

Essay

Summary Judgment: What We Think We Know Versus What We Ought To Know

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The twenty-fifth anniversary of the “trilogy” of summary judgment cases provides a perfect moment to reflect on what summary judgment means to our civil justice system. However, it goes without saying that summary judgment is not one of those procedural topics that has received little attention. Indeed, it is an area of procedure that has produced heated debates, plenty of press, and volumes of law review articles.¹ So, this is not a little-studied area that only gets discussed on these landmark occasions. This leads to the following inquiry: What more can really be written about a topic that appears to be so saturated? It is a good question, but I, and many others, including the participants in this Colloquium, believe that there is much more work to be done. However, while we might agree on the need for further work, our reasons for holding this belief undoubtedly diverge. My reason flows from the observation that what has been done so far, while making an important contribution, does not begin to tell us what the true effect of summary judgment is on potential and actual litigants.

Empirical work in the area of summary judgment tells us a lot about how measured filing rates and grant rates for summary judgment motions have increased or decreased over time.² We also have a breadth of academic work that discusses the advantages of the process—namely, efficiency and the correlated cost-savings.³ There is

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1. See *infra* Parts I–II (illustrating the wealth of information analyzing summary judgment from studies and articles focusing on various courts).

2. See *infra* Parts I.A and I.B (comparing the rates at which motions for summary judgment have been filed and awarded among various district courts between 1976–2000 and in 2006).

3. See *infra* Part II.B (highlighting that a substantial number of scholars have positive criticism about the summary judgment process, including its focus on efficiency and bringing

also a collection of work that defends that process on theoretical grounds.⁴ In contrast to that work, many academics have maligned the process for its unfairness in application, as well as for its affront to the constitutional right to a jury trial in a civil case.⁵ Add to that the work that has been done about the technical aspects of the rule and how the procedure functions in practice,⁶ and it is easy to see that there is an entire body of work that has been done about summary judgment. So, what is missing?

This Essay argues that a key inquiry is missing: a systematic study of what is happening in summary judgment on the ground. In other words, what we do not know, but ought to know, is whether summary judgment sifts out meritorious cases and at what rate. We also need to know how the summary judgment process deters individuals with meritorious claims from filing. And, we need to know this information across the board, at both the state and federal level. The point of this Essay is to show that we think we know the answers to these questions based on the body of work that currently exists. While this body of work informs these inquiries, it does not answer them. This Essay argues that the use of this existing work to make principled arguments about the pros and cons of summary judgment will always fall short.

This Essay proceeds as follows: Part I briefly chronicles and explains the empirical data that we have about summary judgment, highlighting two key studies that explored the rates at which motions for summary judgment are filed and subsequently granted. Part I also includes a brief discussion of the work regarding how Rule 56 of the Federal Rules of Civil Procedure (“Rule 56”) technically functions. Part II similarly discusses the body of theoretical work that has been written, highlighting the leading articles from those who support summary judgment and those who criticize it. Part III then argues why this work does not tell us what we ought to know. While the empirical work tells us a lot, it does not tell us anything about the chilling effect of the summary judgment process, nor does it tell us whether and how many meritorious cases are wrongly dismissed. As for the theoretical work, much of it uses particular cases to support a broader argument about how summary judgment is functioning. This kind of work provides an

only meritorious claims to trial).

4. *Id.*

5. *See infra* Part II.A (pointing out that summary judgment since the “trilogy” has made it easier for defendants to succeed on those motions, resulting in possible constitutional deprivations of a right to a jury trial for the plaintiff).

6. *See infra* Part I.C (describing one article’s focus on the controversial decision of *Scott v. Harris* involving the application of summary judgment).

interesting entrée into thinking about what might be going right or wrong in practice, but it certainly does not tell us anything that is meaningful systemically. Finally, Part IV suggests different ways to figure out the answer to what we ought to know, including a call for more detailed empirical studies, as well as different types of qualitative work. These suggestions are made, however, with the acknowledgment that some of this information is simply unknowable. This Essay concludes that because the information needed to make principled arguments may not be obtainable, the debate about summary judgment should be more transparent—one either favors the jury trial or one does not.

I. MAJOR EMPIRICAL STUDIES IN SUMMARY JUDGMENT

There have been a number of studies about the effect of summary judgment.⁷ The Federal Judicial Center (“FJC”) conducted the two highlighted in this Essay.⁸ These studies were chosen because they were conducted in response to requests from the federal civil rulemaking committees. In other words, policymakers commissioned these studies, and academics and policymakers alike have heavily relied on them when debating the benefits and costs of summary judgment. Also discussed is the only study I am aware of that critically looks at the Supreme Court’s decision in a summary judgment case by studying how different racial and economic groups might have decided such a case.⁹ Finally, I summarize the work that has been done regarding the technical aspects of Rule 56.

A. *Federal Judicial Center Study: “Trends in Summary Judgment Practice: 1975–2000”*

Critics of the “trilogy” accused it of increasing the number of summary judgment motions made and granted. Yet, there was no real data to support or contravene this argument. Based on this lack of information, the FJC took on an ambitious study to answer this question.¹⁰ Its inquiry focused on the following questions:

7. See *infra* Part I and accompanying notes 8–50 (describing the empirical studies the FJC conducted between 1976–2000 and later in 2006).

8. See *infra* Part I.A and I.B (comparing two studies the FJC conducted that investigated summary judgment activity between 1975–2000 and in 2006).

9. See *infra* Part I.C (discussing how the Supreme Court’s decision in *Scott v. Harris* caused different effects and perceptions among various minority groups).

10. Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 863 (2007), available at <http://ftp.resource.org/courts.gov/fjc/jels1207.pdf>; see also Stephen B. Burbank, *Vanishing Trials and*

Have motions for summary judgment increased since 1975? Are motions for summary judgment more likely to be granted since 1975? Are cases more likely to be terminated by summary judgment since 1975? If summary judgment practice has changed over time, are changes in summary judgment practice limited to certain courts or to certain types of cases?¹¹

To say the study was ambitious may have been an understatement.

The study examined filings in six different federal district courts.¹² These six districts were responsible for terminating 20% of the civil cases filed in federal district courts in 2000, so the selected courts provided a broad view of practice.¹³ The basic approach of the study was to sample different cases across the districts and compare summary judgment activity across six time periods: cases terminated in 1975, 1986, 1988, 1989, 1995, and 2000.¹⁴ The idea behind this approach was to see whether there was a spike in summary judgment activity following the 1986 trilogy. In other words, the premise was to see whether the rates of motions filed and granted increased before or after the Supreme Court decided the trilogy of cases, and, more importantly, to see whether these rates increased at all.¹⁵

The study found the following: the rate of summary judgment motion practice in filed cases increased from 12% in 1975, to 17% in 1986, and to 19% in 1988.¹⁶ The rate of motions granted in whole or in part

Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?, 1 J. EMPIRICAL LEGAL STUD. 591, 620 (2004) (arguing that the rate of summary judgment motions increased before the trilogy of cases).

11. Cecil et al., *supra* note 10, at 873–74 (describing the study as a review of docket sheets across a variety of district courts in order to craft a well-rounded answer to summary judgment questions).

12. These districts included: the District of Maryland, the Eastern District of Pennsylvania, the Southern District of New York, the Eastern District of Louisiana, the Central District of California, and the Northern District of Illinois. *Id.* at 874. The study noted that three of the districts were chosen because of past studies where the FJC had data regarding those districts from a separate study of case management. *Id.* The remaining three districts were chosen because of their reputation for restrictively applying summary judgment. *Id.*

13. *Id.* at 875.

14. *Id.* at 875–76. Each of the time periods covered twelve consecutive months. *Id.* at 875. The time period before the trilogy of cases was chosen to provide a benchmark for summary judgment practice before those cases came down. *Id.* The study chose to look at 1986 because that was the year the Supreme Court decided the trilogy. *Id.* The study noted, however, that practitioners' responses to Supreme Court decisions would not be immediate, so it also tested 1988 and 1989 to better determine the effect, if any, of the trilogy. *Id.* Finally, the study selected 1995 and 2000 in order to determine whether the trilogy had an effect once those cases had been fully integrated into practice. *Id.*

15. *Id.*

16. *Id.* at 883.

increased from 6% in 1975 to 12% in 2000.¹⁷ The percentage of cases that summary judgment terminated similarly doubled from 4% in 1975 to 8% in 2000.¹⁸

As to the first set of numbers regarding filing rates, the study concluded that the rate actually increased prior to the trilogy of cases, and that while the rate held steady until 2000, it did not increase to any great degree.¹⁹ In 2000, the rate of filing summary judgment motions was 21%—hardly the huge increase one might expect if she were arguing that the trilogy encouraged defendants to file summary judgment motions more often.²⁰

Regarding the last two sets of numbers—the increase in grant rates and termination rates—the study noted that the rates varied greatly over time and between courts.²¹ Thus, for some courts, the rate increased between 1975 and 2000, but for other courts, the largest increase was between more narrow time periods, such as between 1975 and 1986.²² The study used this variance in time periods to argue that there was no statistical proof that the trilogy had caused this increase.

The study also looked at the frequency of summary judgment motions across different types of substantive claims, and it found that the rate of summary judgment motions filed increased most dramatically in civil rights cases.²³ However, it also compared these motion rates to the general frequency with which those particular types of cases were filed.²⁴ The study argued it was possible to find that the higher rate of summary judgment motions in civil rights cases was due to a proportional increase in those types of cases overall, and not due to a spike in summary judgment motions across the board.²⁵

Finally, the study looked at grant rates for defendants' summary judgment motions over time. First, it looked at the number generally, finding that defendants won their summary judgment motions 40% of the time in 1986, but won 47% of the time in 1988.²⁶ Thus, there was a spike following the trilogy. But the study also found that the rates

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 882.

21. *Id.* at 883.

22. *Id.* at 883–84.

23. *Id.* at 885.

24. *Id.*

25. *Id.*

26. *Id.* at 887.

evened out until they spiked again in 2000 to 49%.²⁷ This led the study to question whether the trilogy caused the 1988 spike or not. Second, the study looked at defendants' success by type of substantive case.²⁸ The study found that there was a difference—defendants won in civil rights cases almost 60% of the time, but only won in torts cases 40% of the time.²⁹ Similar to the rate of motion practice discussed above, however, the study posited that this difference in grant rates between types of cases might have simply been a consequence of the proportional increase in the filing of civil rights cases overall.³⁰

B. Federal Judicial Center Study: "Estimates of Summary Judgment Activity in Fiscal Year 2006"

In this study, the FJC analyzed the results of summary judgment cases that were filed in seventy-eight federal district courts for the fiscal year 2006.³¹ It looked again at how many summary judgment motions were filed, and it found that the activity ranged from 7% to 34%, with an average of 17% across all courts.³² The motions granted per court did not vary as much. The grant rate average was 60%, with a range from 55% to 68%.³³ Finally, the study found that summary judgment motion grant rates varied by substantive area, with contract cases at the low end at 53%, and civil rights cases at the high end at 70%.³⁴ More specifically, the study found that the grant rate for employment discrimination cases was one of the highest at 73%.³⁵

The study was relatively small, so the researchers did not posit theories behind the numbers to any great degree. They did note, however, that in the districts where there were high rates of summary judgment motions for employment discrimination cases, many of those districts had alternative dispute resolution ("ADR") procedures that the

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 888.

31. Memorandum from Joe Cecil & George Cort, The Fed. Judicial Ctr., to Hon. Michael Baylson 1 (Apr. 12, 2007, rev. June 15, 2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/\\$file/sujufy06.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf). The study only looked at seventy-eight summary judgment cases because those courts fully implemented the federal courts' electronic filing system (CM/ECF). *Id.*

32. *Id.* at 1, 3.

33. *Id.* at 1, 3–4.

34. *Id.* at 6–7.

35. *Id.* at 6. Looking district by district, the study found that some district courts granted summary judgment motions in employment discrimination cases as much as 95% of the time. *Id.* at 10.

parties used to resolve their cases before the defendant could file a summary judgment motion.³⁶ The implication of this qualification was that the cases that made it past ADR were less likely to be meritorious, and thus, more prone to summary judgment.

C. Testing the Application of Summary Judgment

To my knowledge, there is only one study that has tested the application of summary judgment in a particular case by asking lay people to assess the evidence like a jury.³⁷ That article, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, took on the Court's controversial summary judgment decision in *Scott v. Harris*.³⁸ That case involved the question of whether a police officer used excessive force when he rammed Victor Harris's car off the road in order to stop a high-speed car chase.³⁹ The accident rendered Harris a quadriplegic.⁴⁰ The issue was whether the video footage of the car chase demonstrated that Officer Scott used reasonable force to meet the danger Harris presented.⁴¹ The Supreme Court, in an eight-to-one decision, found that he did and granted summary judgment in Scott's favor.⁴²

In the study, the authors showed the video of the police chase to a cross-section of the American public and asked them what they thought.⁴³ The study determined that while a majority of the participants agreed with the Court's finding, a substantial number of participants—predominantly from marginalized groups—did not agree with the Court's determination.⁴⁴ From this, the study determined that the Court was not malicious in its inability to see other perspectives, but was simply blinded by its “cognitive illiberalism.”⁴⁵ The author's

36. *Id.* at 2.

37. *But see* Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 143 (2000) (reviewing appellate summary judgment cases from 1973–1978 and determining that the “variety of cases and situations in which federal courts granted summary judgment widened over the study period”).

38. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

39. *Id.* at 839.

40. *Id.*

41. *Id.* at 855.

42. *Scott v. Harris*, 550 U.S. 372, 374 (2007).

43. Kahan et al., *supra* note 38, at 841.

44. *Id.* at 903 (“These patterns suggest the influence of value-motivated cognition. Comprising several discrete mechanisms, value-motivated cognition refers to the tendency of people to resolve factual ambiguities in a manner that generates conclusions congenial to self-defining values.”).

45. *Id.* at 905.

solution to this problem was to encourage the Court to exercise judicial humility, but also to study more about how to understand and decrease the effect of cultural values on how individuals view facts.⁴⁶

Adding to this work, Jeffrey Stempel's article for this Colloquium, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, argues that this criticism of summary judgment should not just be limited to our inability to recognize our bias against "others," but should be broadened to account for our inability to recognize that even individuals who share particular traits can see facts so differently.⁴⁷ Stempel's piece also looks at the rates at which summary judgment grants are overturned on appeal to argue that district courts all too often wrongly decide such motions.⁴⁸

D. Technical Aspects of Summary Judgment

In addition to the FJC's empirical studies, scholars have also written about the technical aspects of the summary judgment process itself. This work has ranged from discussions about the judge's discretion to deny summary judgment because of the word "shall" in Rule 56⁴⁹ to articles like those by Linda Mullenix in this Colloquium that look at whether courts truly engage in the complex procedural burden shifting provided by *Celotex Corp. v. Catrett*.⁵⁰ Finally, scholars like Adam Steinman have attempted to reconcile pre-trilogy summary judgment procedures with those post-trilogy, at least in the context of burden shifting under *Celotex*.⁵¹

46. *See id.* ("We have proposed a form of judicial humility as one technique for ameliorating such conflict. But such a strategy, we concede, will on its own make only a modest contribution to this end. Much more attention to solving the problem of cognitive illiberalism is needed, in both the legal and the political domains.")

47. Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627, 636 (2012); *see also* Michael J. Kaufman, *Summary Pre-Judgment: The Supreme Court's Profound, Pervasive, and Problematic Presumption about Human Behavior*, 43 LOY. U. CHI. L.J. 593, 595 (2012) (arguing that judges should not presume rational human behavior when assessing claims on summary judgment).

48. Stempel, *supra* note 47, at 650–53.

49. Steven S. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. 1139, 1142 (2010).

50. Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI. L.J. 561, 568–72 (2012); *see also* Brooke D. Coleman, *The Celotex Initial Burden Standard and an Opportunity to "Revivify" Rule 56*, 32 S. ILL. U. L.J. 295, 311 (2008) (finding that a study of cases filed in the Northern District of California demonstrated the courts generally did not strictly adhere to, nor apply, the burden shifting provided for in *Celotex*).

51. Adam Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 85–86 (2006); *see also* James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1554–62 (1995) (articulating and dispelling myths about summary judgment in the

II. MAJOR THEORETICAL WORK IN SUMMARY JUDGMENT

The academic work about summary judgment is voluminous—thus, it is impossible to represent the breadth and quality of that work in this Essay. The goal is to highlight some of the notable work that has focused on certain emerging themes. First, the scholarship is crudely distinguished by whether it is critical of summary judgment or supportive of summary judgment.⁵² From there, this Essay highlights the main arguments made in the twenty-five years since the trilogy was decided.

A. *Critical Summary Judgment Scholarship*

Criticism from scholars began the moment the Court decided the trilogy. Some of the criticism was about the confusing nature of the opinions and how they might have negative implications for litigants. For example, scholars, like Jeff Stempel, argued that the Court simply got the decisions wrong, both historically and as a matter of precedent.⁵³ He also argued that the civil rulemaking body should get involved by fixing the Court's mistakes.⁵⁴ Other scholars have similarly criticized the trilogy opinions on the basis that the Court was mistaken.⁵⁵

Much of the criticism that followed these initial reactions focused more on the effect of the trilogy once, as scholars argued, it increased the frequency and use of summary judgment. A substantial portion of this critique has been based on the notion that the trilogy made it easier for defendants to succeed on summary judgment. This work principally argues that it takes a function away from the jury (unconstitutionally or otherwise),⁵⁶ leaves too much discretion to judges,⁵⁷ and is a pro-

wake of the trilogy of cases).

52. The scholarship is, of course, more nuanced than just taking a position that is supportive or critical of summary judgment. Much of the work that is critical of summary judgment acknowledges that there are also positive aspects of it, and vice versa for the scholarship that is categorized as critical. This admittedly artificial separation of the scholarship allows this Essay to better critique the methodologies and arguments made on all sides of the summary judgment debate, but it is not meant to suggest that the work discussed is that simple and binary.

53. 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, 99 (1988).

54. *Id.*

55. See, e.g., Melissa Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53, 66 (1988) (criticizing the Court's misreading of the record in *Celotex* and arguing that its language regarding the use of inadmissible evidence creates confusion).

56. See, e.g., Suja Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 142–43 (2007) (arguing that summary judgment is unconstitutional because there was no procedure like summary judgment under the common law in 1791).

defendant measure.⁵⁸ One piece that is often cited as rounding out this premise is Arthur Miller's article, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crises," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*⁵⁹ In that article, Miller chronicles the abuses that he argues occur in summary judgment motions, and to support his argument, he highlights particularly offensive cases.⁶⁰

There is also a good amount of literature that more specifically theorizes that there is a bias in the summary judgment process because of a plaintiff's gender, race, sexuality, or other category. For instance, Elizabeth Schneider, in *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, argues that gender bias makes summary judgment unfair in application.⁶¹ By looking at the effect of gender in a select number of cases across different substantive areas, Schneider concludes that gender unfairly affects judicial decision-making.⁶² Similarly, in my recent article, *The Vanishing Plaintiff*, I also theorize that particular types of plaintiffs are impacted more harshly by restrictive procedural rules, including summary judgment.⁶³ With respect to summary judgment, I argue that my "vanishing plaintiff" has a more difficult time surviving summary judgment for at least two reasons.⁶⁴ First, her claim is often marginal, in the sense that there is a conscious or unconscious hostility to it, requiring a full opportunity to advance her complete narrative.⁶⁵ Yet, the summary judgment process necessarily cuts off this cohesive narrative by presenting facts and

57. See, e.g., Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1942 (1998) (reviewing a sample of decisions from the D.C. Circuit and determining that "judges will stretch to make summary judgment apply even in borderline cases, which, a decade ago, might have been thought indisputably trial-worthy").

58. See, e.g., John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 539–43 (2007) (arguing summary judgment is pro-defendant).

59. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crises," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1047 (2003).

60. *Id.* at 1065–72. Miller also uses the studies discussed in this Essay, among other similar studies, to determine that summary judgment rates are increasing drastically for particular substantive areas and modestly in the aggregate. *Id.* at 1048–56.

61. Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 737–38, 757 (2007).

62. *Id.* at 714–15.

63. Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1908359.

64. *Id.* (manuscript at 21).

65. *Id.*

arguments piecemeal.⁶⁶ Second, her claim is often one based on her identity—race, sexual orientation, gender, or other—but the reality is that the judge hearing the case does not share any of these attributes with her.⁶⁷ There is no common identity between her and the person judging her like there might be if she were before a jury.⁶⁸

In addition to work that is directly critical of summary judgment, there is a body of scholarship that responds to the proponents of summary judgment. Most of this work responds to the notion that summary judgment makes the civil justice system more efficient. For example, John Bronsteen, in *Against Summary Judgment*,⁶⁹ argues that summary judgment creates three distinct moments in litigation (early settlement, summary judgment, and trial) when without it, there would be only two moments (early settlement and trial).⁷⁰ The thrust of this argument is that the three moments actually make litigation more costly than it would be with only two.⁷¹ More recently, Judge Diane Wood questioned the alleged cost-savings achieved through summary judgment by arguing that parties spend more on discovery than they might otherwise without such abounding access to the process.⁷² Finally, bridging the gap between the proponents and critics of summary judgment, scholars like Martin Redish have tried to balance the pros and the cons of the process by measuring the procedure against

66. *Id.*

67. *Id.* (manuscript at 22–23).

68. *Id.* (manuscript at 23). Many other scholars have done fantastic work in other substantive areas, but have also relied on a selection of cases to support their viewpoints. *See, e.g.,* Deseriee A. Kennedy, *Processing Civil Rights Summary Judgment and Consumer Discrimination Claims*, 53 DEPAUL L. REV. 989, 1002–11 (2004) (looking at how summary judgment does not function well in consumer discrimination claims under the Civil Rights Act); Ann McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 233–41 (1993) (criticizing the use of summary judgment in the context of civil rights and ADEA cases).

69. Bronsteen, *supra* note 58, at 522.

70. *Id.* at 532.

71. *See id.* at 532–33 (“[I]n most cases the cost of litigating to summary judgment exceeds the cost of settling early by a greater amount than the cost of trial exceeds the cost of litigating to summary judgment. In other words, summary judgment is more expensive than trial.”); *see also* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 100–03 (1990) (using economic modeling to argue that increased use of summary judgment might actually discourage settlement, a moment thought to be efficient in our civil justice system).

72. *See* Hon. Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 243–45, 250 (2011) (suggesting that to decrease the amount of resources spent on discovery in advance of summary judgment, the rules could require the party moving for summary judgment to seek permission from the judge before filing the motion).

a neutral benchmark.⁷³ In his essay *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, Redish argues that there are benefits to the summary judgment process that should require the system to lower what he calls “external barriers” into the process.⁷⁴ But he also argues that such benefits should be countered with lower “internal barriers” for the plaintiff when responding to a summary judgment motion—to the extent a jury could draw an inference in her favor, she should be able to survive the motion for summary judgment.⁷⁵

B. Supportive Summary Judgment Scholarship

The scholarship about summary judgment is not all critical. There are a number of scholars that have argued that it is an appropriate process, most notably because of the efficiencies it creates. Ed Brunet’s piece for this Colloquium is but one example.⁷⁶ Brunet argues that efficiencies like the “summary judgment premium” (Brunet’s term for the argument that if the defendant loses the summary judgment motion, the plaintiff will get more in settlement) and fact clarification are worth focusing on when discussing the positive effects of summary judgment.⁷⁷ He also argues that the motion creates a “wake-up” moment for the parties and the judge.⁷⁸ In other words, the motion

73. Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1330–31 (2005).

74. *Id.* at 1347–48.

75. *See id.* at 1355 (“Thus, where plaintiffs present affirmative evidence from which a reasonable factfinder could infer that the facts are as alleged, summary judgment should be denied. This is so, even though it would be just as reasonable to draw the opposite inference. That it would be just as reasonable to believe that the facts happened as the defendant claims as it is to accept the plaintiff’s factual allegations is not an automatic basis for taking the case from the jury.”).

76. Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L.J. 689, 690 (2012).

77. *Id.* at 691–92, 694–95; *see also* Edward Brunet, *Six Summary Judgment Safeguards*, 43 AKRON L. REV. 1165, 1165 (2010) (arguing that summary judgment will not be abused because of the following six safeguards: “(1) the discretionary ability of the trial judge to deny summary judgment by identifying a single disputed factual issue; (2) robust de novo appellate review; . . . (3) a liberal ability to call a helpful ‘time-out’ available under Rule 56[d] to take a focused quantum of discovery essential to combat a summary judgment request . . . [the possibility of] [(4)] the weighing of inferences favoring the non-movant; [(5)] allowing the non-movant to introduce inadmissible evidence; and [(6)] a ‘handle with care’ label applicable to only selected types of cases . . .”).

78. *See* Brunet, *supra* note 76, at 693 (suggesting that a summary disposition motion requires a judge to “wake up” from previous procedural inaction and actively participate by hearing and ruling on the motion).

forces the parties to engage in the litigation and, even more importantly, forces the judge to manage that litigation more efficiently.⁷⁹

This line of argument has been a constant one since the Court decided the trilogy. When the trilogy came down, scholars defended the decisions on the basis that it would empower judges to grant summary judgment in cases where it was justified. Jack Friedenthal, in *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, argued that the efficiencies to be gained from summary judgment would benefit all litigants.⁸⁰ According to Friedenthal, if judges were able to dismiss meritless cases at summary judgment, it would free up more time for those same judges to attend to meritorious claims.⁸¹ Similarly, William Schwarzer, in *Summary Judgment and Case Management*, argued that the process has great benefits.⁸² Similar to Brunet's argument that summary judgment creates a "wake-up" litigation moment, Schwarzer argued that even if the parties did not file a summary judgment motion, forcing parties to think through the potential motion would focus them and the court on the disputed issues.⁸³

This defense of summary judgment has continued. For example, Schwarzer later wrote that

[s]ummary judgment has become recognized not only as a procedure for avoiding unnecessary trials on insufficient claims or defenses but also as an effective case management device to identify and narrow

79. *See id.*

80. Jack Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 771 (1988).

81. *See id.* at 771 ("It is important to see, whether, in an era of increasing litigation costs and the consequent maneuverings by parties which are more related to their assets than to the strength of their legal arguments, the legal system gives too little credence to a procedural device that has the potential for providing just results in many cases and which could leave judicial resources free to concentrate on those actions for which a trial is required.").

82. *See* William W. Schwarzer, *Summary Judgment and Case Management*, 56 ANTITRUST L.J. 213, 220 (1987) ("The summary judgment procedure has utility in nearly every case . . . [a]ttorneys should therefore have Rule 56 in mind in nearly all cases from the outset of litigation.").

83. *See id.* ("The summary judgment procedure has utility in nearly every case, both as an offensive and a defensive tactic. Even if no motion is filed, thinking through the analytic process, as illustrated by the discussion in the preceding section, helps sort out the legal and factual issues and define with precision the scope of the controversy. If a motion is made, whether or not granted, it affords court and counsel a useful vehicle for narrowing the controversy, identifying issues to be decided, and structuring the litigation for efficient and economic disposition."); *see also* Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789, 794 (1989) ("In 1986, the spirit of judicial management and control evinced in the 1983 amendments was given greater vitality in the Supreme Court's analyses of summary judgment in [the trilogy of cases].").

issues. The Supreme Court had it right almost ninety years ago when it said summary judgment “prescribes the means of making an issue.” Properly used, summary judgment helps strip away the underbrush and lay bare the heart of the controversy between the parties.⁸⁴

To be fair, Schwarzer also deftly noted that “proper use of the rule is the sine qua non of its utility,” but he also wholeheartedly credited that the rule created systemic efficiencies.⁸⁵

Indeed, this efficiency assumption undergirds every argument in favor of summary judgment in the literature today. In many articles, the underlying assumption is that current summary judgment practice is efficient, such that additional and innovative uses of the procedure would only be more beneficial. For example, Randy Kozel and David Rosenberg, in *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*,⁸⁶ argue that requiring the adjudication of a summary judgment motion before settlement would eliminate plaintiffs’ incentives to use “nuisance-value strategies.”⁸⁷ The authors explain that a plaintiff employs a nuisance-value strategy when it “asserts a plainly meritless claim . . . in order to extract a payoff based on the cost the other party would incur to have the claim . . . dismissed by the court [at] summary judgment.”⁸⁸ Kozel and Rosenberg assert that if a summary judgment motion is required before a settlement can occur, plaintiffs will be deterred from filing frivolous claims.⁸⁹ The cost of enduring the summary judgment process will dissuade them from bringing the claims in the first place; thus, the authors argue mandatory summary judgment would create greater efficiencies.⁹⁰

Jonathan T. Molot also argues for the potential efficiencies from the increased use of summary judgment in his article, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*.⁹¹ Molot suggests that Rule 56 should be amended to require judges to explain why they denied a motion for summary judgment because such an evaluation of

84. WILLIAM W. SCHWARZER, ALAN HIRSCH & DAVID BARRANS, FED. JUDICIAL CTR., *THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT MOTIONS* 8 (1991) (quoting *Fid. & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902)).

85. *Id.* Schwarzer looked at a collection of cases in different substantive areas, and argued that on the whole, the courts got the summary judgment decision right. *Id.* at 21–37.

86. Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004).

87. *Id.* at 1853.

88. *Id.* at 1850.

89. *Id.* at 1862–64.

90. *Id.* at 1902.

91. Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955 (1998).

the merits by a judge would lead to more accurate settlements.⁹² Like Kozel and Rosenberg, Molot is concerned about plaintiffs that bring weak claims.⁹³ His baseline assumption is that summary judgment is a procedure that is required to weed out these types of suits.⁹⁴ Forcing a judge to explain why she would deny a motion in every case would, according to Molot, go even further in achieving the efficiency potential of summary judgment because parties would have a clearer sense of the quality of their arguments.⁹⁵

III. WHY THIS WORK DOES NOT TELL US WHAT WE OUGHT TO KNOW

The studies and scholarship that are supportive and critical of summary judgment cannot fairly be represented in any work, but the previous section has chronicled some of the high points in the discourse. There is a lot to learn from what has been written. Yet, it must also be acknowledged that there is still so much that we do not know.

For example, the FJC studies⁹⁶ are often cited by rule makers and summary judgment proponents to argue that the filing rates and grant rates following the trilogy did not increase greatly. It is true that, on their face, the rates only modestly increased, and now appear to have evened out.⁹⁷ But, this reading of the numbers is misleading. First, these numbers do not tell us how many potential plaintiffs chose not to file their claims because of the chilling effect of the trilogy and increased use of summary judgment.⁹⁸ In other words, the percentage

92. *Id.* at 1031.

93. *See id.* at 1032 (discussing how summary judgment can help screen out weak or unsupported positions from litigation).

94. *See id.* (“If judges were consistently to take an active role in litigation . . . as legal arbiters who exercise influence over the merits by granting partial summary judgment more liberally . . . this would be a step in the right direction, stripping unsupported positions of much of their settlement value.”).

95. *Id.*; *see also* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 *YALE L.J.* 27, 44 (2003) (“The summary judgment mechanism . . . forc[es] parties to focus on the merits of their positions . . .”).

96. *See supra* Parts I.A and I.B and accompanying notes (analyzing the FJC studies).

97. *See supra* Parts I.A and I.B and accompanying notes (discussing the general trends in summary judgment filing and grant rates).

98. For a similar critique of an FJC study in the context of pleading, see Lonny Hoffman, Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss, 6 *FED. CTS. L. REV.* 1, 28–30 (2012). For a response from the FJC to Hoffmann and others’ critique of this study, see Joe S. Cecil, Of Waves and Water: A Response to Comments on the FJC Study *Motions to Dismiss for Failure to State a Claim after Iqbal* (Mar. 19, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2026103. Cecil’s response notes that the FJC, in response to a request from the Standing Committee on the Federal Rules of Practice and Procedure, is proposing a new “comprehensive and collaborative” study examining the effect of dispositive motions, including the motion to dismiss

of summary judgment motions filed and granted may have stayed the same, but that does not indicate how many fewer cases were filed in total after the trilogy. Moreover, the data does not tell us whether those motions were properly filed, and more importantly, whether they were properly granted. We simply cannot know by looking at these raw numbers whether the cases are being decided correctly.

Another issue with the FJC studies is how they attempt to explain away increases in grant rates within particular substantive areas. In the *Trends in Summary Judgment Practice* study, the authors suggested that the increase in grant rates in civil rights cases may have been due to the volume of cases filed in that area more generally.⁹⁹ In the *Estimates of Summary Judgment Activity in Fiscal Year 2006* study, the authors noted the high numbers of grant rates in employment discrimination cases, but explained that those districts require alternative dispute resolution before the filing of the summary judgment motion.¹⁰⁰ The authors of the study seem to suggest that because of this requirement, many of the meritorious cases settle and are not brought to the summary judgment stage.¹⁰¹

As to the volume increase in substantive areas as a way to explain the increase in grant rates, the number could also be viewed as representing a bias toward those types of claims. Regardless of whether the volume of those kinds of cases increased or not, the number of motions filed and granted has increased over time to a level that is far above other substantive areas. The *Trends in Summary Judgment Practice* study found that filing rates for summary judgment motions increased most in civil rights cases and found that grant rates for civil rights cases were similarly higher than other substantive areas (i.e., 60% in civil rights cases versus 40% in torts cases).¹⁰² The volume of claims made in the substantive area might explain in part why the rates increased, but it does not explain away the overall increase or render that increase

and summary judgment. *Id.* (manuscript at 49).

99. Cecil et al., *supra* note 10, at 885 (“[I]ncreases in summary judgment activity overall may reflect the growing proportion of cases in which summary judgment has always been common, such as civil rights cases, rather than a broad shift in summary judgment practice across all cases.”).

100. Memorandum from Joe Cecil & George Cort to Hon. Michael Baylson, *supra* note 31, at 2 (“Some of the districts with high rates of motions granted [for employment discrimination cases] also have ADR procedures that resolve many cases before a summary judgment motion is filed.”).

101. *Id.*

102. See Cecil et al., *supra* note 10, at 885 fig.4, 887 fig.6 (comparing changes in tort and civil rights caseloads over time and outcomes in summary judgment motions by defendants, respectively).

innocuous. Similarly problematic is the argument that the percentages of motions granted might be skewed by requiring ADR before the filing of a summary judgment motion.¹⁰³ It could be argued that the cases that do not settle might be the most meritorious because the plaintiff is willing to take a chance at summary judgment (and perhaps get to trial) instead of the certainty of settlement. Moreover, there is at least a fair question about whether ADR mechanisms are fair to plaintiffs in employment discrimination cases; thus, the notion that districts require that procedure might be alarming on that ground alone.¹⁰⁴

This is not to say that only the supportive summary judgment empirical work has its issues. To the contrary, while the *Scott v. Harris* study is important, it is by its own terms only a modest study.¹⁰⁵ It uses a relatively small sample size, and it only looked at one particular summary judgment case.¹⁰⁶ Like the FJC studies, we can learn a lot from it, but we cannot know how common “cognitive illiberalism” is and whether it is problematic in the vast majority of summary judgment cases.

There are problems with the theoretical work as well. One of the major problems with much of the scholarship critical of summary judgment is its reliance on a selection of cases to support its arguments. For example, in Elizabeth Schneider’s article regarding gender and summary judgment, she relies on a sampling of cases to support her thesis.¹⁰⁷ Her piece is incredibly well researched, but even she acknowledges that she cannot draw “empirical conclusions.”¹⁰⁸ She can only offer a taste of what she believes is happening in the civil justice system—a taste she can only show by sampling cases that demonstrate her argument. Similarly, in my article *Vanishing Plaintiff*, while I absolutely believe in the veracity of my arguments, my only proof was a

103. Memorandum from Joe Cecil & George Cort to Hon. Michael Baylson, *supra* note 31, at 1–2 (outlining the scope of the summary judgment activity summary).

104. *See generally* Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 399 (1999) (questioning whether employment discrimination claims are an appropriate substantive area for resolution through arbitration).

105. *See* Kahan et al., *supra* note 38, at 905–06 (asserting *Scott* may create another view of the “reasonable person” as it pertains to juries).

106. The study showed the video to 1350 individuals. *Id.* at 854.

107. Schneider, *supra* note 61, at 736–54.

108. *Id.* at 736 (“The cases that follow are a rich source of information on judicial decision making; not empirical data to be sure, but more than anecdotal evidence, more than what District Judge Lee Rosenthal, Chair of the Standing Committee on Rules of Practice and Procedure, has called ‘anecdota.’”).

sampling of cases demonstrative of my perspective—hardly an empirically-satisfying foundation.¹⁰⁹

The scholarship that is supportive of summary judgment is similarly unreliable. First, it focuses on substantive areas where proponents argue that summary judgment can work particularly well. For example, Schwarzer, in his article *Summary Judgment and Case Management*, highlights how the process functions effectively in antitrust.¹¹⁰ He notes that “[s]ummary judgment analysis in antitrust cases requires the identification of issues that are either dispositive or pivotal and do not turn on disputed evidentiary facts,” and concludes that many antitrust cases lend themselves well to the summary judgment process.¹¹¹ But, the rules are trans-substantive. An arguably beneficial use and result in one substantive area does not necessarily justify the use of the procedure across all substantive areas if it is otherwise failing.

And, like the theoretical work that is critical of summary judgment, the work that is supportive of it does not rely on consistent data. At best, the argument that summary judgment creates efficiencies is anecdotal. In their article, Kozel and Rosenberg use numeric examples to back up their argument that a mechanism like mandatory summary judgment would create greater efficiencies.¹¹² Their work, while compelling, is hypothetical; it has not been otherwise tested on parties that file actual cases.¹¹³ Similarly, in his piece, Brunet argues that there is a “summary judgment premium” because if the summary judgment motion is denied, the settlement value will be higher for the plaintiff.¹¹⁴ The consequence of this, Brunet argues, is that this “premium” deters defendants from bringing frivolous summary judgment motions.¹¹⁵ This is an interesting point, and while there might be fairly universal agreement that the consequence of a summary judgment motion impacts

109. Coleman, *supra* note 63 (manuscript at 35–38, 41–45).

110. Schwarzer, *supra* note 82, at 222–28 (summarizing the application of summary judgment in various antitrust cases).

111. *Id.* at 222–23.

112. See Kozel & Rosenberg, *supra* note 86, at 1862 (modeling the behavior of parties in a class action where the plaintiffs’ claims are assumed to be frivolous).

113. Kozel and Rosenberg employ various hypothetical scenarios to demonstrate their model. *Id.* at 1857–67.

114. Brunet, *supra* note 76, at 700 (“The denial of a summary judgment request seems to set up a real probability that the case will proceed to a risky and costly trial. What this effectively does is to help the plaintiff collect a greater dollar amount than would be possible without the motion.”).

115. See *id.* at 700–01 (“The prudent defendant has the incentive to file Rule 56 motions that are probable winners to avoid paying this premium. These dynamics efficiently deter the filing of any low-quality summary judgment motions . . .”).

settlement values, there is no way to test whether and how that impact affects defendant behavior before filing the motion. Brunet also argues that the summary judgment motion creates a “wake-up” moment for the judge, forcing her to engage when she otherwise might not.¹¹⁶ Again, this is an interesting point, and it may be true, but there is no evidence to back it up. Stated differently, to my knowledge, there are no studies to show that the time spent on summary judgment motions creates more time for other cases; that the parties are efficient when it comes to settlement because of summary judgment; or that the judge engages because of summary judgment. All of these arguments, while interesting and perhaps true, are not proven by simply making the statement, nor are they proven by looking at one or two cases.

IV. HOW WE CAN DETERMINE WHAT WE OUGHT TO KNOW

Where does this leave us? Well, it is probably not quite as bad as this Essay has made it out to be. As already stated, the body of work about summary judgment is generally rigorous and quite good. The point here is that as scholars and policymakers, we need to be careful about extracting too much from what has been said. If we want to have an argument about whether summary judgment is efficient, we need to study that issue in a way that will give us a reliable answer. Perhaps we could study how much time judges spend resolving the motions, or even how much time the parties spend preparing for the motions. This would be a difficult study to conduct, but it would give us much better information about the alleged efficiencies of summary judgment.

In a similar vein, if we are going to argue that the process is unfair,¹¹⁷ we need to find a way to more carefully study whether that is true. This might involve a volume of work that makes such a study too onerous. But, it seems possible that such a study could be designed. For example, a sampling of cases where summary judgment was granted could be gathered, along with the supporting motions and evidence. A broad swath of scholars and judges could then weigh in on whether the motions were decided “correctly.”¹¹⁸ If anything, that study might tell

116. *See id.* at 696, 703 (arguing that something needs to happen “to activate the court who supposedly is a ‘judicial manager’”).

117. *See supra* Part II.A (summarizing critiques of post-trilogy summary judgment use, which have focused on how summary judgment can make courts unfairly pro-defendant).

118. *See* Mark Spottswood, *Evidence-Based Litigation Reform* 51–54 (Florida State University College of Law, Public Law Research Paper No. 554, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937787 (analogizing to studies done in the medical malpractice context to argue that studies that assess the accuracy of cases after-the-fact will provide better insight into the value of procedural innovations and lead to better procedural

us the ways in which we disagree on how the rule is applied. At most, such a study might allow us to assess whether summary judgment works fairly in practice.¹¹⁹

In short, we need to do the work necessary to answer these questions head on. Without better indicators of how summary judgment is working, neither those who support it nor those who criticize it can validly assess the procedure. We can learn a lot from the impressive body of work that has been done so far, but it does not tell us everything.

Finally, we must also acknowledge the degree to which some of this information is unknowable. As to that point, the debate about summary judgment then needs to become far more transparent. We cannot continue to use what we think we know to back up our arguments about what, as a matter of policy, we think is right. In other words, it is not enough to point to one case (or even a few cases) where summary judgment may have been improvidently granted, and argue that the whole summary judgment regime is wrong.¹²⁰ Similarly, it is not enough to have a perception that the summary judgment motion creates a moment where the parties and the judge engage and use that perception to argue that summary judgment is efficient.¹²¹

The scholarship discussed in this Essay is certainly not as one-dimensional as just described. As discussed, the scholars doing this work have acknowledged the limitations of their findings. Even with those limitations, however, the debate continues to be framed as a binary one between efficiency and fairness. And, to that end, all of the scholarship and empirical work discussed has taken some amount of liberty in drawing conclusions from less-than-perfect data toward an

rules).

119. A related, but different, approach might be to select a collection of key cases that survived summary judgment before the Court decided the trilogy in 1986—cases that a broad group of scholars agree are integral to our understanding of the law. This might be a difficult consensus to reach, but assuming it could be, scholars could then assess whether those cases would survive a summary judgment motion today, and if not, whether and how society would have suffered without those cases. Such an exercise might help to focus the discussion more critically on the potential losses and benefits of our summary judgment regime. See Brooke D. Coleman, *What If?: A Study of Seminal Cases as if Decided in Twombly/Iqbal Regime*, 90 OR. L. REV. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916832 (engaging in a similar exercise in the context of pleading rules under *Twombly* and *Iqbal*). An additional way to test the worth of new procedural rules might also include running “randomized controlled trials” before the rules are implemented. Spottswood, *supra* note 118, at 38–40.

120. See *supra* Part III (critiquing existing scholarship critical of summary judgment).

121. See *supra* Part III (critiquing existing scholarship that argues summary judgment has increased efficiency in the legal system).

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“efficient” or “unfair” conclusion. This is, of course, what scholars do—draw conclusions from the information we have. However, this Essay is meant to challenge the way the debate has been framed in the summary judgment context by pointing out that there might be ways to get better information in order to have a more productive debate.

Further, if such information does not exist or is not knowable, then perhaps the nature of the debate needs to change altogether. If that is the case, then the real question is not so much about the efficiency or fairness of the summary judgment process, but really just about one critical issue—the jury trial. Regardless of what the data might tell us, the bottom line is that one either has great faith in the value of the jury trial or one does not. And maybe that is where the debate about summary judgment should start and end.