

WHAT WOULD A REASONABLE JURY DO? JURY VERDICTS FOLLOWING SUMMARY JUDGMENT REVERSALS

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This Note examines the claim that judges have improperly granted summary judgment where a reasonable jury could find for the non-moving party. It begins by reviewing the literature on summary judgment, particularly three opinions the Supreme Court issued in 1986, as well as claims about the propriety of summary judgment in fact-intensive civil rights cases. To test these claims, this Note compiles cases where summary judgment was reversed and where the jury returned a verdict for the nonmovant, which together indicate improperly granted summary judgment. Finding a number of such cases, including a higher-than-projected concentration of civil rights cases, this Note concludes by considering implications for civil rights litigation and federal civil procedure.

INTRODUCTION

In *Scott v. Harris*, eight Justices of the Supreme Court held that no reasonable jury could find that a Georgia law-enforcement officer used excessive force to stop a fleeing motorist during a high-speed police chase.¹ The Court's decision relied in large part on a dashboard video of the chase.² Neither party disputed that the officer caused the plaintiff's car to spin out of control off the road in order to end the high-speed chase;³ the resulting car crash left the plaintiff "a quadriplegic at the age

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1. 550 U.S. 372, 374–75, 386 (2007).

2. See *id.* at 378–81 ("The videotape quite clearly contradicts the version of the story told by respondent . . . [N]o reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape."). There were actually four different videos in the record, each from a different officer's car, that were put together to show the view of the plaintiff's car from the lead chase car. See *id.* at 395 n.7 (Stevens, J., dissenting) (noting multiple tapes).

The majority, in the course of responding to the dissent's arguments, took the step of posting the video on the Court's website, saying, "JUSTICE STEVENS suggests that our reaction to the videotape is somehow idiosyncratic, and seems to believe we are misrepresenting its contents. We are happy to allow the videotape to speak for itself." *Id.* at 378 n.5 (majority opinion) (citation omitted). While the original web address for the video provided by the Court in its opinion no longer works, the video is still available elsewhere on the Court's website. See Video Resources, Supreme Court of the U.S., <http://www.supremecourt.gov/media/media.aspx> (on file with the *Columbia Law Review*) (last visited Feb. 18, 2015) (follow "Scott v. Harris - VIDEO (Windows MediaPlayer)" hyperlink).

3. *Scott*, 550 U.S. at 374–75.

of 19.”⁴ Yet, after the district court reviewed the video, it denied the officer’s summary judgment motion on the ground that a reasonable jury could have found that the officer used excessive force.⁵ The Eleventh Circuit, having also reviewed the video of the chase,⁶ affirmed the denial of summary judgment, stating that whether the plaintiff’s driving was “sufficiently reckless to give [the officer] probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians . . . [was] a disputed issue to be resolved by a jury.”⁷ And one Supreme Court Justice thought that the video would support a jury finding that the officer’s behavior was reckless.⁸ But the other eight members of the Court rejected these interpretations; the majority called the plaintiff’s story “visible fiction”⁹ and held that “[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”¹⁰ One might wonder how these learned jurists could differ so sharply despite viewing the same video.¹¹

While the disagreement in *Scott v. Harris* was only among Justices and judges, it speaks to the scope of the jury’s fact-finding role in the modern civil-justice system. The case came to the Court after the court of appeals affirmed the district court’s denial of the defendant’s motion for summary judgment,¹² for which the test is often framed as whether a

4. *Id.* at 397 (Stevens, J., dissenting).

5. *Harris v. Coweta Cnty.*, No. CIV 3:01CV148 WBH, 2003 WL 25419527, at *4–*5 (N.D. Ga. Sept. 25, 2003), *aff’d* in part, *rev’d* in part, 433 F.3d 807 (11th Cir. 2005), *rev’d* sub nom. *Scott*, 550 U.S. 372.

6. See *Harris*, 433 F.3d at 819 n.14 (commenting on events shown by videos of police chase).

7. *Id.* at 815.

8. *Scott*, 550 U.S. at 390 (Stevens, J., dissenting) (“Rather than supporting the conclusion that what we see on the video ‘resembles a Hollywood-style car chase of the most frightening sort,’ the tape actually confirms, rather than contradicts, the lower courts’ appraisal of the factual questions at issue.” (footnote omitted) (quoting *Scott*, 550 U.S. at 380 (majority opinion))).

9. *Id.* at 381 (majority opinion).

10. *Id.* at 380.

11. After the Court’s decision, one study showed the same police-chase video viewed by the Justices to a sample of individual people to test the majority’s claim that no reasonable jury could find the officer had acted unreasonably. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 *Harv. L. Rev.* 837 (2009). While it found that more than half of the sample agreed with the majority opinion’s view of the video, many people belonging to identifiable subgroups would have found against the officer. See *id.* at 841 (“African Americans, low-income workers, and residents of the Northeast, for example, tended to form more pro-plaintiff views of the facts So did [self-identified] liberals and Democrats.”).

12. *Scott*, 550 U.S. at 376. Whether the Supreme Court should expend its limited resources “reviewing utterly fact-bound decisions that present no disputed issues of law”—such as *Scott v. Harris*, *id.* at 387 (Breyer, J., concurring)—is a subject of some debate. See Will Baude, *Tolan v. Cotton—When Should the Supreme Court Interfere in ‘Factbound’*

reasonable jury could find for the party opposing summary judgment.¹³ This requirement reflects the constitutional right to have a jury determine the facts in most federal civil cases.¹⁴ Yet many cases never reach a jury, and despite an increase in case filings generally, the number of jury trials has been declining.¹⁵ Some have traced this trend to the increasing prevalence of summary judgment and point to a “trilogy” of landmark Supreme Court cases¹⁶ as the cause.¹⁷ Given the kind of disagreement the same evidence can engender even among federal judges, as illustrated by *Scott v. Harris*, it is not unreasonable to expect the views of judges and juries to diverge as well.¹⁸ Further, it is entirely possible that a judge

Cases?, Wash. Post: Volokh Conspiracy (May 7, 2014) (quoting *Cash v. Maxwell*, 132 S. Ct. 611, 616 (2012) (Scalia, J., dissenting from denial of certiorari)), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/07/tolan-v-cotton-when-should-the-supreme-court-interfere-in-factbound-cases/> (on file with the *Columbia Law Review*) (describing appearance of incongruity between Justice Alito’s joining Justice Scalia’s dissent in *Cash* and his more recent concurrence in *Tolan v. Cotton*, 134 S. Ct. 1861 (2014)). In *Cash*, Justice Alito supported the position that the Court should review a “fact-bound decision[]” granting habeas relief to a state prisoner. 132 S. Ct. at 613, 616 (Scalia, J., dissenting from denial of certiorari). However, in *Tolan*, Justice Alito doubted that the Court should review an erroneous grant of qualified immunity because there were so many other cases presenting similar issues of the propriety of summary judgment. 134 S. Ct. at 1868 (Alito, J., concurring in the judgment).

13. See *infra* note 45 (providing examples of this formulation); see also Fed. R. Civ. P. 56(a) (requiring movant for summary judgment show (1) “there is no genuine dispute as to any material fact” and (2) “movant is entitled to judgment as a matter of law”).

14. See U.S. Const. amend. VII (“In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.”); cf. *infra* note 118 and accompanying text (noting exceptions to jury-trial right).

15. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 459 (2004) [hereinafter Galanter, *Vanishing Trial*] (“The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline. More startling was the 60 percent decline in the absolute number of trials since the mid 1980s.”).

16. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); see also *infra* Part I.B.2 (describing “trilogy” of decisions in greater detail).

17. See *infra* notes 72–73 (citing criticism of summary judgment). But see Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 Wis. L. Rev. 107, 113–15 (explaining problems with attributing decrease in trial rate since trilogy of *Celotex*, *Anderson*, and *Matsushita* to those decisions).

18. See 550 U.S. 372, 396 (2007) (Stevens, J., dissenting) (“If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court’s characterization of events.”); *Shager v. Upjohn Co.*, 913 F.2d 398, 403 (7th Cir. 1990) (“A judge’s decision to grant a motion for summary judgment may be a good predictor of the outcome of a bench trial before the same judge; it may not be a good predictor of the outcome before a jury.”). As Denny Chin, formerly a trial judge and now an appellate judge, recently wrote:

In an appeal from the grant of summary judgment . . . , the fact of disagreement would suggest, perhaps, that summary judgment should

might not only disagree with a reasonable jury but also be unaware of the disagreement. This exposes a potential gap in the constitutional guarantee of jury fact-finding: Could judges, by granting summary judgment because they view the evidence one way and believe no reasonable jury could disagree, be inaccurately predicting the behavior of a reasonable jury? In other words, are courts denying relief to litigants who could prevail in front of a jury?¹⁹

This Note empirically examines this question of the accuracy of judges' perceptions of the reasonable jury. Specifically, this Note compiles cases where the judge granted summary judgment for one party, thus indicating a belief that no reasonable jury could find for the non-moving party, but where the case ended in the opposite ruling: a jury verdict for the nonmoving party. While this outcome is possible in any case where summary judgment was reversed on appeal, this Note focuses on cases where the appellate court held that a reasonable jury could find for the party opposing summary judgment.²⁰

Most importantly, this Note demonstrates that this troubling phenomenon does, in fact, occur.²¹ In at least some cases, judges inaccurately predict the behavior of a reasonable jury. But for the intervention of an appellate court, trial court judges in these cases would have deprived litigants of their constitutional right to a jury trial, not to mention relief. Beyond proving the existence of this problem, this Note also collects additional information about these cases, finding that the majority of them involve civil rights claims. This corroborates the fear that judges disproportionately grant summary judgment improperly in civil rights cases.²² Further, this Note argues that, for a variety of reasons, these

not have been granted. If three judges cannot agree, then surely, one would think, there must be a genuine issue of fact for trial. But sometimes, of course, there is disagreement about what a reasonable jury could or could not find.

Denny Chin, Summary Judgment in Employment Discrimination Cases: A Judge's Perspective, 57 N.Y.L. Sch. L. Rev. 671, 671, 681–82 (2012–2013).

19. As District Judge Richard Kopf recently framed the question in the context of *Scott v. Harris*:

[W]hen a district judge, several 11th Circuit judges and one Supreme Court Justice conclude that a "reasonable jury" could find for the plaintiff based upon a video, how can the Seventh Amendment have vitality when no jury will ever get that opportunity because eight Justices viewing the same thing come to a different factual conclusion[?]

Richard George Kopf, A Question for the Civil Rules Committee: Is the "No Reasonable Jury" Standard Unreasonable?, *Hercules & the Umpire* (May 3, 2014), <http://herculesandtheumpire.com/2014/05/03/a-question-for-the-civil-rules-committee-is-the-no-reasonable-jury-standard-unreasonable/> (on file with the *Columbia Law Review*).

20. See *infra* Part II.A (discussing reasons for excluding reversals based on errors of law).

21. See *infra* Part II.B (discussing results of docket search).

22. See *infra* note 73 (describing claims of overuse of summary judgment in civil rights cases).

findings represent a very conservative measure of the lower bound of improper summary judgment grants, suggesting that the overall rate at which judges improperly grant summary judgment (the “true error rate”) is much higher.²³

Part I addresses the justifications for and the history of trial by jury and summary judgment by judge, including recent empirical work on the frequency of and trends in summary judgment and trials. Part II describes the methodology and results of an empirical study of jury verdicts following summary judgment reversals. It shows that improper summary judgment grants do occur and that the judge–jury divide may disproportionately deprive certain types of plaintiffs of their right to a jury trial. Finally, Part III places the results of the study in context and explains why the true error rate of improper summary judgment grants may in fact be much higher.

I. JUDGES AND JURIES

Issues in legal disputes are often divided into questions of law

23. It is worth noting that there is another side to the debate, which contends that these types of errors are preferable to the mirror-image error, where summary judgment is improperly denied but the movant ultimately prevails at trial. See *Arnstein v. Porter*, 154 F.2d 464, 480 (2d Cir. 1946) (Clark, J., dissenting) (“[I]t is just as much error—perhaps more in cases of hardship, or where impetus is given to strike suits—to deny or postpone judgment where the ultimate legal result is clearly indicated.”). As two practitioners have argued:

We reject the normative view that it is somehow “better” to let unmeritorious cases proceed than to risk that meritorious cases will be dismissed. Either way represents error, and neither error is inherently better than the other. Indeed, given the enormous transaction costs that litigation entails, Type II errors (false negatives) are probably preferable to Type I errors (false positives) from a purely economic perspective.

Mark Herrmann & James M. Beck, Opening Statement, Pleading Standards After *Iqbal*, 158 U. Pa. L. Rev. PENNumbra 142, 147 (2009), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1046&context=penn_law_review_online. Though their comments were made in the context of the debate over pleading standards, see *infra* note 42 (discussing recent developments in civil procedure), their claim maps onto the summary judgment standard as well. This position may have some merit when limited to suits driven by economics, where avoiding false negatives (dismissals) imposes financial harm on defendants. See Herrmann & Beck, *supra*, at 145 (claiming defendants incur “millions of dollars of unnecessary legal expense” during pendency of baseless lawsuits).

But this argument fails to account for noneconomic harm present in civil rights cases. Further, in relying on the magnitude of litigation costs, Herrmann and Beck fall prey to the same error made by many opponents of the *Celotex*, *Anderson*, and *Matsushita* trilogy: They fail to examine the data systematically and so assume outliers to be representative. Cf. Stephen B. Burbank, Rebuttal, Time Out, 158 U. Pa. L. Rev. PENNumbra 148, 151 (2009), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1046&context=penn_law_review_online (pointing to empirical evidence showing discovery costs have not increased significantly in vast majority of cases).

decided by judges and questions of fact decided by juries,²⁴ with so-called mixed questions of law and fact falling somewhere in between.²⁵ This division comports with the constitutional guarantee of a trial by jury,²⁶ though it elides the longstanding difficulty in classifying a given issue as one of law, one of fact, or one of mixed law and fact.²⁷ A motion for summary judgment allows a judge in a civil case to resolve questions of law and, if warranted, find for the party bringing the motion (“moving party” or “movant”) without a trial if there is no “genuine” question of “material” fact.²⁸ Some scholars have argued that summary judgment has evolved into a procedure that erodes the jury trial right by allowing judges to weigh evidence and decide cases where facts are in dispute.²⁹

This Part begins with historical and legal foundations of the civil jury trial right. Next, Part I.B traces the development of summary judgment jurisprudence since the introduction of the Federal Rules of Civil Procedure, focusing on three decisions issued by the Supreme Court in 1986. Part I.C then considers the reactions to these decisions as well as recent empirical studies of the decisions’ effect on summary judgment practice.

A. *Trial by Jury*

The Seventh Amendment guarantees a litigant the right to have a jury decide questions of fact in a federal civil lawsuit.³⁰ There are political

24. See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1082 (2003) [hereinafter Miller, *Pretrial Rush*] (noting given issue can be categorized as “one of law, one of fact, or one of applying the law to the facts” and that “accepted wisdom about the law–fact spectrum is that judges determine the law and juries the facts” (footnote omitted)).

25. See *id.* at 1083 (“[T]he division of responsibility between judge and jury in resolving mixed questions of law and fact always has been shrouded in uncertainty.”). For instance, in tort law, the objective-reasonableness test of negligence has long been a mixed question for the jury. *Id.* at 1126. On the other hand, the objective-reasonableness test for qualified immunity is now considered a pure question of law for the court. Stephanie E. Balcerzak, Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 Yale L.J. 126, 126 (1985). Both determinations revolve around reasonableness, yet in each context they are resolved by a different decisionmaker.

26. See *infra* Part I.A (discussing historical and legal foundations of right to trial by jury).

27. See Miller, *Pretrial Rush*, *supra* note 24, at 1074 n.485 (“These judge–jury/law–fact discussions were a concern even when the common law demurrer to the evidence was used to filter out actions not worthy of trial . . .”).

28. Fed. R. Civ. P. 56(a); see also *infra* Part I.B (describing summary judgment procedure).

29. See *infra* Part I.C (discussing scholarly criticism of modern summary judgment standard).

30. See U.S. Const. amend. VII (“In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court

and historical reasons for this guarantee,³¹ but in our democratic society, with judges—at least federal judges—insulated from other branches of government and electoral politics,³² it is worth asking why litigants still demand civil jury trials and what function, if any, juries still serve.³³ Plaintiffs might believe that juries will be more likely to find liability and award higher damages.³⁴ Conversely, jurors are sometimes thought hostile to dissimilar litigants and overly solicitous of authority figures.³⁵

of the United States, than according to the rules of the common law.”). At least one scholar has argued that summary judgment is unconstitutional because it violates the Seventh Amendment. Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 145–60 (2007) [hereinafter Thomas, *Unconstitutional*] (showing English common law procedures differed significantly from summary judgment such that it may violate Seventh Amendment). But see Edward Brunet, *Summary Judgment Is Constitutional*, 93 Iowa L. Rev. 1625, 1631–41 (2008) [hereinafter Brunet, *Constitutional*] (arguing pre-1791 common law procedure similar to summary judgment shows summary judgment is constitutional).

31. See generally Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 *Hastings L.J.* 579, 582–600 (1993) (describing history of jury trial right in England, role as “check on the tyrannical and oppressive power of government,” and adoption of Seventh Amendment in America).

32. See U.S. Const. art. III, § 1 (“The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.”).

33. There is a separate argument that juries serve a “public articulation of the law” function, among others. Michael J. Kaufman, *Summary Pre-Judgment: The Supreme Court’s Profound, Pervasive, and Problematic Presumption About Human Behavior*, 43 *Loy. U. Chi. L.J.* 593, 623 & n.159 (2012) (describing scholarly works arguing juries ensure citizenship, equalize influence in dispute resolution, and encourage diverse involvement).

34. See Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 *Cornell L. Rev.* 1124, 1127 (1992) [hereinafter Clermont & Eisenberg, *Transcending Empiricism*] (“Juries are believed to find liability when judges would not, to grant higher awards than judges, and to grant inappropriate punitive damages awards.”); see also Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 *Geo. L.J.* 1567, 1595 (1989) [hereinafter Eisenberg, *Litigation Models*] (noting “belief that juries are more humane than judges and generally are more sympathetic to plaintiffs”). However, this view may be inaccurate. See Clermont & Eisenberg, *Transcending Empiricism*, *supra*, at 1152 (“[R]esearch does not support a view of the jury as overly generous on awards . . .”); see also Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 *Ariz. L. Rev.* 717, 745 (1998) [hereinafter Galanter, *Contemporary Legends*] (citing Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 *Hofstra L. Rev.* 763, 771–73 (1995)) (showing average and median personal-injury awards reported by New York newspapers in 1992 far outstrip average and median awards in New York overall).

35. See Eisenberg, *Litigation Models*, *supra* note 34, at 1595 (noting difficulty jurors might have in “suspending their disdain for the non-conformists, minorities, and poor people often involved in civil rights and prisoner litigation”); see also Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers’ Misconduct*, 87 *Yale L.J.* 447, 454–55 (1978) (noting in § 1983 suits, “knowledge of the plaintiff’s criminal conduct prior to arrest often undermines a jury’s impartial assessment of claims such as police brutality”).

To Blackstone, the jury system promised fairness to litigants by “prevent[ing] the encroachments of the more powerful and wealthy citizens.”³⁶ Federal civil juries must be unanimous, which results in longer—and hopefully more serious—deliberations.³⁷ Requiring a joint decision by multiple people likely ensures more reliable inferences.³⁸ It may also produce more accurate decisions that are less extreme.³⁹ And perhaps most relevant for this Note, a jury can bring a wider range of experiences to bear on evidence presented, potentially drawing inferences that would not occur to a federal judge.⁴⁰

B. *Summary Judgment by Judge*

But not every relevant, unsettled factual dispute in a lawsuit results in a jury trial. The Federal Rules of Civil Procedure, enacted in 1938,⁴¹ give a defendant two mechanisms to have the court reject a plaintiff’s claims prior to trial: first, at the motion to dismiss stage under Rule 12(b);⁴² and second, on summary judgment under Rule 56.⁴³ According

36. Miller, *Pretrial Rush*, supra note 24, at 1078 (quoting 3 William Blackstone, *Commentaries* *380).

37. See Stephan Landsman, *The Civil Jury in America*, 62 *Law & Contemp. Probs.* 285, 303 (1999) (describing empirical evidence and scholarly thinking on jury unanimity).

38. See Miller, *Pretrial Rush*, supra note 24, at 1078 n.497 (“It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.” (quoting *Sioux City & Pac. R.R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873)) (internal quotation marks omitted)); cf. Chin, supra note 18, at 682 (positing that with “exchange of views drawn from a spectrum of backgrounds, experiences, and perspectives” judges are more likely to “reach[] a just and true result”); Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 *B.C. L. Rev.* 759, 771–72 (2009) [hereinafter Thomas, *Fallacy*] (“What a reasonable jury would find is not necessarily the same as what a reasonable juror would find because there is at least some possible difference between group decision making versus individual decision making.”).

39. Cf. Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?*, 48 *DePaul L. Rev.* 221, 228–29 (1998) (arguing in absence of market for losses, jury, as sample of community, “is in a better position than any other decision-maker to say what these losses [are] worth”). But see Miller, *Pretrial Rush*, supra note 24, at 1078 n.497 (“The great growth in the size and diversity of the nation’s population casts doubt on the representativeness of any particular jury . . .”).

40. Cf. Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 *S. Cal. L. Rev.* 791, 795 (2002) (“[W]hile reasonable people believe that conduct is sexually harassing, the courts often underestimate the effects of such behaviors . . .”).

41. Stephen N. Subrin et al., *Civil Procedure: Doctrine, Practice, and Context* 311 (4th ed. 2012).

42. Fed. R. Civ. P. 12(b). Recent developments involving the 12(b)(6) motion are beyond the scope of this Note. See generally *Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009) (requiring complaints allege facts not only conceivable, but plausible, to survive motion to dismiss); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (requiring antitrust complaint allege facts making claimed conspiracy plausible). But to the extent such developments impose a “plausibility” standard on pleadings, the 12(b)(6) motion may produce results similar to those described in this Note. See Elizabeth M. Schneider, *The*

to the latter rule, “the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”⁴⁴ Today, this inquiry is often framed as whether a reasonable jury could find for the party opposing summary judgment (the “nonmoving party” or “nonmovant”).⁴⁵

1. *Before 1986.* — Even before the enactment of the Federal Rules, and thus Rule 56, there were procedures that shared at least some similarity with summary judgment.⁴⁶ Yet initially under the Federal Rules, summary judgment was intended to be, and was, used sparingly.⁴⁷ Courts were wary of the potential for abuse and deprivation of rights the procedure could entail,⁴⁸ and showed particular caution with its application in

Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases, 158 U. Pa. L. Rev. 517, 544 (2010) [hereinafter Schneider, Changing Shape] (“Many cases that have already been decided on the pleadings under *Twombly* and *Iqbal* replicate the very problems that scholars have identified concerning summary judgment.”).

43. Fed. R. Civ. P. 56.

44. Fed. R. Civ. P. 56(a). Whether the word “shall” means that courts have discretion to deny the motion where the Rule’s requirements are otherwise met is a subject of much debate. See D. Brock Hornby, Summary Judgment Without Illusions, 13 Green Bag 2d 273, 287 n.43 (2010) (describing “vigorous” argument surrounding propriety of changing “shall” to “should” in Rule 56). See generally Steven S. Gensler, Must, Should, Shall, 43 Akron L. Rev. 1139, 1164 (2010) (noting “question of whether courts have any discretion to deny summary judgment” remains open).

45. See Thomas, Fallacy, *supra* note 38, at 761–62 (“[U]nder motions for summary judgment, judges determine whether no reasonable jury could find for the plaintiff and thus, whether the case can be dismissed because no genuine issue of material fact exists.”); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“[T]he trial judge’s summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying [the evidentiary standard applicable at trial] could reasonably find for either the plaintiff or the defendant.”); Edward Brunet, Six Summary Judgment Safeguards, 43 Akron L. Rev. 1165, 1175 (2010) [hereinafter Brunet, Safeguards] (“Provided that no reasonable jury could enter a verdict for the nonmoving party, summary judgment should be granted.”).

46. See Brunet, Constitutional, *supra* note 30, at 1631–60 (describing common law procedures of trial by inspection and demurrer). For a comparison of procedures, such as demurrer, with present-day summary judgment, see Thomas, Unconstitutional, *supra* note 30, at 148–57. But the summary judgment motion itself originated in a different procedure. See Bernadette Bollas Genetin, Summary Judgment and the Influence of Federal Rulemaking, 43 Akron L. Rev. 1107, 1109 (2010) (noting summary judgment was “[c]onceived in England and carried forward in early America as a tool that would primarily assist plaintiffs in terminating one-sided and undisputed cases before trial”); Miller, Pretrial Rush, *supra* note 24, at 1016–17 (describing summary judgment’s origins as tool used by plaintiffs to recover debts where facts were undisputed).

47. See J. Maria Glover, The Federal Rules of Civil Settlement, 87 N.Y.U. L. Rev. 1713, 1720 (2012) (“[S]ummary judgment was meant to be rare, and it was infrequently granted in the years immediately following the adoption of the new Federal Rules.”).

48. See William W. Schwarzer et al., Fed. Judicial Ctr., The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure 3–4 (1991) (recounting court of appeals’ decisions expressing “[h]esitancy” toward summary judgment).

cases “where motive and intent play[ed] leading roles.”⁴⁹ The initial burden to negate the nonmovant’s claim for summary judgment was on the moving party.⁵⁰ Through the 1970s, a nonmoving party could avoid summary judgment if there was a “scintilla of evidence” or the “slightest doubt as to the facts,”⁵¹ even if based solely on its own affidavit,⁵² though such limited evidence might not suffice to survive a motion for directed verdict.⁵³ Thus, before 1986, it was considered settled law that, “if a dozen Jesuit priests proffer identical testimony regarding a street fight they all observed, and one disreputable inebriate proffers contrary testimony, summary judgment is inappropriate.”⁵⁴

2. *The Trilogy*. — In 1986, however, the Supreme Court issued three decisions on appeals from summary judgment that changed the landscape and have come to be known as “the trilogy.”⁵⁵ First, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Court held that if a nonmovant’s claim is implausible given the “factual context,” in order to proceed past summary judgment the nonmovant must “come forward with more persuasive evidence to support their claim than would otherwise be necessary.”⁵⁶ Tellingly, the Court explained that “[t]o survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for [an antitrust conspiracy] . . . must show that the inference of conspiracy is reasonable”⁵⁷ To defeat a summary judgment motion, litigants now had to present facts showing that the inferences a jury might draw in their favor were reasonable.⁵⁸ As Justice White

49. Miller, *Pretrial Rush*, supra note 24, at 1022 (footnote omitted in original) (quoting *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962)); see also Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 Marq. L. Rev. 141, 147 (2000) (finding sample of published summary judgment opinions shows “extreme vigilance against treading on contested fact issues or mixed questions of law and fact—even arguable ones—reserving them for evidentiary hearings”).

50. Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 Hastings L.J. 53, 63–64 (1988) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

51. Schwarzer et al., supra note 48, at 5, 45.

52. See Mollica, supra note 49, at 151 (“A party’s own affidavit would ordinarily be sufficient to create a factual issue.”).

53. Schwarzer et al., supra note 48, at 5.

54. Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1907 n.57 (1998) (describing example used to teach law students about summary judgment).

55. See, e.g., Bert I. Huang, *Trial by Preview*, 113 Colum. L. Rev. 1323, 1325 n.6 (2013) [hereinafter Huang, *Trial by Preview*] (referencing “famed ‘trilogy’”); Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 Loy. U. Chi. L.J. 561, 561 & n.1 (2012) (naming three cases comprising “trilogy”).

56. 475 U.S. 574, 587 (1986).

57. *Id.* at 588.

58. See Miller, *Pretrial Rush*, supra note 24, at 1032 (“The Court held in *Matsushita* that a nonmovant could not survive a summary judgment motion simply by advancing

recognized in dissent, evaluating plausibility relative to the nonmovant's theory required courts to make "assumptions that invade the factfinder's province."⁵⁹

Later that year, the Court further energized summary judgment with two decisions issued on the same day at the end of the term. In *Anderson v. Liberty Lobby, Inc.*, the Court held that

the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case Consequently . . . the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying [the evidentiary standard applicable at trial] could reasonably find for either the plaintiff or the defendant.⁶⁰

Essentially, the Court equated the genuineness of the factual dispute with whether there would be sufficient evidence for a reasonable jury to find in the nonmovant's favor at trial.⁶¹ The Court made clear that it was moving summary judgment beyond the "scintilla of evidence" standard,⁶² stating, "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant [a] jury . . . verdict in favor of that party."⁶³

Finally, in *Celotex Corp. v. Catrett*, the Court held that to survive summary judgment, a nonmoving party with a burden of proof must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'"⁶⁴ This essentially overruled the Court's prior decision in *Adickes v. S.H. Kress & Co.*⁶⁵ and placed an affirmative burden on the nonmoving party.⁶⁶ As a result, trial judges are now not only supposed to evaluate the plausibility of actions alleged by the nonmovant,⁶⁷ but they are also expected to conduct that

facts that, standing alone, support the inferences needed for a finding in its favor. Instead, the inferences to be drawn must be reasonable in light of the *entire* record . . .").

59. *Id.* at 1034 (quoting *Matsushita*, 475 U.S. at 599 (White, J., dissenting)).

60. 477 U.S. 242, 255 (1986).

61. *Id.* at 248.

62. *Id.* at 251 ("Formerly it was held that if there was what is called a "scintilla of evidence" in support of a case the judge was bound to leave it to the jury" (quoting *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442, 448 (1871))).

63. *Id.* (quoting *Improvement Co.*, 81 U.S. at 448).

64. 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)) (referencing version of rule in effect prior to amendment in 2010).

65. 398 U.S. 144 (1970).

66. Nelken, *supra* note 50, at 63–65 (discussing prior interpretation of *Adickes* that "moving party on a summary judgment motion must *negate* the nonmoving party's claim" and *Celotex* holding that moving party "need only point to the absence of evidence in the record" as to any essential element of nonmoving party's claim).

67. See Samuel Issacharoff & George Loewenstein, *Second Thoughts About*

evaluation by applying the standard used to weigh testimony at trial to evidence mustered by the parties.⁶⁸

3. *Summary Judgment Today*. — The trilogy has inspired much academic debate, both as to its merit and its effect. Some favored it for the predicted gains in judicial efficiency increased summary judgment seemed to offer.⁶⁹ In the years since the decisions, scholars have debated whether the rate of summary judgment has increased, and if so, whether it has delivered those efficiencies.⁷⁰ But even at the time, there was no shortage of opposition to the decisions,⁷¹ including on the grounds that the Court had abrogated the right to trial by jury,⁷² particularly for civil rights plaintiffs.⁷³ Even today, the trilogy looms large over summary judgment practice.⁷⁴

Summary Judgment, 100 Yale L.J. 73, 89 (1990) (“There is evidence in the post-trilogy case law that summary judgment has moved beyond its originally intended role as a guarantor of the existence of material issues to be resolved at trial and has been transformed into a mechanism to assess plaintiff’s likelihood of prevailing at trial.”).

68. As then-Judge Scalia predicted in the D.C. Circuit panel decision that *Anderson* overturned:

Imposing the increased proof requirement at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff’s case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant’s uncontroverted facts as well.

Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1570 (D.C. Cir. 1984), vacated, 477 U.S. 242.

69. See, e.g., Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 Notre Dame L. Rev. 770, 771 (1988) (describing summary judgment as “procedural device that has the potential for providing just results in many cases and which could leave judicial resources free to concentrate on those actions for which a trial is required”).

70. See Hornby, *supra* note 44, at 274 (“Summary judgment does *not* save lawyer time. It does *not* save legal fees. It does *not* significantly reduce court time or trials.”); see also D. Theodore Rave, *Questioning the Efficiency of Summary Judgment*, 81 NYU. L. Rev. 875, 908–09 (2006) (arguing, based on economic model of summary judgment costs, summary judgment may not be efficient if used in marginal cases and not significantly less expensive than trial); cf. Schneider, *Changing Shape*, *supra* note 42, at 559–60 (noting arguments that “point-counterpoint” rules . . . were particularly resource intensive”).

71. See, e.g., Issacharoff & Loewenstein, *supra* note 67, at 114 (arguing, based on economic modeling, “[trilogy] summary judgment standards shift wealth from plaintiffs to defendants, and they may not achieve their primary purpose of reducing litigation”).

72. See, e.g., Miller, *Pretrial Rush*, *supra* note 24, at 1071 (“Overly enthusiastic use of summary judgment means that trialworthy cases will be terminated pretrial on motion papers, possibly compromising the litigants’ constitutional rights to a day in court and jury trial. That is a risk the trilogy has created.”); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95, 150 (1988) (“In *Liberty Lobby*, the Court held that the jury would not be free to disbelieve the defendants’ averred absence of malice despite going to press with defamatory statements based on an unknown source and a previously disputed article.”).

73. See, e.g., Deborah Thompson Eisenberg, *Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases*, 57 NYL. Sch. L. Rev. 815, 839 (2012)

Most of the existing empirical work on the trilogy's effect on summary judgment and civil procedure has focused on the rate at which the motion is granted. Early studies examined only published cases,⁷⁵ which is problematic because of likely bias in the sample: Published opinions are nonrandom and not representative of opinions overall.⁷⁶ More recent studies have examined the full spectrum of cases by analyzing unpublished dispositions as well. For instance, Cecil et al. found summary judgment rates were higher a decade after the trilogy than they had been a decade before.⁷⁷ Eisenberg and Lanvers also found this to be true for at least one district court, but only in regard to employment discrimination

[hereinafter Eisenberg, Equal Pay] (“The high rate of summary judgment grants for . . . fact-intensive [equal pay] claims suggests that summary judgment is being overused by most federal district courts in equal pay cases.”); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 208 (1993) (“Following the trilogy, the lower courts have granted summary judgment more aggressively in civil rights cases, even though these cases most often turn on subtle questions of credibility and intent that only a factfinder faced with a live witness should decide.”).

74. Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 Loy. U. Chi. L.J. 517, 518 (2012) (“What is unquestionably clear, however, is that the Trilogy continues to hold a central place in modern summary-judgment jurisprudence and practice.”).

75. See, e.g., Issacharoff & Loewenstein, *supra* note 67, at 91–94 (assessing impact of trilogy based on references to *Celotex* in published federal court opinions); Mollica, *supra* note 49, at 142 (examining “samples of federal courts of appeals decisions published during 1973 and 1997–98”).

76. See Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 Law & Soc’y Rev. 1133, 1165 (1990) (“Both theory and empirical work suggest that employment discrimination cases with published opinions are unlike those without them in certain systematic and important ways.”); see also Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 Hofstra Lab. & Emp. L.J. 45, 55 (2005) (comparing published and sample of unpublished opinions and concluding published opinions exhibited 5.5% bias towards granting summary judgment); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. Empirical Legal Stud. 591, 604 (2004) [hereinafter Burbank, *Drifting*] (“[T]he picture of a legal landscape that emerges from published opinions, at whatever court level, is very probably distorted”). One reason for this may be that “a judge granting summary judgment will almost surely write an opinion, but will not necessarily do so when denying the motion.” Berger et al., *supra*, at 67; see also Lizotte, *supra* note 17, at 108–09 (comparing opinions published on Westlaw and Lexis with unpublished opinions available on PACER and showing “[s]ummary judgments awarded to plaintiffs were more likely to appear online than were judgments awarded to defendants, and appealed judgments were more likely to be available than those that were not appealed”).

77. Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. Empirical Legal Stud. 861, 876 n.46, 881 n.60, 883 (2007) (finding “percentage of cases terminated by summary judgment increased from 3.7 percent in 1975 to 7.8 percent in 2000” excluding prisoner and Social Security cases).

cases.⁷⁸ Grant rates and efficiency aside, at the least, the trilogy had the effect of framing courts' reasoning on the subject.⁷⁹

C. *The Significance of Summary Judgment Grants*

The implicit (and often explicit) reasoning behind these criticisms and studies of post-trilogy summary judgment is that in some unknown number of meritorious cases, summary judgment is granted in favor of defendants and deprives deserving plaintiffs of their right to trial by jury.⁸⁰ This assumes that judges are improperly determining what a reasonable jury could find.⁸¹ Along these lines, a number of studies give

78. See Theodore Eisenberg & Charlotte Lanvers, Summary Judgment Rates over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts 17–18 (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 08-022, 2008), available at <http://ssrn.com/abstract=1138373> (on file with the *Columbia Law Review*) (finding “[s]ummary judgment rates in employment discrimination and other civil rights cases are consistently higher than rates in contract and torts cases” but “[o]ur results . . . raise the question of how observers could consistently report increased summary judgment rates since the Supreme Court trilogy”).

79. See Huang, Trial by Preview, *supra* note 55, at 1325 n.6 (“The shift toward merits-like analysis of the evidence at summary judgment can be fairly traced to the famed ‘trilogy’ . . .”).

80. See, e.g., McGinley, *supra* note 73, at 207 (“In response to the trilogy, lower courts have granted summary judgment in cases where there exist questions of fact concerning the employer’s motive, thereby denying to employment discrimination plaintiffs their ‘day in court’ historically promised by the American model of litigation.” (footnote omitted)); Schneider, Changing Shape, *supra* note 42, at 542 (“Why is the grant of summary judgment a problem? The first reason is that it ends the case for the plaintiff: the plaintiff does not have the opportunity for a jury trial (in those cases where the plaintiff would otherwise have a right to a jury trial).”); see also Burbank, Drifting, *supra* note 76, at 622 (“[T]his work should suffice to persuade even the most hard-hearted empiricist that some litigants in some types of cases in some courts are not receiving reasonable opportunities to present their cases.”); Brooke D. Coleman, Summary Judgment: What We Think We Know Versus What We Ought to Know, 43 *Loy. U. Chi. L.J.* 705, 706 (2012) (“While the empirical work tells us a lot, it does not tell us anything about the chilling effect of the summary judgment process, nor does it tell us whether and how many meritorious cases are wrongly dismissed.”).

Further, there may be an argument that harm comes from the violation of the proper judge–jury divide itself, as opposed to the litigant’s participation interest. See Miller, Pretrial Rush, *supra* note 24, at 1075 (“To the extent that summary judgment grants deny litigants access to jury trial, it obviously unhinges the judge–jury decisionmaking balance.”). This distinction is well established. See *id.* at 1086 (“[T]he decision to label an issue a ‘question of law,’ a ‘question of fact,’ or a ‘mixed question of law and fact’ . . . at times has turned on a determination that . . . one judicial actor is better positioned than another to decide the issue in question.” (quoting *Miller v. Fenton*, 474 U.S. 104, 113–14 (1985))).

81. It is of course possible that the judge properly granted summary judgment based on the evidence produced at summary judgment but that there was additional evidence presented to the jury at trial that, had it been shown to the judge, would have resulted in the denial of summary judgment. Cf., e.g., Univ. of Chi. Law Sch., Panel Discussion: Easterbrook on Statutes, YouTube, at 50:29 (July 12, 2013), http://youtu.be/y_i3KfdU_0Q?t=50m29s (on file with the *Columbia Law Review*) (describing how Judge Frank

examples of grants of summary judgment that their respective authors argue were improper.⁸² Without a subsequent jury verdict, however, it is not possible to determine whether there actually would have been judge–jury disagreement in those cases. But even the empirical studies finding increased rates of summary judgment grants do not necessarily show that these “additional” grants dismiss cases that could prevail in front of a jury. As one researcher has phrased the problem:

[E]ven if we knew exactly the extent of the increase in case terminations due to summary judgment, we could not be confident . . . that it translated directly to the bottom-line trial rate. To assess that relationship, we would need to know whether cases that are now terminated by summary judgment are cases that would have gone to trial previously. Perhaps they would have terminated by another means, in which event we should perhaps also consider vanishing settlements.⁸³

Rather than extrapolate from overall summary judgment and trial rates, one alternative is to look at those studies that have attempted to examine judge–jury disagreement to see what they reveal about judges’ perceptions of juries’ thinking. For instance, some studies have endeavored to compare actual jury results with how the judge would have

Easterbrook of Seventh Circuit changed his vote when appeal was reheard en banc because plaintiff’s new lawyer responded with facts at en banc oral argument previous counsel had failed to mention at panel argument). But except in the case of newly discovered evidence, this might well support the argument that judges are engaged in improper weighing of the evidence: It would be odd for a party to fail to allege all available facts to avoid losing at the summary judgment stage.

82. See, e.g., Beiner, *supra* note 40, at 809–14 (describing cases where district court allegedly downplayed sexual harassment or examined incidents in isolation before granting summary judgment for defendant); Eisenberg, *Equal Pay*, *supra* note 73, at 834 (criticizing district judge’s summary judgment opinion in Equal Pay Act case for “appl[y]ing] his own conception of appropriate executive pay”); Issacharoff & Loewenstein, *supra* note 67, at 91 (arguing grant of summary judgment to defendant and Seventh Circuit’s affirmance in sex discrimination case was improper because of “conflicts on material issues absolutely central to the dispute[.]”); Miller, *Pretrial Rush*, *supra* note 24, at 1095–1101 (arguing court improperly granted summary judgment in investor class action case because “jury should have been allowed to find and apply the facts”); Mollica, *supra* note 49, at 168 (criticizing Fifth Circuit’s affirmation of summary judgment in age discrimination case based on court’s interpretation of facts in record); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 *Rutgers L. Rev.* 705, 732 (2007) [hereinafter Schneider, *Dangers*] (criticizing Judge Posner’s opinion in gender discrimination case for using “summary judgment . . . as a weapon to cut off plaintiff’s redress and to stunt the development of the law (as well as penalizing the plaintiff for what may have been her counsel’s inadequacy)”); Matthew C. Koski, *Preserving the Right to a Jury Trial by Preventing Adverse Credibility Inferences at Summary Judgment* 4 (July 2011), http://www.employeerightsadvocacy.org/fmd/files/TheInstitute_AdverseCredibility%20Inferences_July2011.pdf (on file with the *Columbia Law Review*) (arguing Fifth Circuit improperly affirmed summary judgment in gender discrimination and retaliation cases based on “supervisor’s bare assertion of lack of knowledge”).

83. Burbank, *Drifting*, *supra* note 76, at 617.

decided the case, and vice versa.⁸⁴ But as is discussed in Part II.A, *infra*, that a jury agrees with the judge does not necessarily mean that the judge made the proper ruling on summary judgment.

II. DO JUDGES AND JURIES DISAGREE?

Crucially, while these studies have examined how judges and juries respond to the same question, no study has examined how judges think juries should and would rule⁸⁵ by comparing actual summary judgment rulings with how a jury would have ruled.⁸⁶ This Note fills that gap by identifying cases where both the trial judge granted summary judgment and the jury reached a verdict. While the standard for summary judgment—that “no reasonable jury” could find for the nonmovant—is not necessarily meant to simulate an actual jury decision,⁸⁷ the fact that an actual jury finds for the nonmovant is strong proof that the trial court’s application of the standard was incorrect. Part II.A begins by describing the methodology by which these cases were chosen. Part II.B then examines the results and breaks them down according to circuit and case type.

A. Methodology

To test the assumption that judges sometimes grant summary judgment improperly, this Note compiles cases in which summary judgment was reversed on appeal and proceeded to a jury verdict for the nonmoving party. But not every summary judgment reversal indicates that the judge overlooked a genuine factual dispute that the jury would have resolved in the nonmovant’s favor. First, a trial court’s⁸⁸ grant of disposi-

84. See Brian Bornstein, *Judges vs. Juries*, 43 *Court Rev.* 56, 56 (2006) (“Most attempts to answer [whether judges’ decisions differ from juries’ decisions] fall into one of three general categories: archival studies of trial verdicts; surveys of judges’ opinions regarding jury trials over which they presided . . . ; and experimental vignette studies in which judges serve as research participants.”).

85. Whether judges ruling on summary judgment motions actually consider what a reasonable jury could find, as opposed to the judge’s own view of the facts, is questionable. See Thomas, *Fallacy*, *supra* note 38, at 772 (arguing “disagreement among judges on whether a reasonable jury could find for the plaintiff” indicates they are basing their rulings on their own different views of facts).

86. See Coleman, *supra* note 80, at 711 (“To my knowledge, there is only one study that has tested the application of summary judgment in a particular case by asking lay people to assess the evidence like a jury.”).

87. Cf. Kenneth S. Abraham, *The Forms and Functions of Tort Law* 96 (4th ed. 2012) (“In granting a motion for a directed verdict on the negligence issue, a court is not ruling that a jury *would not* find for the defendant, but that the jury *should not* and therefore *may not* so find, because it would be unreasonable to do so.”). But see Megan E. Wooster, Note, *Sexual Harassment Law—the Jury Is Wrong as a Matter of Law*, 32 *U. Ark. Little Rock L. Rev.* 215, 216 (2010) (asking whether “jury composed of twelve people [can] be unreasonable as a matter of law” when considering “what level of conduct a reasonable person considers severe or pervasive” in employment discrimination context).

88. This Note refers to trial courts and trial judges, rather than district courts and

tive summary judgment⁸⁹ could generally be reversed on appeal based on one of three grounds: an erroneous statement or application of law, an abuse of the trial judge's discretion, or the presence of a genuine issue of material fact.⁹⁰ This Note refers to grants reversed based on either of the first two grounds as erroneous grants and those based on the third as improper grants. The distinction is drawn from the fact that while the higher court's interpretation of law or the scope of the trial court's discretion is by definition the correct one, the same logic does not apply to the appellate court's understanding of jury behavior. In fact, it is at least plausible that a trial judge—who presides over live jury trials—has a better intuitive sense of jury behavior than does an appellate court. Second, where a grant is reversed on appeal and the case progresses to a jury verdict, the result may be in the movant's favor or the nonmovant's favor.⁹¹ This Note refers to the former type of case as a consistent improper grant and to the latter as a verified improper grant because where a jury has found contrary to the summary judgment ruling, it validates the appellate court's reversal of the improper grant. It is these latter cases—those involving a verified improper grant—that are the focus of this Note.

This last condition—that a jury has found in the nonmovant's favor—may substantially limit the number of cases given how few jury

district judges, because in some cases the parties consent to magistrate judge jurisdiction, thus bypassing the district court altogether for the purposes of summary judgment. Where a case or study dealt specifically with a federal district court, however, this Note uses that terminology.

89. Dispositive summary judgment grants are those that allow the court to enter final judgment as to all claims of a given party. This Note treats both denials and partial grants of summary judgment, wherein at least some of the nonmovant's claims or defenses remain, as nondispositive because they generally are not appealable until the case has gone to trial, except in extraordinary cases. See Schwarzer et al., *supra* note 48, at 77 (discussing which summary judgment orders are appealable); cf. 28 U.S.C. §§ 1291–1292 (2012) (providing for appellate jurisdiction from final orders but only certain interlocutory decisions). At that point, the reviewing court has the benefit of the jury's verdict on the surviving claims or defenses, which might skew the appellate court's review. Conversely, this Note treats partial grants where (1) summary judgment is granted on all of the nonmovants' *federal* law claims or defenses and (2) the court declines to exercise supplemental jurisdiction over the nonmovant's *state* law claims as a dispositive grant because the final judgment is entered at that point and thus appealable.

90. See Subrin et al., *supra* note 41, at 617–18 (describing appellate standards of review of trial court decisions in federal system); Martin B. Louis, Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion, 64 N.C. L. Rev. 993, 993–94 (1986) (distinguishing between appellate review of questions of law and those of fact); cf. Fed. R. Civ. P. 56(a) (allowing summary judgment where (1) “no genuine dispute as to any material fact” and (2) “the movant is entitled to judgment as a matter of law”).

91. If there are multiple causes of action and if the jury finds in favor of the nonmovant on at least one claim, this Note characterizes the result as a nonmovant verdict because it demonstrates that at least as regards that claim, the jury viewed the evidence differently than the trial judge did.

trials occur⁹² and the likely strength of the evidence given the trial judge's improper grant. But this limitation is justified on two grounds. First, the existence of a jury verdict is necessary because while an appellate court's ruling that a summary judgment grant was improper (as opposed to erroneous) is binding in a legal sense, it does not necessarily mean that the appellate court's view of how a reasonable jury will evaluate the evidence is factually more accurate than that of the trial court. Second, by definition, a jury verdict for the movant does not prove that some other reasonable jury could not find for the nonmovant. While a consistent-improper-grant case—where the jury verdict is for the movant—does not prove that the trial judge properly granted summary judgment, because another jury could have viewed the evidence differently, it also does not shed light on whether the trial judge was wrong.

Unfortunately, cases containing verified improper grants are not readily identifiable, and there does not appear to be a dataset recording statistics on these grants. One of the most widely used datasets of cases, the Federal Court Cases Integrated Database Series from the Administrative Office of the United States Courts, only records information at the start and close of a case and does not record when summary judgment motions are made, granted, or denied. The closest measure it records is when a case is terminated prior to trial.⁹³ Thus, the database would not allow for identification of improper grants without examining the docket for each and every jury trial case in the database.⁹⁴

In order to deal with the sheer volume of cases, this Note uses a search of dockets to identify improper grants. The Public Access to Court Electronic Records (PACER) system allows “online access to U.S. District Court, U.S. Bankruptcy Court, and U.S. Courts of Appeals case information.”⁹⁵ Because PACER's own search function does not allow for a search of docket entries,⁹⁶ this Note relies on Lexis Advance, a commercial legal-

92. See Galanter, *Vanishing Trial*, *supra* note 15, at 459–65 (noting less than two percent of cases went to trial in 2002); see also *infra* Figure 5 (showing number of jury trials each year 2000–2012 on September 30 basis).

93. See Memorandum from Joe Cecil & George Cort to Judge Michael Baylson 5 n.8 (Aug. 13, 2008) [hereinafter Cecil & Cort Memo], available at <https://bulk.resource.org/courts.gov/fjc/sujulrs2.pdf> (on file with the *Columbia Law Review*) (“We were unable to use population measures to assess rate at which cases are terminated by summary judgment since this measure is not recorded by the individual federal district courts as part of the CM/ECF system.”); see also John Bronsteen, *Against Summary Judgment*, 75 *Geo. Wash. L. Rev.* 522, 524 n.10 (2007) (“[T]he Administrative Office of the U.S. Courts does not keep statistics on summary judgment . . .”); Lizotte, *supra* note 17, at 116–19 (summarizing problems in coding of Administrative Office of U.S. Courts data).

94. There were roughly between two and three thousand completed jury trials each year in federal court from 2000 to 2012. See *infra* Figure 5 (showing number of trials completed between September 30, 1999, and September 30, 2012).

95. Pub. Access to Court Elec. Records, PACER User Manual for ECF Courts 7 (June 2012) (on file with the *Columbia Law Review*).

96. See PACER Case Locator, PACER, <https://pcl.uscourts.gov/search> (on file with the *Columbia Law Review*) (last visited Sept. 10, 2014) (showing, after login, advanced

database search engine,⁹⁷ to find improper grants. Dockets for identified cases⁹⁸ were individually reviewed using Bloomberg Law,⁹⁹ another commercial legal-database search engine, to determine whether the case in fact met the following criteria: (1) summary judgment was granted such that either (i) a nonmovant's¹⁰⁰ case was dismissed or could have been if not for a stay of judgment pending appeal¹⁰¹ or (ii) judgment was entered against the nonmovant; (2) the grant of summary judgment on at least one claim was rejected by an appellate court on the independent ground that a genuine issue of material fact existed;¹⁰² and (3) the case proceeded to trial in front of a jury, which returned a verdict opposite that of the summary judgment grant on at least one claim.¹⁰³ This information was collected from the district or magistrate judge's opinion granting summary judgment, the magistrate judge's Report and Recommendation as to the motion for summary judgment (if any), the appellate court's opinion rejecting summary judgment, the jury's verdict, and post-trial opinions.¹⁰⁴

search fields of "Region," "Case Number," "Case Title," "Nature of Suit," "Date Filed," "Date Closed," and "Party Name" for civil cases).

97. Lexis Advance, LexisNexis, <http://www.lexisnexis.com/en-us/products/lexis-advance.page> (on file with the *Columbia Law Review*); see also *infra* Appendix A.1 (explaining differences between legal-database search engines).

98. See *infra* Appendix A.2 (detailing and explaining search terms used).

99. Lexis Advance's docket sheets did not provide access to the underlying documents.

100. The analysis only included a case with multiple nonmovants if the same nonmovant whose claims were rejected on summary judgment subsequently prevailed on at least one claim at trial.

101. This includes cases where the court subsequently declined to exercise supplemental jurisdiction over a nonmovant's state claims after granting summary judgment on any federal claims.

102. Cases where the grant of summary judgment was rejected because the lower court's decision was erroneous on a question of law, such as where new precedent had not been considered, were excluded, as they simply demonstrated the courts' disagreement on a matter of law, as opposed to what determinations a reasonable jury could make. Where a court made errors as to both law and fact, the case was only included if it was clear the court would have granted summary judgment even if it had correctly interpreted the law.

103. Only a verdict for the nonmovant shows that the grant of summary judgment was improper. Because the standard for summary judgment is that *no* reasonable jury could find for the nonmoving party, a verdict for the moving party only proves that a reasonable jury might not find for the nonmoving party; a different reasonable jury might have found for the nonmoving party. See *supra* notes 60–61 and accompanying text (detailing standard for summary judgment after trilogy).

This Note did not evaluate the relative importance of the prevailing claim(s) as compared to the original allegations and claims considered on summary judgment for two reasons. First, such an evaluation would likely require a subjective judgment. Second, the fact that at least one claim, no matter how minor, had merit is likely valuable to litigants. See *infra* note 159 and accompanying text (noting value of day in court).

104. There were several cases where the lower court opinion, court of appeals opinion, or jury verdict was not available. Cases have been excluded unless it could be determined from another filing or opinion (such as one denying a motion for a new trial)

This methodology has its drawbacks. Given the variation in case chronology and docket recordation, it is possible that this Note fails to identify all verified-improper-grant cases. In fact, it may be precisely those cases sharing a common criterion, such as a particular judge or the involvement of multiple parties on the same side, that are likely to be missed because of some relationship between that criterion and the cases' dockets.¹⁰⁵ Future research of this kind might be facilitated by a change in the information recorded in the Federal Court Cases Integrated Database Series, but, at present, a docket search is the next-best option and still allows for fruitful analysis. In fact, because the central aim of this Note is to determine whether verified improper grants even exist as a lower bound for the true error rate, a lack of complete comprehensiveness would not detract significantly from this Note's findings.

B. *Results of the Docket Search*

The overall results show that verified improper grants do exist, but that they are not particularly common. The docket searches returned 1,009 unique civil cases filed between January 1, 2000,¹⁰⁶ and December 31, 2006.¹⁰⁷ Of these, 263 included a dispositive summary judgment

that the case met the criteria. For instance, eleven cases that appeared to meet the criteria (four that appeared to be verified improper grants and seven that appeared to be consistent improper grants) were excluded from the results because their status could not be conclusively verified.

105. For instance, civil rights cases can have many defendants, and so the sample may be unintentionally skewed if they are disproportionately likely to be excluded. It is possible that if enough defendants filed trial memoranda, there might be more than 99,999 words between the entries for the earlier summary judgment grant and the eventual jury verdict on the docket sheet. Because the search only returns docket sheets that have the specified terms within 99,999 words of one another, this would result in the case being excluded in the search results.

Similarly, a particular judge—or more precisely the particular person entering information into the docket—might correlate with falling outside the search terms. There was great variation in the length and style of docket entries, with some noting only the name of the document while others provided textually summaries of the contents of filings and opinions. The latter could also result in these cases having more than 99,999 words between the specified search terms.

106. This start date was chosen because federal courts began using electronic filing in the early part of the decade, meaning that an earlier start date might have produced many results whose underlying documents—and most importantly, unpublished opinions—were unavailable through PACER. See Case Management/Electronic Case Files, Admin. Office of the U.S. Courts, <http://www.uscourts.gov/FederalCourts/CMECF.aspx> (on file with the *Columbia Law Review*) (last visited Feb. 20, 2015) (“District court implementation began in 2002. Appellate court implementation began in late 2004.”). Even so, some opinions for cases in the search results were not available through PACER.

107. This end date was selected to limit the potential effect of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which could have resulted in the dismissal of cases at the pleading stage that might otherwise have reached summary judgment. See *Schneider, Changing Shape*,

grant,¹⁰⁸ a reversal on appeal, and a jury verdict.¹⁰⁹ This group included three types of cases: Slightly over one-quarter (65 cases) were verified improper grants;¹¹⁰ roughly thirty-eight percent (100 cases) were consistent improper grants;¹¹¹ and the remaining thirty-seven percent (98 cases) were erroneous grants.¹¹² Thus, this result proves judges have improperly granted summary judgment a minimum of sixty-five times, a rate of more than nine cases per year studied.¹¹³

Before analyzing the data further, a few words of caution: First, there were relatively few verified improper grants. Over the same time period

supra note 42, at 540–41 (“[T]he Supreme Court’s recent decisions in *Twombly* and *Iqbal* now raise serious questions as to whether summary judgment will continue to play this central role in federal pretrial practice.”). Lexis Advance does not have a filter for case termination date, and using such a filter could have eliminated cases unaffected by the decisions but closed after they were issued. While limiting the filing dates is a crude measure, most cases should have passed the pleading stage by the time the more recent *Iqbal*, if not *Twombly*, was issued. Of course, if *Twombly* and *Iqbal* cause lower courts to screen out borderline cases out prior to summary judgment, that might reduce the number of verified improper grants going forward, but the implications of the existence of improper-grant cases, see infra Part III, are still significant.

108. See supra note 89 (defining dispositive summary judgment grants as those allowing entry of final judgment on all of party’s claims).

109. Many of the search results met some, but not all, of the criteria. For example, in a few cases, there were jury trials that ended in hung juries. These cases were not counted as either consistent or verified improper grants, because, lacking verdicts, they were not clearly distinguishable from cases that settled following the reversal of summary judgment.

110. See supra Part II.A (defining verified improper grant as summary judgment reversed because of existence of genuine dispute of material fact and followed by jury verdict for *nonmovant*).

111. See supra Part II.A (defining consistent improper grant as summary judgment reversed because of existence of genuine dispute of material fact and followed by jury verdict for *movant*). The search criteria did not screen for prevailing party for two reasons. First, many docket sheets did not indicate—at least in any way that was consistent—which party the jury found for; in some cases there were split verdicts where there were multiple causes of action, or multiple plaintiffs or defendants. Some used the terms “plaintiff” and “defendant,” while other dockets used the parties’ names. Further, some dockets did not indicate which party prevailed at all, simply indicating “Jury Verdict.” Second, while nearly all summary judgment grants were for defendants, a few were for plaintiffs. It could be argued that improper summary judgment for a plaintiff is not as troubling as for a defendant, but see supra note 23 (arguing harm to defendants is more concerning), particularly given its rarity. Without knowing beforehand, however, how often the phenomenon occurred, a broader search was preferred.

112. See supra Part II.A (defining erroneous grant as grant of summary judgment reversed on appeal not independently because of existence of a genuine dispute of material fact). For instance, several patent cases were reversed based on claim construction, which the Federal Circuit has held to be a question of law. See *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 970–71 (Fed. Cir. 1995) (“[W]e conclude that the interpretation and construction of patent claims, which define the scope of the patentee’s rights under the patent, is a matter of law exclusively for the court.”), *aff’d*, 517 U.S. 370 (1996).

113. But see supra note 81 (noting but criticizing possibility summary judgment was proper when granted because different evidence was only introduced later at trial).

as the search, roughly 1.3 million civil cases were filed.¹¹⁴ Of these, an estimated 102,000 included dispositive summary judgment grants¹¹⁵ and approximately 16,000 included completed jury trials.¹¹⁶ The magnitude of the difference means that even if the search terms did not capture every verified improper grant, the percentage of verified improper grants is still likely less than one percent of all initiated jury trials and less than a tenth of a percent of all dispositive summary judgment grants.

Second, these data may also be biased, because they require appellate reversal and a jury trial and therefore are likely subject to a selection effect¹¹⁷: For instance, the portion of cases that proceed to trial, particularly one before a jury, may have similarities that other types of cases with summary judgments do not share. This makes generalizing to those other types of cases risky. For instance, “usually no jury right exists” in cases where the United States is a defendant.¹¹⁸ Some types of cases or litigants might be more likely to settle,¹¹⁹ while others might be particu-

114. See *infra* Figure 3 (showing number of cases filed every year from 2000 to 2006, exclusive of prisoner and social security cases). This sum excludes prisoner and social security cases for consistency with summary judgment estimates provided. See *infra* note 115 and accompanying text (estimating number of summary judgment grants and explaining methodology for estimate that excludes these types of cases).

115. This number is derived by applying the 7.8% summary judgment termination rate identified in Cecil et al., *supra* note 77, at 883, to the estimated 1.3 million filings, see *infra* Figure 3 (showing federal civil filings 2000–2006).

Three caveats: First, because the last year for which the Cecil et al. study reports data is 2002, it is not clear whether the 7.8% statistic holds for other years in this Note’s sample period. Second, the districts examined might not be representative of the rest. See Burbank, *Drifting*, *supra* note 76, at 618 (“The evidence also suggests that summary judgment activity, including filing, grant, and case-termination rates, varies, sometimes dramatically, among courts and among case types.”). Third, this rate excludes prisoner and social security cases. See Cecil et al., *supra* note 77, at 876 n.46, 881 n.60 (noting reasons for and past practice of excluding these types of cases).

116. This estimate is based on taking the average number of jury trials per year, see *infra* Figure 6 (providing number of jury trials for 2001–2012), and multiplying by the number of years studied (seven). The twelve-year period was used to help control for the likelihood that trial often takes place years after filing (particularly where there is an appeal before trial). The year 2007 was excluded from this calculation. See *infra* note 187 (explaining likely coding error in data).

117. See, e.g., Clermont & Eisenberg, *Transcending Empiricism*, *supra* note 34, at 1128–29 (“[T]he selection effect refers to the proposition that the selection of tried cases is not a random sample of the mass of underlying cases’ Cases only go to trial when the parties substantially disagree on the predicted outcome of trial.” (quoting Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. Legal Stud. 337, 337 (1990))).

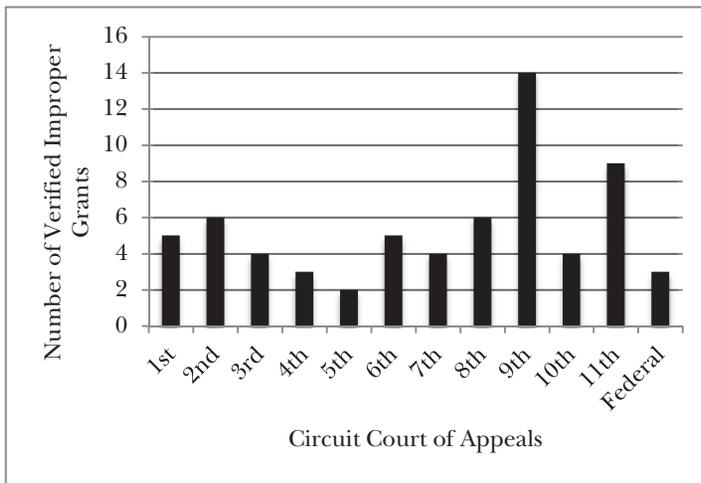
118. *Id.* at 1136 (“For example, in a contract or tort action brought under the Tucker Act or Federal Tort Claims Act, statute dictates trial by judge.” (citing 28 U.S.C. §§ 1346, 2402)).

119. See, e.g., Eisenberg, *Litigation Models*, *supra* note 34, at 1582 (“A successful action alleging a pattern or practice of employer misbehavior may spur related actions against the employer. An employer who loses even one discrimination claim is more vulnerable to future discrimination claims. Rational defendants would vigorously defend

larly difficult to resolve out of court.¹²⁰ Because of these limitations, these data are not necessarily representative of cases with summary judgment grants overall. Nonetheless, these data show that verified improper grants do occur. While the data may not permit inferences of causation, or perhaps even correlation, proof of the existence of such grants provides powerful insights.

1. *Comparing Circuits.* — First, the data show that verified improper grants occur in every circuit except the District of Columbia:¹²¹

FIGURE 1: VERIFIED IMPROPER GRANTS BY CIRCUIT



employment discrimination cases and settle weak cases . . . before trial.”). For a seminal article on how so-called “repeat players” like employers use this process to gain an advantage in litigation in part by only allowing favorable cases to be resolved by courts, thus creating favorable precedent, see generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc’y Rev.* 95 (1974).

120. See, e.g., Eisenberg, *Litigation Models*, supra note 34, at 1582–83 (“Civil rights plaintiffs and prisoners (and their attorneys) are less cost-benefit oriented than other litigants. They might push cases to trial that others would forego.”).

121. It is possible that this is due to the distinct types of cases the D.C. Circuit handles. Cf., e.g., Editorial, *What Makes the D.C. Circuit Different?*, *N.Y. Times* (May 31, 2013), <http://www.nytimes.com/2013/06/01/opinion/what-makes-the-dc-circuit-different.html>? (on file with the *Columbia Law Review*) (describing caseload consisting of higher percentage of cases involving federal government and dealing with legal challenges to federal regulation). Unlike civil rights cases, these types of disputes did not make up a significant portion of verified improper grants. In addition, the D.C. Circuit handles far fewer jury trials. See, e.g., Admin. Office of the U.S. Courts, *Judicial Business 2006*, at 198–200 tbl.C-7 (2007), available at [http://www.uscourts.gov/uscourts/Statistics/Judicial Business/2006/appendices/c7.pdf](http://www.uscourts.gov/uscourts/Statistics/Judicial%20Business/2006/appendices/c7.pdf) (on file with the *Columbia Law Review*) (showing D.C. Circuit had twenty civil jury trials as compared with average of 189 for other geographic circuits).

While the Ninth Circuit initially appears to be an outlier here, this is likely attributable to the disproportionate number of cases in the circuit.¹²² Instead, the First Circuit, with a caseload of less than one-third the average,¹²³ had more than twice as many verified improper grants as the Fifth Circuit, which had a caseload one and a half times the average.¹²⁴ In other words, the rate at which verified improper grants occurred was over twelve times as high in the First Circuit as in the Fifth. Both circuits do have similar reversal rates,¹²⁵ but trials are nearly twice as common in the First Circuit.¹²⁶ Thus, it could be that both circuits have similar rates of improper summary judgment grants and appellate reversal, but because First Circuit cases are more likely to end in a jury verdict (satisfying this Note's search criteria), they are more likely to appear as verified improper grants.

Nonetheless, these data cannot reveal whether this greater frequency of trial is a significant factor in the higher rate of verified improper grants. It is possible that trial judges in the First Circuit are simply more likely to improperly grant summary judgment than those in the Fifth, that First Circuit judges are more likely to reverse improper grants, or that some combination of factors—such as circuit precedent,¹²⁷ local culture, or type of industry—explains this disparity.

122. For instance, from 2000 to 2006, nearly twice as many cases were filed in district courts in the Ninth Circuit than the average (exclusive of the Federal Circuit). See *infra* Figure 4 (showing filing statistics by circuit).

123. See sources cited *supra* note 122 (showing case filing statistics by circuit).

124. See sources cited *supra* note 122 (showing case filing statistics by circuit).

125. The reversal rate was calculated as the percent of "Other Civil Cases" reversed during the twelve months preceding each September 30 of the years 2000, 2006, and 2012. Admin. Office of the U.S. Courts, Judicial Business: 2000, at 102–05 tbl.B-5 (2000), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2000/appendices/b05sep00.pdf> (on file with the *Columbia Law Review*); Admin. Office of the U.S. Courts, Judicial Business: 2006, at 130–33 tbl.B-5 (2006), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/appendices/b5.pdf> (on file with the *Columbia Law Review*); Admin. Office of the U.S. Courts, Judicial Business: 2012, at 1–4 tbl.B-5 (2012), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/B05Sep12.pdf> (on file with the *Columbia Law Review*).

126. The trial rate was calculated by summing the total number of completed civil jury trials in each circuit from 2000 to 2012 and then dividing by the number of civil filings in that circuit over the same period. For the statistics on civil filings by circuit, see *infra* Figure 4. For the statistics on completed jury trials in each circuit, see *infra* Figure 5.

127. It could be that circuit precedent disfavors the motion relative to the governing Supreme Court precedent. Moreover, a trial court judge might internalize this low probability of success and reject the motion in the first place. Going even further, litigants might expect either appellate reversal of summary judgment grants or immediate rejection at the trial court level, and so avoid moving for summary judgment in the first place.

Cecil et al. propose a related theory for their finding of a comparatively low rate of summary judgment motions in the Southern District of New York. See Cecil et al., *supra* note 77, at 897 ("If disputes that would otherwise be raised as summary judgment motions are being handled informally at the pretrial conference, the docket would not include a record of such activity and it would not be detected by this study.").

2. *Comparing Case Types.* — Breaking down the search results according to the type of case¹²⁸ is also revealing. As Figure 2 below indicates, more than half of the verified improper grants occurred in cases in the civil rights category, while there were few improper grants in other types of cases, such as contracts or torts:

FIGURE 2: IMPROPER GRANTS BY TYPE OF CASE

Type of Case	Verified Improper Grants	Consistent Improper Grants	Total
Civil Rights	40	54	94
Contract	6	9	15
Federal Tax Suits	–	1	1
Forfeiture/Penalty	1	–	1
Labor	7	5	12
Other Statutes	2	4	6
Prisoner Petitions	–	5	5
Property Rights	6	11	17
Real Property	–	1	1
Torts	3	10	13
Total	65	100	165

That many of the verified improper grants were civil rights cases does not necessarily indicate a correlation. Civil rights cases make up an average of fifteen percent of total federal civil filings each year¹²⁹ and constitute about forty-one percent of jury trials.¹³⁰ Thus, it would be reasonable to expect that civil rights cases make up a significant portion of the search results, given that one requirement for inclusion was a jury trial.¹³¹ That said, two-thirds of verified improper grants occurred in civil

128. This Note uses the “Type of Case” designation provided by PACER. Each of these types is further divided into “Nature of Suit” (NOS) codes, such that, for instance, both an employment discrimination case and a housing discrimination case would fall under the same case type (here, civil rights) but different NOS codes. Nature of Suit, PACER, <https://www.pacer.gov/documents/natsuit.pdf> (on file with the *Columbia Law Review*) (last visited Feb. 20, 2015).

129. See *infra* Figure 3 (showing total federal civil filings and civil rights filings 2000–2006).

130. See *infra* Figure 6 (showing percentage of jury trials occurring in civil rights cases 2001–2012). This calculation excludes 2007. See *infra* note 187 (explaining why 2007 is outlier).

131. The summary judgment requirement would be expected to exhibit a similar effect. See Hornby, *supra* note 44, at 286 (“Statistical studies show employment discrimination cases in particular generate a significantly higher share of summary judgments than other categories.”); McGinley, *supra* note 73, at 208 (“Following the trilogy, the lower

rights cases, a much higher percentage than the forty percent of jury trials that are civil rights cases. These data do not prove that a judge is more likely to improperly grant summary judgment in a civil rights case, but they do suggest this area is also ripe for further study.¹³²

III. VERIFIED IMPROPER GRANTS IN CONTEXT AND THE FUTURE

Having found in Part II that judges do sometimes improperly grant summary judgment, what causes this phenomenon? Without being privy to the jury's deliberations, it is impossible to know exactly how its thinking differed from that of the judge's. It is possible that the evidence presented at trial diverged from what was alluded to at the summary judgment stage.¹³³ Perhaps the nonmovant's attorney undermined a witness's credibility on cross examination, or a witness admitted something not disclosed during discovery. It is the very potential for these types of occurrences that makes the trial such a valuable procedure and creates the risk that a judge granting summary judgment will improperly deprive the nonmoving party of a trial that he or she would otherwise win.

While the criteria for verified improper grants may prevent the data from being generalizable to other filed cases,¹³⁴ their existence suggests there may be many unverified improper grants, and their prevalence in civil rights cases reinforces concerns about judicial receptivity to such cases. Part III.A argues that the data reported do not represent the entire population of such improper summary judgments, but rather just the tip of the iceberg given the restrictions and necessary conditions for a verified improper grant. Part III.B places this study's results in the context of other work on summary judgment and civil rights litigation.

A. *The True Error Rate*

At least two different conclusions may be drawn from this study's results. One interpretation might be relief: The fact that these verified improper grants were reversed on appeal might show that the system

courts have granted summary judgment more aggressively in civil rights cases, even though these cases most often turn on subtle questions of credibility and intent that only a factfinder faced with a live witness should decide."). At the same time, "[s]ummary judgment motions by defendants are . . . more likely to terminate the litigation." Cecil & Cort Memo, *supra* note 93, at 3.

132. Cf. Galanter, *Contemporary Legends*, *supra* note 34, at 740–41 ("Court statistics are rudimentary: for example, they do not record the detailed subject matter of cases, the characteristics of the parties, or the events in the case Lawyers . . . have tolerated a situation in which anecdotes and surmises have filled the void of genuine inquiry." (footnotes omitted)). But cf. Lizotte, *supra* note 17, at 119 (noting Administrative Office of the U.S. Courts data were not collected or designed for academic study).

133. See *supra* note 81 (noting but doubting possibility summary judgment was proper when granted due to different evidence introduced later).

134. See *supra* Part II.B (discussing how criteria for verified improper grant could cause certain case attributes to be over or underrepresented).

works. While trial courts may make the occasional error, appellate courts catch them. Under this interpretation, the population of verified improper grants is equivalent to the population of improper grants. With fewer than a hundred improper grants¹³⁵ out of an estimated 102,000 grants overall,¹³⁶ the error rate for improper summary judgment would be less than one percent. If that error rate is accurate, then the occasional improper grant may be preferable, especially if the alternative is many more improper denials¹³⁷ or a diversion of judicial resources away from some other, larger problem.

This Note argues, however, that though its results are limited, they suggest that the true rate at which judges improperly grant summary judgment is in fact much higher than the relatively low number of verified improper grants alone indicates.¹³⁸ The very existence of verified improper grants demonstrates that in some cases, juries reasonably find liability where trial judges hold they cannot.¹³⁹ It is likely that additional verified-improper-grant cases exist but were not captured by this Note's search terms.¹⁴⁰ And perhaps most important, because not all summary judgment grants are appealed, because appellate courts may not catch every improper grant, and because not every reversal ends in a jury trial, this study likely screened out many unverifiable improper grants.

1. *Failure to Appeal*. — The reversed-on-appeal requirement means that the error rate this Note found does not include summary judgment grants that were not appealed in the first place or where the appeal was not completed. After all, when granting summary judgment due to insufficient evidence, the signal the judge sends is that the nonmovant's case is a losing one. A rational litigant might well decide that if the judge does not think the case has any reasonable chance of success at trial, then an appeal would be pointless.¹⁴¹ Given the cost in time and money,

135. See supra Part II.B (describing results of docket search).

136. See supra note 115 (describing calculation of this estimate and sources of data).

137. For instance, where a trial judge denies summary judgment because of the appearance of a genuine issue of material fact when no reasonable jury would find for the nonmovant. For the argument that these false positives are the larger problem, see supra note 23.

138. In addition to additional improper grants, courts' overuse of summary judgment to dispose of cases before trial might have a chilling effect. It is conceivable that where a court develops a reputation for receptivity to such motions, or where the precedent is favorable to summary judgment, plaintiffs may forgo filing some lawsuits in the first place that might nonetheless have convinced a jury at trial.

139. See supra Part II.B (reporting results of verified-improper-grants search).

140. See supra note 105 and accompanying text (giving examples of types of cases search terms might exclude).

141. Commentators have suggested that judges issue nonbinding, advisory summary judgments for almost exactly this reason. See, e.g., Geoffrey P. Miller, Preliminary Judgments, 2010 U. Ill. L. Rev. 165, 167–68 (proposing procedure where judge provides “tentative assessment of the merits of a case or any part of a case, based on the same sorts of information that the courts already consider on motions for summary judgment” but which would have no preclusive effect on the litigation). On the other hand, behavioral-

not to mention uncertainty, many litigants may choose not to appeal. Yet even if the grant of summary judgment was improper, the failure to appeal means that an appellate court will never have the chance to reverse the grant of summary judgment. Thus, some additional percentage of cases that are never appealed, such as those with partial grants,¹⁴² likely result in a true error rate that is above the percentage revealed by this Note's study.

2. *Depressed Appellate Scrutiny*. — The fact that an improper summary judgment grant is appealed does not guarantee that the appellate court will catch the mistake and reverse. Appellate courts may be too overburdened to give a fact-intensive but doctrinally uninteresting case the time that is necessary to identify and correct the trial court's mistake.¹⁴³ For instance, Judges Richard Posner and John Gibbons have both suggested that overworked appellate judges are more deferential to district courts because they have less time to review the lower court's ruling.¹⁴⁴ On a theoretical level, this argument makes sense: If the lower court's errors are not immediately apparent, and discovering them would require a thorough review of the entire record and the parties' submissions, an appellate judge pressed for time by the volume of other cases might not catch the error. It is also possible that appellate judges will revert to biases and heuristics, some potentially concerning,¹⁴⁵ to decide whether the lower court's grant was proper.

A recent article by Bert Huang tests this hypothesis by examining the reversal rate of civil cases in circuit courts flooded with additional,

science literature has shown that parties can draw opposite conclusions from the same information because they "tend to interpret information in 'self-serving' ways [P]resented with new facts, each side may come to see its own case as even stronger than before." Huang, *Trial by Preview*, supra note 55, at 1339; cf. Miller, *Pretrial Rush*, supra note 24, at 1043 & n.329 (raising possibility new information will cause each side to become more optimistic). However, this seems unlikely where a third party evaluates those facts.

142. See supra note 89 (discussing reasons for excluding partial grants).

143. Martin B. Louis, *Discretion or Law: Appellate Review of Determinations that Rule 11 Has Been Violated or that Nonmutual Issue Preclusion Will Be Imposed Offensively*, 68 N.C. L. Rev. 733, 738–39 (1990) (arguing even though rigorous review of trial court decisions by appellate courts would result in more correct results, such procedure is extremely time consuming).

144. See Bert Huang, *Lightened Scrutiny*, 124 Harv. L. Rev. 1109, 1112 & n.7 (2011) [hereinafter Huang, *Lightened Scrutiny*] (describing both judges' hypotheses that increased judicial productivity necessary to combat increased judicial workload comes at cost of greater deference to rulings of lower courts); see also *Shager v. Upjohn Co.*, 913 F.2d 398, 403 (7th Cir. 1990) ("[D]ocket pressures . . . make[] appellate courts reluctant to reverse a grant of summary judgment merely because a rational factfinder *could* return a verdict for the nonmoving party, if such a verdict is highly unlikely as a practical matter because the plaintiff's case . . . is marginal.").

145. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 784 (2001) (describing unconscious cognitive errors people, including judges, can make that might lead to incorrect decisions).

unrelated immigration appeals in the wake of the September 11, 2001, attacks.¹⁴⁶ Huang finds that judges in the affected circuits likely succumbed to this heavier workload in that they became more deferential toward district court rulings.¹⁴⁷ This increased deference suggests that when trial court judges improperly grant summary judgment, overburdened appellate courts are less likely to correct these mistakes and reverse the judgment. Huang's results are specifically applicable to this Note, as part of the period he studies overlaps with the period from which the sample of cases in this Note is drawn.¹⁴⁸ Thus, improper summary judgment grants that might otherwise have been reversed by appellate courts and ultimately been included in the search results may instead have been affirmed because of the "lightened scrutiny" caused by the surge of immigration appeals. While it is true that during the period covered by this Note's study, the Second Circuit implemented a plan to address the surge, it is not clear that the plan was successful.¹⁴⁹ Thus, the effects of the overburdening might have continued through the rest of the study period, limiting the number of verified improper grants found by reducing the number of reversals.

Another study of appellate review paints a particularly bleak picture for civil rights plaintiffs.¹⁵⁰ The authors, Clermont and Eisenberg, find a considerable prodefendant bias in the treatment of such appeals.¹⁵¹ Not only is such a bias troubling given the value placed on impartiality in the judiciary,¹⁵² it also suggests improper grants occur most often in the types

146. See Huang, *Lightened Scrutiny*, supra note 144, at 1122 ("I am able to focus on a source of docket pressure (direct appeals from a single federal agency's decisions) that is otherwise unrelated to the cases whose outcomes I measure (civil cases being appealed from the district courts)."). The docket pressure in question was the Department of Justice's decision in the wake of the attacks to clear a deportation backlog, resulting in "a deluge of petitions for review in the U.S. courts of appeals." *Id.* at 1122–23.

147. See *id.* at 1130 ("During the surge period, both the Second and Ninth Circuits show marked declines in how often they reversed decisions of the district courts.").

148. Compare *id.* at 1147 (studying period 1997–2005), with supra Part II.B (limiting study to 2000–2006).

149. See Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 *Brook. L. Rev.* 429, 434–35 (2009) (describing how, after initial success in reducing backlog, increased filings overcame reductions). It should be noted that the Second Circuit also changed procedures so that fewer immigration cases would burden its judges at any given time. *Id.* at 435.

150. Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 *U. Ill. L. Rev.* 947 [hereinafter Clermont & Eisenberg, *Plaintiphobia*].

151. *Id.* at 948 ("Defendants succeeded surprisingly more than plaintiffs on appeal from civil trials, and especially from jury trials. Defendants . . . obtained reversals at a 28% rate, while losing plaintiffs succeeded in only 15% of their appeals, with the spread increasing to 31% and 13% for appeals from jury trials.").

152. See, e.g., Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 *S. Cal. L. Rev.* 313, 315 n.9 (2012) (discussing foundations for American tradition of impartial judging).

of cases in which appellate courts are the most hostile to appeals by plaintiffs.¹⁵³ This suggests that the true error rate for improper summary judgment grants is even higher than this Note's results indicate, as improper summary judgments not appealed escape appellate scrutiny.

3. *Settlement and Inconclusive Outcomes.* — Because only jury verdicts for the nonmovant contradict improper summary judgment grants, cases that settled at any point and jury trials that ended with consistent verdicts were excluded from this Note's tally of verified improper grants. Movants, particularly defendants, are unlikely to take a case to trial after an adverse appellate ruling on summary judgment.¹⁵⁴ Statistically, the jury trial requirement alone reduced the population of eligible cases to roughly sixteen thousand.¹⁵⁵ Compounding this is the fact that the verdict must be for the nonmovant, further constricting the sample. Yet while only nonmovant verdicts conclusively demonstrate that a reasonable jury could find for the nonmoving party, juries that find for the movant do not necessarily validate the trial court's summary judgment decision. While a particular jury might not have found for the nonmovant, because the standard is that *no* reasonable jury could find for the nonmovant, the possibility still exists that a different reasonable jury would have sided with the nonmovant.¹⁵⁶ In some sense then, some portion of cases excluded from the sample because of a verdict for the movant could arguably be counted toward the error rate, as the court of appeals found the grant of summary judgment to have been in error.

* * *

Together, these factors—the limited appellate scrutiny, the low number of summary judgments and trials, and the likelihood of settlement—all suggest that, in fact, the true rate at which trial judges improperly grant summary judgment when an issue of material fact remains is higher than the low error rate found by this Note.

B. *Summary Judgment and Civil Rights*

Beyond the robust debate on summary judgment generally, much of the literature focuses on the propriety of summary judgment in specific

153. See Clermont & Eisenberg, *Plaintiphobia*, supra note 150, at 957 (“The defendant/plaintiff differential is large in all the civil rights categories, but it is largest in the [Jobs category], where minorities and females are the predominant types of plaintiffs. In these cases, plaintiffs obtain appellate reversals of trial wins by defendants in less than 6% of their appeals.”).

154. Cf. Bronsteen, supra note 93, at 529 (explaining defendants usually settle cases immediately after summary judgment is denied “because litigating after a denial of summary judgment costs money (attorneys’ fees) and risks the nightmare outcome of an adverse judgment”).

155. See supra note 116 (describing data source and method for calculating estimate).

156. See supra Part II.A (explaining significance of verdict for nonmovant).

types of cases, particularly civil rights cases. This scholarship argues that the nature of the evidence involved makes the procedure ill-suited to civil rights cases and shows civil rights claims are, predictably, dismissed on summary judgment at a disproportionate rate. Given the prevalence of civil rights cases among the verified improper grants, it is worth considering how this result fits into this context.

Scholars argue that trials are especially important in civil rights cases. These cases often depend on issues of credibility and intent of witnesses, the determination of which likely requires live testimony.¹⁵⁷ Because summary judgment is based on affidavits and deposition records, it does not reflect important insights that live testimony can provide.¹⁵⁸ Further, civil rights plaintiffs, and society at large, may be particularly interested in having these claims heard in a public trial, even if the outcome is ultimately unfavorable.¹⁵⁹ In addition, federal judges may be unconsciously hostile to civil rights and, in particular, discrimination claims and plaintiffs. Even today, the federal judiciary is over sixty percent white and sixty percent male.¹⁶⁰ Yet studies have empirically shown how judicial behavior can vary based on a judge's personal background. Weinberg and Nielsen powerfully demonstrate that white judges grant summary judgment in employment discrimination cases more often than minority judges do.¹⁶¹ Appellate judges with daughters are also more sympathetic to female plaintiffs in employment discrimination cases.¹⁶² And judges may be out of touch with the workplace experiences of most Americans.¹⁶³ Together, these points should counsel caution

157. McGinley, *supra* note 73, at 208.

158. See *id.* at 208–09 (arguing civil rights cases “most often turn on subtle questions of credibility and intent that only a factfinder faced with a live witness should decide”).

159. See Schneider, *Changing Shape*, *supra* note 42, at 570 (“The historic role of federal courts in the protection of civil rights and freedom from discrimination is at stake.”); Schneider, *Dangers*, *supra* note 82, at 713 (“[T]he presentation of live evidence before a jury and the telling of the full story in a public setting can make an important difference to a plaintiff, even if she ultimately loses. She will have had her day in court” (internal quotation marks omitted)); see also Chin, *supra* note 18, at 676 (noting for employment discrimination cases, “[o]n the employee side, there may be bruised egos, shattered self-esteem, and a need for vindication”).

160. Phillip Rucker, *Obama Pushing to Diversify Federal Judiciary amid GOP Delays*, *Wash. Post* (Mar. 3, 2013), http://www.washingtonpost.com/politics/obama-pushing-to-diversify-federal-judiciary-amid-gop-delays/2013/03/03/16f7d206-7aab-11e2-9a75-dab0201670da_story.html (on file with the *Columbia Law Review*).

161. Weinberg & Nielsen, *supra* note 152, at 320, 338–39.

162. See Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 *Am. J. Pol. Sci.* 37, 43, 47 (2014) (showing appeals court judges with at least one daughter vote in more “feminist” fashion on gender issues).

163. For instance, in sexual harassment cases, judges may well have a skewed view of what most people would view as harassment. See Beiner, *supra* note 40, at 846 (“Courts often judge harassment incorrectly, granting summary judgment or judgment as a matter of law in questionable cases, given what social science tells about people's perceptions of harassment.”).

when federal judges are faced with summary judgment motions in civil rights cases.¹⁶⁴

Yet, there is empirical evidence to suggest that judges have taken the opposite tack. A report by the Federal Judicial Center found that summary judgment motions were more likely to be made and granted in employment discrimination litigation.¹⁶⁵ Judges also appear to be more hostile to civil rights claims than are juries when considering evidence at trial.¹⁶⁶ And civil rights plaintiffs cannot rely on appellate courts to balance the scales and catch many improper grants.¹⁶⁷ This Note found that a number of civil rights plaintiffs were very nearly denied their constitutional rights and relief justice. Roughly two-thirds of verified improper grants were civil rights cases.¹⁶⁸ Of course, due to the limited nature of this study, it would be risky to generalize this result to all summary judgment grants to show that the increased rate of summary judgment in

164. It is worth noting that these studies do not explicitly account for the potential influence of law clerks. For instance, if clerks influence outcomes by reviewing summary judgment submissions and drafting opinions, Gerald Lebovits, *Judges' Clerks Play Varied Roles in the Opinion Drafting Process*, N.Y. St. B.A. J., July/Aug. 2004, at 34, 35, the literature may be attributing to judges biases that emanate from their clerks. Conversely, clerks could serve a moderating function by exposing their judges to additional perspectives. Cf. Todd C. Peppers et al., *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 Alb. L. Rev. 623, 636 (2008) (noting some judges use their clerks as sounding boards); Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 Ariz. St. L.J. 1, 50 (2007) (“[W]omen are more likely to clerk for district court judges than men . . .”).

More broadly, it bears repeating that both these statistics and those found by this Note are only correlations: They do not show that these factors *cause* judges to behave a certain way. For instance, it is possible that the ability of certain types of lawyers or those in a particular circuit varies, thus making it more or less difficult for trial judges (or their clerks) to detect when a genuine issue of material fact exists. But such a correlation would still support more scrutiny, as judges would need to be more careful to catch attorney error in those cases.

165. Cecil & Cort Memo, *supra* note 93, at 3 (“[I]n employment discrimination cases, . . . [s]ummary judgment motions by defendants are more common[,] . . . more likely to be granted . . . , and more likely to terminate the litigation . . .”). A number of other studies have tried to determine the rate of summary judgment grants in various types of civil rights cases. See Berger et al., *supra* note 76, at 54–55 (finding more than half of dispositive summary judgment motions in employment discrimination cases in certain districts in the Second Circuit were granted); Eisenberg, *Equal Pay*, *supra* note 73, at 839 tbl.8 (finding summary judgment was granted in three-quarters of Title VII cases with equal-pay claims between 2000 and 2011).

166. Clermont & Eisenberg, *Transcending Empiricism*, *supra* note 34, at 1175 app.A (showing plaintiffs in employment discrimination cases prevailed before juries at nearly twice rate they won trials in front of judges).

167. See Eisenberg, *Equal Pay*, *supra* note 73, at 817 (reporting appellate courts affirmed summary judgment grants in ninety-two percent of equal-pay cases); see also Brunet, *Safeguards*, *supra* note 45, at 1182 (“[T]he considerable expense demanded by the hands-on nature of de novo review diminishes the potential breadth of [de novo appellate review].”).

168. See *supra* Part II.B.2 (showing number of verified improper grants by case type).

civil rights cases reflects a higher rate of improper grants. The data reported here cannot confirm fears that summary judgment is particularly inappropriate in civil rights litigation. Nonetheless, the prevalence of civil rights cases among verified improper grants is consistent with these fears and shows that they are by no means unfounded. This Note's data should give further pause to judges granting summary judgment in civil rights cases.

CONCLUSION

Summary judgment allows a judge to dismiss a case without a trial based on a lack of genuine dispute as to any material fact. Until now, scholarly criticism of summary judgment has mainly relied on a theorized increase in the rate at which summary judgment is granted. This Note addresses the unexplored area of whether any summary judgment grants are improper by collecting a previously unexamined set of cases exhibiting a rare, yet disturbing, phenomenon: In these cases, the trial judge granted summary judgment for the movant, the court of appeals reversed, and the case was tried to a jury who returned a verdict for the nonmoving party. These cases prove that judges sometimes err in their determination of what a jury could reasonably find, and they also suggest that these mistakes occur more frequently in civil rights cases. Though the litigants in these cases were not ultimately deprived of their day in court or recovery, they were forced to endure the appellate process, incurring additional litigation costs and delay, sometimes over several years. And while further study of this topic is necessary to better understand why and how often judges grant summary judgment improperly, this Note provides the first concrete proof that summary judgment does, in some cases, reject meritorious claims.

APPENDIX

A. *Detailed Methodology*

1. *Commercial Legal Databases.* — Each of the three major legal-research providers' search functions and dockets operated differently. For instance, not all federal dockets were available in WestlawNext.¹⁶⁹ Bloomberg Law dockets are drawn from PACER.¹⁷⁰ Bloomberg Law's search function, however, limits proximity connectors to 255 words.¹⁷¹ Lexis Advance purports to have the same restriction,¹⁷² but in fact, Lexis Advance allows connectors below 100,000. Unfortunately, some of the dockets on Lexis Advance were incomplete, out of chronological order, or lacking more recent entries.¹⁷³ Thus, it is possible that some cases with improper grants were not included in the search results while some cases without such grants were incorrectly included. Nonetheless, because of the greater scope allowed for by the search constraints, this Note uses a Lexis Advance search of dockets to retrieve improper grants.

2. *Search Parameters.* — Four searches were performed to identify improper grants. The searches used the following general format:

(grant! /para ([SUMMARY JUDGMENT TERM])) pre/99999
("appeal" pre/99999 ("reversed" or "reversing" or "vacated"
or "vacating") pre/99999 ("jury trial" pre/99999 "verdict"))).

The terms which were used in place of [SUMMARY JUDGMENT TERM] for each search were "sum!," "rule 56," "s/j," and "sj."

169. See Lynn Lenart, Comparing WestlawNext, Lexis Advance and Bloomberg Law 1 (2013), available at http://www.uakron.edu/law/library/docs/chart_comparing_3_research_systems.pdf (on file with the *Columbia Law Review*) (last visited Jan. 5, 2014) (noting "[o]nly some state and federal dockets [are] available" in WestlawNext).

170. See, e.g., Jennifer L. Behrens, J. Michael Goodson Law Library, Duke Univ. Sch. of Law, Research Guides: Court Records and Briefs 5 (Jan. 2014), available at <http://law.duke.edu/sites/default/files/lib/recordsbriefs.pdf> (on file with the *Columbia Law Review*) ("Generally, all documents which are available in the paid version of PACER are also available through Bloomberg Law."); Lenart, supra note 169, at 1 (noting Bloomberg Law has federal dockets from PACER); Michael J. Robak, Getting a Better Bead on Bloomberg Law, Spectrum Online, <http://www.aallnet.org/main-menu/Publications/spectrum/Spectrum-Online/bloomberg-law.html> (on file with the *Columbia Law Review*) (last visited Jan. 5, 2014) ("Bloomberg Law Docket searching actually provides searching across Bloomberg Law's version of PACER . . .").

171. Legal Search Help, BloombergLaw.com, http://www.bloomberglaw.com/help/Leg_Legal_Search_Operators.htm (on file with the *Columbia Law Review*) (last visited Jan. 5, 2014).

172. See Lexis Advance Help, LexisNexis, http://help.lexisnexis.com/tabularasa/newlexis/n_ref-reference?lbu=US&locale=en_US&audience=all,res,shep,lpa,lps,med,pub,ysa (on file with the *Columbia Law Review*) (last visited Jan. 5, 2014) (noting "you may choose a number for n as large as 255" for "/n" connector).

173. See Docket Research, Yale Law Sch., <http://library.law.yale.edu/docket-research> (on file with the *Columbia Law Review*) (last visited Jan. 5, 2014) ("Some docket information in Lexis Advance appears to be incomplete.")

Each set of terms had several components to counter variability in docket-entry phrasing. First, the term (“jury trial” *pre/99999 verdict*) was used to screen out cases where there might have been a jury trial or proposed verdict form submitted without an actual jury verdict. For instance, many dockets used the “Verdict Form” entry to indicate a jury verdict; however, searching for only this term would have excluded others that used alternate language while also including dockets where the parties only submitted proposed verdict forms. Second, the same term was required to follow within 99,999 words of one of four words used to indicate a prior judgment had been rejected, as well as to screen out cases only including an initial jury demand. This language was required to follow the word “*appeal*” to screen out cases where a magistrate judge’s Report and Recommendation might be reversed by a district court without resort to an appellate court. Finally, all of these terms needed to follow the phrase (*grant! /para (sum!)*), (*grant! /para (“rule 56”)*), (*grant! /para (“s/j”)*), or (*grant! /para (“sj”)*), which required the docket to have some form of the word “grant” within the same paragraph of some form of the word “sum,” “rule 56,” “s/j,” or “sj.”¹⁷⁴ While this captures both “motion for summary judgment granted” as well as “granting motion for s/j,” it comes at the cost of including cases with entries where summary judgment was either only partially granted, or denied at the same time as some other motion was granted.

B. *U.S. Courts Statistics*

Most of the aggregate data about the federal judicial system in this Note is drawn from tables published by the Administrative Office of the United States Courts (the “AO”). The AO publishes an annual report, the *Judicial Business of the United States Courts*, which contains numerous tables of information about the federal courts.¹⁷⁵ The annual report presents statistics for the fiscal year ending on September 30th of the year,¹⁷⁶ but the AO also makes available a more limited set of statistics compiled on a December 31st basis.¹⁷⁷ The following tables excerpt data from these compilations.

174. See Cecil et al., *supra* note 77, at 879 n.54 (using following terms to find summary judgment motions: “summary judgment,” “summary adjudication,” “sum jgm,” “summ jgm,” “sum adj,” “summ adj,” “s/j,” “sj,” “rule 56,” “summary jgm,” “summary adj,” and “summary”).

175. Reports from 1997 to 2012 are available at Judicial Business Archive, Admin. Office of the U.S. Courts, <http://www.uscourts.gov/Statistics/JudicialBusiness/archive.aspx> (on file with the *Columbia Law Review*) (last visited Feb. 1, 2015).

176. E.g., *Judicial Business of the United States Courts*, Admin. Office of the U.S. Courts (2013), <http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx> (on file with the *Columbia Law Review*).

177. Statistical Tables for the Federal Judiciary, Admin. Office of the U.S. Courts, <http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary.aspx> (on file with the *Columbia Law Review*) (last visited Feb. 1, 2015).

FIGURE 3: CIVIL CASES FILED EACH YEAR (ENDING DECEMBER 31)
BY CASE TYPE¹⁷⁸

Type of Case	2000 ¹⁷⁹	2001	2002	2003	2004	2005	2006
Contract Actions	51,965	40,605	34,718	31,111	28,839	27,593	33,098
Real Property Actions	6,939	7,366	8,104	7,167	5,386	4,468	4,195
Tort Actions	34,692	45,481	44,686	47,158	52,209	48,764	74,234
Antitrust	877	701	830	758	759	820	1,078
Bankruptcy	3,343	2,876	4,200	3,451	4,023	2,881	3,563
Banks And Banking	195	218	246	243	382	220	200
Civil Rights	41,037	40,485	40,733	40,250	39,307	34,998	32,736
Commerce (ICC Rates, Etc.)	555	585	585	546	452	-	-
Environmental Matters	939	1,771	777	976	962	865	781
Deportation	229	197	341	286	294	169	144
Prisoner Petitions	58,531	57,921	55,830	53,819	57,576	60,045	54,056
Forfeiture and Penalty	2,168	2,048	2,132	2,034	2,157	2,326	2,249
Labor Laws	14,308	15,596	18,259	17,811	18,256	17,926	18,925
Protected Property Rights (IP)	8,640	8,404	8,333	9,190	10,176	12,009	11,499
Securities, Commodities, and Exchanges	2,813	3,554	3,476	3,110	2,900	1,867	1,604
Social Security Laws	17,403	16,900	18,412	16,631	16,239	14,563	13,729
Rico	826	687	793	732	839	694	683
State Reapportionment Suits	3	23	13	1	7	7	6
Tax Suits	941	1,042	1,225	1,239	1,340	1,361	1,547

178. This data is taken from Table C-2, "Cases Commenced, by Basis of Jurisdiction and Nature of Suit," of the *Statistical Tables for the Federal Judiciary* calendar-year report because it aligns with the time frame used in the Note. Only years 2000 through 2006 are shown because the sample used in the Note was taken from cases filed in the same time period.

179. Because the compilation, which breaks down the filings by plaintiff, is only available as far back as 2001, but each year's publication includes summary data for the prior year, the data presented here for 2000 is taken from the 2001 publication. Admin. Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary: December 31, 2001*, at 28-30 tbl.C-2 (2002), available at <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2001/dec01/c02dec01.pdf> (on file with the *Columbia Law Review*).

Type of Case	2000 ¹⁷⁹	2001	2002	2003	2004	2005	2006
Customer Challenge	10	14	13	9	18	16	19
Freedom of Information Act	340	314	263	291	417	292	313
Constitutionality of State Statutes	276	254	261	281	303	325	290
Other Statutory Actions	10,792	12,869	12,323	20,115	33,976	13,261	15,109
Other Actions	10	16	9	25	125	105	113
Total	257,842	259,943	256,571	257,259	276,942¹⁸⁰	245,575	270,171¹⁸¹

FIGURE 4: CIVIL CASES FILED EACH YEAR (ENDING DECEMBER 31)
BY CIRCUIT COURTS OF APPEALS¹⁸²

Circuit	2000	2001	2002	2003	2004	2005	2006
DC	3,228	2,838	2,686	2,770	2,423	2,635	2,388
1st	6,901	6,427	6,738	6,490	6,589	6,198	5,806
2nd	25,523	28,734	24,003	23,538	22,692	23,480	27,275
3rd	22,188	21,855	26,689	24,450	32,239	27,471	46,774 ¹⁸³
4th	21,137	26,511	22,565	21,337	39,553	18,407	17,435
5th	31,180	30,566	33,130	34,859	30,458	33,596	36,633

180. The temporary increase in 2004 is primarily due to over 19,000 cases involving “high-risk mortgage loans to consumers . . . filed against a single defendant” in the District of South Carolina. Admin. Office of the U.S. Courts, Judicial Business 12 (2005), available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2005/front/mar05JudBus.pdf> (on file with the *Columbia Law Review*).

181. Part of this increase is due to an influx of over 10,000 asbestos cases in the Eastern District of Pennsylvania. Admin. Office of the U.S. Courts, Judicial Business 22 (2006), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/front/judicialbusiness.pdf> (on file with the *Columbia Law Review*). The number of these such cases may be even higher, as the number of Other Product Liability case filings also rose by about 7,000. Admin. Office of the U.S. Courts, Statistical Tables for the Federal Judiciary: December 31, 2001, at 28 tbl.C-2 (2002), available at <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2006/dec06/c02dec06.pdf> (on file with the *Columbia Law Review*).

182. This data is taken from Table C, “U.S. District Courts—Civil Cases Commenced, Terminated, and Pending” of the *Statistical Tables for the Federal Judiciary* calendar-year report because it aligns with the time frame used in the Note. Only years 2000 through 2006 are shown because the sample used in the Note was taken from cases filed in the same time period. As with Figure 3, the data for the year 2000 were taken from the 2001 table. See *supra* note 179.

183. For an explanation for this sudden increase, see *supra* note 181.

Circuit	2000	2001	2002	2003	2004	2005	2006
6th	26,084	24,204	22,741	22,363	23,321	23,613	20,847
7th	19,273	21,470	20,932	19,912	18,752	16,803	16,375
8th	14,379	14,462	16,384	17,881	17,907	15,548	16,437
9th	44,711	41,649	41,537	43,383	43,256	40,875	41,759
10th	12,141	11,290	11,703	11,432	11,186	10,354	9,886
11th	31,087	29,921	27,454	28,819	28,566	26,595	28,556
Total	257,832	259,927	256,562	257,234	276,942	245,575	270,171

FIGURE 5: JURY TRIALS COMPLETED EACH YEAR (ENDING SEPTEMBER 30)
BY CIRCUIT COURTS OF APPEALS¹⁸⁴

Circuit	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
DC	3	33	18	22	18	16	20	16	14	10	15	23	22
1st	148	117	130	143	115	113	99	103	122	122	92	77	50
2nd	483	383	353	274	280	249	213	228	224	246	264	235	269
3rd	331	326	269	270	238	254	204	243	218	160	178	190	202
4th	284	227	188	159	172	142	148	120	113	117	124	125	153
5th	429	345	312	313	292	270	283	287	275	292	283	251	238
6th	302	270	231	233	196	197	202	209	185	221	198	168	159
7th	237	231	194	152	164	169	160	166	164	126	154	207	176
8th	279	243	210	218	183	200	168	150	134	147	124	127	188
9th	316	303	300	289	281	287	264	347	309	305	297	321	313
10th	209	190	167	206	202	176	124	130	127	129	140	117	128
11th	363	312	278	324	270	239	212	270	290	263	285	242	238
Total	3,404	2,980	2,650	2,603	2,411	2,312	2,097	2,269	2,175	2,138	2,154	2,083	2,136

184. This data is excerpted from Tables C-7 and T-1, "U.S. District Courts—Civil and Criminal Trials Completed, by District," from the *Judicial Business of the United States Courts* fiscal-year reports because these tables are not available in *Statistical Tables for the Federal Judiciary* calendar-year reports. As a result, the statistics do not align perfectly with the time period of this Note nor those in Figure 6, *infra*.

FIGURE 6: CIVIL RIGHTS AND TOTAL JURY TRIALS BEGUN EACH YEAR
(ENDING DECEMBER 31)¹⁸⁵

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Percentage of Civil Rights Jury Trials	45.6%	45.6%	45.6%	45.6%	45.6%	45.6%	45.6%	45.6%	45.6%	45.6%	45.6%	45.6%
Civil Rights Jury Trials	1323	1238	1121	1074	1083	962	976	886	857	879	907	877
Total Jury Trials ¹⁸⁶	2902	2667	2406	2333	2291	2183	8468 ¹⁸⁷	1965	2038	1975	2018	1918

C. *Verified-Improper-Grant Cases*

FIGURE 7: VERIFIED-IMPROPER-GRANT CASES

Case Name	Docket #	Circuit	Type of Case
Becker v. Kroll	02-00024	10th	Civil Rights
Betton v. St. Louis County	05-01455	8th	Civil Rights
Burstein v. Emtel, Inc	03-60474	11th	Civil Rights
Charles Barnard v. Las Vegas Metropolitan Police Department	03-01524	9th	Civil Rights
Colussi v. Woodruff Family	01-01898	3rd	Civil Rights
Defrietas v. Horizon Investment & Management	06-00926	10th	Civil Rights
Duncan v. Fleetwood Motor Homes of Indiana, Inc.	06-00042	7th	Civil Rights
Edward Y.S. Lee v. TRW Inc.	02-05172	9th	Civil Rights
Eeoc v. Warfield-Rohr Casket	01-02872	4th	Civil Rights
Eliserio v. Bridgestone/Firestone, Inc.	02-70159	8th	Civil Rights

185. This data is taken from Table C, “U.S. District Courts—Civil Cases Commenced, Terminated, and Pending” of the *Statistical Tables for the Federal Judiciary* calendar-year report because it aligns with the time frame used in the Note.

186. These sums are exclusive of prisoner and social security cases. See *supra* note 115 (noting exclusion from prior studies).

187. “The substantial increase in 2007 resulted from the disposition of more than 6,300 oil refinery explosion cases in the Middle District of Louisiana that had been pending more than 10 years.” Admin. Office of the U.S. Courts, Judicial Facts and Figures 2011 tbl.6.3 n.1 (2011), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2011/Table603.pdf> (on file with the *Columbia Law Review*); see also Marc Galanter & Angela Frozena, The Continuing Decline of Civil Trials in American Courts 6 n.3, 21 n.10 (2011), available at <http://poundinstitute.org/docs/2011%20judges%20forum/2011%20Forum%20Galanter-Frozena%20Paper.pdf> (on file with the *Columbia Law Review*) (attributing inflated number to “large number of misreported cases in the Middle District of Louisiana related to oil refinery explosions”).

Case Name	Docket #	Circuit	Type of Case
Gaskins v. BFI Waste Service	02-01832	4th	Civil Rights
Gonzalez v. City of Elgin	06-05321	7th	Civil Rights
Green v. City of New York	01-01996	2nd	Civil Rights
Haneke v. Mid-Atlantic Capital Management	03-02807	4th	Civil Rights
Herman Atkins v. County of Riverside	01-01574	9th	Civil Rights
Johnson v. Ganim	00-01556	2nd	Civil Rights
Justice v. Crown Cork & Seal Co.	06-00066	10th	Civil Rights
Kelley v. Doc's Transfer & Warehouse	02-01766	11th	Civil Rights
Marable v. Nitchman	05-01270	9th	Civil Rights
McClellan v. City of Rensselaer	02-01141	2nd	Civil Rights
Mitchell v. American Family Care Medical Centers	01-00362	11th	Civil Rights
Mock v. Bell Helicopter Textron, Inc.	04-01415	11th	Civil Rights
Moreno v. City of Sacramento	01-00725	9th	Civil Rights
Myers v. Central Florida Investments, Inc.	04-01542	11th	Civil Rights
Pena v. Meeker	00-04009	9th	Civil Rights
Perez-Cordero v. Walmart PR, Inc.	01-02383	1st	Civil Rights
Randolph v. Indiana Regional Council of Carpenters & Millwrights, Millwright Local Union 1003	03-00092	7th	Civil Rights
Rashad v. Fulton County Department of Health & Wellness	05-01658	11th	Civil Rights
Shaver v. Independent Stave	01-01354	8th	Civil Rights
Spiegla v. Hull	01-00075	7th	Civil Rights
St. John v. Hickey	02-00682	6th	Civil Rights
Swanson v. City of Bruce	00-00194	5th	Civil Rights
Taylor v. Bishop State	02-00309	11th	Civil Rights
Terry v. City of San Diego	06-01459	9th	Civil Rights
Thompson v. University of California Regents	00-01009	9th	Civil Rights
Tobin v. Liberty Mutual Group	01-11979	1st	Civil Rights
Tomasso v. Boeing Co.	03-04220	3rd	Civil Rights
Turner v. Ashcroft	01-01407	8th	Civil Rights
Velez v. Thermo King De Puerto Rico, Inc.	03-02307	1st	Civil Rights
Wallace v. DTG Operations, Inc.	03-06055	8th	Civil Rights

Case Name	Docket #	Circuit	Type of Case
Adams v. Travelers Indemnity	03-01333	5th	Contract
Cranpark, Inc. v. Rogers Group Inc.	04-01817	6th	Contract
John M. Floyd & Associates, Inc. v. Ocean City Home Bank	03-01473	3rd	Contract
Justofin v. Metropolitan Life	01-06266	3rd	Contract
Liac Inc. v. Founders Insurance Co.	01-72995	6th	Contract
Massachusetts Eye & Ear v. QLT Phototherapeutic	00-10783	1st	Contract
United States v. 3234 Washington Ave	03-05765	8th	Forfeiture/Penalty
Bell v. Prefix, Inc.	05-74311	6th	Labor
Elliott v. Wackenhut Correction	00-05479	9th	Labor
Michael Marlo v. United Parcel Service	03-04336	9th	Labor
O'Quinn v. Raley's & Bel Air	02-00308	9th	Labor
Posada v. James Cello, Inc.	02-23207	11th	Labor
Scott Teutscher v. Riverside Sheriffs Ass'n	06-01208	9th	Labor
Supinski v. United Parcel Service, Inc.	06-00793	3rd	Labor
American Steel Erectors, Inc. v. Local Union No. 7	04-12536	1st	Other Statutes
Thompson v. Aramark Corp.	04-00339	6th	Other Statutes
Amini Innovation v. Anthony California	03-08749	Federal	Property Rights
Georgia-Pacific v. Von Drehle Corp.	05-00478	4th	Property Rights
Infant Swimming Research, Inc. v. Shideler	00-00731	10th	Property Rights
Omegaflex, Inc. v. Parker Hannifin	02-30022	Federal	Property Rights
Uniloc USA, Inc. v. Microsoft Corp.	03-00440	Federal	Property Rights
Zobmondo Entertainment LLC v. Falls Media LLC	06-03459	9th	Property Rights
Magan v. Lufthansa German	00-05788	2nd	Torts
Martinez v. Brink's, Inc.	01-08393	11th	Torts
Mitrione v. Monroe	02-00526	2nd	Torts

