

# QUESTIONING THE EFFICIENCY OF SUMMARY JUDGMENT

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*The primary justification for summary judgment is efficiency, but the motion's efficiency has been largely assumed. Avoiding trials reduces costs, but that savings is only realized when the motion is granted. This Note offers a framework for analyzing the efficiency of summary judgment. If the cost of trials avoided does not exceed the cost of summary judgment motions filed, then summary judgment is inefficient. Modern doctrine places a low production burden on defendants moving for summary judgment and a high production burden on plaintiffs opposing the motion, creating incentives for defendants to file many motions and for plaintiffs to incur substantial costs in opposing them. If the motion is not granted with enough frequency and does not have a positive impact on the settlement rate, then its availability and use may cost more than the trials it avoids. Drawing on available empirical data and assumptions based on the incentives of the parties, this Note goes on to lay out some of the conditions necessary for summary judgment to be efficient and concludes with a call for more empirical investigation into the success rate of summary judgment motions and the costs of litigation.*

## INTRODUCTION

The primary justification for summary judgment has always been efficiency. The motion has drawn a great deal of criticism as unfair to plaintiffs or as infringing on the Seventh Amendment right to a jury trial.<sup>1</sup> But summary judgment has been consistently defended as a means to reduce costs by avoiding unnecessary trials.<sup>2</sup>

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<sup>1</sup> See, e.g., 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, 1093 (2003) (noting that "hyperactive use of pretrial motions threatens long-standing constitutional values"); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 181–205 (2000) (evaluating current applications of summary judgment that "press against tolerable constitutional limits"); 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, 162–70 (1988) (noting evaluation of facts is generally regarded as jury function).

<sup>2</sup> See, e.g., Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1041–42 (1988) (stating that

The efficiency of summary judgment, however, has been largely assumed.<sup>3</sup> Some commentators have suggested that it may be inefficient,<sup>4</sup> but no one has yet conducted a systematic examination of the efficiency of summary judgment.<sup>5</sup> While it seems intuitive that avoiding costly trials would save money, that savings is only realized when summary judgment is granted. Modern summary judgment, however, is a frequently used motion that is costly to oppose and, if not granted often enough, may be a net drain on society.

In the much discussed 1986 Trilogy of summary judgment cases,<sup>6</sup> the Supreme Court rejuvenated the motion by reducing the burden on the moving party and increasing the amount of evidence that the non-movant must present to survive the motion. The Court also seemed to sanction broader factual review at the pretrial stage. These doctrinal changes, made in the name of efficiency, have resulted in an expensive and frequently used motion that may not achieve the cost savings the Court envisioned.

In a general sense, if the total savings in trial costs avoided through summary judgment does not exceed the total cost of motions made then summary judgment is inefficient in the aggregate. This Note will present a framework for testing the efficiency of summary judgment. Unfortunately, empirical data on summary judgment (and the costs of litigation in general) are difficult to come by, so concrete answers on the efficiency of the motion are not available. This Note, however, provides a sense of what conditions would have to be satisfied for summary judgment to be efficient.

Part I examines the primary justification for summary judgment and the doctrinal changes made in pursuit of efficiency. Part II lays out a framework for the analysis of the efficiency of summary judgment.

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increased pressure of court congestion and escalating litigation costs paved way for more liberal application of summary judgment); sources cited *infra* note 66.

<sup>3</sup> Miller, *supra* note 1, at 1093. For the purposes of this Note, I am examining efficiency from a societal standpoint along the Kaldor-Hicks model. When I ask if summary judgment is efficient, I am asking whether, in the aggregate, the availability and use of summary judgment results in a net savings to the parties, the judicial system, and society as a whole in the resolution of civil disputes.

<sup>4</sup> E.g., Morton Denlow, *Summary Judgment: Boon or Burden?*, JUDGES' J., Summer 1998, at 26; Milton I. Shadur, *Trials or Tribulations (Rule 56 Style?)*, LITIG., Winter 2003, at 5; see also Miller *supra* note 1, at 1047-48.

<sup>5</sup> Samuel Issacharoff and George Loewenstein performed a detailed game theoretic analysis of the effects of summary judgment on settlement and concluded that its effects were unclear, but not likely to be efficient. See Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990). They did not, however, address the efficiency of the motion on cases that did not settle. I discuss Issacharoff and Loewenstein's findings in Part II.C, *infra*.

<sup>6</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

ment. Part III identifies some of the conditions necessary for the motion to be efficient through the use of a stylized model and some assumptions drawn from the available empirical data. This Note concludes with a call for more empirical investigation into the costs of different stages of litigation and the success rate of summary judgment motions.

## I

### DOCTRINE AND JUSTIFICATIONS

Rule 56 of the Federal Rules of Civil Procedure allows a court to enter summary judgment for either party if “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.”<sup>7</sup> The stated purpose of summary judgment is to avoid unnecessary trials by “promptly disposing of actions in which there is no genuine issue as to any material fact.”<sup>8</sup> The rule does not, however, offer specific guidance on how a court should determine the existence of such a material fact. Section A of this Part traces the evolution of summary judgment from a disfavored motion that courts were reluctant to grant except in the clearest case through the 1986 Trilogy. Section B discusses how the doctrinal changes wrought by the Trilogy strengthened summary judgment, and Section C examines modern uses of the motion. Section D examines the justification offered for summary judgment in the face of fairness criticisms.

#### A. *A Brief History of Summary Judgment*

Summary judgment has evolved a great deal, but from its inception its purpose has been to increase efficiency in the court system. Summary judgment began as a plaintiff’s motion in nineteenth-century England where it was used to pierce “sham” defenses in debt actions involving liquidated damages.<sup>9</sup> Forms of summary judgment were available in several U.S. jurisdictions prior to the adoption of the Federal Rules in 1938,<sup>10</sup> but the use of summary judgment was not widespread or consistent.<sup>11</sup> Its purpose, however, was clear: “to pre-

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<sup>7</sup> FED. R. CIV. P. 56(c).

<sup>8</sup> FED. R. CIV. P. 56 advisory committee’s note.

<sup>9</sup> Edson R. Sunderland, *An Appraisal of English Procedure*, 24 MICH. L. REV. 109, 111 (1925); see also Issacharoff & Loewenstein, *supra* note 5, at 76.

<sup>10</sup> See Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 440–69 (1929) (discussing state summary judgment procedures).

<sup>11</sup> Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 594–600 (2004) (“Summary judgment prior to the Federal Rules was in fact a collection of very different tools of very different (and usually very limited) scope.”); see also Issacharoff &

serve the court from frivolous defences [sic] and to defeat attempts to use formal pleadings as means to delay the recovery of just demands."<sup>12</sup>

The adoption of Rule 56 expanded the availability of the motion to both parties in all types of actions,<sup>13</sup> but its purpose remained the same. The architects of the rule saw summary judgment as a way to reduce "law's delay" and help clear crowded court dockets.<sup>14</sup>

Federal courts treated summary judgment cautiously after the adoption of the Rules. The Second Circuit, for example, limited summary judgment to cases in which there was not the "slightest doubt" about the relevant facts.<sup>15</sup> The Supreme Court also took a cautious view of summary judgment in *Poller v. CBS*, when it reversed a grant of summary judgment in an antitrust action.<sup>16</sup> The Court was unwilling to weigh facts, especially concerning motive and intent, or make a credibility judgment because the issue was disputed in the pleadings.<sup>17</sup> In *Adickes v. S.H. Kress & Co.*, the Court addressed the burdens on the parties in a summary judgment motion, holding that the moving party bears the production burden of affirmatively "showing the absence of any genuine issue of fact."<sup>18</sup> If the moving party was unable to meet this initial burden, then the nonmovant "was not required to come forward with suitable opposing affidavits."<sup>19</sup>

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Loewenstein, *supra* note 5, at 76–78 (remarking that uncertain standards of summary judgment limited its early usage).

<sup>12</sup> *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902).

<sup>13</sup> *See* FED. R. CIV. P. 56(a) ("A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may . . . move . . . for a summary judgment . . ."); FED. R. CIV. P. 56(b) ("A party against whom a claim . . . is asserted . . . may . . . move . . . for a summary judgment . . ."); FED. R. CIV. P. 56 advisory committee's note ("This rule is applicable to all actions . . ."); *see also* 10A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 2711 (3d ed. 1998).

<sup>14</sup> *See* Burbank, *supra* note 11, at 596–600, 602, 625 ("The chief value of the summary procedure is as a simple and quick way of disposing of routine matters.") (quoting Charles E. Clark, Reporter, Advisory Committee on Rules for Civil Procedure, Memoranda with Reference to Certain Problems under Preliminary Draft III (Jan. 14, 1937)).

<sup>15</sup> *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (citing *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130, 135 (2d Cir. 1945)). Advisory Committee member Judge Charles Clark dissented vigorously from the decision, arguing that the majority was eviscerating summary judgment, which he claimed was "more necessary in the system of simple pleading" to avoid the cost of unnecessary trials. *Id.* at 479.

<sup>16</sup> 368 U.S. 464, 473–74 (1962).

<sup>17</sup> *Id.* But *see* *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 284–86 (1968) (upholding grant of summary judgment in antitrust case where intent was at issue and distinguishing *Poller* because, unlike in that case, here inference of conspiracy was unreasonable).

<sup>18</sup> 398 U.S. 144, 153 (1970); *see also* *Bd. of Educ. v. Pico*, 457 U.S. 853, 875 (1982) (interpreting *Adickes* as requiring movant to "foreclose the possibility" that nonmovant might prevail at trial).

<sup>19</sup> *Adickes*, 398 U.S. at 160.

In the wake of *Poller* and *Adickes*, the lower courts were reluctant to grant summary judgment. Paul Mollica analyzed a sample of circuit court cases from 1973, concluding that there was “an extreme vigilance against treading on contested fact issues or mixed questions of law and fact—even arguable ones—reserving them for evidentiary hearings. Only a modest proffer by the nonmovant was enough to demonstrate the necessity of a trial.”<sup>20</sup> Courts were especially reluctant to grant summary judgment in cases involving reasonableness, state of mind, or credibility,<sup>21</sup> and procedurally, they favored the non-movant, indulging every opportunity to create a factual record and considering a party’s own affidavit sufficient to create an issue of fact.<sup>22</sup>

### B. The 1986 Trilogy

In 1986, the Supreme Court decided three cases<sup>23</sup> that many commentators have argued signaled a fundamental change in the Court’s approach to summary judgment.<sup>24</sup> Doctrinally, the summary judg-

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<sup>20</sup> Mollica, *supra* note 1, at 147. Mollica reviewed ten volumes of the Federal Reporter from 1973 and analyzed all appeals from summary judgment. *Id.* at 146–52. While Mollica’s methodology of relying on published appellate decisions is subject to criticism, see, e.g., Burbank, *supra* note 11, at 603–05 & n.54 (noting that such methodology is not reliable guide to “law in action”), and does not provide an accurate estimate of the prevalence or success rate of summary judgment motions, see *id.* at 604, his analysis of the prevailing legal standards is valuable.

<sup>21</sup> Mollica, *supra* note 1, at 147–52; see, e.g., *Tarshis v. Lahaina Inv. Corp.*, 480 F.2d 1019, 1021 (9th Cir. 1973) (holding summary judgment improper because determination of negligence was issue of fact); *Jackson v. Griffith*, 480 F.2d 261, 268–69 (10th Cir. 1973) (reversing summary judgment where terminated employee needed to prove employer’s state of mind because affidavits were inconclusive); *Taggart v. Wadleigh-Maurice, Ltd.*, 489 F.2d 434, 439 (3d Cir. 1973) (stating summary judgment does “not involve the resolution of . . . credibility issues”); *O’Malley v. Brierly*, 477 F.2d 785, 796 (3d Cir. 1973) (reversing summary judgment because appellant’s affidavit created question of reasonableness).

<sup>22</sup> Mollica, *supra* note 1, at 151.

<sup>23</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). For an excellent overview of the Trilogy and its commentary, see Miller, *supra* note 1, at 1026–45. For a discussion of the Trilogy’s role in recasting burdens and changing evidentiary standards, see Issacharoff & Loewenstein, *supra* note 5, at 79–87.

<sup>24</sup> The extent of the shift in doctrine is disputed. Compare Issacharoff & Loewenstein, *supra* note 5, at 79 (arguing that “trilogy fundamentally altered [summary judgment]”), and Miller, *supra* note 1, at 1027–29 (“The 1986 Supreme Court trilogy is striking . . .”), and Stempel, *supra* note 1, at 99–107 (“[Trilogy] effected major changes in . . . doctrine and practice . . .”), with James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1554–62 (1996) (arguing that summary judgment always required weighing of evidence), and Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 771 (1988) (“[Trilogy’s] ultimate effect is uncertain and could prove to be limited . . .”), and William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 451 (1991) (arguing that Trilogy clarified prior practice), and Patricia M.

ment Trilogy made two important changes: It (1) lowered the burden of production on the moving party, and (2) increased the quantum of evidence needed for the nonmovant to survive summary judgment by adopting the standard for directed verdict (now called "judgment as a matter of law" under Rule 50).<sup>25</sup> After the Trilogy, in order to survive summary judgment, a nonmovant who bears the burden of proof at trial (a typical plaintiff) would have to produce a substantial amount of evidence during the pretrial stage or risk an adverse judgment.<sup>26</sup> In addition, some commentators (and the Trilogy dissenters) have suggested that the Court approved the weighing of evidence at the summary judgment stage.<sup>27</sup>

### 1. *Burdens of Production and Persuasion*

In *Celotex Corp. v. Catrett*,<sup>28</sup> the Court re-evaluated the burdens it had laid out in *Adickes*. The Court tied the movant's production burden for summary judgment to the burden of proof that party would bear at trial.<sup>29</sup> Thus the production burden for a defendant moving for summary judgment "may be discharged by showing—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case."<sup>30</sup> The Court found "no express or implied requirement in Rule 56 that the moving party sup-

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Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1913 (1998) ("The Justices' apparent inability to agree on the meaning of one another's opinions . . . casts serious doubt on many commentators' and some courts' interpretation of [the Trilogy] as the Supreme Court's clarion call for a new understanding of summary judgment."). But as Judge Wald notes:

The fact that the Court had struck down three denials of summary judgment in one year and Justice Rehnquist's rhetorical recitation in *Celotex* . . . had promoted summary judgment from a housekeeping device for picking up obviously unworthy cases to a major option to be encouraged, or even pushed in all kinds of disputes, large and small, even in some involving factual controversies.

*Id.* at 1913.

<sup>25</sup> See Issacharoff & Loewenstein, *supra* note 5, at 79; Miller, *supra* note 1, at 1035.

<sup>26</sup> See Issacharoff & Loewenstein, *supra* note 5, at 93; Miller, *supra* note 1, at 1062.

<sup>27</sup> See *Matsushita*, 475 U.S. at 599–601 (White, J., dissenting) ("In defining what respondents must show in order to recover, the Court makes assumptions that invade the factfinder's province."); *Anderson*, 477 U.S. at 266 (Brennan, J., dissenting) ("[T]he Court's opinion is also full of language which could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would."); Issacharoff & Loewenstein, *supra* note 5, at 84, 86 (*Anderson* and *Matsushita* allow "broad pretrial evidentiary review"). But see *Mollica*, *supra* note 1, at 162 (attempting to restrict Trilogy cases to their facts).

<sup>28</sup> 477 U.S. 317 (1986).

<sup>29</sup> See *id.* at 324; Issacharoff & Loewenstein, *supra* note 5, at 80–81.

<sup>30</sup> *Celotex*, 477 U.S. at 325; see also Issacharoff & Loewenstein, *supra* note 5, at 81–82 (noting that movant's burden is simply that of "informing" court of absence of key facts in dispute).

port its motion with affidavits or other similar materials negating the opponent's claim."<sup>31</sup>

Under the plurality's conception, the production burden on a defendant-movant is very low.<sup>32</sup> Conversely, once the movant satisfies the initial burden of production, the burden on the nonmovant who will bear the burden of proof at trial (a typical plaintiff) is very high. The nonmovant cannot rest on assertions in the pleadings, but instead must produce evidence, in the form of affidavits, answers to interrogatories, or admissions on file, showing that there is "a genuine issue for trial."<sup>33</sup> The Court abandoned the *Adickes* requirement that the movant affirmatively show the absence of any genuine issue of material fact,<sup>34</sup> and completed what Samuel Issacharoff and George Loewenstein have called the transformation of summary judgment from a plaintiff's motion to a defendant's motion.<sup>35</sup>

## 2. *Quantum of Evidence Needed to Survive Summary Judgment*

In *Anderson v. Liberty Lobby*, the Court equated the standard for granting summary judgment with the standard for obtaining a directed verdict under Rule 50, stating that the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."<sup>36</sup> The Court made it clear that a mere "scintilla of evidence" supporting the nonmovant is insufficient to survive summary judgment.<sup>37</sup> The trial judge must take into account the "quantum and quality of proof" required at trial by the substantive law, and no genuine issue of fact could exist if "the evidence presented

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<sup>31</sup> *Celotex*, 477 U.S. at 323; see also *id.* at 324 ("[W]here the non-moving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file.").

<sup>32</sup> See *Celotex*, 477 U.S. at 323–24; see also Issacharoff & Loewenstein, *supra* note 5, at 82 (claiming that Court relieved defendant of "any significant burden of production"); Miller, *supra* note 1, at 1038–39 (same); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 41 (1988) (noting that "something close to a one page form motion by defendant" would suffice). Issacharoff and Loewenstein argued that although the Court was divided in *Celotex*, lower courts have largely viewed the plurality approach as controlling. Issacharoff & Loewenstein, *supra* note 5, at 82 n.48, 91–94.

<sup>33</sup> *Celotex*, 477 U.S. at 324 (internal quotes omitted).

<sup>34</sup> See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970); Wald, *supra* note 24, at 1913.

<sup>35</sup> Issacharoff & Loewenstein, *supra* note 5, at 83.

<sup>36</sup> 477 U.S. 242, 251–52 (1986). The Court affirmed its equation of the standards for the two motions in *Celotex*, 477 U.S. at 323, and later in *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 150 (2000).

<sup>37</sup> *Anderson*, 477 U.S. at 252.

in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact" to rule in the nonmovant's favor at trial.<sup>38</sup>

While the Court purported to leave "[c]redibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts" to the jury,<sup>39</sup> Justice Brennan, in dissent, accused the Court of providing "an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would."<sup>40</sup> Brennan argued that *Anderson* significantly increased the burden on nonmovants:

It is hard for me to imagine that a responsible counsel, aware that the judge will be assessing the 'quantum' of the evidence he is presenting, will risk either moving for or responding to a summary judgment motion without coming forth with *all* of the evidence he can muster in support of his client's case.<sup>41</sup>

Several commentators have also argued that *Anderson* (read in combination with the rest of the Trilogy) sanctions broad pretrial evidentiary review, even in cases where state of mind is at issue.<sup>42</sup>

Arguably, the Court went even further in weighing evidence<sup>43</sup> in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* when it rejected detailed and un rebutted expert testimony because it made "no economic sense."<sup>44</sup> Despite expert testimony developed over two years of discovery, the Court found that "the factual context rendered [the plaintiffs'] claim implausible" and thus required that they "come forward with more persuasive evidence to support their claim than would otherwise be necessary."<sup>45</sup> In dissent, Justice White (who wrote the majority opinion in *Anderson*) accused the Court of invading the "factfinder's province,"<sup>46</sup> by instructing the trial judge to "decide for himself whether the weight of the evidence favors the plaintiff."<sup>47</sup>

The Trilogy thus made summary judgment more attractive to defendants by reducing their burden of production, requiring a substantial factual showing on the part of the nonmovant, and perhaps authorizing the judicial evaluation of facts at the pretrial stage. The

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<sup>38</sup> *Id.* at 254.

<sup>39</sup> *Id.* at 255.

<sup>40</sup> *Id.* at 266 (Brennan, J., dissenting).

<sup>41</sup> *Id.* at 267.

<sup>42</sup> E.g., Issacharoff & Loewenstein, *supra* note 5, at 84–87; Miller, *supra* note 1, at 1041; Stempel, *supra* note 1, at 114–16.

<sup>43</sup> See Issacharoff & Loewenstein, *supra* note 5, at 86 & n.71.

<sup>44</sup> 475 U.S. 574, 587 (1986).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 599 (White, J., dissenting).

<sup>47</sup> *Id.* at 600.



burdens and standards laid out in the Trilogy remain controlling law today.<sup>48</sup>

### C. Recent Trends in Use of Summary Judgment

Although there has been a perception that use of summary judgment increased in the wake of the Trilogy,<sup>49</sup> the little empirical evidence available suggests that the trend towards greater use of summary judgment had already begun years before.<sup>50</sup> After a survey of the few existing empirical studies on summary judgment and some new data from the Eastern District of Pennsylvania, Stephen Burbank concluded that the percentage of cases in federal courts terminated by summary judgment increased substantially, from about 1.8% in 1960 to 7.7% in 2000.<sup>51</sup> But he cautioned that filing, grant, and case termination rates for summary judgment vary considerably in different courts and types of cases.<sup>52</sup>

This increase in the use of summary judgment coincided with a drastic decrease in the number of trials. A recent study by Marc Galanter showed that the percentage of “federal civil cases resolved by trial fell from 11.5% in 1962 to 1.8% in 2002,” and the absolute number of trials has declined by 60% since the mid-1980s.<sup>53</sup> Many commentators have pointed to summary judgment as a cause for this decline.<sup>54</sup> If this were indeed the case, it would be evidence that summary judgment has served its purpose of saving the cost of unnecessary trials and would, at first glance, support the notion that summary judgment is efficient. Burbank, however, has argued that there is

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<sup>48</sup> Some commentators have suggested that in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), the Court pulled back a little from its pro-summary judgment stance in the Trilogy. See Mollica, *supra* note 1, at 163–64. Others have argued that the cases can easily be reconciled. See e.g., William W. Schwarzer & Alan Hirsch, *Summary Judgment After Eastman Kodak*, 45 HASTINGS L.J. 1, 10–20 (1993). The lower courts seem to have adopted the latter view. See *supra* note 24 and accompanying text.

<sup>49</sup> See Miller, *supra* note 1, at 1048–56.

<sup>50</sup> See Burbank, *supra* note 11, at 620 (“Such reliable empirical evidence as we have, however, does not support the claims of those who see a turning point in the Supreme Court’s 1986 trilogy. Rather, that evidence suggests that summary judgment started to assume a greater role in the 1970s.”); see also Mollica, *supra* note 1, at 163 (“[L]ower courts were already moving in the direction of summariness even before [the Trilogy decisions] were announced.”).

<sup>51</sup> Burbank, *supra* note 11, at 617–18. Burbank calls this a “plausible (and perhaps conservative)” estimate. *Id.*

<sup>52</sup> *Id.* at 618.

<sup>53</sup> 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).

<sup>54</sup> See, e.g., Shadur, *supra* note 4, at 5; see also *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1397 (7th Cir. 1997) (Posner, C.J.) (“The expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial.”).

insufficient empirical evidence to support this causal relationship across the board.<sup>55</sup> He argues that, because of variation in summary judgment practice, it may be a “major driver” of the decrease in trials in some courts or types of cases, but play little role in others.<sup>56</sup>

While the trend toward “summariness” may have started in the 1970s, Paul Mollica found a substantial change in the way lower courts have applied Rule 56 after the Trilogy. In a survey of case law from 1997 to 1998, Mollica found that courts were much more willing to address issues of reasonableness, state of mind, and even credibility than they had been in 1973,<sup>57</sup> and tended to require more than a plaintiff’s own uncorroborated affidavit to defeat summary judgment.<sup>58</sup> Arthur Miller, too, observed that “federal courts have abandoned the historical reluctance to grant the motion in complex actions or actions turning on state of mind.”<sup>59</sup>

What emerges from this transformation is a summary judgment motion that has seen increased use in a time of declining trials. The motion is easier for defendants to make because the production burden is lower, and judges seem willing to make some factual determinations at the pretrial stage.

#### D. Fairness Criticisms and Efficiency Defenses

Many commentators have criticized the post-Trilogy summary judgment motion on fairness grounds. Most recently, Arthur Miller argued that summary judgment is eroding the due process right to a “day in court” and the Seventh Amendment right to a jury trial, all in

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<sup>55</sup> Burbank, *supra* note 11, at 618.

<sup>56</sup> *Id.* Burbank observed a fairly stable and relatively low rate of case terminations by summary judgment in a period when the trial rate fell from 2.5% to 1.0%. *See id.* at 618 n.113.

<sup>57</sup> *See* Mollica, *supra* note 1, at 164–77. Courts were particularly likely to address these issues in the employment discrimination context. *See, e.g.,* Gaul v. Lucent Techs. Inc., 134 F.3d 576, 581 (3d Cir. 1998) (upholding summary judgment in ADEA claim because proposed accommodation was unreasonable); Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101 (3d Cir. 1997) (upholding summary judgment on issue of intent); Grady v. Affiliated Cent., Inc., 130 F.3d 553, 560–61 (2d Cir. 1997) (affirming summary judgment over plaintiff’s testimony because of “same actor” inference that person who hired employee is unlikely to have discriminated in firing him). *See also supra* notes 20–22 and accompanying text (discussing pre-Trilogy practice).

<sup>58</sup> *See* Mollica, *supra* note 1, at 174 (discussing Weeks v. Samsung Heavy Indus. Co., 126 F.3d 926, 939 (7th Cir. 1997)).

<sup>59</sup> Miller, *supra* note 1, at 1055; *see also id.* at 1064–71 (discussing cases where “courts in the post-trilogy years appear to have encroached on the factfinder’s role”); *see, e.g.,* Distasio v. Perkin Elmer Corp., 157 F.3d 55, 61 (2d Cir. 1998) (“[P]laintiffs may not avoid summary judgment by simply declaring that state of mind is at issue.”); Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478–79 (6th Cir. 1989) (“Complex cases are not necessarily inappropriate for summary judgment.”); Wald, *supra* note 24, at 1927–41 (discussing summary judgment practice in D.C. Circuit).

pursuit of efficiency.<sup>60</sup> He joins a long list of commentators criticizing summary judgment on similar grounds.<sup>61</sup> Still others have criticized the motion as too pro-defendant.<sup>62</sup>

Defenders of summary judgment, however, have consistently pointed to efficiency to justify the motion. Efficiency has been a recurrent theme since the original Advisory Committee Notes in 1937.<sup>63</sup> In his opinion in *Celotex*, Justice Rehnquist emphasized efficiency, writing, “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’”<sup>64</sup> In a system of notice pleadings, summary judgment had replaced the motion to dismiss as the “principal tool[ ] by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources.”<sup>65</sup>

Commentators and courts have pointed to this rhetoric in calling summary judgment a “tool to promote judicial efficiency”<sup>66</sup> and announcing that “the Supreme Court has told us to make wider use of summary judgment to eliminate cases.”<sup>67</sup> Martin Louis has argued that “the cost of providing the fullest measure of support and protec-

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<sup>60</sup> Miller, *supra* note 1, at 1074–77.

<sup>61</sup> See, e.g., Mollica, *supra* note 1, at 181–205; Stempel, *supra* note 1, at 162–70.

<sup>62</sup> See, e.g., Stempel, *supra* note 1, at 159–62, 180–81 (“[Anderson] has shifted the equities and impact of rule 56 even more strongly in favor of defendants.”); cf. Issacharoff & Loewenstein, *supra* note 5, at 75 (“[L]iberalized summary judgment inhibits the filing of otherwise meritorious suits and results in a wealth transfer from plaintiffs as a class to defendants as a class.”). But see Louis, *supra* note 2, at 1034 (arguing that Trilogy corrects former pro-claimant bias). Interestingly, Judge Patricia Wald has argued that an increased reliance on summary judgment will impede the development of the law because its application will be divorced from any real factual context. Wald, *supra* note 24, at 1943–44. Quoting Justice Holmes, she said that if “‘the life of the law has not been logic: it has been experience,’ then the decoupling of law from experience could strike a mortal blow to its integrity.” *Id.* at 1944.

<sup>63</sup> See *supra* notes 8 & 14 and accompanying text.

<sup>64</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting FED. R. CIV. P. 1).

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

<sup>66</sup> Miller, *supra* note 1, at 1040; see, e.g., William O. Bertelsman, *Views from the Federal Bench: Significant Developments in the Law of Summary Judgments*, KY. BENCH & BAR, Winter 1987, at 19 (describing Trilogy as reaffirmation of purpose of summary judgment); Steven Allen Childress, *A New Era for Summary Judgment: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 194 (1987) (arguing that new summary judgment standard reflects desire for efficiency in court system); William W. Schwarzer, *Summary Judgment and Case Management*, 56 ANTITRUST L.J. 213 (1987) (approving of summary judgment as encouraging settlement and better case management).

<sup>67</sup> Risinger, *supra* note 32, at 42 (quoting unspecified judge’s comments in open court during argument on motion for summary judgment); see also *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986) (“Properly used, summary judgment permits a court to

tion to the merits is prohibitively high, [and] some portion of this ideal must be sacrificed on the altars of efficiency, affordability, and fairness to the opposing party and the judicial system.”<sup>68</sup>

Few other justifications for summary judgment have been offered and, in fact, the Supreme Court may have effectively ruled out any justification other than efficiency when it equated the Rule 56 motion with the Rule 50 motion for judgment as a matter of law. Prior to the Trilogy, the three dispositive pre-verdict motions—motion to dismiss for failure to state a claim on which relief can be granted under Rule 12(b)(6), summary judgment under Rule 56, and judgment as a matter of law under Rule 50(a)<sup>69</sup>—were all distinct in theory and practice.<sup>70</sup> However, after the Supreme Court adopted the judgment as a matter of law standard for summary judgment in *Anderson*,<sup>71</sup> Rule 50 and Rule 56 began to look very much alike. The legal standard for deciding both motions is whether reasonable jurors could disagree about the facts presented.<sup>72</sup>

The justifications for the two motions, however, are quite different. Judgment as a matter of law serves primarily as a jury control mechanism—allowing the judge to take issues away from the jury to avoid results that are unreasonable or contrary to the law.<sup>73</sup> Rule 50(a) serves as a gatekeeper, keeping claims in which the plaintiff has

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streamline the process for terminating frivolous claims and to concentrate resources on meritorious litigation.”).

<sup>68</sup> Louis, *supra* note 2, at 1033.

<sup>69</sup> FED. R. CIV. P. 12(b)(6), 50(a), 56. These motions are in addition to a host of other mechanisms intended to prevent cases from reaching trial: At the pretrial conference under Rule 16, the judge is authorized to act to facilitate settlement. FED. R. CIV. P. 16(a)(5); *see also* FED. R. CIV. P. 16(c) (“[T]he court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.”). A judge may also divert the litigation into “special procedures” such as a mini-trial, a summary jury trial, mediation, neutral evaluation, or non-binding arbitration. FED. R. CIV. P. 16(c)(9); *see also* FED. R. CIV. P. 16 advisory committee’s note (“Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures . . . that can lead to consensual resolution of the dispute without a full trial on the merits.”). Rule 68 provides adverse consequences for rejecting a settlement offer that exceeds the final judgment at trial. FED. R. CIV. P. 68 (“[O]fferee must pay the costs incurred after the making of the offer.”). One must question whether trials are really *so* expensive that we need all of these mechanisms to terminate cases early.

<sup>70</sup> Miller, *supra* note 1, at 1057; *see also* Stempel, *supra* note 1, at 144–54 (surveying treatises and articles on summary judgment and directed verdict prior to Trilogy).

<sup>71</sup> 477 U.S. at 250–52. The Court made it very clear that it intended the motions to be judged on the same standard by reiterating the adoption in *Celotex*, 477 U.S. at 323, and more recently in *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 150 (2000).

<sup>72</sup> Brady v. S. Ry. Co., 320 U.S. 476, 479–80 (1943) (holding that directed verdict is appropriate “[w]hen the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict”).

<sup>73</sup> *See* Miller, *supra* note 1, at 1057.

not presented sufficient evidence to meet his production burden out of the hands of the jury.<sup>74</sup> Summary judgment is not needed as a jury control mechanism because even if the motion is denied, Rule 50 is still available as a gatekeeper. The only thing summary judgment adds to the system is the opportunity to dispose of the case earlier in the process. Other than this timing difference, the motions are largely redundant, rendering any justification other than efficiency unconvincing.

## II

### A FRAMEWORK FOR ANALYZING THE EFFICIENCY OF SUMMARY JUDGMENT

Several commentators have questioned the assumption that summary judgment reduces cost, but few have examined it in depth.<sup>75</sup> The efficiency of summary judgment depends on the ability of the motion to reduce the number or cost of trials by more than the costs added to the system by its availability and use. In order for summary judgment to be efficient, the costs of trial avoided through summary judgment must exceed the cost of the motion. In other words, the total cost of trials in a world without summary judgment ( $T$ ) must exceed the total cost of trials minus the cost of trials avoided through summary judgment ( $C$ ) plus the cost of the summary judgment motion ( $S$ ):

$$T > T - C + S.$$

The most obvious way summary judgment reduces trial costs is by disposing of cases before trial, reducing the total number of trials that occur. There are two ways in which the motion might otherwise affect the number or costs of trials: Partial grants of summary judgment may affect the cost of trials, and denials of summary judgment may have an impact on the settlement rate, further influencing the number of trials. Additionally, summary judgment may introduce another type of cost: If the motion is less accurate than trial, the cost of error may offset the savings in trial costs avoided. This Part will address the impact of summary judgment through dispositive motions, partial grants, settlement rates, and error costs.

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<sup>74</sup> See *id.* A renewed motion for judgment as a matter of law (formerly called judgment notwithstanding the verdict) can also be used to correct an erroneous or unreasonable jury verdict under FED. R. CIV. P. 50(b).

<sup>75</sup> See, e.g., Denlow, *supra* note 4, 26–27; Shadur, *supra* note 4, at 66; see also Anderson, 477 U.S. at 266–67 (Brennan, J., dissenting) (“I am fearful that this new rule—for it surely would be a brand new procedure—will transform what is meant to provide an expedited ‘summary’ procedure into a full-blown paper trial on the merits.”). Issacharoff and Loewenstein, *supra* note 5, performed a detailed game-theoretic analysis on the effect of summary judgment on the settlement rate. Their analysis is discussed in Part II.C, *infra*.

### A. *Direct Avoidance of Trial: Dispositive Motions*

Successful summary judgment motions that dispose of the case represent a clear savings over trial. In any individual case, a successful summary judgment motion would almost certainly be cheaper than a trial; however, in the aggregate, summary judgment motions that are denied must be considered as well. In cases where summary judgment has been denied, the parties and the government have incurred a substantial cost and received little or no benefit. They will proceed to trial where the court will again have an opportunity to decide the same issue—the sufficiency of the evidence—on a Rule 50 motion. Because of this redundancy, summary judgment motions that are not granted are deadweight losses to society.<sup>76</sup>

Assuming that only dispositive summary judgment motions are affecting the number and cost of trials, the success rate of summary judgment is an important factor in determining the efficiency of the motion. In a world without summary judgment, no trials will be avoided, so the cost of trials ( $T$ ) would be multiplied by a rate of 1. With summary judgment, the cost of trials avoided (represented by  $C$  in the inequality above) would be equal to the cost of trials ( $T$ ) multiplied by the success rate of summary judgment motions ( $r$ ). A comparison of a world without summary judgment and a world in which summary judgment only affects the cost of trials by disposing of them can be represented as:

$$1 * T > T - (T * r) + S,$$

or

$$T > T * (1 - r) + S,$$

or

$$T * r > S.$$

In other words, in order for summary judgment to be efficient, the cost of trials ( $T$ ) discounted by the success rate of summary judgment ( $r$ ) must exceed the cost of all summary judgment motions filed ( $S$ ).

The simplest way to test the efficiency of summary judgment would be through empirical examination. Some intangibles, like the value of the time jurors give up to involuntary public service, would be difficult to measure. But we could get a good sense of the relative costs of trial and summary judgment by comparing the amount of time

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<sup>76</sup> The loss would be offset to some degree by any costs incurred at the summary judgment stage that would also be incurred in going to trial. See Issacharoff & Loewenstein, *supra* note 5, at 96 n.113; see also *infra* Part III.B.

the lawyers for both sides and the government spend working on each alternative.<sup>77</sup>

Unfortunately, empirical data on the costs of litigation are difficult to come by. The only comprehensive study was conducted in 1983 by David Trubek et al. They looked at a sample of "ordinary" cases, excluding both the smallest and largest claims.<sup>78</sup> They concluded that, on average, trials accounted for less than ten percent of the time lawyers devoted to a case.<sup>79</sup> Trials were relatively rare,<sup>80</sup> and when they did occur, they were typically short, adding, on average, 6.7 hours to the time the lawyers spent on the case<sup>81</sup> (out of an average of 72.9 hours spent on an entire case).<sup>82</sup> Thus trials were not a major factor in the overall cost of litigation. Trubek did not examine summary judgment as a separate category, but he found motion practice and discovery had the greatest impact on the number of hours lawyers spent on a case.<sup>83</sup> Considering the study's age and its failure to break summary judgment out as a distinct category, however, it is difficult to get a sense of the relative cost of trial and summary judgment from the data Trubek collected and analyzed.

In 1983, the RAND Institute conducted a study of court expenditures, analyzing the most recent data available at the time.<sup>84</sup> Data from the study suggested that cases disposed of by jury trial, on average, cost the government about three times as much as cases disposed of during pretrial.<sup>85</sup> Cases disposed of by bench trial cost the government about twice as much as cases disposed of during pretrial.<sup>86</sup> The presence of a trial tended to be the most significant factor affecting cost to the government.<sup>87</sup> While this might indicate that summary judgment could be a large cost saver to the government, liti-

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<sup>77</sup> See *infra* note 159 and accompanying text.

<sup>78</sup> David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 80–85 (1983). In surveying "ordinary" cases, Trubek et al. looked at 1649 state and federal civil lawsuits from five judicial districts, excluding disputes where the initial claim was less than \$1000, as well as thirty-seven "megacases." *Id.* at 80–81 & n.17.

<sup>79</sup> *Id.* at 91.

<sup>80</sup> Trials occurred in fewer than 8% of cases sampled. *Id.* at 89.

<sup>81</sup> *Id.* at 104.

<sup>82</sup> *Id.* at 90.

<sup>83</sup> *Id.* at 104.

<sup>84</sup> J.S. KAKALIK & R.L. ROSS, RAND INST. FOR CIVIL JUSTICE, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR VARIOUS TYPES OF CIVIL CASES (1983).

<sup>85</sup> *Id.* at xviii tbl.S.8, 41 tbl.4.4. The study did not break the data down to determine method of disposal, but presumably included settlement, dismissal, and summary judgment.

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

<sup>87</sup> See *id.* at 41–42.

gation costs borne by private parties greatly exceed the costs borne by the government.<sup>88</sup>

The available empirical data are insufficient to answer the question of whether summary judgment is efficient. Although the data are dated<sup>89</sup> and do not break out summary judgment from other pretrial motions or events, the results of the Trubek and RAND studies would support the hypothesis that the presence or absence of a trial has a large effect on the cost to the government, but a much smaller effect on the total cost borne by litigants; pretrial motions like summary judgment have a relatively larger impact on the cost to the litigants than trials. But any precise comparison of the relative costs of summary judgment and trial is not possible with currently available empirical data, and this simple picture of dispositive motions is incomplete. Other factors may affect the number or cost of trials and must be considered in evaluating the efficiency of summary judgment.

### *B. Reducing the Cost of Trial: Partial Summary Judgment*

Rule 56(d) allows for partial grants of summary judgment.<sup>90</sup> Partially granted motions do not dispose of the case and still require a trial, but can serve to narrow the issues in dispute. In this way, partial grants can reduce the cost of trials—even if they do nothing to decrease their number—and do not constitute as great a deadweight loss as denials. However, because a trial will still occur (with all of the attendant costs), the savings may not be substantial. The summary judgment motion itself is unlikely to be any less costly because the defendant would have little incentive to move for summary judgment on only one issue when a motion on the whole dispute costs little more, and the plaintiff would still be forced to present all of his evidence or risk losing his entire claim.<sup>91</sup>

Partial grants complicate the efficiency analysis. We must compare the savings in reduced trial time and complexity, discounted by the likelihood of achieving that savings, with the cost of summary judgment motions. Some new variables must be added to the dispositive motion inequality: The success rate for summary judgment motions must be broken down into the success rate of dispositive motions ( $r_{SJ}$ ) and the success rate of partial summary judgment

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

<sup>89</sup> These studies predate the Trilogy and, to the extent that any useful assumptions about the cost of summary judgment can be drawn from them, they would tend to underestimate the cost of summary judgment because the post-Trilogy motion is substantially more involved and costly than the pre-Trilogy "slightest doubt" standard. See *supra* Part I.B.

<sup>90</sup> FED. R. CIV. P. 56(d).

<sup>91</sup> See *supra* Part I.B.1.



motions ( $r_{PSJ}$ ). We must also consider the fraction of the trial cost that will be avoided by a partial grant ( $n$ ) and the success rate of partial summary judgment motions ( $r_{PSJ}$ ). The efficiency of summary judgment when partial grants are taken into account can be represented as:

$$T > T - (T * r_{SJ} + n * T * r_{PSJ}) + S,$$

or

$$T * r_{SJ} + n * T * r_{PSJ} > S,$$

or

$$T(r_{SJ} + n * r_{PSJ}) > S.$$

Unfortunately, no empirical data are available on either the success rate of partial summary judgment motions or the portion of trial cost avoided. The trial cost avoided is difficult to estimate because it is highly case specific and likely to vary widely depending on case type and complexity.<sup>92</sup> It is likely, however, that in most cases the fraction of the trial cost avoided by partial summary judgment will be small. Even if a substantial issue were eliminated and the trial shortened, the fixed cost of trial would remain. The jury would still have to be selected and the lawyers would still have to prepare witnesses and arguments. The only real savings would be reduced in-court time.

### C. *Changing the Number of Trials:*

#### *Effects of Denial of Summary Judgment on Settlement*

As discussed above, the efficiency of summary judgment depends on its ability to reduce either the number or cost of trials. So far we have considered only grants and partial grants, and have been assuming that denials of summary judgment would have no effect on the pool of cases that go to trial. In reality, a denial of summary judgment could have an impact on the likelihood of settlement; what that impact would be is not entirely clear. On one hand, a nonmovant who survives a summary judgment motion has invested a significant amount of money in the litigation, and if some of that investment would be reusable at trial, he may be less willing to settle.<sup>93</sup> On the other hand, the court's decision on summary judgment may provide the parties with new information that will help inform settlement.<sup>94</sup> If we could discern the net effect of denial of summary judgment on the

<sup>92</sup> Cf. Denlow, *supra* note 4, at 30 (arguing that "great care" should be taken before filing motions for partial summary judgment as they may often not prove cost-effective).

<sup>93</sup> Issacharoff & Loewenstein, *supra* note 5, at 99.

<sup>94</sup> For this point I am grateful to Professor Samuel Issacharoff.

settlement rate ( $x$ ), the efficiency of summary judgment could be represented as:

$$T > T - (T * r_{SJ} + T * n * r_{PSJ} + T * x * (1 - r_{SJ} + r_{PSJ})) + S,$$

or

$$T(r_{SJ} + n * r_{PSJ} + x * (1 - r_{SJ} + r_{PSJ})) > S.^{95}$$

Unsurprisingly, there are no available empirical data on settlement rates after denial of summary judgment. Even if there were, however, they would not be tremendously helpful. It would be nearly impossible to distinguish cases that settled because of the denial of summary judgment from those that would have settled anyway as the trial date approached or even those that would have settled sooner in the absence of an opportunity for summary judgment. We can, however, examine the conflicting incentives to settle that summary judgment creates.

### 1. *Summary Judgment May Reduce the Settlement Zone and the Parties' Incentives to Settle*

A denial of summary judgment may make the nonmovant/plaintiff<sup>96</sup> less willing to settle if a portion of the expense of opposing summary judgment is reusable at trial.<sup>97</sup> Law and economics scholars generally consider the settlement zone—the range between the lowest offer that the plaintiff would accept to forgo trial and the maximum amount the defendant would pay to avoid it—to be equal to the sum of risk-neutral parties' legal expenses going forward.<sup>98</sup> Generally, the wider the settlement zone, the more likely the case is to settle.<sup>99</sup> If plaintiffs are able to reuse some of the work done opposing summary judgment, their costs of going to trial are decreased, and correspondingly, the settlement zone is decreased.<sup>100</sup> The settlement zone would

<sup>95</sup> The term  $(1 - r_{SJ} + r_{PSJ})$  is the rate of denials of summary judgment.

<sup>96</sup> This analysis will consider the typical situation in which the defendant moves for summary judgment. See Burbank, *supra* note 11, at 611, 616 (providing statistics showing that defendants move for summary judgment more often than plaintiffs); Issacharoff & Loewenstein, *supra* note 5, at 92 ("Summary judgment is a defendant's motion."). With slight modifications, the analysis is fairly applicable to the reverse situation as well.

<sup>97</sup> See Issacharoff & Loewenstein, *supra* note 5, at 99. For a fuller economic analysis of the effects of summary judgment on the likelihood of settlement, see *id.* at 98–103.

<sup>98</sup> See *id.* at 101; see also Don L. Coursey & Linda R. Stanley, *Pretrial Bargaining Behavior Within the Shadow of the Law: Theory and Experimental Evidence*, 8 INT'L REV. L. & ECON. 161, 162 (1988).

<sup>99</sup> See Issacharoff & Loewenstein, *supra* note 5, at 101; Coursey & Stanley, *supra* note 98, at 162–63.

<sup>100</sup> See Issacharoff & Loewenstein, *supra* note 5, at 99. Issacharoff and Loewenstein were working from an assumption that summary judgment is very costly to the plaintiff, but nearly costless to the defendant in light of the heavy burden of production that *Celotex*

be further decreased if the defendant also spent a substantial amount supporting the summary judgment motion, and a portion of those costs were reusable at trial. The parties therefore would be less likely to settle once a motion for summary judgment has been denied than they would have been had the motion been unavailable.

Of course, the parties would still have an opportunity to settle before summary judgment. The availability of summary judgment creates a bifurcated negotiation process.<sup>101</sup> In the pre-summary judgment period the settlement zone is equal to the sum of the costs to the parties of supporting and opposing the motion.<sup>102</sup> This will inevitably be smaller than the settlement zone when summary judgment is not available.<sup>103</sup> The impact of summary judgment on the settlement rate “depends on whether settlement is more likely to result from a one-stage process of negotiations with a single large settlement zone, or from a two-stage process, each involving a smaller settlement zone.”<sup>104</sup>

Issacharoff and Loewenstein analyzed summary judgment's effects on settlement using this model, but were unable to draw any conclusion as to the overall effect that this bifurcated process would have on the settlement rate. The decrease in the post-motion settlement zone is highly dependent on the amount of summary judgment expenses reusable at trial, and it is difficult to balance the effects of a smaller settlement zone against the opportunity to settle before the motion.<sup>105</sup> They do hypothesize that the asymmetry in expenditures at the different stages may make it more difficult to reach settlement.<sup>106</sup>

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imposed on the nonmovant. *Id.* at 95. In this situation, denial of the motion would cause the settlement zone to shift upwards—the plaintiff would demand more to settle—as well as narrow, putting the plaintiff in a better strategic position after the denial. *Id.* at 99. This holds true as long as the plaintiff spends more in recoverable costs opposing the motion than the defendant does supporting it. This will generally be the case, as the plaintiff has greater incentives than the defendant to invest at the summary judgment stage. *See infra* notes 145–52 and accompanying text.

<sup>101</sup> *See* Issacharoff & Loewenstein, *supra* note 5, at 97, 100.

<sup>102</sup> *See id.* at 101. Again, Issacharoff and Loewenstein assumed that the cost of summary judgment to the defendant was zero, but this holds true even if the motion is not costless to the defendant. *Cf. id.* at 96–99, 120–26 (discussing effect of summary judgment expenditures on settlement zone).

<sup>103</sup> If this were not the case, summary judgment would be inefficient on its face: The motion would cost more than the trial.

<sup>104</sup> Issacharoff & Loewenstein, *supra* note 5, at 101.

<sup>105</sup> *Id.* at 102.

<sup>106</sup> *Id.* at 103 (citing Eytan Weg et al., *Two-Person Bargaining Behavior in Fixed Discounting Factors Games with Infinite Horizon*, 2 GAMES & ECON. BEHAV. 76 (1990)). The plaintiff will have to spend more up front to oppose the summary judgment motion, but

## 2. Summary Judgment as an Information-Forcing Device

Of course, if the parties had perfect information about their likelihood of success, and their ranges of acceptable settlements overlapped, all rational parties would settle. In reality, parties often proceed in litigation because they have incomplete information about the other side's case, and about their own chances of prevailing.<sup>107</sup> One of the main justifications for the liberal discovery rules is to get the parties to exchange information to facilitate settlement.<sup>108</sup>

In some ways, the post-Trilogy summary judgment motion can serve as an information-forcing device that may facilitate settlement. Because *Matsushita* and *Anderson* sanctioned judicial evaluation of facts at the summary judgment stage, the parties have an incentive to engage the merits of the case with full briefing and presentation of evidence—in essence, a dress rehearsal of the trial.<sup>109</sup> In addition, summary judgment gives the parties information that they could not have gleaned from discovery alone about the organization and presentation of evidence, and the potential trial strategy of their opponent.

What is perhaps even more valuable is that summary judgment gives the parties a neutral evaluation of the claim by an impartial decisionmaker reviewing a substantial factual record. If enough facts are presented at this stage, summary judgment gives the judge some opportunity to weigh in on the merits of the case before trial.<sup>110</sup> The parties know that judges have been increasingly willing to evaluate issues of fact, reasonableness, and credibility at the summary judgment stage,<sup>111</sup> so a denial of summary judgment can send a signal that the judge thinks the claim has some merit. This can provide valuable information to the parties in estimating their likelihood of prevailing at trial. It might help mitigate the condition of “mutual optimism” in which both parties overestimate their chances of success, narrowing or eliminating the settlement zone.<sup>112</sup> To the extent that judges are

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some costs will be recoverable at trial. The defendant will have to spend less up front, but more to catch up at the trial stage. *See id.*; *see also infra* Part III.C.

<sup>107</sup> Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 422 (1973).

<sup>108</sup> *Id.* at 423.

<sup>109</sup> *See Anderson v. Liberty Lobby*, 477 U.S. 242, 266–67 (1986) (Brennan, J., dissenting) (predicting that summary judgment will become “full-blown paper trial on the merits”); *supra* Part I.B.2.

<sup>110</sup> *See* E-mail from Samuel Issacharoff, Reiss Professor of Constitutional Law, New York University School of Law, to D. Theodore Rave (Mar. 20, 2005) [hereinafter Issacharoff e-mail] (on file with the *New York University Law Review*).

<sup>111</sup> *See supra* Part I.C.

<sup>112</sup> *Cf.* Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 463 (1984). Judge Lambros developed the summary jury trial in the early 1980s as a method of reducing the uncertainty facing the parties over

willing to make findings of fact at the summary judgment stage, they may help the parties settle with fuller information.<sup>113</sup>

Summary judgment will not, however, facilitate settlement in all cases. The extent to which judges are able to rule on facts is still limited, and a good deal of uncertainty remains over what the jury will do with the claim.<sup>114</sup> Overall, it is difficult to tell whether the narrowed settlement zone or the additional information available to the parties after a denial of summary judgment has a stronger effect on the likelihood of settlement. The implications of the bifurcated negotiation process are unclear as well.<sup>115</sup>

#### *D. Additional Costs of the Motion: Error Costs*

Error costs are the costs to society of erroneous judgments.<sup>116</sup> The classic (and most easily monetized) example is a reduction in deterrence in tort suits,<sup>117</sup> but error costs can take many other forms including creation of improper incentives, failure to achieve desired distributional effects, or improper imposition of sanctions.<sup>118</sup> If summary judgment reduces the accuracy of decisions, error costs will be introduced and must be added to the cost of summary judgment when

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how a jury would rule on the case. *Id.* "It is my perception that the sole bar to settlement in many cases is the uncertainty of how a jury might perceive liability and damages. Such uncertainty often arises, for example, in cases involving a 'reasonableness' standard of liability, such as in negligence litigation." *Id.* at 469. A mini jury is empanelled and hears a summary version of the case argued by the lawyer for each side, then issues a nonbinding ruling. *Id.* Lambros reported good results in the Northern District of Ohio in 1984 with 92% of cases referred to a summary jury trial settling. *Id.* at 472 tbl.1. If summary judgment could provide similar information to the parties, it could potentially increase the settlement rate.

<sup>113</sup> See Issacharoff e-mail, *supra* note 110.

<sup>114</sup> Some parties, especially defendants, may be inclined to settle once it is certain that the claim will be heard by a jury. While this is an example of the sort of information that a denial of summary judgment can provide to the parties, it is in fact an argument to abolish summary judgment. The same sort of certainty about reaching the jury would be provided in all cases if summary judgment were not available.

<sup>115</sup> See Issacharoff & Loewenstein, *supra* note 5, at 103.

<sup>116</sup> See Posner, *supra* note 107, at 400.

<sup>117</sup> See *id.* For example, failure to hold injurers liable because of errors in adjudication will reduce deterrence, and therefore reduce to below the optimal level the costs that potential injurers would be willing to incur to prevent injuries. This is particularly true in the summary judgment context where the defendant is the movant because the only erroneous determination can be one of no liability. For a more detailed explanation of error costs in civil cases, see *id.* at 402–10. See also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 564–65 (6th ed. 2003).

<sup>118</sup> See Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 309–11 (1994).

considering the efficiency of the motion. The effect of error costs ( $E$ ) can be represented in the simple inequality as:

$$T > T - C + S + E.$$

Or in the more complicated inequality, accounting for partial grants and settlement, as:

$$T > T - (T * r_{SJ} + T * n * r_{PSJ} + T * x * (1 - r_{SJ} + r_{PSJ})) + S + E,$$

or

$$T * (r_{SJ} + n * r_{PSJ} + x * (1 - r_{SJ} + r_{PSJ})) > S + E.$$

Error costs are difficult to measure empirically, or even to monetize and estimate, but if summary judgment is less accurate than trial, the use of the motion can only introduce errors.<sup>119</sup> Some of those errors—erroneous denials—can be corrected at trial, but erroneous grants will not be corrected.<sup>120</sup> One can generally assume that the more information available to an impartial decisionmaker, and the higher the quality of that information, the smaller the chance of error.<sup>121</sup> But since information is costly, there is an optimal balance between the cost of errors and the direct cost of procedures designed to obtain more information.<sup>122</sup>

The chances of error in an adjudicative procedure are largely a function of three factors: the amount of evidence presented, the quality of evidence presented, and the competence of the deci-

<sup>119</sup> Some defense attorneys may be inclined to think that summary judgment will reduce the cost of erroneous jury verdicts. However, even if it were more accurate than a jury trial, summary judgment is not needed as a jury correction mechanism. Judgment as a matter of law under Rule 50 (either before or after the jury verdict) serves that purpose; summary judgment's purpose is to increase efficiency in the system. See *supra* notes 69–74 and accompanying text.

<sup>120</sup> Of course erroneous grants of summary judgment can be corrected through the appeals process, but this adds additional costs, and still will not correct all of the errors introduced by summary judgment.

<sup>121</sup> See, e.g., Stempel, *supra* note 1, at 173–77 (arguing that we should be less confident in result of summary judgment than that of trial because summary judgment is decided on less informative record).

<sup>122</sup> See Posner, *supra* note 107, at 399–400. See generally Kaplow, *supra* note 118 (discussing optimal degree of accuracy in adjudicative system). Courts have recognized this balance in the administrative law context. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court established the test for whether procedures satisfy due process. The Court determined that a recipient of disability benefits was not entitled to a pre-termination hearing because the hearing was unlikely to increase the accuracy of the determination enough to outweigh the cost of the additional procedures. *Id.* at 334–35, 344–45. The Court said that the test for what process is due is whether the potential loss to the individual discounted by the chances of erroneous deprivation outweighed the increased cost to society of the additional procedure. *Id.* at 334–35. In other words, the Court balanced direct costs against error costs.

sionmaker. We can compare the likelihood of a correct outcome at the summary judgment and trial stages by considering these factors.

The amount of evidence presented at trial is likely to be greater than the amount of evidence presented at the summary judgment stage.<sup>123</sup> The format of a trial allows more evidence to be introduced than would be possible through affidavits.<sup>124</sup> Lawyers for both parties can tailor their questions to fill in gaps in the evidence or counter arguments made by the other side.<sup>125</sup>

The quality of evidence presented at trial is also likely to be better than that presented at summary judgment<sup>126</sup> because of three factors: live testimony,<sup>127</sup> cross examination,<sup>128</sup> and the format of trial as a discrete and continuous event.<sup>129</sup> Live testimony can often convey more information and allow the factfinder to assess credibility through nonverbal communication.<sup>130</sup> Additionally, live testimony can be tailored to the changing situation at trial, ensuring that the proper evidence is presented at the proper time, and misunderstandings can be clarified when identified. Cross examination has long been a fundamental part of due process,<sup>131</sup> and has been considered

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<sup>123</sup> See Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 769 (1989); see also Stempel, *supra* note 1, at 173 ("Inevitably, summary judgment is granted or denied based on a record less informative than that achieved through trial. Consequently, one should always be less confident in the result obtained through summary judgment than that obtained at later stages of trial.").

<sup>124</sup> See Marcus, *supra* note 123, at 762–70.

<sup>125</sup> *Id.*

<sup>126</sup> Whether the trial format actually increases the quality of evidence is an arguable point. However, because the entire American system is built around the trial, it is beyond the scope of this Note to question its usefulness as a truth-finding device. I will assume, as did those who wrote the Constitution and the Federal Rules, that the trial is the preferred form of presenting information to a decisionmaker. See U.S. CONST. amend. VII ("[T]he right of trial by jury shall be preserved."); *Rule 41 Motion for Summary Judgment Upon Depositions and Admissions*, 3 PROCEEDINGS OF MEETING OF ADVISORY COMM. ON RULES FOR CIV. PROC. OF THE SUP. CT. OF THE UNITED STATES 819 (Feb. 20–25, 1936) (Mr. Donworth) ("[W]e are not trying to introduce a rule which would substitute trial by affidavit for trial by jury.").

<sup>127</sup> See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970) (highlighting importance of oral hearing for presenting evidence as key element of due process); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507–08 (1947) (same).

<sup>128</sup> See 5 JOHN HENREY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1367, at 32 (1974) ("[Cross examination is] the greatest legal engine ever invented for the discovery of truth.").

<sup>129</sup> See Marcus, *supra* note 123, at 762–70.

<sup>130</sup> See, e.g., Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 40 (1987) ("Any lawyer who has ever tried a case knows that the trier of fact has expertise in discerning witness credibility and veracity.").

<sup>131</sup> See *Goldberg*, 397 U.S. at 269.

essential to testing credibility.<sup>132</sup> Finally, the trial forms a discrete event in which the decisionmaker is immersed in the dispute and can capitalize on multiple forms of communication to comprehend the elements of the case.<sup>133</sup> In contrast, summary judgment motions are decided on a sterile written factual record, without the advantages of live testimony and cross examination.<sup>134</sup>

The competence of the decisionmaker is probably equal at the summary judgment and trial stages. In bench trials, the decisionmaker will be the same person. Although many lawyers, especially defense lawyers, have little confidence in the ability of jurors,<sup>135</sup> empirical studies have shown that judges and juries reach similar outcomes in similar cases, and there is no proof that either is a superior fact finder.<sup>136</sup>

Because the decisionmakers are of roughly equal competence and the quantity and quality of evidence is likely to be better at trial, errors are probably more likely at the summary judgment stage. Use of the motion will produce more error costs than if cases proceeded directly to trial.

While the concept that to be efficient, summary judgment must avoid more in trial costs than the cost of the motion is simple, the efficiency analysis is complex. In addition to the success rate and the relative costs of trial and summary judgment, it must take into account the ability of partial grants to reduce the cost of trial, the potential effects on the settlement rate, and error costs of reduced accuracy. The currently available empirical data are insufficient to provide a definitive answer.

### III

#### IDENTIFYING CONDITIONS FOR EFFICIENCY

Despite the lack of reliable empirical data, we can get a sense of what conditions must be met for summary judgment to be efficient by drawing assumptions about the relative costs of summary judgment and trial from the limited available data and the burdens and incentives on each party. For simplicity's sake, we will only consider dis-

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<sup>132</sup> See 5 WIGMORE, *supra* note 128, at 32. But see Marcus, *supra* note 123, at 757-62 (arguing that demeanor evidence is not that useful in assessing credibility).

<sup>133</sup> See Marcus, *supra* note 123, at 762-70.

<sup>134</sup> See *id.* at 769.

<sup>135</sup> See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 178-81 (1936); Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1127-28 (1992).

<sup>136</sup> See Clermont & Eisenberg, *supra* note 135, at 1151-56 (summarizing experiments showing 78% agreement between judges and juries on liability).



positive motions that avoid trial altogether. While partial grants, settlement rates and error costs all play an important role in the overall efficiency of summary judgment, they are difficult to measure or estimate and are beyond the scope of this limited analysis. For the purposes of this analysis, let us assume that partial grants are either so infrequent or result in a savings so small as to be negligible in the aggregate, that denials have no net effect on the settlement rate and that summary judgment does not result in significantly greater error than trial.<sup>137</sup>

Recall that for dispositive motions, summary judgment is efficient if the cost of trial ( $T$ ) discounted by the success rate of summary judgment motions ( $r$ ) exceeds the cost of summary judgment motions ( $S$ ):<sup>138</sup>

$$T * r > S,$$

or

$$r > S/T.$$

For dispositive motions, the success rate is a major factor in the efficiency calculation. For example, if the success rate is 20%, then in order for summary judgment to be efficient, the motion must cost less than 20% of a trial. Likewise, if the success rate is 40%, then the motion must cost less than 40% of a trial. To get a sense of the relative costs of trial and summary judgment, it is useful to break them down into their components. The cost of trial ( $T$ ) equals the cost of trial to the plaintiff/nonmovant<sup>139</sup> ( $T_P$ ) plus the cost of trial to the defendant/movant ( $T_D$ ) plus the cost of trial to the government ( $T_G$ ), and likewise for summary judgment ( $S$ ):

$$T = T_P + T_D + T_G.$$

$$S = S_P + S_D + S_G.$$

Thus summary judgment will be efficient if:

$$r > \frac{S_P + S_D + S_G}{T_P + T_D + T_G}.$$

<sup>137</sup> This seems as good an assumption as any considering that to the extent that these factors can be estimated at all, they tend to cut in opposite directions. Partial grants would tend to make summary judgment more efficient while error costs would tend to make it less efficient and the effects on the settlement rate are indeterminate.

<sup>138</sup> See *supra* Part II.A.

<sup>139</sup> Again, for this analysis we will consider the typical situation in which the defendant moves for summary judgment. See *supra* note 96.

Sections A through D consider these variables in turn. Section E shows the relative values for these factors necessary to make summary judgment efficient.

### A. Success Rate of Summary Judgment Motions ( $\tau$ )

The success rate for summary judgment is defined simply as the number of motions granted that result in disposal of the case divided by the number of motions filed.<sup>140</sup>

The simplest way to assess the success rate would be through empirical study, but unfortunately the Administrative Office of the U.S. Courts does not keep data on summary judgment. There have been several empirical studies conducted by individual researchers since 1960, but the data are spotty at best and indicate a wide variation in success rates among case types and jurisdictions.<sup>141</sup> A study of three district courts conducted by the Federal Judicial Center (FJC) in 1987 revealed a summary judgment success rate that varied from about 44% to 66% in 1975, but declined to between 19% and 37% in 1986.<sup>142</sup> In 2001, the FJC prepared an unpublished report on summary judgment in the same six district courts that found success rates for motions resulting in terminations of approximately 31% in 1975 and 39% in 2000.<sup>143</sup> Stephen Burbank conducted a study of docket

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<sup>140</sup> This definition excludes partial grants that were considered in Part II.B, *supra*. For the purposes of analyzing dispositive motions, we are only concerned with grants of summary judgment that result in case terminations. Unfortunately, some of the empirical studies on summary judgment include partial grants in their calculation of the number of motions granted. I have done my best to exclude partial grants when estimating the success rate.

<sup>141</sup> See Burbank, *supra* note 11, at 603–18 (canvassing and critiquing several empirical studies on summary judgment).

<sup>142</sup> JOE S. CECIL & C.R. DOUGLAS, FED. JUDICIAL CTR., SUMMARY JUDGMENT PRACTICE IN THREE DISTRICT COURTS 11 tbl.7 (1987). The FJC published another study in 1991, this time of six district courts (including the three in the previous study), but did not look at case terminations. See Joe S. Cecil, *Trends in Summary Judgment Practice: A Summary of Findings*, FJC DIRECTIONS, April 1991, 11, 15 (1991). The 1991 study found that the success rate (including partial grants) for defendants increased from 44% in 1975 to 47% in 1988, and the success rate (including partial grants) for plaintiffs increased from 33% to 35%. *Id.* at 15. The disparity between the 1975 success rates in the 1987 and 1991 FJC studies may be explained by the fact that the 1991 study excluded prisoner litigation from the sample and included partial grants of summary judgment while the 1987 study did not. See Burbank, *supra* note 11, at 612–13 & n.90.

<sup>143</sup> Success rates derived from data in Burbank, *supra* note 11, at 613 (citing Joe S. Cecil et al., *Trends in Summary Judgment Practice: A Preliminary Analysis 1* (Nov. 2001) (unpublished report)). I estimated the success rate for motions terminating cases by dividing the termination rate (3.7% in 1975 and 7.7% in 2000) by the filing rate (12% in 1975 and I assumed a 20% filing rate in 2000 because it had remained fairly stable from the 19% in 1988). *Id.* I also estimated the success rates including partial grants at 50% in 1975 and 60% in 2000 by dividing the grant rates (6% and 12%) by the filing rates. *Id.*

sheets in the Eastern District of Pennsylvania in 2004, revealing a success rate of about 22% in 2000.<sup>144</sup>

From the empirical data available, it appears that the success rate for summary judgment motions (resulting in terminations) in the years since the Trilogy varies from a low of roughly 20% to a high around 40%. This approximate range is consistent with what we would expect when considering the burdens and incentives on each party. Because defendants risk little and stand to gain much by moving for summary judgment,<sup>145</sup> and plaintiffs have much at stake (the entire value of their claims) and an evidentiary standard in their favor,<sup>146</sup> we would expect defendants to file many motions, but for plaintiffs to prevail on most of them.<sup>147</sup>

In fact, defendants have several strategic reasons to move for summary judgment even if they are not optimistic about their chances of prevailing. Despite the modern discovery system, surprise still has value at trial.<sup>148</sup> In opposing a summary judgment motion, a plaintiff is forced to lay out every element of his case before trial—with the stakes so high, he would be unlikely to hold evidence in reserve and risk losing—giving the defendant a preview of the plaintiff's trial strategy.<sup>149</sup> Knowing the burden the plaintiff will face, a defendant with a large "war chest" may be tempted to engage in attrition and impose costs on an underfunded plaintiff hoping to exhaust his resources before trial.<sup>150</sup> Additionally, because of the time value of money, delay tends to favor the defendant, and an extra motion would

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<sup>144</sup> Burbank, *supra* note 11, at 616–17. The success rate is an estimate because Burbank presents data in both calendar and fiscal year formats. I calculated the success rate by averaging the number of motions granted in fiscal year 2000 and fiscal year 2001 and dividing that by the number of motions filed in calendar year 2000 less the number of motions with no action taken.

<sup>145</sup> The costs are low because the production burden is low. See *supra* Part I.B.1. The risk is low—the defendant cannot lose the case on his motion. And the potential payoff is high—winning the case and avoiding trial.

<sup>146</sup> All evidence must be viewed in a light most favorable to the nonmovant. *United States v. Diebold Inc.*, 369 U.S. 654, 655 (1962); accord *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999). But see *Matsushita Indus. Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986) (dismissing nonmovant's un rebutted expert testimony as "implausible").

<sup>147</sup> Judges also may consider the fact that a grant of summary judgment can be appealed, but a denial cannot—it simply goes to trial. Thus in close cases, the plaintiff is likely to prevail.

<sup>148</sup> POSNER, *supra* note 107, at 572.

<sup>149</sup> See *Prof. Managers, Inc. v. Fawer, Brian, Hardy & Zatkis*, 799 F.2d 218, 221–22 (5th Cir. 1986) ("[S]ummary judgment has often been used improperly: as a discovery device; to educate the trial judge; in the hope, however faint, of quick victory; and in the expectation, frequently realized of retarding the progress of a suit and making litigation more expensive."); see also Denlow, *supra* note 4, at 27 (arguing that summary judgment gives defendants tactical advantage).

<sup>150</sup> See *Prof. Managers*, 799 F.2d at 221–22; Denlow, *supra* note 4, at 27.

prolong the suit.<sup>151</sup> The allocation of the burden of production after *Celotex* facilitates such strategic behavior by allowing defendants to impose large costs on plaintiffs at only minimal costs to themselves.<sup>152</sup>

Thus with incentives for defendants to move for summary judgment even when they are unlikely to prevail, and plaintiffs likely to prevail on most motions because of the favorable legal standard and the incentive to invest heavily in opposing the motion, we would expect the success rate to be fairly low.

### B. Costs to Plaintiff/Nonmovant ( $T_p$ & $S_p$ )

When comparing the costs of trial and summary judgment, we are only concerned with the marginal cost of each. Costs that would be incurred in either endeavor should be excluded. Because the plaintiff/nonmovant would be compelled to complete discovery in order to respond effectively to a summary judgment motion, we can already exclude what is widely considered the most costly part of a lawsuit.<sup>153</sup> Although Rule 56 allows the parties to move for summary judgment almost immediately after commencement of the action,<sup>154</sup> Rule 56(f) gives the nonmovant time to engage in discovery before the motion is decided.<sup>155</sup> In fact, *Celotex* stressed Rule 56(f) as a safety valve to ensure that the nonmoving party has had "an opportunity to make full discovery."<sup>156</sup> As a result, most summary judgment motions are

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<sup>151</sup> See *Prof. Managers*, 799 F.2d at 221-22; Denlow, *supra* note 4, at 27. The longer it takes for a case to be decided, the longer the defendant will hold any money in dispute and gain the benefit of its use or investment.

<sup>152</sup> But see FED. R. CIV. P. 56(g) (providing sanctions for affidavits presented "in bad faith or solely for the purpose of delay"); FED. R. CIV. P. 11 (providing sanctions for motions designed "to harass or to cause unnecessary delay or needless increase in the cost of litigation").

<sup>153</sup> See James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Data*, 39 B.C. L. REV. 613, 636 (1998) (finding discovery accounts for one-quarter to one-third of total lawyer work hours per litigant in subset of cases that terminate more than 270 days from filing); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 547-48 (1998) (stating discovery accounts for one-half of total cost of litigation for each party in sample of cases likely to include discovery). But see Trubek et al., *supra* note 78, at 89-91 (finding that discovery accounts for about 17% of lawyer hours in "ordinary" cases).

<sup>154</sup> Plaintiffs may move for summary judgment after twenty days from the commencement of the action. FED. R. CIV. P. 56(a). Defendants may so move at any time. FED. R. CIV. P. 56(b).

<sup>155</sup> FED. R. CIV. P. 56(f); see generally John F. Lapham, Note, *Summary Judgment Before the Completion of Discovery: A Proposed Revision of Federal Rule of Civil Procedure 56(f)*, 24 U. MICH. J.L. REFORM 253 (1990) (arguing that completion of discovery under Rule 56(f) undermines efficiency of summary judgment).

<sup>156</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986); see also Schwarzer & Hirsch, *supra* note 48, at 14-15 (arguing that district court's denial of time for more discovery

decided after a substantial amount of discovery has already occurred.<sup>157</sup>

The majority of factual investigation is likely to have been completed as well.<sup>158</sup> We can also exclude the cost of researching, briefing, and arguing points of law as these would be required in either case, and may in fact have occurred at an earlier stage in the suit (for example, in a Rule 12(b)(6) motion).

The bulk of the cost of trial to the plaintiff consists of the lawyer time<sup>159</sup> spent at trial and in preparation for trial.<sup>160</sup> The primary components of the cost of trial to the plaintiff include: (1) jury selection (if any), (2) witness preparation, (3) lawyer preparation for arguments and questioning, and (4) in-court time. The plaintiff will, of course, have to present all of the evidence that supports his case, and would not stand to save much if the trial ended in a directed verdict—only the additional in-court time.<sup>161</sup>

The cost of summary judgment to the plaintiff/nonmovant consists primarily of preparing affidavits and documentation supporting the motion and preparing a memorandum of law. In many jurisdictions, local rules impose further requirements on a summary judgment motion. For example, some jurisdictions require the nonmovant to provide a statement listing issues of material fact with citations to admissible evidence supporting the issues to be tried.<sup>162</sup> These costs are largely unrecoverable at trial because, even if the substance of the evidence presented is the same, the form is not—preparing witnesses

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under 56(f) may have influenced Supreme Court's decision to reverse summary judgment in *Eastman Kodak v. Image Technical Services*, 504 U.S. 451 (1992)).

<sup>157</sup> See, e.g., *Ala. Farm Bureau Mut. Cas. Co. v. Am. Fid. Life Ins. Co.*, 606 F.2d 602, 609 (5th Cir. 1979) ("Summary judgment should not . . . ordinarily be granted before discovery has been completed.").

<sup>158</sup> According to Trubek, conferring with the client, factual investigation, and discovery take up about 45% of lawyer time in a case. See Trubek et al., *supra* note 78, at 91. These components are likely to be mostly completed before either summary judgment or trial.

<sup>159</sup> I use lawyer time as the primary measure of the cost to the parties because fees paid to lawyers make up the bulk of litigation expenses to the parties. See *id.* Additionally, what little empirical information is available dates from the early 1980s, and also refers to hours. Thus it is simply easier to estimate and compare.

<sup>160</sup> *Id.* There is also some additional cost in the value of the client's time spent in preparation for and at trial, but according to Trubek, payments to lawyers constitute about 88% of the total costs to individual litigants, and client time is likely to be more or less proportional to lawyer time. *Id.* For client organizations, the comparable legal fees make up 72% of total costs. See *id.*

<sup>161</sup> A motion for judgment as a matter of law under Rule 50 can be made by either party as early as after the opening statements, see FED. R. CIV. P. 50(a), but it is typically made by the defendant at the close of plaintiff's case-in-chief. See Miller, *supra* note 1, at 1061.

<sup>162</sup> See, e.g., U.S. DIST. CT. RULES S. & E.D.N.Y., CIV. R. 56.1.

for trial and preparing affidavits are very different exercises.<sup>163</sup> Even for costs that are largely recoverable at trial, there is some cost in redundancy and uses of evidence may not overlap exactly. Witnesses may need to be re-interviewed or documents reread in preparation for trial. The accelerated timeframe of discovery and investigation in preparation for summary judgment may both increase the cost of summary judgment and result in errors or omissions that need to be corrected in preparation for trial while a more leisurely pace of discovery may have gotten it right the first time.

Under the pre-Trilogy standards, a nonmovant only had to make a minimal showing to defeat a summary judgment motion, but under today's standards the burden is much more substantial. Because the stakes are so high—losing the motion means losing the case—the plaintiff/nonmovant has a strong incentive to present all of the evidence he can muster at the summary judgment stage.<sup>164</sup> In smaller cases, the cost of a summary judgment motion to the plaintiff/nonmovant could even approach that of a trial.<sup>165</sup>

For the sake of this analysis, let us assume, to start, that a trial costs the plaintiff about twice as much as a summary judgment motion. While this may seem like a low estimate for complex cases involving multiple experts and high stakes, according to Trubek the

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<sup>163</sup> See Shadur, *supra* note 4, at 6 (“[T]he very different structures of a summary judgment motion . . . (a totally paper exercise) and a trial . . . tend to minimize the common elements of cost involved.”). Federal Magistrate Judge Morton Denlow described the process of preparing for summary judgment as follows:

[S]ummary judgment can entail significant expenditures of time and money. Once a defendant files a summary judgment motion, the plaintiff is compelled to complete discovery to ensure that he has put his best case forward. Depositions must be taken, transcripts prepared, and potential witnesses interviewed, in order to prepare affidavits. The affidavits, depositions, and discovery must be compiled along with legal briefs. Preparing the motion and technically correct affidavits is time consuming. Summary judgment motions, related briefs, and documents six-to-twelve inches thick are not rare. The expenses can be substantial.

Denlow, *supra* note 4, at 27.

<sup>164</sup> See Issacharoff & Loewenstein, *supra* note 5, at 93–94; see also *Anderson v. Liberty Lobby*, 477 U.S. 242, 267 (1986) (Brennan, J., dissenting) (“It is hard for me to imagine that a responsible counsel, aware that the judge will be assessing the ‘quantum’ of the evidence he is presenting, will risk either moving for or responding to a summary judgment motion without coming forth with *all* of the evidence he can muster in support of his client’s case.”).

<sup>165</sup> See Denlow, *supra* note 4, at 28 (“In smaller cases, the cost of trial may not be substantially greater than the preparation and filing of a summary judgment motion.”); Risinger, *supra* note 32, at 41 (“Because the material must be reduced to a coherently structured written form, this task can sometimes take as long or longer than actually trying the case.”); see also Shadur, *supra* note 4, at 5–6 (arguing that defendants often irrationally move for summary judgment).

average trial adds about 6.7 hours of lawyer time and involves no experts.<sup>166</sup> Therefore it seems like a reasonable starting point.

### C. Cost to the Defendant/Movant ( $T_D$ & $S_D$ )

The cost of trial to the defendant is likely to be similar to the cost of trial to the plaintiff. It consists of the same components. The defendant would stand to save more on a successful directed verdict at the close of plaintiff's evidence because he would not have to present his case in court, but he would most likely have to engage in all of the trial preparation anyway, so the savings would only amount to actual court time avoided.

The cost of summary judgment to the defendant/movant, however, is likely to be substantially less than for the plaintiff. After *Celotex*, the defendant/movant does not bear much of a production burden and need not even submit affidavits or documentary evidence to support the motion.<sup>167</sup> Though the production burden is minimal, defendants knowing that the judge will be weighing the "quantum" and "quality" of the evidence may have an incentive to spend more than the minimum required to submit a proper motion. Because *Anderson* and *Matsushita* sanctioned broader factual review,<sup>168</sup> defendants who think they may prevail on summary judgment have an incentive to submit much more evidence in an attempt to disprove the plaintiffs' allegations of contested facts. However, defendants will still tend not to spend as much as plaintiffs on summary judgment motions because the stakes for them are generally much lower. While for the plaintiff the stakes are equal to the value of the claim, for the defendant the stakes are equal only to the cost of going to trial.<sup>169</sup> Thus summary judgment presents a potentially significant savings for defen-

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<sup>166</sup> Trubek et al., *supra* note 78, at 104.

<sup>167</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); Issacharoff & Loewenstein, *supra* note 5, at 82. Shadur, *supra* note 4, at 6, argues that defendants "must bear the bulk of the time and expense incurred in pursuing the Rule 56" motion, however Shadur focuses only on the defendant's cost of preparing a memorandum of law and filing the correct supporting documentation, not the incentives for the parties to present evidence.

<sup>168</sup> See *supra* Part I.B.2.

<sup>169</sup> Of course the cost of going to trial must be discounted by the expectation of success at trial. Many defendants may perceive their chances in front of a jury to be worse than their chances in front of a judge, see, e.g., Clermont & Eisenberg, *supra* note 135, at 1127-28 (wrongly, it appears, see *id.* at 1151-56), and thus may tend to spend more on summary judgment. Repeat litigants also may tend to spend more on summary judgment to develop a reputation for being early and aggressive litigators, and thus encourage plaintiffs to accept lower settlements beforehand.

dants over trial, but in many cases, defendants will still spend a substantial amount of money trying to win the case at that stage.<sup>170</sup>

For the sake of this analysis, let us work with the assumption that the cost of trial to defendants is about four times as much as the cost of summary judgment. Let us also assume that the cost of trial for both parties is approximately equal.

#### *D. Cost to the Government (T<sub>G</sub> & S<sub>G</sub>)*

Government costs include all of the costs attendant to running a trial or deciding a summary judgment motion. The two major components include judge time and juror time. Judge time should reflect more than the judge's salary divided into an hourly rate, but also all of the attendant costs to a judge's functioning, including clerks and other support staff, courtroom time, and the like. Of paramount importance is the opportunity cost of a judge's time—that is, the time he could be spending deciding other cases or motions. Consuming more judicial time creates delay in the system by preventing other cases from being decided.

The major component of judge time for trials is presiding over the trial in court and managing the parties. The major component of judge time in summary judgment motions is wading through the documentary submissions and deciding on the sufficiency of the evidence presented by the nonmovant.

Jury time is somewhat more difficult to measure. It should include not only the monetary costs of lost wages during jury duty, but also the non-monetary costs of ordinary citizens performing an involuntary public service.

It is clear from empirical studies that cases involving a trial consume substantially more in judicial resources (two to three times as much) than cases that end during the pretrial stage.<sup>171</sup> However, this expense is dwarfed by the costs incurred by the parties.<sup>172</sup> Of course, no jury costs are incurred in deciding a summary judgment motion, but jury costs are only incurred in about two-thirds of all trials.<sup>173</sup> Moreover, while the non-monetary costs to the jurors are difficult to measure, they also receive some non-monetary benefits through their

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<sup>170</sup> See Shadur, *supra* note 4, at 5–6 (arguing that defendants often irrationally move for summary judgment even though trial would cost less).

<sup>171</sup> See KAKALIK & ROSS, *supra* note 84, at xviii tbl.S.8, 37–43.

<sup>172</sup> See *id.* at vii.

<sup>173</sup> See Galanter, *supra* note 53, at 466 (noting that jury trials made up 65.8% of all civil trials in 2002).



participation in the civil justice system.<sup>174</sup> Whether that benefit is sufficient to offset the costs is arguable.

For the sake of this analysis, let us assume that the cost of trial to the government is about three times the cost of summary judgment.<sup>175</sup> Let us also assume that the cost of trial to the government is about half the cost of trial to either party.

#### E. What Would it Take for Summary Judgment to be Efficient?

By plugging these cost assumptions into the stylized model for dispositive summary judgment motions, we can get a sense of what conditions would be necessary for summary judgment to be efficient. Recall that summary judgment is efficient if:

$$r > \frac{S_P + S_D + S_G}{T_P + T_D + T_G}.$$

We are assuming, that the costs of trial to the plaintiff and to the defendant are equal ( $T_P = T_D$ ), and the cost of trial to the government is one-half the cost to either party ( $T_G = .5T_D$ ). We are also assuming that trial costs the plaintiff about twice what summary judgment costs ( $T_P = 2S_P$ ), costs the defendant about four times what summary judgment costs ( $T_D = 4S_D$ ), and costs the government about three times what trial costs ( $T_G = 3S_G$ ).<sup>176</sup> Plugging in these assumptions:

$$\text{Let } x = T_P = T_D = 2T_G.$$

$$r > \frac{.5x + .25x + .33(.5x)}{x + x + .5x},$$

or

$$r > 0.366.$$

<sup>174</sup> Cf. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (declaring racially based peremptory strikes in civil cases unconstitutional because they harm potential jurors by denying them “the honor and privilege of participating in our system of justice”).

<sup>175</sup> This is a reasonable assumption considering the RAND study’s finding that cases terminated during the pretrial phase consume about one-third the judicial resources as cases terminated by jury trial and about one-half the resources consumed by a bench trial. See KAKALIK & ROSS, *supra* note 84, at xviii tbl.S.8, 37–43. While the pretrial phase may include judicial activity prior to a motion for summary judgment that would also be incurred in a case going to trial, the costs of early judicial involvement are likely to be small in comparison to ruling on a dispositive motion. The lesser cost of bench trials (which make up about one-third of all trials) should offset the failure to take into account the cost of other pretrial activity.

<sup>176</sup> It is important to remember that the costs that we are comparing—( $T$ ) and ( $S$ )—exclude any overlapping expenses incurred in both trial and summary judgment.

Thus summary judgment would be efficient if the success rate was greater than 36.6%. This is above the midpoint of the range of success rates gleaned from the limited empirical data.<sup>177</sup>

Numbers will help to illustrate this. If trial will cost each party \$10,000 and the government \$5000, then the cost of trial will equal \$25,000. Summary judgment will cost the plaintiff \$5000, the defendant \$2500, and the government \$1666. Thus the total cost of the summary judgment motions will be \$9166 which is equal to 36.6% of the cost of trial.

We can vary these assumptions to see what conditions must be met for summary judgment to be efficient. Table 1 shows the success rate that would be necessary to make summary judgment efficient for a range of possible costs of the motion relative to trial for both plaintiff and defendant.

TABLE 1: SUCCESS RATE NECESSARY FOR  
SUMMARY JUDGMENT TO BE EFFICIENT<sup>178</sup>

		Cost of Summary Judgment/Cost of Trial for Plaintiff						
Cost of Summary Judgment/ Cost of Trial for Defendant		3/4	1/2	1/3	1/4	1/6	1/8	1/10
	3/4	66.67%	56.67%	50.00%	46.67%	43.33%	41.67%	40.67%
	1/2	56.67%	46.67%	40.00%	36.67%	33.33%	31.67%	30.67%
	1/3	50.00%	40.00%	33.33%	30.00%	26.67%	25.00%	24.00%
	1/4	46.67%	36.67%	30.00%	26.67%	23.33%	21.67%	20.67%
	1/6	43.33%	33.33%	26.67%	23.33%	20.00%	18.33%	17.33%
	1/8	41.67%	31.67%	25.00%	21.67%	18.33%	16.67%	15.67%
	1/10	40.67%	30.67%	24.00%	20.67%	17.33%	15.67%	14.67%

Thus if the cost of summary judgment for the plaintiff is one-third the cost of trial and the cost of summary judgment for the defendant is one-sixth the cost of trial, summary judgment motions must be successful 26.67% of the time to be efficient.

For summary judgment to be clearly inefficient, considering the observable success rates of 20–40%, the cost of the motion to the plaintiff would have to be in the vicinity of three-quarters the cost of trial, and for the defendant, around one-quarter the cost of trial. Under these same assumptions, for summary judgment to be clearly efficient, the cost of the motion to the plaintiff would have to be less than one-quarter the cost of trial, and for the defendant, less than one-

<sup>177</sup> See *supra* notes 142–44 and accompanying text.

<sup>178</sup> Assuming, as above, that the cost of trial to the plaintiff and defendant is equal, the cost of trial to the government is one-half the cost to either party and summary judgment costs the government one-third the cost of trial.

eighth the cost of trial. More concrete data on the success rate of summary judgment motions and the relative costs of trial and summary judgment to the plaintiff, defendant, and government are necessary to draw solid conclusions about the efficiency of the motion.

### CONCLUSION

While this analysis cannot show conclusively whether or not summary judgment is efficient, it does raise serious questions about what has largely been assumed to be a cost-saving device. It also highlights the need for serious empirical study into both the success rate of summary judgment motions, and the relative costs of the various stages of litigation, both for parties and for the government. It is quite possible that, just as Burbank observed wide variation in summary judgment practice across jurisdiction and case type,<sup>179</sup> the efficiency of summary judgment varies widely as well. In some courts and types of cases, it may be a useful tool for avoiding costly trials, but in others, it may be wasting resources and imposing delay. If summary judgment is, in fact, inefficient, we may need to rethink our reliance on it. At the very least, we would have to abandon efficiency as the justification for summary judgment.

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<sup>179</sup> Burbank, *supra* note 11, at 617–18.

