Federal Judicial Center'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 (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 www.nawj.org. I am grateful to Joe S. Cecil, Senior Research Associate, and Rebecca Eyre, Research Associate 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 (discussion of FJC summary judgment dataset); see also Joe S. Cecil, Dean P. Miletich & George Cort,

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 – the Districts of 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.²²⁹ For each case, FJC researchers recorded the identification of the moving party;²³⁰ the type of summary judgment motion made;²³¹ the court’s ruling on the action;²³² and whether the action terminated the case. They also recorded the nature of the case (tort, contract, civil rights, other),²³³ 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,²³⁴ the parties’ attorneys,²³⁵ the judge presiding over the case,²³⁶ and, when applicable, the magistrate judge,²³⁷ along with the cause of action and the statute cited, if applicable.²³⁸

Trends in Summary Judgment Practice: A Preliminary Analysis (Federal Judicial Center, 2001), Cecil Miletich and Eyre, *supra* note 8.

229. For purposes of this analysis, the FJC excluded prisoner cases, social security cases, student loan repayment cases, and multi-district litigation cases.

230. The moving parties were coded as plaintiff, defendant, or third party. *Motions for Summary Judgment in Federal Court Docket Sheets* at 4.

231. 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.

232. 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.

233. 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.”

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

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

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

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

238. 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 (non-employment); 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 Info Act; Taxes; Securities, Commission, & Exchange. Social Security cases and student loan cases were excluded from the random sample.

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 1,198 summary judgment-type motions²³⁹ 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.”²⁴⁰ FJC researchers then performed several statistical analyses on this newly coded data.²⁴¹ They determined that overall, the gender of the plaintiff had no statistically significant effect on the outcome of defendants’ summary judgment-type motions.²⁴²

239. “Summary judgment-type motions” include motions for summary judgment, partial summary judgment, summary judgment or motion to dismiss, summary judgment or remand, and other.

240. Of the 1,422 summary judgment-type motions made against all plaintiffs, 115 of the plaintiffs were represented by female attorneys, 1,050 were represented by male attorneys, and 257 were represented by at least one female and one male attorney. Of those 1,422 summary judgment-type motions, 323 of them were presided over by female judges, and 1,099 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.

241. 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”).

242. 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 are more likely to receive grants of summary judgment than their male counterparts. Similarly, the gender of the judge has a marginal effect ($p = .089$) on the outcome; female judges may be more likely to grant defendants’ summary judgment motions. In fact, female judges are 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, that is to say, 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 are 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 is 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 is highest when both the plaintiff and the defense attorney are female, followed by when both the plaintiff and the defense attorney are male. In other words, more summary judgment-type motions are granted overall when the plaintiff and the defense attorney are the same gender.

Within defendants’ summary judgment-type motions, there is 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 is highest when the judge is male and the plaintiff’s attorney is female, followed by when the judge is female and the plaintiff’s attorney is 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

While the results are not what might have been anticipated, they do show that gender may play at least some role on the outcome of summary judgment motions. The study, using a broad approach, did not detect a differential effect in the granting of summary judgment motions against female 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.²⁴³

The results of this study did not support the hypothesis that problems with summary judgment decisionmaking resulted in summary judgment being granted disproportionately against women plaintiffs as compared with male plaintiffs, at least during this time period. The study did not reveal significant disparities in summary judgment dispositions based on gender of the plaintiff.²⁴⁴ There are many factors at play in judicial decisionmaking, and it was difficult to isolate the subtle issues of

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 is 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 is female; female defense attorneys are more likely than male defense attorneys to have summary judgment motions granted in breach of contract cases. However, because there is 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 is male, and a marginal effect ($p = .097$) when the magistrate judge is male. Male plaintiff's attorneys are more likely than female plaintiff attorneys to have defendants' summary judgment-type motions granted against them in products liability cases, and male magistrates are 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 category render 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.

243. 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." (Joe S. Cecil email to author, August 2, 2006).

244. A recent study of published employment discrimination decisions in the Second Circuit found that 41% of "sex claims" survived summary judgment. 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%). The authors suggest that Judge Weinstein's decision in *Gallagher v. Delaney*, may have impacted on the high rate of survival of sexual harassment claims. Berger, Finkelstein & Cheung, *supra* note 42, at 61.

gender bias that may be involved, and identify whether and how gender may play a role.

One reason why the intuition that there may be differences in the granting of summary judgment between men and women plaintiffs is hard to test 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.²⁴⁵ 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 86% of the plaintiffs were women – 68% of all cases resulted in summary judgment being granted to dismiss their claims, and that 76% of all District Court decisions were upheld by Circuit Courts.²⁴⁶ 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 are part of the general wave of “tort reform.” Two different aspects of the purported “litigation explosion” are represented.²⁴⁷ 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 “anecdotal,” the 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

245. 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.

246. Rafael Gely and Timothy D. Chandler, *Maternity Leave Under the FMLA: An Analysis of the Litigation Experience*, 15 WASH. U. J.L. & POL'Y 143, 156, 162 (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 27, 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 59% of plaintiffs were men and 39% of plaintiffs were women. *Id.* at 906.

247. Selmi, *supra* note 27, at 568; Miller, *supra* note 9, at 1063-74.

judgment based on gender during this particular time period minimizes the significance of the prior case studies showing problems in judicial decisionmaking. The empirical data cannot get at the subtlety of the bias. Although many of the problems with judicial decisionmaking that I have identified lead to full grants of summary judgment by District Judges, not all do. Some problems with judicial decisionmaking 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 decisionmaking that is the larger problem, and although these problems in judicial decisionmaking often lead to dismissal, they do not always. This study did not and could not test for these more subtle problems.

Just as I argue that in many cases judges need a fuller record for decisionmaking 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 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.²⁴⁸ More quantitative data and qualitative analysis of judicial decisionmaking on both gender and summary judgment is 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.

VI. 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 decisionmaking role on summary judgment from the decisionmaking 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

248. 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.

thoughtful factfinding.²⁴⁹ Summary judgment implicates all of these dimensions.²⁵⁰

In theory, on summary judgment, District Courts are deciding “legal” issues,²⁵¹ 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.²⁵² This means that the 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 if a judge does not have the humility, self-awareness or insight to recognize the limitations of his or her own perspective?²⁵³

Judge Weinstein highlights this issue in judging in *Gallagher v. Delaney*. 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 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 communication.”²⁵⁴ Numerous other courts have followed his lead and relied on *Delaney* for this proposition.²⁵⁵ 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.²⁵⁶ And 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.²⁵⁷

249. For 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).

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

251. BRUNET & REDISH, *supra* note 41, at 20.

252. Beiner, *Let the Jury Decide*, *supra* note 141, at 819-21.

253. Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767 (2005) (arguing for judicial “modesty” in decisionmaking on the need for a jury).

254. *Gallagher v. Delaney* at 932.

255. See discussion of *Gallagher v. Delaney*, *supra* note 28 and accompanying text.

256. Mollica, *supra* note 76 at 180–81.

257. Beiner, *The Misuse of Summary Judgment*, *supra* note 22.

Is it so clear that a judge and jury would come to a different conclusion in a particular case? Some scholars say no.²⁵⁸ However, in cases involving explicit issues of gender, albeit subtle, it may make more of a difference who the decision makers are.²⁵⁹ Although there is some increase in diversity of the federal judiciary,²⁶⁰ there appears to be greater diversity on federal juries.²⁶¹ Many studies have been conducted over the years in order to determine whether the gender of a judge plays a role in decisionmaking behavior,²⁶² and results have been inconsistent. Though some studies have found gender to play a role in judicial decisionmaking,²⁶³ other studies have found no perceptible effect.²⁶⁴ Still others suggest that other factors, including political affiliation, are more accurate predictors of how a judge will decide a case.²⁶⁵ Some argue that

258. 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 (2005). In this study, the authors found that plaintiffs (both men and women) in employment discrimination cases had a higher success rates in front of juries than in bench trials. When before a jury, plaintiffs would win 25.2% of the time; however, the plaintiff success rate drops to 11% in front of a judge. *Id.* at 700–01.

259. Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, *supra* note 27; Stempel, *supra* note 71.

260. See data presented *supra* note 33.

261. See Theresa M. Beiner, *What Will Diversity Mean for the Federal Bench?*, 6 MICH. J. GENDER & LAW 113, 117–28 (1999). See data presented *supra* note 33.

262. For a survey of existing studies, see Theresa Beiner, *Female Judging*, 36 U. TOL. L. REV. 821 (2005); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decision-Making in the Federal Appellate Court*, 114 YALE L.J. 1759 (2005).

263. 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, Note, *Gender Effects in the Courts of Appeals Revisited: The Date [sic] 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) for its suggestion 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” with claims such as gender discrimination and sexual harassment. Jennifer 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).

264. Parker, *supra* note 27 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 [1995]; Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 [1985]).

265. Minna J. Kotkin, *Gender Myths v. Working Realities*, *supra* note 203 (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]; Tracey E. George, *Developing a Positive Theory of Decision-making in U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1678–86 [1998]).

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.²⁶⁶ However, one recent study of three judge panels in federal appellate courts found that the presence of a female judge on the panel increased the probability that plaintiffs in sexual harassment and discrimination cases would succeed.²⁶⁷ Though this finding does not suggest that a particular judge's gender affects decision-making, this study does reinforce the importance of diversity for decision-makers in these types of cases. We don't know about gender and decisionmaking by judges, and I want to rebut, or at least complicate, an "essentialist" view of judging by gender (and the FJC data just discussed seems to raise questions about that).²⁶⁸

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 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."²⁶⁹ 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"?²⁷⁰ We have to look to factors other than gender like political party affiliation that also seem to make a difference.²⁷¹ Judge Weinstein in *Gallagher* assumes that there is a difference between what judges would see and how juries would bring different perspectives to bear. Judge Rovner in *DeClue* suggests that gender and experience count in recognition of the seriousness of the "bathroom problem" – whose "knowledge" and what kind of "knowledge" is important?

266. See, e.g., Peresie, *supra* note 262 at 1764; Beiner, *Diverse Bench*, *supra* note 261, at 599.

267. *Id.*

268. An "essentialist" view of gender and judging would suggest that women judges might rule differently in summary judgment cases. 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." (Comment of former Judge Joan Dempsey Klein, California Court of Appeal, at NAWJ Annual Meeting in Indiana.). See discussion of Judge Klein in Beiner, *Female Judging*, *supra* note 262.

269. I am grateful to Martha Minow who characterized possible gendered dimensions of summary judgment decisionmaking in this way (Martha Minow email to author, Feb. 11, 2004). *But see* Segal, *supra* note 263. The data about gender of judges granting summary judgment from the study in Part V does not seem to support this.

270. *Id.* Christina Boyd's findings that women judges are more likely to dispose of cases by settlement suggests otherwise. See Boyd, *supra* note 263.

271. Kotkin, *Gender Myths*, *supra* note 203, at 615–16.

What about judge versus jury decisionmaking generally – Judge Scheindlin’s response to *Gallagher* that judges should be setting the boundaries of the law?²⁷² Are these “explicit” gender cases or even “implicit”/gender in tort cases, cases that juries should be deciding not judges? 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”?²⁷³ 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 a trial that is based on affidavits and depositions, not full live presentation. On bench trials, there is the requirement for findings of fact and conclusions of law,²⁷⁴ 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. Dept of Navy*,²⁷⁵ the 9th Circuit reversed a District Court 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, and the court remanded the case for reassignment to a different District Judge because the judge had demonstrated his commitment to the government’s view of the facts. Clermont and Schwab say that employment discrimination plaintiffs do much worse on bench trials than on jury trials.²⁷⁶

272. Scheindlin and Elofsen, *supra* note 19, at 822-24.

273. This standard has surfaced in discussions with federal judges. Of course, it is difficult to distinguish between cases that might implicate “social issues.”

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

275. *Sullivan v. Dept. of Navy*, 365 F.3d 827 (9th Cir. 2004).

276. Clermont & Schwab, *supra* note 139, at 434.

VII. 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 their “day in court.”²⁷⁷ With the present operation of summary judgment, we are moving to a system of paper trials.²⁷⁸ Live testimony and adversarial presentation make a difference in decisionmaking; law determination should be shaped by the complexity of facts developed in a live forum.²⁷⁹ The traditional reluctance for summary judgment rests on the notion that unforeseeable disclosures at trial or juror/judge perceptions of witnesses may produce a stronger case.²⁸⁰ 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 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.²⁸¹

Insights concerning the importance of listening to women’s experiences of harm give additional weight to this general need for live testimony.²⁸² 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.²⁸³ 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 plaintiff’s claims,²⁸⁴ and more likely to evaluate

277. Miller, *supra* note 9, at 1074.

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

279. Miller, *supra* note 9, at 1061.

280. Wald, *supra* note 3, at 1904.

281. Wald, *supra* note 3, at 1943; Burbank, *supra* note 12, at 625

282. Beiner, *Using Evidence of Women’s Storytelling*, *supra* note 141.

283. There is certainly much discussion in the general summary judgment literature to this effect.

284. See generally Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Settlements*, 64 WASH. & LEE L. REV. ___ (forthcoming 2007); Minna J. Kotkin, *Invisible Settlements*,

them based on a cold record. The increase in private settlements also makes discrimination invisible,²⁸⁵ for there may be less law made in courts that is “available” to judges to decide these. 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 analysis 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 airing, claims get understood and legitimized. They take on a life of their own, and through 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 process of 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.²⁸⁶ 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 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 allows for 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 gone for many years and had been taken for granted as the cost for

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).

285. Kotkin, *Invisible Settlements*, *supra* note 284, at 927.

286. 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).

women of participating in a “man’s world”.²⁸⁷ However, as sexual harassment claims were filed in court, these issues were brought to light. As a result of this litigation, there was widespread publicity, companies were forced to develop diversity and sensitivity training programs and there were substantial settlements of these claims.²⁸⁸

Another key element is the opportunity for exposure of the harms, validation and legitimization for both the parties and the public.²⁸⁹ Many cases discussed in this Article describe horrendous aspects 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.²⁹⁰ In these cases, a public forum is particularly crucial. Not only should juries be playing a role in determining appropriate work environment 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.”²⁹¹ Furthermore, the litigant, in telling her experience live, may experience validation of her claims.

In addition to the benefits conferred upon a litigant 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.”²⁹² 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

287. 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 (2004-2005); Lizzie Barmes & Sue Ashtany, *The Diversity Approach to Achieving Equality: Potentials 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).

288. Significantly, 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).

289. Resnik, *supra* note 286, at 413; Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors be Open or Closed?*, 18 YALE L. & POL’Y REV. 155, 180 (1999). See also Beiner, *Let The Jury Decide*, *supra* note 141, at 846.

290. The majority opinion in *Jennings*, discussed *supra* at pages 35-37, is a particularly egregious example of judicial censorship.

291. Beiner, *supra* note 22, at 133.

292. Resnik, *supra* note 286, at 413.

practices. The public can then serve as a “check” on the judiciary, encouraging judges to apply these norms properly.²⁹³

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 dispute resolution methods,²⁹⁴ including arbitration,²⁹⁵ as well as secret settlements,²⁹⁶ and decisions to keep court opinions from being published.²⁹⁷

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.

VIII. IMPLICATIONS FOR REFORM OF SUMMARY JUDGMENT

293. Resnik, *supra* note 283, at 418; *see also* Bazelon, *supra* note 289 (“Rather, a public presence helps ensure that courts will follow established norms.”).

294. *See e.g.* Rex Perschbacher & Debra Lyn Basset, *The End of Law*, 84 B.U. L. REV. 1, 7 & n.8 (2004); Deborah 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 Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEXAS L. REV. 1587, 1588, n.4 (1995); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RES. 211 (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, *supra* note 249; Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173; Resnik, *Many Doors, supra*. These processes are almost always without any public access, and oftentimes even the outcome of the case is kept secret. 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.” 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 U.C.L.A. L. REV. 949 (2000) (discussing the need to infuse constitutional protections into the alternative dispute resolution system to expand the public justice system).

295. 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 (2002) (citing Tanya Padgett article about belief that arbitration was detrimental to the resolution of the sexual harassment claims in the securities industry).

296. 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 284, at 927.

297. *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 depublishing them, stripping them of precedential authority. 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/gender bias, and stagnant development of the law (including the art of writing a principled and well-organized opinion). Pether, *supra* note 66, at 1483-1514. This results in the fact that “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.

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. The implications go beyond gender cases. The challenge is how to keep District Court decisionmaking on summary judgment within proper boundaries.²⁹⁸ The standards of determination for summary judgment in Rule 56 are not sufficiently determinate so judicial decisionmaking is bound to get out of control.²⁹⁹ Now there is nothing constraining or limiting District Court judges decisionmaking around summary judgment.³⁰⁰ 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 vs. fairness.³⁰¹ But efficiency goals are not met by the new practice of summary judgment – more time may be spent on 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 individual judge decisionmaking. What about having more than one judge deciding any summary judgment motion, or even a three-judge court?³⁰² This would undercut the efficiency rationale for summary judgment, but it would increase the possibility of more nuanced and inclusive

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

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

300. Miller, *supra* note 9, at 1062; Burbank, *supra* note 8. Even though District Court summary judgment decisions were reversed in cases that I analyze in Parts III and IV, there were many that were not.

301. David L. Shapiro, *The Story of Celotex: The Role of Summary Judgment in the Administration of Civil Justice*, CIVIL PROCEDURE STORIES (2004).

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

decisionmaking. What about having a summary jury trial that would be advisory to the judge on the decision on summary judgment?³⁰³ That would also undercut efficiency but expand the possibilities for broader input for decisionmaking. 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 the way in which summary judgment motions are decided.

At a minimum, this Article suggests that District Judges should pause and reconsider before granting summary judgment. Judges should exercise their discretion to deny summary judgment, even when it might be “technically appropriate”³⁰⁴ or a “close case.”³⁰⁵ 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. They should exercise all discretion in favor of trial. This historic presumption in summary judgment has been lost and should be vigorously reasserted in the federal courts.

303. 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 be likely to be contingent on summary judgment. *See* Berger, Finkelstein & Cheung, *supra* note 42.

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

305. Beiner, *The Misuse of Summary Judgment*, *supra* note 22 at 125.