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08-CV-145

January 28, 2009

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendments to Fed. R. Civ. P. 56

Dear Mr. McCabe,

I am pleased to submit comments on the proposed amendments to Rule 56 of the Federal Rules of Civil Procedure.

By way of background, I have been teaching and writing about civil procedure, the Federal Rules and the rulemaking process for thirty years. In 2003, having been asked to contribute to a symposium on vanishing civil trials sponsored by the American Bar Association, I undertook a historical, empirical and normative study of summary judgment. This work led to two articles that were published in 2004.[1] Although I was not able to attend the January 2007 conference sponsored by the Civil Rules Committee's Summary Judgment Subcommittee, I did submit a memorandum to Judges Baylson and Rosenthal. I also participated in the November 2007 Rule 56 Conference, and I have read all of the comments that were accessible on the judiciary's website as of January 20, 2009. In order that readers of these comments can better understand my perspectives on the subject, it may be helpful if I repeat here the preliminary observations made in my January 2007 memorandum:

> Although Charles Clark was not the chief architect of original Rule 56, he was one of its most outspoken advocates, both as a rulemaker and a judge. Yet, like Edson Sunderland, who *was* the rule's chief architect, and the rest of the original Advisory Committee, Clark thought that the rule would prove useful chiefly

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[1] Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Cases*, 1 J. EMP. LEG. STUD. 571 (2004); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMP. LEG. STUD. 591 (2004) ("*Vanishing Trials and Summary Judgment*").

for plaintiffs seeking to collect debts. Withal, at the 1938 Cleveland Institute, he observed that "the great question about the motion for summary judgment is whether it may not be attempted in all sorts of cases, whereas it is only really going to perform its function in the simple case where there isn't much of a defense. It is quite possible that the motion ... may be resorted to too much and may become an instrument of delay."

In the succeeding seventy years, summary judgment has become something very different from what those who introduced it into federal practice envisioned. It is invoked far more by defendants than by plaintiffs; it is by no means invoked only in simple cases, and it accounts for a much higher percentage of terminations in federal civil cases than do trials. There is nothing necessarily wrong with these developments, particularly when one recognizes the changes in the broader litigation landscape to which they might be thought responsive, and if one acknowledges the propriety of judges and rulemakers dusting off old tools and reshaping them to deal with problems not foreseen by their creators.

Still, Clark's concerns about the possible misuse of motions for summary judgment (given what he thought were the possible benefits of the rule) are not irrelevant when it is proposed again to reshape this procedural device. Even more obviously to be attended to are problems (or, more precisely, possible problems) in the use of the rule that its architects did not foresee but that are revealed in subsequent experience. My inquiries suggest a number of such problems. One is the fact that the rule, although superficially uniform, is very differently interpreted in different circuits and in different types of cases, a phenomenon that may help to account for differences in the rates at which it is invoked, and at which cases are terminated by summary judgment, in different parts of the country. From that perspective, I have suggested, Rule 56 today resembles Rule 11 during the period between the 1983 and 1993 amendments. Another problem is suggested by evidence that some courts are granting summary judgment by resort to techniques of factual and legal carving that threaten the right to jury trial and the integrity of the substantive law. Still another is that – apart from the problem of delay – summary judgment motions may be used by one party to inflict expense on the opponent, part of a strategy that, particularly in cases where opposing counsel is paid on a contingency basis, is designed to extract a favorable settlement.

The deliberations of the original Advisory Committee concerning Rule 56 were, quite understandably, replete with discussions about

> the consistency of the proposed rule with the Seventh Amendment, and, constitutional questions to the side, about the differences between "trial by affidavit" and trial in open court, and about the normative implications of foreclosing average citizens from a decision by their peers. Notwithstanding recent scholarship that raises serious doubts about summary judgment on the constitutional front, it is surely too late in the day to expect the federal courts to reject the conventional position. *We should not, however, become so preoccupied with the technical details of proposed rule amendments that we lose sight of abiding normative issues. If we can no longer commit to do no harm to constitutional values – whether they be found in the Seventh Amendment or in the structural protections of federalism and the separation of powers – perhaps we can commit not to exacerbate existing harm. In thinking about how to improve Rule 56, let us be candid that it is a rule empowering judges at the expense of juries, and that for that reason and because it encourages what I have called the "lawmaking disease" in the lower federal courts, special care is appropriate lest this equilibrating device become further out of balance.*[2]

In these comments, I will address only proposed Rule 56(c)'s addition of a "point/counterpoint procedure" (which I will also refer to as a "bilateral structured format") for the identification of (or of the absence of) genuine disputes concerning material facts. I will do so by considering primarily (1) the Advisory Committee's stated reasons for recommending a uniform rule, and (2) the empirical work of the Federal Judicial Center. My comments with respect to both are informed by my own research, the empirical work and normative scholarship of others, in particular articles and studies concerning the role of summary judgment in employment discrimination cases, and comments on the proposed amendments that have already been submitted.

In advancing the proposed amendments to Rule 56, the Committee describes them as "an effort to improve the procedures for making and opposing summary-judgment motions and to facilitate the judge's work in resolving them." Disclaiming any purpose to change "the summary-judgment standard or ... the assignment of burdens between movant and nonmovant," the Committee states that the proposed "amendments are designed to be neutral between plaintiffs and defendants."

> The aim is a better Rule 56 procedure that increases the likelihood of good motions and good responses, and deters bad motions and bad responses. No prediction is offered whether the result will be more or fewer motions, or more or fewer summary judgments ...
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> The Subcommittee and Advisory Committee unanimously agreed that improvements in summary judgment procedure, made without changing the standard for summary judgment or the related moving

[2] Memorandum to Mike Baylson and Lee Rosenthal from Steve Burbank 1-2 (Jan. 20, 2007) (emphasis added).

> burdens, can improve the role of summary judgment as the third leg of the notice-pleading, discovery, summary-judgment stool

Finally, noting the growth of "local rules to supplement the national rule," the Committee observes.

> These local rules have provided ideas and experience that have played a central role in developing the proposed amendments. The laboratories provided by individual districts, separately and collectively, have proved invaluable. At the same time, the local rules are not uniform, and at times mandate practices that are inconsistent from one district to another. It is useful, and increasingly important, to restore greater uniformity through a national rule that builds on the most successful local rules as well as on proliferating interpretations of present Rule 56 text.

There are thus at least two different strands of justification in the Committee's stated reasons for proposing the "point/counterpoint procedure." First, it is hoped that the bilateral structured format would result in "improvements in summary judgment procedure" that would in turn "improve the role of summary judgment." Second, it is deemed "useful, and increasingly important, to restore greater uniformity" and to do so by "build[ing] on the most successful local rules."

Taking the second strand of justification first, there appears to be some confusion about the current landscape of local rules. Thus, the comments on behalf of the American College of Trial Lawyers support the proposed "point/counterpoint procedure" and assert that it "is used in the vast majority of district courts."[3] This is not correct. The bilateral structured format that served as the Committee's model is prescribed by local rule in twenty (20) districts, and it is used by some individual judges in other districts. Thirty-four (34) districts impose a structured format as to undisputed facts only on a party moving for summary judgment, while thirty-seven (37) districts do not impose any such format on either party. *Why, it might be asked, does the Committee propose to saddle seventy-one (71) districts with a summary judgment format currently followed in only twenty (20)?*[4]

At the outset it should be noted that, given the striking lack of uniformity in summary judgment doctrine and rates of activity, both geographically and by type of case, which is documented in normative scholarship and FJC and other empirical studies, this particular quest for uniformity is a small point at which to stick. There is no

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[3] Letter from Chris Kitchel, Chair, Federal Civil Procedure Committee of the American College of Trial Lawyers to Peter G. McCabe 2 (Nov. 10, 2008) (08-CV-060).

[4] The temptation to group the twenty (20) districts imposing a bilateral structured format with the thirty-four (34) districts imposing such a format only on movants should be resisted. The FJC's empirical work strongly suggests that any differences of interest among the three types of districts occur as between the twenty (20) districts with bilateral requirements on the one side and the two other types, totaling seventy-one (71) districts, on the other side. *See, e.g.*, Memorandum to Judge Michael Baylson from Joe Cecil and George Cort (Aug. 13, 2008) ("FJC Memorandum"); *id.* at 8 (Table 3), 10 (Table 5), 15 (Table 10), 16 (Table 11), 17 (Table 12).

suggestion that any of the local rules on the subject of interest is inconsistent with current Rule 56, which would of course be a good reason to abrogate offending local rules. Moreover, the Committee merely asserts that "[i]t is useful, and increasingly important to restore greater uniformity through a national rule," neglecting to explain why it believes that (1) disuniformity in the format used for the presentation and consideration of motions for summary judgment (and responses thereto) imposes costs worth worrying about, or (2) any such costs outweigh the benefits of leaving districts (and where permitted individual judges) free to continue using the format that works best for them.[5] What are those costs, and are they really so great as to justify overriding the preferences of the numerous individual federal judges who have submitted (or authorized) comments opposing proposed Rule 56(c), including the judges of the District of Alaska, the Northern District of California, the Northern District of Indiana, the District of Maryland, and the Western District of Washington?[6] What, in other words, is the Committee's response to Judge Crabb's views that (1) "[f]or the very reasons noted by the committee in its report, I think it better to continue to let the individual courts serve as laboratories in this respect, rather than impose a set way of doing things on all courts," and (2) "[even if disuniformity on this matter in fact adversely affects litigants, which she doubts,] the adverse effect is not so great as to offset the difficulty courts might experience if required to use a 'one size fits all' approach, whatever their own preferences and the needs of their cases."[7]

Notwithstanding the federal judiciary's chilly reception of "bottom-up" procedural reform when Congress sought to impose it in the Civil Justice Reform Act of 1990, this would not be the first time that the rulemakers changed a national rule in response to a perceived groundswell among the district courts as represented in local rules. Yet, consideration of prior experience in that regard should perhaps give pause rather than provide encouragement. Certainly, the most well-known such instance in the past – acquiescence in local rules providing for six-person civil juries by the Supreme Court,[8] followed by change in Rule 48 to acknowledge the *fait accompli* – is widely regarded as a disaster. It is, moreover, a disaster that, once embedded in courthouse

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[5] I recognize that proposed Rule 56(c)(1) would permit district court judges to order different procedures on a case-by-case basis. The proposed Committee Note makes it appear, however, that it would be inappropriate for a judge to do so in every case because the judge deemed the procedure prescribed by Rule 56(c) inferior. I assume that Judge Crabb also was aware of (c)(1) when, notwithstanding her own favorable experience with a bilateral structured format, she commented that she "would not like to see the procedure written into the Federal Rules." Letter from Hon. Barbara B. Crabb to Peter McCabe 1 (Jan. 8, 2009) (08-CV-123). *See also infra* text accompanying note 7.

[6] *See, e.g.*, the letters or other statements of opposition from Chief Judge Sedwick (08-CV-017 and, on behalf of all district judges in Alaska, 08-CV-120), Judge Holland (08-CV-028), Judge Mullen (08-CV-030), Judge Doumar (08-CV-012), Chief Judge Norton (08-CV-043), Chief Judge Legg, on behalf of the judges of the District of Maryland (08-CV-053), Judge Murphy (08-CV-009), Judge Smith (08-CV-014), Judge Hood (08-CV-020), Judge Hunt (08-CV-062), Judge Fox (08-CV-064), Chief Judge Pasnik, on behalf of the judges of the Western District of Washington (08-CV-069), and Chief Judge Miller, on behalf of the judges of the Northern District of Indiana (08-CV-104). *See also* letter from Gregory S. Fisher to Peter G. McCabe (Dec. 23, 2008) (08-CV-114) ("Fisher letter") (referring to December 11, 2008 memorandum from Chief Judge Wilken of the Northern District of California).

[7] Letter, *supra* note 5, at 1.

[8] *See* Colgrove v. Battin, 413 U.S. 149 (1973).

construction plans, and nurtured by the armchair empiricism of individual members of the Judicial Conference, thwarted proposed amendments that would have reestablished the historic norm of twelve-person civil juries with support from systematic social science research on juries and on small group decisionmaking.[9]

In any event, in this instance there is no inconsistency between the local rules and current Rule 56 on the matter in question: the local rules requiring a bilateral structured format are in the distinct minority, and there is widespread, cogent opposition to "top-down" uniformity on this subject among federal judges and practitioners, including (in one communication) some seventy (70) of the most prominent plaintiffs' and defense lawyers in the country.[10]

More important, and implicating the Committee's first strand of justification, what is the metric by which it has identified "the most successful local rules"? If the market for local rules were the measure of "success," that honor would fall to a regime of no rules on the format for identifying genuine disputes about material facts, with second place to local rules imposing a structured format only on the movant.[11] The "point/counterpoint procedure" championed by the Committee is a distant third. Is the anecdotal evidence provided by lawyers and judges who favor the bilateral structured format so powerful as to overwhelm the numerous criticisms of proposed Rule 56(c), in particular the opposition of judges who have extensive experience with multiple formats (including opposition on behalf of entire districts with such experience) and who, *on the basis of that actual experience*, do not agree that the local rules favored by the Committee are the "most successful?"[12]

Probing further the Committee's first strand of justification, federal procedure is supposed to be "just, speedy and inexpensive."[13] One of the important questions raised by proposed Rule 56(c) on which those submitting comments seem to be talking past one another is whether a bilateral structured format would improve summary judgment practice from the perspectives of time and expense. Some practitioners and judges evidently find a bilateral structured procedure helpful in the preparation and decision of motions for summary judgment. Others believe that it does not improve decisionmaking for judges, and for litigants fosters satellite litigation and otherwise imposes an additional layer of expense on a system that is already too expensive for most Americans to afford. The rulemaking debate in this respect is much like that which attended the proposed

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[9] *See* Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ARIZ. L. REV. 221, 244 (1997) ("it is ironic that concerns about courthouse construction and the personal impressions of decisionmakers prevailed in the face of compelling social science evidence that the size of the jury makes a difference").

[10] *See, e.g.*, *supra* note 6; Practitioners' Comment on Rule 56(c) (Dec. 1, 2008) ((08-CV-072) (opposition to proposed Rule 56(c) from some seventy "experienced federal practitioners, including plaintiffs' and defense lawyers, practitioners from large and small firms, leaders of law firms, litigation departments and litigation practice groups; and leaders in national, state, federal and local bar associations").

[11] *See supra* note 4.

[12] *See, e.g.*, the letters from Chief Judges Sedwick (08-CV-017) and Miller (08-CV-104), Judge Holland (08-CV-028), and the Fisher letter (08-CV-114), *supra* note 6.

[13] FED. R. CIV. P. 1.

amendments to Rule 11 in the early 1980's, except that the problem of the cost of federal litigation is much more serious now than it was then.[14]

There is, however, an important difference. In the early 1980's the Advisory Committee evinced no interest in empirical investigation of litigation phenomena.[15] To its credit, the current Advisory Committee has commissioned empirical research on matters relevant to some of the policy questions raised by these proposed amendments. Unfortunately, the Committee has yet (publicly) to engage the results of the FJC's research. Thus, *the Committee has not explained why systematic empirical data demonstrating that use of a bilateral structured format is associated with substantial delay in decisions on motions for summary judgment should not be deemed a basis for rejecting the proposed amendment.*[16]

To be sure, at the Committee's direction, the FJC made further inquiries concerning, and discovered, other characteristics of the districts involved and their dockets that may account for the differences in disposition time among districts using different formats.[17] In the absence of more sophisticated empirical tests to pin down causation (which may not be possible here), however, the question becomes who should bear the risk of uncertainty. *Since delay is not usually considered a hallmark of improved procedure, I would have thought that the risk of uncertainty should lie with those promoting the format associated with delay.*

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[14] *See* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989).

> Twenty-five years ago, on January 1, 1983, it cost roughly the same to litigate in state and federal court. Plaintiffs chose federal court sometimes for expansive discovery or to get a good judge, even though state court was an available alternative and additur impermissible in federal court. Today, plaintiffs with non-federal causes of action flee federal court, and those with federal claims scour the books for state law analogues.

Gregory P. Joseph, *Federal Litigation - Where Did It Go Off Track?*, *available at* http://www.josephnyc.com/articles/viewarticle.php?53. *See also* letter from Judge Doumar (08-CV-042), *supra* note 6 ("As I watched the rules be amended, the cost of litigation increased to an extent that small businesses cannot afford to ever be in federal court.").

[15] > Rule 11 was amended but six years ago, and the amended Rule was avowedly an experiment. The Advisory Committee knew little about experience under the original Rule, knew little about the perceived problems that stimulated the efforts leading to the two packages of Rules amendments in 1980 and 1983, knew little about the jurisprudence of sanctions, and knew little about the benefits and costs of sanctions as a case management device.

Burbank, *supra* note 14, at 1927 (footnotes omitted).

[16] *See* FJC Memorandum, *supra* note 4, at 10 (Table 5). It takes 6-8 weeks longer to decide to grant or deny summary judgment motions in districts using a bilateral structured format than in districts imposing a structured format only on movants (6) or districts imposing no such requirement (8). The comparable differences with respect to motions in employment discrimination cases are 8-9 weeks. *See also supra* note 4 (citing these results as one reason to group movant-only-structured-format districts with no-structured-format districts rather than with bilateral-structured-format districts).

[17] *See id.* at 19 (Appendix B) (reporting differences in the following median characteristics: weighted case filings per judge, pending cases per judge, case terminations per judge, months from filing to disposition, and percent of civil cases over 3 years old). Note, however, that there is only a one month (4 week) difference in the medians reported for months from filing to disposition.

The numerous comments submitted that criticize proposed Rule 56(c) because it is likely to increase the *expense* of summary judgment procedure, and hence of federal litigation, recall my preliminary observations.[18] I am concerned about the potential for abuse of summary judgment through strategic motion practice designed to extract favorable settlements from litigants (i.e., usually plaintiffs) with fewer resources, often represented by counsel working on a contingent fee basis. A bilateral structured format is an invitation to engage in such strategic behavior.[19] The Committee's expressed hope that litigants (i.e., usually defendants) would not abuse the procedure by filing massive statements of uncontested facts in an attempt to exhaust (or divert) respondents is just that: a hope. The experience of many of those commenting does not engender optimism on that score,[20] and the incentives point clearly in the opposite direction. I am sure that judges would prefer not to add resolving disputes in this area to the kindergarten monitoring that discovery so often requires. *In any event, the matter cries out for additional empirical inquiry focused on the costs of preparing and responding to summary judgment motions in districts that use the different formats.*

Of course, the costs of making summary judgment procedure more protracted and/or more expensive (if that is what proposed Rule 56(c) would do) might be worth incurring if they were attended by greater benefits. *We are now in Rule 1's domain of justice, which is as important for defendants as it is for plaintiffs.* One such benefit suggested by the FJC's empirical work is that a bilateral structured format is associated with a greater rate of actual disposition.[21] A number of comments evince frustration that motions for summary judgment remain undecided.[22] Yet, if a bilateral structured format takes more time and/or costs more money, that format implicates a greater waste of resources in cases where summary judgment is denied. Moreover, once it is acknowledged that the alternative to summary judgment is not usually trial but settlement -- that the increasing rate of case termination by summary judgment has probably contributed not just to the declining trial termination rate but to a decline in settlements[23] -- whether a greater rate of decision on motions for summary judgment is a benefit is in any event subject to question. Note in this regard that even in districts with a bilateral structured format the rate of "no disposition" across all cases is still 50%.[24]

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[18] *See supra* text accompanying note 2.

[19] *See, e.g.*, the memorandum from Judge Murphy (08-CV-009) and the letter from Judge Holland (08-CV-028), *supra* note 6.

[20] *See, e.g.*, the letter from Chief Judge Sedwick (08-CV-017), *supra* note 6, *see also* letter from Joseph D. Garrison to Peter G. McCabe 2 (Oct. 15, 2008) (08-CV-016) (noting, among other examples, that defendants in individual age discrimination cases submitted 246 and 107 "allegedly material facts," that in "each case, responding took the time of at least two lawyers and at least one paralegal," and that the "costs of response are substantial to our clients").

[21] *See* FJC Memorandum, *supra* note 4, at 8 (Table 3).

[22] *See, e.g.*, Comments of Lawyers for Civil Justice and the U.S. Chamber Institute for Legal Reform 3 (Nov. 12, 2008) (08-CV-061).

[23] *See* Burbank, *Vanishing Trials and Summary Judgment*, *supra* note 1, at 617; Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMP. LEG. STUD. 705, 733 (2004).

[24] *See* FJC Memorandum, *supra* note 4, at 8 (Table 3). The comparable rate for movant-only-structured-format districts is 62% and for no-structured-format districts 58%.

Perhaps the Committee's implicit metric for "the most successful local rules" in connection with proposed Rule 56(c) is those local rules practice under which has yielded the most case terminations by summary judgment. The suggestion appears consistent with the Committee's (otherwise quite ambiguous) stated goal of "improv[ing] the role of summary judgment as the third leg of the notice-pleading, discovery, summary-judgment stool." Moreover, *the Committee has continued to assert that the "amendments are designed to be neutral between plaintiffs and defendants" and that "[n]o prediction is offered whether the result will be more or fewer motions, or more or fewer summary judgments" even after receiving the results of the FJC's empirical studies, which suggest that proposed Rule 56(c) may not be neutral, and that it may lead to more terminations by summary judgment, particularly in employment discrimination cases.*

I will not belabor my frustration that the very substantial differences in the rate of termination of employment discrimination cases by summary judgment that the FJC's earlier studies of districts using the different formats revealed could be considered not "meaningful."[25] Those differences were equivalent to, if they did not exceed, the mean termination rate by summary judgment in all cases.[26] In any event, having decided that the data it had been using for these analyses were unreliable, the FJC took a stratified random sample for this purpose and performed tests of statistical significance on the results.[27] The FJC found that the much higher rate at which districts using a bilateral structured format terminate employment discrimination cases by summary judgment (15%, compared with 11% in districts imposing a structured format only on movants and districts imposing no structured format by local rule) is statistically significant ($p < 0.01$).[28]

This finding of statistical significance does *not* mean that the format differences caused the differences in termination rate. But, unless the goal is to secure more terminations by summary judgment at any cost, the finding surely provides good reason for further inquiry. Part of that inquiry should include the question why, *within* districts with a bilateral structured format, the "no disposition" rate in employment discrimination cases is so much lower than in other types of cases.[29] *Again, so long as we do not know*

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[25] *See, e.g.*, Memorandum to Judge Michael Baylson from Joe Cecil, George Cort, and Pat Lombard (April 2, 2008). As explained by the FJC researchers, this resulted from the fact that they "arbitrarily designated a meaningful difference as a difference that exceeds five percentage points between the districts with such local rules and either of the other two district groups." *Id.* at 2. They also noted that the Committee could "determine that a greater or lesser difference constitutes a meaningful difference." *Id.*

[26] *See id.* at 16 (Table 12) (finding termination rates in employment discrimination cases of 13% (bilateral), 10% (movant only), and 9% (none), while finding termination rates for all cases of 4%, 3% and 3%).

[27] *See* FJC Memorandum, *supra* note 4, at 5.

[28] *See id.* at 17 (Table 12). The FJC also found that, *for all cases*, the difference in termination rate by summary judgment between districts using a bilateral structured format (5%) and the two other groups of districts (both 4%) was statistically significant ($p < 0.001$). *See id.*

[29] *See id.* at 8 (Table 3). This rate declines from 55% for contract and tort cases to 39% for employment discrimination cases. The comparable "no disposition" rates in movant-only districts are 64% (contracts), 60% (torts), and 52% (employment discrimination), and in no structured-format districts, they are 59% (contracts), 57% (torts), and 53% (employment discrimination).

whether a bilateral structured format causes more terminations of employment discrimination cases by summary judgment, and if so why the risk of uncertainty should lie with those proposing to require the format associated with the higher termination rate

Among those inclined to the view that more terminations by summary judgment are an unqualified good (at least in certain types of cases thought to be overwhelmingly meritless),[30] this proposition may encounter resistance. Yet, a number of comments on these proposed amendments emphasize the risk of improper summary adjudication in employment discrimination cases, in part because of the phenomenon of factual and legal carving to which I referred in my preliminary observations and which is well-documented in doctrinal and normative scholarship about summary judgment.[31] *One concern raised by the FJC's empirical findings is precisely that the higher rate of termination in districts using a bilateral structured format may be due to the incentive that format furnishes movants and judges to take a partial and incomplete view of the relevant facts and/or to distort legal doctrine by subdividing it specifically for the purpose of enabling summary adjudication.*

Quite apart from the question of carving, both the higher rate of termination by summary judgment and the lower rate of "no disposition" (even within districts using a bilateral structured format) prompt the question whether we are witnessing in employment discrimination cases the results of what Professors Kahan, Hoffman and Braman call "cognitive illiberalism"[32] in their recent article on the dangers of summary adjudication exemplified by the Supreme Court's decision in Scott v. Harris.[33]

> Precisely because juries can lend legitimacy to law by assuring *minorities* that their perspective is being respected, it surely isn't enough that the facts in a particular case "speak for themselves" for a large majority. If the minority's view of the facts reflects the minority's view of social reality, summary adjudication will deny the minority a basis to accept, or for the majority to demand that it accept, the law's view of the facts as its own. Before summary adjudication can be justified, then, the consensus that attends a particular set of factual findings must be more than (or simply different from) "large." It must

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[30] *But see* Richard S. Arnold, *Money, or the Relations of the Judicial Branch with the Other Two Branches Legislative and Executive*, 40 ST. LOUIS U. L.J. 19, 34 (1995-96) ("Although you pick up a file and say, 'Well, there is a ninety-eight percent chance that this is frivolous,' that does not mean you read only two percent of the file.")

[31] *See supra* text accompanying note 2; Burbank, *Vanishing Trials and Summary Judgment*, *supra* note 1, at 624-25; letter from Professor Elizabeth M. Schneider to Peter G. McCabe (Nov. 12, 2008) (08-CV-049); letter from John Vail to Hon. Mark Kravitz & Hon. Michael Baylson (Nov. 10, 2008) (08-CV-046); Statement of Richard T. Seymour (Nov. 17, 2008) (08-CV-066); Comments of L. Steven Platt (Dec. 26, 2008) (08-CV-100).

[32] Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 838 (2009). *See id.* at 896.

[33] 550 U.S. 372, 127 S. Ct. 1769 (2007).

> also be devoid of any partial understanding of social reality the endorsement of which by the law would alienate or stigmatize an identifiable subcommunity whose perspective has been excluded from consideration. Or, in a word, it must be *mundane*.
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> ...
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> *Scott* put identifiable subgroups of citizens in exactly that position [of defeated and subjugated outsiders]. Even though constrained, the nature of the dissensus surrounding the facts revealed in the tape shows that Americans interpret those facts against the background of competing subcommunity understandings of social reality. Under these circumstances, ordering that the case be decided summarily based on the video was wrong precisely because doing so denied a dissenting group of citizens the respect they were owed, and hence denied the law the legitimacy it needs, when the law adopts a view of the facts that divides citizens on social, cultural, and political lines. In so doing, the *Scott* majority transformed an inevitably partial view of social reality reflected in law into a needlessly partisan one.[34]

In employment discrimination cases, one would expect "Americans [to] interpret th[e] facts against the background of competing subcommunity understandings of social reality."[35] These cases are, therefore, strong candidates for the operation of cognitive biases of the sort those authors document.

> Because they are not generally aware of their own disposition to form factual beliefs that cohere with their cultural commitments, legislators, policy analysts, and ordinary citizens manifest little uncertainty about their answers to [policy questions turning on issues of disputed fact]. But much worse, because they *can* see full well the influence that cultural predispositions have on those who *disagree* with them, participants in policy debates often adopt a dismissive and even contemptuous posture towards their opponents' beliefs .
> The result is a state of *cognitive illiberalism*.[36]

Professor Kahan and his co-authors note that "[j]udges, like the rest of us, lack full insight into how the mechanisms of value-motivated cognition shape their and others' perceptions of particular facts," but that they are perfectly capable of understanding that

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[34] Kahan et al., *supra* note 32, at 886-87

[35] *Id.* at 887

[36] *Id.* at 895-96

these dynamics exist and can adversely affect the quality of their decisionmaking."[37] As an antidote they recommend "a form of judicial *humility*."[38]

> Before concluding .. that no reasonable juror could find such facts, the judge should try to imagine who those potential jurors might be. If, as will usually be true, she cannot identify them, or can conjure only the random faces of imaginary statistical outliers, she should proceed to decide the case summarily. But if instead she can form a concrete picture of the dissenting jurors, and they are people who bear recognizable identity-defining characteristics – demographic, cultural, political, or otherwise – she should stop and think hard Due humility obliges her to consider whether privileging her own view of the facts risks conveying a denigrating and exclusionary message to members of such communities If it does, she should choose a different path [39]

Jurors in employment discrimination cases will often have "recognizable identity-defining characteristics" that might cause them to dissent from a view of the facts grounded in a judge's cultural predispositions.[40] The FJC's empirical findings hardly suggest judicial humility and works of doctrinal and normative scholarship provide good reasons for concern that a bilateral structured format is least likely to elicit it.

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Prominent rulemakers have privately acknowledged the fact that, in a variety of procedural contexts, employment discrimination cases seem to be outliers, and they have privately agreed that it would be useful to attempt a focused, trans-procedural study designed to uncover the reasons why that is so.[41] As federal litigation becomes ever more expensive, with procedural hurdles erected to regulate access to trial that are ever more daunting for litigants without the financial means to engage either in extensive prefiling investigation or in expensive and protracted motion practice, humility also seems an appropriate posture for rulemakers. The work of Professor Kahan and his colleagues makes clear that the stakes here are not simply accuracy, but legitimacy [42]

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[37] *Id* at 898

[38] *Id* at 897 *See also* Elizabeth M Schneider, *The Dangers of Summary Judgment Gender and Federal Civil Litigation* 59 RUT L. REV. 705, 766-67 (2007) ("What if a judge does not have the humility, self-awareness or insight to recognize the limitations of his or her own perspective?"), Suja A Thomas, *Judicial Modesty and the Jury*, 76 U COLO L REV 767 (2005)

[39] Kahan et al., *supra* note 32, at 898-99

[40] *See* Schneider, *supra* note 38, at 767-71, Russell M Robinson *Perceptual Segregation*, 108 COLUM L REV 1093 (2008)

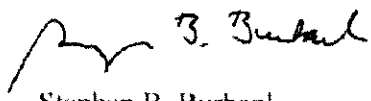
[41] For systematic empirical evidence of just how poorly employment discrimination plaintiffs fare see Kevin M Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court* 1 J Emp Leg Stud 429 (2004); Kevin M Clermont & Stewart J Schwab, *Employment Discrimination Plaintiffs in Federal Court From Bad to Worse?*, 3 HARV L & POL'Y REV. 1 (2009)

[42] *See* Kahan et al , *supra* note 32, at 881-87

> The Federal rules necessarily confer substantial discretion on Article III judges The discretion they confer entails the power to make policy choices that, although they may be buried in the obscurity of technical language, are increasingly likely to be exposed by those who have come to recognize the power of procedure, often in recent years aided by systematic empirical data. Growing awareness that questions of "mere procedure" may implicate important social policy encourages those who cannot make an independent judgment to have only so much confidence in the integrity of the process and the quality of the legal products it produces as they do in the actors who control it. In an age when politicians, interest groups and the media find it convenient to represent that the courts are part not only of the political process, but of ordinary politics, and that judges should be viewed as the policy agents of those who appoint or elect them, that is not good news [43]

In light of numerous unanswered questions raised by the Committee's articulated justifications, doctrinal and normative scholarship on summary judgment, particularly in employment discrimination cases, the comments submitted by others, and the FJC's empirical studies, the risks of uncertainty that proposed Rule 56(c) presents are far too serious to warrant proceeding with its adoption at this time.

Sincerely,



Stephen B. Burbank
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for the Administration of Justice

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[43] Stephen B. Burbank, *Pleading and the Dilemmas of 'General Rule'*, 2009 WIS. L. REV. (footnotes omitted) (forthcoming)