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## The Four Greatest Myths About Summary Judgment

James Joseph Duane

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# The Four Greatest Myths About Summary Judgment

James Joseph Duane\*

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### *Introduction*

With all that has been written on the topic of summary judgment in books, articles, and cases — and so much of it already duplicative — one would hardly imagine that anything new of value could be said about it.<sup>1</sup> As this Article will demonstrate, however, our federal court system is struggling in the grip of four profound and ubiquitous myths about summary judgment procedure. Even more surprisingly, these errors are directly attributable to many of the highest placed sources in the legal world, including the United States Supreme Court, the United States courts of appeals, the Advisory Committee on the Federal Rules of Evidence, and some of the most respected and authoritative reference works on civil procedure and evidence.

This Article exposes each of those four errors, reveals how they are all intimately connected, and points the way toward a proper resolution of the questions addressed by those misconceptions. These recommendations, if adopted, will augment both the efficiency and the fairness of our system of civil justice and will greatly enhance our ability to communicate the theory of that system to new students of the law.<sup>2</sup>

#### *I. Is Hearsay Admissible on a Motion for Summary Judgment?*

When ruling on a summary judgment motion, is a judge permitted to consider "hearsay" in the form of an affidavit from a witness?<sup>3</sup> The answer

1. As my civil procedure and copyright teacher, Professor Arthur R. Miller, was fond of telling our class, "There is nothing new under the sun!" Imagine my disillusionment when I later discovered that he did not even make up *that* line, but that he stole it from someone else. See *Ecclesiastes* 1:9. Just the same, I am grateful to him for his inspiration and instruction.

2. When I speak of new students of the law, I am referring primarily to law students and young lawyers, but I am also including one of the more unpopular segments of our legal culture: pro se litigants. For better or worse, the fundamental right to represent oneself has been protected by statute in federal court "since the beginnings of our Nation," *Faretta v California*, 422 U.S. 806, 812-13 (1975) (citing § 35 of Judiciary Act of 1789 (codified at 28 U.S.C. § 1654 (1988))), and is guaranteed by the Constitution for criminal defendants, *id.* at 807. That being the case, there is something substantial to be said in favor of any proposal that will enhance the analytical clarity of our rules of evidence and procedure and the ability of educated pro se litigants to teach themselves those rules accurately. That is one of the many long-run objectives of this Article.

3. Two brief notes of clarification might be in order here: (1) Whenever I use the term "hearsay" in this Article, I am referring, for the sake of brevity, to hearsay that it is not already made admissible under any of the numerous exceptions listed in Federal Rules of Evidence 803-805. Obviously, if a judge ruling on a summary judgment motion is presented

to that question can be found in a host of sources, including an impressive collection of the nation's most respected authorities on evidence and civil procedure, and they all give the same answer. Unfortunately, that standard answer — which has been universally accepted (until today) — is both confusing and wrong.

### A. *The Traditional Answer*

May a judge ruling upon a summary judgment motion consider hearsay? Consider the question from the perspective of someone who is relatively new to legal study — a law student, a young lawyer, or a pro se litigant. As that new student of the law would quickly discover, the traditional and universally accepted answer to this question is quite straightforward: Yes, a judge may consider hearsay — if it is in the form of an affidavit. This answer can be found readily in a host of prominent legal authorities, perhaps most notably in the Advisory Committee Notes to the Federal Rules of Evidence.

Federal Rule of Evidence 802 (Rule 802) states, "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."<sup>4</sup> The accompanying Advisory Committee Note states that this exception is designed to insure the continued admissibility of "hearsay which is made admissible by other rules adopted by the Supreme Court [but] which would not qualify under these Evidence Rules."<sup>5</sup> The Advisory Committee

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with an affidavit that falls under one of those exceptions, the judge would be able to use that affidavit *regardless* of what assumptions one might make about whether the Federal Rules of Evidence apply to pretrial motion practice or the relationship between Federal Rule of Evidence 802 (Rule 802) and Federal Rule of Civil Procedure 56 (Rule 56). (2) Whenever I speak about the use of affidavits and other materials "on a summary judgment motion," I am referring to the normal situation governed by Rule 56(c), (d), and (e). In that situation, at least one party asks for summary judgment, and some opposing party argues that the motion should be denied. The parties then submit what Rule 56(e) calls "[s]upporting and opposing affidavits." FED. R. CIV P 56(e). I do not discuss the obviously distinct requirements applicable to the less common situation governed by Rule 56(f) ("When Affidavits are Unavailable"), in which the nonmoving party submits affidavits to suggest merely that the motion is premature and that further discovery may be necessary. Affidavits submitted under that subsection are not subject to the requirements of Rule 56(e), including the requirement that affidavits contain admissible evidence stated upon personal knowledge. Affidavits submitted under Rule 56(f), therefore, do not pose the analytical difficulties addressed in this Article.

4. FED. R. EVID. 802.

5. *Id.* advisory committee's note.

Notes go on to explicitly cite the provision of Federal Rule of Civil Procedure 56 (Rule 56) governing "affidavits in summary judgment proceedings" as one of several examples of other rules allowing the use of otherwise inadmissible "hearsay which would not qualify under these Evidence Rules."<sup>6</sup>

Elsewhere in those Notes, the Advisory Committee again manifests its assumption that the affidavits used on a summary judgment motion constitute hearsay made admissible under an exception to the general rules of evidence. When a dispute over the admissibility of evidence turns upon the resolution of some underlying question of fact, Federal Rule of Evidence 104 provides that the factual question is to be decided by the judge, who "is not bound by the rules of evidence" in making that ruling.<sup>7</sup> In explaining why the judge should not be bound generally by the rules of evidence in that process, the Advisory Committee expressed the view that "the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay"<sup>8</sup> To illustrate this conclusion, the Committee again drew the following analogy to the supposed use of hearsay affidavits for summary judgment motions: "If concern is felt over the use of affidavits by the judge in preliminary hearings on admissibility, attention is directed to the many important judicial determinations made on the basis of affidavits. Rule 56 provides in detail for the entry of summary judgment based on affidavits."<sup>9</sup>

Following the venerable lead of the Advisory Committee Notes, virtually every major American treatise on the law of evidence offers the same claim that Rule 56 makes hearsay (in the form of affidavits) admissible on summary judgment motions and that it constitutes a noteworthy exception to the general rule of exclusion found in Rule 802.<sup>10</sup> The same conclusion is

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6. *Id.*

7. FED. R. EVID. 104(a). This rule contains an exception, of course, for the rules with respect to privileges. *Id.*, see also FED. R. EVID. 1101(c).

8. FED. R. EVID. 104(a) advisory committee's note (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 53, at 123 n.8 (1954)).

9. *Id.*

10. See MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6741, at 539-40 (interim ed. 1992) (citing use of affidavits on summary judgment motion as example of "evidence classified as hearsay" made admissible "by a non-evidence rule"); MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 802.1, at 815-16 (3d ed. 1991) (same); 4 JACK B. WEINSTEIN ET AL., WEINSTEIN'S EVIDENCE ¶ 802[02], at 802-5 to 802-6 (1995) ("The rules of [civil] procedure limit the operation of the hearsay rule by authorizing the use of affidavits in a number of instances including motions for summary judgment"); GLEN WEISSENBERGER, FEDERAL EVIDENCE § 802.1, at 427 (2d ed. 1995) (citing Rule 56 as one of "several examples of rules or statutes which operate to admit hearsay

found also in some of the leading reference works on the Federal Rules of Civil Procedure.<sup>11</sup> No major treatise or writer on evidence or civil procedure has ever suggested otherwise.<sup>12</sup>

Any law student or young lawyer who read these prominent legal authorities would be left, by design, with the clear impressions that: (1) Rule 56 allows a judge ruling on a summary judgment motion to consider hearsay in the form of an affidavit, and (2) this relaxation of the hearsay rule is a reflection of our general willingness to trust judges to make important decisions on the basis of inadmissible evidence. Indeed, the first claim recently was made explicit in an important publication of the Federal Judicial Center on summary judgment.<sup>13</sup> In fact, however, as this Article will demonstrate, both of those universally unquestioned assumptions are false, and anyone under such an impression would have a profoundly distorted understanding of either the definition of hearsay or the theory behind summary judgment.

Moreover, even if these two claims were true, they would make no sense. If that law student were to research just a bit further, she would quickly discover a host of courts that have stated, in seeming contradiction, that "[a] hearsay affidavit is a nullity on a motion for summary judgment,"<sup>14</sup>

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evidence"); *see also* 1 WIGMORE, EVIDENCE § 4, at 42 n.15 (Tillers rev 1983) ("In some interlocutory proceedings, however — as in motions for summary judgment — the rules of admissibility are expressly made applicable *even though* the use of affidavits is authorized.") (emphasis added).

11. *See* JAMES W MOORE, MOORE'S FEDERAL PRACTICE RULES PAMPHLET: FEDERAL CIVIL RULES pt. 1, at 574 (1995) ("Evidence Rule 802 provides, in effect, that affidavits submitted under Rule 56(e) in support of or in opposition to a motion for summary judgment are exceptions to the hearsay rule.").

12. Of course, some leading reference works make no mention of the connection between the federal rules on hearsay and summary judgment, perhaps thinking that the point made in the Advisory Committee Notes to Rule 802 is too obvious to deserve elaboration. But no writer to my knowledge has ever questioned the explicit statement in those Committee Notes to the effect that Rule 56 is an example of a rule authorizing the limited use of hearsay in the form of affidavits. (One leading commentator, however, *has* suggested that such hearsay still would have been admissible on a summary judgment motion even if Rule 56 had not authorized such use. *See infra* note 31.)

13. A recent publication on summary judgment by the Federal Judicial Center, authored by the director of the center and others, states categorically: "The *fact* that a witness affidavit *is* hearsay does not make the testimony it contains inadmissible when offered at trial by that witness." William W Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 481-82 (1992) (emphasis added).

14. *Schwimmer v Sony Corp. of Am.*, 637 F.2d 41, 45 n.9 (2d Cir. 1980). This phrase, originally coined in *Schwimmer*, has been highly influential in shaping judicial

that "[a]ffidavits composed of hearsay do not satisfy Rule 56(e) and must be disregarded,"<sup>15</sup> and that "[h]earsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment."<sup>16</sup> This legal rule, in turn, is based upon Rule 56(e), which states that affidavits on a summary judgment motion "shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence."<sup>17</sup> By that point, the typical student naturally would be in a state of great confusion.<sup>18</sup>

Of course, most readers of this Article believe that they know the proper resolution to this apparent inconsistency. Professor James Moore, noted commentator on the Federal Rules, recently tried to explain it this way:

Evidence Rule 802 provides, in effect, that affidavits and depositions submitted under Rule 56(e) in support of or in opposition to a motion for summary judgment are exceptions to the hearsay rule. See the Advisory Committee's Note to Evidence Rule 802. This hearsay exception

attitudes toward summary judgment and continues to be quoted widely. See, e.g., *Caldwell v American Basketball Ass'n*, 825 F. Supp. 558, 571 (S.D.N.Y. 1993), *aff'd*, 66 F.3d 523 (2d Cir. 1995); *Maritime Ventures Int'l, Inc. v Caribbean Trading & Fidelity, Ltd.*, 722 F. Supp. 1032, 1037 (S.D.N.Y. 1989); *SEC v Blavin*, 557 F. Supp. 1304, 1314 (E.D. Mich. 1983), *aff'd*, 760 F.2d 706 (6th Cir. 1985); see also *Sellers v M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988) (condemning "a hearsay affidavit" as inadequate to defeat summary judgment motion).

15. *Dole v Elliott Travel & Tours, Inc.*, 942 F.2d 962, 968 (6th Cir. 1991) (quoting *State Mut. Life Assurance Co. v Deer Creek Park*, 612 F.2d 259, 264 (6th Cir. 1979)).

16. *Garside v Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990); *accord* *Financial Timing Publications, Inc. v Compugraphic Corp.*, 893 F.2d 936, 942 n.6 (8th Cir. 1990) ("[H]earsay evidence alone may not defeat a summary judgment motion."); *Walker v Wayne County, Iowa*, 850 F.2d 433, 435 (8th Cir. 1988) ("Thus, without a showing of admissibility, a party may not rely on hearsay evidence to support or oppose the motion."), *cert. denied*, 488 U.S. 1008 (1989). Likewise, although Rule 56(c) allows a judge to consider depositions on a summary judgment motion, the Supreme Court has held that Rule 56(e) forbids the consideration of sworn statements given at a deposition if those statements are inadmissible hearsay. See *Adickes v S.H. Kress & Co.*, 398 U.S. 144, 159 n.19 (1970).

17. FED. R. CIV. P. 56(e).

18. To make matters even worse, if that ambitious young lawyer were to research just a bit further, she also would discover a distinct but sizable minority of circuit courts of appeals and legal commentators that (erroneously) have reached the opposite conclusion that hearsay *may* be used to oppose a summary judgment motion! See cases and authorities cited *infra* notes 31, 86. By that point in her research, one hardly could blame this unfortunate young scholar for concluding that the law was in a state of hopeless confusion, and one could only pray that she manages to stumble across a copy of the Article you are now reading.

refers, of course, only to the affidavits and depositions *themselves* as hearsay. The statements contained therein must be admissible in evidence.<sup>19</sup>

In other words, the standard "explanation" for this apparent inconsistency is that an affidavit considered on a summary judgment motion may *be* hearsay but may not *include* hearsay.<sup>20</sup> To put the matter in slightly more technical terminology, the almost universally received view is that Rule 56 allows a judge to consider hearsay (in the form of an affidavit), but not "multiple hearsay."<sup>21</sup> The hearsay words of the affidavit, we often are told, may be accepted in lieu of oral testimony from the affiant himself as long as they describe a matter within his personal knowledge, but *his* words about what another has told him may not be accepted in lieu of a statement from that other person.<sup>22</sup>

Apart from the fact that this "explanation" is wrong, as the next section of this Article will demonstrate,<sup>23</sup> it is also senseless and unnecessarily confusing. The concepts of hearsay and multiple hearsay already are challenging enough for most newcomers,<sup>24</sup> and I frankly doubt that many law

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19. MOORE, *supra* note 11, at 574 (emphasis added) (citations omitted). As noted later in this Article, it bears emphasis that a number of courts and commentators would not agree with Professor Moore's view that the statements contained in the affidavit must be admissible in evidence. See authorities cited *infra* notes 31, 86. But that point can be put to the side. It will suffice for now to demonstrate why Professor Moore is incorrect; later we will explain why the others are also wrong.

20. Or, one might say, the affidavit may *constitute* hearsay but may not *consist* of hearsay. Another variation on the same theme: On a summary judgment motion, hearsay is admissible if it *is* an affidavit, but not if it *is in* an affidavit. I seriously doubt that any of these formulations, including Professor Moore's phrasing, mean anything to most young lawyers and law students who are newcomers to the concept of hearsay.

21. 2 MCCORMICK ON EVIDENCE § 324.1, at 368 (John W. Strong ed., 4th ed. 1992) (using term "multiple hearsay"). Federal Rule of Evidence 805 describes the same concept as "Hearsay within Hearsay." FED. R. EVID. 805. Of course, hearsay contained within an affidavit may be admissible if it falls under one of the other exceptions listed in Evidence Rule 803 or 804. I am assuming for the sake of simplicity the case of an affidavit containing second-hand information that does not fall under any such exception.

22. Anyone who subscribed to this view would "explain" that the cases condemning "a hearsay affidavit" as a nullity on a summary judgment motion, see *supra* note 14, were referring to an affidavit that contains hearsay, but not to an affidavit that itself *is* hearsay. That is hardly the most natural interpretation of the phrase, but that linguistic point is fortunately academic. As this Article will demonstrate, that "explanation" is simply wrong.

23. See *infra* part I.B.

24. In the landmark case of *Faretta v California*, 422 U.S. 806 (1975), which established the constitutional right of a criminal defendant to conduct his own defense, it was no coincidence that the trial judge attempting to test whether the accused truly understood the rules for trial first tried to stump him with a question about the hearsay rule. See *id.* at 808



students are able to attach much meaning to the almost metaphysical distinction between what an affidavit *is* and what it *contains*. Even for those of us who can, the distinction proposed by Professor Moore simply makes no sense. Why would the framers of the federal rules trust a judge on a summary judgment motion to use and consider *all* hearsay evidence in the form of an affidavit — no matter what the source — but never multiple hearsay? At best, the two differ only in degree of reliability, not in kind, and everyone knows that some forms of multiple hearsay are infinitely more reliable than some simple hearsay.<sup>25</sup> In all other contexts, the Federal Rules of Evidence do not distinguish between hearsay and multiple hearsay in terms of admissibility; they trust a judge to consider either one when making a preliminary ruling on admissibility,<sup>26</sup> and they allow a jury to consider neither one.<sup>27</sup> It would be extremely difficult to reconcile that pattern with the assumption that Rule 56 was intended to trust judges with any hearsay in the form of an affidavit, however suspicious, but never with multiple hearsay, no matter how trustworthy.<sup>28</sup>

Fortunately, there is no need to make such a reconciliation because the universally accepted view of this issue is simply wrong. As the next section of this Article will demonstrate,<sup>29</sup> the truth of the matter is that judges ruling upon summary judgment motions are not authorized to consider hearsay in the form of affidavits, they do not do so, and Rule 56 is not an exception to

& n.3.

25. When the *New York Times* quotes the Pope as saying he has been praying for world peace, it is technically "multiple hearsay." But who would argue that this news report is less reliable than a simple hearsay affidavit from a convicted mass murderer who denies his guilt to avoid the death penalty on his most recent arrest?

26. See FED. R. EVID. 104(a), 1101(d)(1).

27. See FED. R. EVID. 802, 805. Again, because this section of this Article focuses on the reach and effect of Rule 56, I am assuming for the sake of simplicity that we are discussing hearsay that does not fall within one of the exceptions in Federal Rules of Evidence 803 and 804. See *supra* note 3.

28. Moreover, as noted in the next section of this Article, the incoherence of the prevailing understanding of the law runs even deeper than that. See *infra* part I.B. If the federal rules governing summary judgment were in fact a reflection of our supposed willingness to trust judges to intelligently gauge the probative value of inadmissible evidence, it would be impossible to justify the rule that forbids a judge from giving *any* weight to unsworn statements (or unauthenticated documents) when deciding whether summary judgment should be granted. See *infra* notes 49-60 and accompanying text. Even juries bound by the Federal Rules of Evidence are often entrusted with statements that are not under oath! See FED. R. EVID. 803, 804 (outlining hearsay exceptions).

29. See *infra* part I.B.

the hearsay rules at all. In short, the Advisory Committee Notes are dead wrong.

### *B. The Truth of the Matter*

For the sake of our discussion, we will begin with the assumption that the Federal Rules of Evidence are generally applicable to pretrial motions, as the Advisory Committee Notes appear to assume.<sup>30</sup> In fact, that question is actually quite controversial, and a staggering amount has been written on the subject both ways.<sup>31</sup> Fortunately, that issue is academic for our purpose,

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30. If the Federal Rules of Evidence literally had no applicability to summary judgment motions, it would, of course, be illogical for the Advisory Committee to cite Rule 56 as an *exception* to Rule 802 or as a rule governing the use of "hearsay which is made admissible by other rules [but] which would not qualify under these Evidence Rules." FED. R. EVID. 802 advisory committee's note.

31. One prominent authority has suggested that hearsay would be admissible on a summary judgment motion regardless of Rule 56 because the Federal Rules of Evidence are not applicable to pretrial motion procedures. See 4 WEINSTEIN ET AL., *supra* note 10, ¶ 802[02], at 802-6 (citing Federal Rules of Evidence 104(a) and 1101(d) for conclusion that "[h]earsay would, in any event, be usable in [summary judgment motions] under these Rules"). But those two rules do not squarely address or resolve the issue, as Wigmore notes. See 1 WIGMORE, *supra* note 10, § 4, at 42 n.15 (stating that "the Federal Rules contain no express general exemption for adversary interlocutory proceedings"). Wigmore, though, ultimately reaches the same conclusion on different grounds after acknowledging that complicated arguments of statutory construction can be made on both sides of the question. *Id.* Then again, the Advisory Committee has implicitly suggested that the Federal Rules of Evidence *are* generally applicable to pretrial motion practice before a district judge because the committee lists a number of pretrial motions (including summary judgment) where hearsay is made admissible only because of the operation of some other rule of civil or criminal procedure. See FED. R. EVID. 802 advisory committee's note. On the other hand, one of those "exceptions" is Federal Rule of Civil Procedure 43(e), which appears to give the district judge a broad grant of authority to decide pretrial motions "on affidavits" — subject, of course, to the apparent exception of Rule 56(e) requiring affidavits in summary judgment motions to "set forth such facts as would be admissible in evidence." See FED. R. EVID. 43(e), 56(e). This collection of exceptions to exceptions has led some to ultimately conclude that the Federal Rules of Evidence are fully applicable to summary judgment motions. See EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 116 (1994) ("It is clear that the evidence submitted by the parties to support or oppose a motion for summary judgment must be admissible under the Federal Rules of Evidence."); see also 1 WIGMORE, *supra* note 10, § 4, at 42 n.15 (concluding that Federal Rules of Evidence "are expressly made applicable" in certain motions, such as summary judgment). To top it all off, however, the Supreme Court has made the perplexing claim that the party opposing the motion is not required "to produce evidence in a form that would be admissible at trial in order to avoid summary judgment," *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986), and commentators are divided as to whether that remark throws the Federal Rules of Evidence back out the window again. Compare Melissa L. Nelken,

which is determining whether the Advisory Committee's identification of summary judgment as an exception to the logic (if not the force) of Rule 802 and as a rule that authorizes the limited admissibility of hearsay in the form of affidavits is correct.

Returning to our original question, and assuming that the Federal Rules of Evidence are generally applicable to a summary judgment motion, is hearsay admissible on a motion for summary judgment? When Rule 56(e) authorizes a judge to rule upon a summary judgment motion on the basis of "supporting and opposing affidavits" in lieu of live testimony,<sup>32</sup> does that rule authorize the court to consider hearsay? Is Rule 56, in fact, an exception to Rule 802? Contrary to what you will read anywhere else you look, the answer to all three questions is "no."

The proper resolution of this dilemma is almost too obvious. Indeed, the short form of the demonstration consists of two incontrovertible steps: (1) An assertion made out of court — including an affidavit — is not hearsay at all and, therefore, not even subject to exclusion under Rule 802 unless it is "offered in evidence to prove the truth of the matter asserted."<sup>33</sup> (2) When does that description apply to affidavits submitted on a summary judgment motion? Never. In the landmark case of *Anderson v Liberty Lobby, Inc.*,<sup>34</sup> the Supreme Court stated that a judge ruling upon a summary judgment motion "is *not* himself to weigh the evidence and determine the truth of the matter" involved in the litigation which, of course, includes the

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*One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53, 76, 82 n.140 (1988) (arguing that *Celotex* "[i]nvent[ed] a new rule of procedural admissibility that goes against the express language of Rule 56" and created "an unfortunate change in summary judgment law") with BRUNET ET AL., *supra*, at 119 (concluding that this "potentially misleading passage" in *Celotex* was not intended to override "the clear command of Rule 56(e) that the rules of evidence apply to affidavits") and Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure*, 127 F.R.D. 237, 384 (1990) (containing Advisory Committee Note to proposed Rule 56, which describes *Celotex* as 1) case containing "dicta indicating that summary judgment can be successfully resisted on basis of inadmissible evidence" but also as 2) case that did not change rule requiring "showing that admissible evidence can be realistically expected to be available at trial"). The federal courts of appeals are just as profoundly split on the same question. See cases cited *infra* note 86. Enough ink has been spilt on this topic to fill Lake Erie and that is just about how murky it still remains. We will return to this thorny problem and sort it out later. See *infra* part I.C.

32. FED. R. CIV P 56(e).

33. FED. R. EVID. 801(c).

34. 477 U.S. 242 (1986).

matter asserted in the parties' pleadings, depositions, and affidavits.<sup>35</sup> So, those affidavits are not hearsay, they are not excluded by Rule 802, and they would be admissible under the Federal Rules of Evidence even if Rule 56 said nothing about them.<sup>36</sup>

Is it really that simple? In fact it is, although a little bit more explanation is in order. (Otherwise, of course, somebody else would have caught this point before now.) In what sense can it be said that affidavits submitted to a judge on a summary judgment motion are neither offered nor considered for "the truth of the matter asserted" in those affidavits? The answer requires us to review a few of the most basic — but most frequently overlooked — principles about hearsay and summary judgment.<sup>37</sup>

Consider first the definition of hearsay. A written statement made out of court is relevant to a judicial proceeding without regard to its truth and therefore is not hearsay "[i]f the significance of [the] offered statement lies solely in the fact that it was made."<sup>38</sup> When would that be the case? Consider this simple example: During a trial, a party offers into evidence a duly authenticated,<sup>39</sup> handwritten statement signed one day earlier by Edward, stating "Last December, I saw the traffic light turn red just before the police car ran through with its siren and lights off." If this statement is offered to prove what the police did, it is hearsay and presumptively inadmissible because it makes better sense to force the proponent of the

35. *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (emphasis added).

36. See FED. R. EVID. 401, see also *United States v Abel*, 469 U.S. 45, 50-51 (1984) (stating that "all relevant evidence is admissible, except as otherwise provided" by federal law and rules).

37. In fairness to the many others who have missed this point, the *Anderson* decision is less than perfectly consistent on this score. Elsewhere in the same opinion, the Court also made the regrettable but highly influential claim that the evidence, including affidavits, submitted to a court by the nonmoving party "is to be believed," *Anderson*, 477 U.S. at 255 (emphasis added), which certainly sounds a lot like it is being accepted for its truth. As Part III of this Article will demonstrate, however, that poorly chosen language from *Anderson* was one of the greatest mistakes ever made about summary judgment.

38. FED. R. EVID. 801(c) advisory committee's note (emphasis added). Legal commentators have noted several examples including, among others, statements offered to show their effect on the reader, legally operative language (sometimes called "verbal acts"), and circumstantial evidence of the declarant's state of mind. See 2 MCCORMICK ON EVIDENCE, *supra* note 21, § 249, at 104-06; ROGER C. PARK, TRIAL OBJECTIONS HANDBOOK § 4.01 (1991). None of those categories is applicable to affidavits submitted on a summary judgment motion.

39. In other words, the proponent of the statement has been able to offer evidence sufficient to support a finding that the letter was handwritten by Edward. See FED. R. EVID. 901(a).

statement to call Edward to the stand, if he is available, so that he can be cross-examined under oath and the jury can observe his demeanor.

But what if this case has nothing to do with the police or the traffic light? If the statement is offered to show only that Edward speaks English, that he was alive at some time yesterday, that he is not illiterate, that he is capable of relatively fine motor control, or that he is not in a coma, then the statement is not hearsay at all. In any one of those cases, we could say that the relevance of the statement "lies solely in the fact that it was made,"<sup>40</sup> and it would not make the slightest difference whether the statement was the truth or a lie.<sup>41</sup> In such cases, the mere fact that the statement was *written* by Edward is relevant, and the probative value of the letter would be enhanced in no way by asking Edward to come downtown to tell us the same things about the police car in person.<sup>42</sup>

To take a slightly more complicated example closer to the point of this discussion, imagine that the jury at a trial conducted pursuant to the Federal Rules of Evidence needs to decide the factual question of whether Joseph is likely to be disruptive of the workplace in the future if he is restored to some former position. To prove that Joseph would be such a threat, a party offers a number of offensive and lewd notes by Joseph about his supposed sexual history, which notes he wrote to female co-workers when he held that position in the recent past. Would the notes be hearsay? Of course not. The notes are not being offered to prove the truth of whatever outrageous assertions he made in those notes; they are admissible merely because the making of such statements in the past is relevant evidence (perhaps even the best available evidence) of what he is likely to say in the same setting if he is given the chance. For that purpose, the truth or falsity of the notes is beside the point, so it would make no sense to exclude the letters and insist that Joseph testify under oath to the contents of the notes. The letters are not being offered for any conclusions about his sexual

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40. FED. R. EVID. 801(c) advisory committee's note.

41. All of these examples are obviously variations on the well-known hypothetical suggested by *McCormick on Evidence*: "On an issue whether a given person was alive at a particular time, evidence that she said [or wrote] something at the time would be proof that she was alive. Whether she said, 'I am alive,' or 'Hi, Joe,' would be immaterial; the inference of life is drawn from the fact that she spoke, not what was said. No problem of veracity is involved." 2 MCCORMICK ON EVIDENCE, *supra* note 21, § 250, at 113-14.

42. Indeed, the probative value of the written statement might be positively destroyed by calling him as a witness to testify in person rather than offering the statement. For example, if a party wishes to discredit Edward's claim that he is illiterate or that he is unable to move his arms and hands, the handwritten statement by Edward would be infinitely more valuable than asking Edward to tell us about the police car in person from the witness stand.

history (the contents of the notes) but rather about what the man is likely to say in the future.<sup>43</sup>

That is precisely how a judge uses affidavits when ruling upon a motion for summary judgment. Although this point has been widely misunderstood, the fact is that a judge ruling on such a motion is neither permitted nor required to draw any conclusions about what happened in the *past* — that is, the truth of the matter asserted in the parties' pleadings and affidavits — but *what will happen at a future trial if there is one*. Admittedly, this basic principle has been largely obscured, and the Supreme Court itself deserves the majority of the blame for that confusion.<sup>44</sup> Nevertheless, this vital point is manifested clearly in at least three different aspects of sum-

43. Generalizing from this illustration, we could fairly identify a distinct but previously unidentified category of statements that are not hearsay because their significance lies solely in the fact that they were made: statements offered to prove what the author or speaker of the statement is likely to say in the future (that is, after the trial or hearing). Statements offered for that limited purpose are never hearsay because they are relevant without regard to their truth or falsity. That "category" of nonhearsay statements is admittedly a limited one because our law usually asks the trier to decide questions of fact about the past. *See Daubert v Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 2798 (1993) (describing "the quest for truth in the courtroom" as "the project of reaching a quick, final, and binding legal judgment — often of great consequence — about a particular set of events in the past"). There are a few other obvious exceptions, however, as where a judge or jury makes findings of fact pertinent to the propriety of injunctive relief or criminal sentencing (at least under the incapacitative model of punishment). *See Dawson v Delaware*, 112 S. Ct. 1093, 1098 (1992) ("A defendant's membership in an organization that endorses the killing of any identifiable group might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future.").

44. For many years, the Supreme Court stated, incorrectly, that summary judgment was to be granted only "where it is quite clear what the truth is." *Poller v Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 467 (1962) (quoting *Sartor v Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944)). Although this standard has since been overruled *sub silentio*, *see infra* note 268, it has never been repudiated explicitly by the Court and continues to exert a powerfully confusing influence over leading legal commentators and lower courts. *See Iacobelli Constr., Inc. v County of Monroe*, 32 F.3d 19, 26 (2d Cir. 1994) (stating that summary judgment is inappropriate in face of "uncertainty as to the true state of a[] material fact") (citations omitted); 10A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2727, at 124 (2d ed. 1983) ("Before summary judgment will be granted it must be clear what the truth is") (footnote omitted). More recently, the Court unwittingly has sown even more confusion by stating, with minimal explanation, that "[f]here is no requirement that the trial judge make findings of fact" when ruling upon summary judgment motions although "[i]n many cases findings are extremely helpful to a reviewing court." *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 250 & n.6 (1986). Both of those standards certainly tend to reinforce the common myth that summary judgment motions invite the judge to look back in time to make historical findings of fact. These errors are dealt with more fully in later sections of this Article. *See infra* parts I.C., II, III.

mary judgment practice and procedure. We can illustrate this point by considering several fundamental questions about summary judgment that apparently have never even been asked, much less answered (until now).

The "prospective looking" character of a summary judgment motion is perhaps best illustrated by the rare — but not unprecedented — situation in which an affidavit filed on a summary judgment motion was signed by a witness who subsequently died before the motion was argued or decided.<sup>45</sup> Assuming that such an affidavit was made under oath, on personal knowledge, and in compliance in all other respects with Rule 56(e), how much weight, if any, should it be given by the judge? Even a moment's reflection teaches that the affidavit cannot be given any weight at all.<sup>46</sup> Under the federal rules, supporting and opposing affidavits may be considered by the court only if "the affiant *is* competent to testify to the matters stated therein" — not merely because he *was* competent to testify to such matters when he signed the affidavit.<sup>47</sup> This restriction would have been an arbitrary limitation to impose upon the judge if (as has often been suggested) the purpose of a summary judgment motion were to find out whether it is "clear what the truth is."<sup>48</sup> After all, the fact that a man was competent to speak

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45. This question was raised but not decided in *Massachusetts v United States*, 788 F Supp. 1267, 1271 n.8 (D. Mass. 1992) ("Mr. Hansen is now deceased, so arguably his affidavit, although in standard form for consideration upon a motion for summary judgment, is now inadmissible hearsay"), *aff'd sub nom.* *Massachusetts Dep't of Pub. Welfare v Secretary of Agric.*, 984 F.2d 514 (1st Cir.), *cert. denied*, 114 S. Ct. 81 (1993).

46. I am assuming, of course, that we are not dealing with the even more unusual situation in which the affidavit itself might be admissible at trial as an exhibit under some exception to the hearsay rules. In that case, the admissibility of the dead man's statement would be analyzed in terms of the rules governing the use of exhibits and other papers on a summary judgment motion, *see infra* notes 59-60, rather than the rules normally applied to the use of affidavits.

47. FED. R. CIV P 56(e) (emphasis added). To be precise, the rule technically requires that the affiant, at the time he makes and signs the affidavit, "show affirmatively that the affiant is competent to testify to the matters stated therein." *Id.* The rule does not literally require that the affiant also make an affirmative showing at that same time that he still *will be* competent to testify at the time of the trial; that would be absurd. Nobody knows, when he signs an affidavit, how long it will be until trial or whether he will still be alive and well by then. Nevertheless, it can be inferred safely from both the text and the logic of Rule 56(e) that the rule would not allow consideration of an affidavit when it appears through other evidence that the affiant is no longer available and "competent" to testify at trial. It would make absolutely no sense to require an affiant to make an affirmative showing of competence to testify unless the rule implicitly authorized the judge to disregard the affidavit when it subsequently becomes absolutely clear that the affiant is *not* competent to testify any more.

48. *Poller*, 368 U.S. at 467 (quoting *Sartor v Arkansas Natural Gas Corp.*, 321 U.S.

from personal knowledge at the time he wrote something would be ample reason for a historian to rely on his writings. But a judge ruling upon a motion for summary judgment is looking into the future, not the past. Thus, an affidavit signed by a man who died before the argument of the summary judgment motion is worthless to the court. It may tell us something reliable (and maybe even quite important) about the past, but it tells us nothing about the testimony we can count on hearing at a future trial if we have one.

We also can find valuable evidence of the true purpose and scope of summary judgment motions if we consider the limits placed upon the kinds of written statements the judge may consider from witnesses. Rule 56(c) states that a party may ask a judge to grant or deny summary judgment on the basis of only two kinds of witness statements: (1) the pleadings and admissions of the other party,<sup>49</sup> and (2) statements made under oath or affirmation.<sup>50</sup> Because the detailed specification of certain items normally implies the deliberate exclusion of all others,<sup>51</sup> the courts correctly have interpreted this rule to preclude a judge from considering any other form of written statement by a witness — including, most notably, any unsworn

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620, 627 (1944)); *see supra* note 44.

49. FED. R. CIV P 56(c). Rule 56(c) states generally that a judge may consider, among other items, "the pleadings and admissions on file." *Id.* Those items, by definition, can only be served and filed by a party to the action. *See* FED. R. CIV P 7(a) (listing permissible pleadings), 36(a) (noting that requests for admission may only be served upon and answered by party). When Rule 56 states that a party may ask the court to grant summary judgment because the absence of a genuine issue is demonstrated by "the pleadings," it means, of course, the pleadings of the adverse party; the rule clearly states that a genuine issue of material fact cannot be created by a party's reliance on "the mere allegations or denials of [his own] pleading." FED. R. CIV P 56(e).

50. FED. R. CIV P 56(c). In addition to the pleadings and admissions, *see supra* note 49, the only other witness statements that a court may consider under the rule are "depositions, answers to interrogatories [and] affidavits, if any" *Id.* All three of those materials, by definition, must be made under oath or affirmation. *See* FED. R. CIV P 30(c) (officer conducting deposition "shall put the witness on oath or affirmation"), 33(b)(1) (all answers to interrogatories must be "in writing under oath"); BLACK'S LAW DICTIONARY 58 (6th ed. 1990) (defining affidavit as written statement "confirmed by the oath or affirmation of the party making it"); *see also* Henderson v Inter-Chem Coal Co., 41 F.3d 567, 569 n.1 (10th Cir. 1994) (noting that, in light of 28 U.S.C. § 1746 (1988), affidavits filed on summary judgment motion may be either made under oath or affirmed under penalty of perjury).

51. *See* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160, 1163 (1993) (refusing to read any requirements into Federal Rule of Civil Procedure 9(b) beyond those specifically listed there).



letter or other writing.<sup>52</sup> But why should judges categorically be barred from relying on unsworn statements, regardless of how credible or trustworthy they might otherwise appear to be? That restriction would be arbitrary and indefensible if, as has been widely reported, the rules governing summary judgment practice were a reflection of our supposed trust in the superior ability of judges to accurately gauge the reliability of hearsay and other inadmissible evidence.<sup>53</sup>

Why on earth would the framers of the federal rules trust a judge to consider any statement made under oath, no matter how suspicious it seemed, but never an unsworn letter, no matter how trustworthy? In nearly every other context, the Federal Rules of Evidence do not distinguish between sworn and unsworn statements in terms of admissibility,<sup>54</sup> and everybody knows that some unsworn statements are incomparably more

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52. *E.g.*, *Adickes v S.H. Kress & Co.*, 398 U.S. 144, 157-59 nn.16-17 & 19 (1970); *Sellers v Henman*, 41 F.3d 1100, 1101 (7th Cir. 1994); *Dole v Elliott Travel & Tours, Inc.*, 942 F.2d 962, 968 (6th Cir. 1991); *Rohrbough v Wyeth Lab., Inc.*, 916 F.2d 970, 973 n.8 (4th Cir. 1990). Despite this overwhelming body of precedent, including the Supreme Court's holding in *Adickes*, Professor Brunet has reasoned — incorrectly — that Rule 56 does not contain an exhaustive listing of the materials the court may consider because the Supreme Court itself has considered summary judgment records including "documents," even though Rule 56(c) makes no mention of them. Edward Brunet, *Summary Judgment Materials*, 147 F.R.D. 647, 649 (1993) ("Documents are routinely considered in Rule 56 motions and the omission of them in Rule 56(c)'s listing of summary judgment evidence must be considered nothing more than an oversight."). Indeed, Professor Brunet even goes so far as to conclude that the judge ought to be permitted to consider any "fruits of discovery." *Id.* The fatal flaw in that argument, which would render the listing of materials in Rule 56(c) superfluous, is that Rule 56 *does* contain an express provision that makes documents and other "papers" admissible on a summary judgment motion but only as long as they are served with a proper authenticating affidavit and would themselves be admissible as exhibits at trial. *See* FED. R. CIV. P. 56(e); *see infra* notes 59-60 and accompanying text.

53. As noted *supra* notes 7-9, this view has been suggested for years by the Advisory Committee Notes to Federal Rule of Evidence 104(a).

54. Under the Federal Rules of Evidence, there are a few isolated situations in which the presence of an oath — coupled with other factors — may make the difference in whether a written statement is admissible. *See* FED. R. EVID. 801(d)(1)(A) (statement under oath admissible if it was made at trial, hearing, or deposition and is inconsistent with declarant's later trial testimony), 804(b)(1) (former testimony under oath admissible only if declarant is unavailable and testimony is offered against party who had fair opportunity to question declarant earlier). In every other situation, however, the admissibility of statements made out of court has nothing to do with whether the statement was made under oath. *See* FED. R. EVID. 801-806. Indeed, the Advisory Committee noted its view: "So far as concerns the oath, its mere presence has never been regarded as sufficient to remove a statement from the hearsay category, and it receives much less emphasis than cross-examination as a truth-compelling device." FED. R. EVID. 801(d)(1) advisory committee's note.

trustworthy than some affidavits filed under oath.<sup>55</sup> So why should the presence or absence of the oath make such a radical difference in terms of whether a statement can be considered in the summary judgment context?<sup>56</sup> Although no answer is perfectly satisfactory, the most coherent explanation, once again, reflects the nature of the judge's inquiry on such a motion: to identify the testimony we are likely to hear at trial in the future. In contrast with unsworn statements, affidavits and other statements made under oath are *not* always more reliable as a guide to the truth about questions of historical fact, but they are always more reliable evidence (indeed, the best available evidence) of what we can reasonably expect the affiant to say under oath or affirmation on the witness stand at trial.<sup>57</sup> Likewise, although

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55. To borrow once again from an analogy used earlier to illustrate a different point: If the *New York Times* quotes the Pope as saying that he has been praying for world peace, nobody in his right mind would suggest that this report — because it is not under oath — is less credible than a sworn affidavit from a convicted mass murderer who denies his guilt on his most recent arrest in an effort to escape the death penalty.

56. Indeed, the contrast is even more stark than it appears at first blush. As noted below in Part III of this Article, the lower courts have uniformly given a literal interpretation to the Supreme Court's direction that an affidavit submitted in opposition to a summary judgment motion, if in proper form, "is to be believed." *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Meanwhile, the identical statement, if not made under oath, is to be given no weight whatsoever. *See Adickes*, 398 U.S. at 157-59 nn.16-17 & 19. Under current law, therefore, the presence or absence of the oath on a witness statement literally makes all the difference in the world as to whether the statement will be given unconditionally conclusive weight or none at all.

57. Every experienced litigator has encountered the occasional witness who is willing to say one thing, perhaps even in open court, but changes his story as soon as he is required to repeat it under oath. Indeed, the world saw a nice example of that phenomenon in the midst of the recent murder trial of O.J. Simpson, in which Judge Lance Ito complained to defense counsel:

Let me tell you what concerns me about Mr. Pavelic. When I first asked him, are there any tape recordings or notes, he said these are the only two statements. Then at Miss Clark's urging and over — and with some reluctance by the Court, I put him under oath and I got a different answer.

*People v Simpson*, No. BA097211, 1995 WL 79806, at \*6 (Cal. Dep't Super. Ct. Feb. 28, 1995). Moreover, even apart from the problem of the witness who changes his story under oath, an unsworn statement gives the court no way to know whether it was signed by a witness who would decline to take an oath or affirmation, perhaps for some sort of religious or conscientious scruples, and therefore would be unable to testify at trial at all. *See FED. R. EVID.* 603; *see also United States v Fowler*, 605 F.2d 181, 185 (5th Cir. 1979) (stating that trial judge properly refused to allow testimony from defendant who refused to take oath or affirmation), *cert. denied*, 445 U.S. 950 (1980). Such witnesses admittedly are quite rare, but Rule 56 implicitly and wisely takes the position that there is no point in taking the unnecessary risk, however slight, that summary judgment might be denied on the basis of an

the admissions and pleadings of an adverse party have never been regarded as an infallible guide to the truth, they are, as a matter of law, an infallible guide as to what the adverse party can be expected to testify at a trial in the future. This function is a result of the fact that pleadings and responses to a request for admission — unlike other statements by a witness — are both examples of "judicial admissions" binding on the party making them, who will not be allowed to testify otherwise at trial.<sup>58</sup>

Finally, the "prospective looking" aspect of summary judgment procedure is illustrated also by the treatment of documents and other exhibits under the federal rules. Those rules state that all such "papers" may be considered by the court only if they are "[s]worn or certified" in an authenticating affidavit and "attached thereto or served therewith."<sup>59</sup> Documents and other exhibits, no matter how trustworthy or plausible they may appear to the judge, may not be given any weight unless they are accompanied by an affidavit from a sponsoring witness with personal knowledge — an affiant "through whom the exhibits could be admitted into evidence."<sup>60</sup> Why do we insist on that limitation? Like the other rules listed above, that restriction would be indefensible if, as has been widely reported, the purpose of summary judgment was to decide whether there was any room for doubt about questions of historical fact, unencumbered by the ordinary Federal Rules of Evidence. After all, the presence of an authenticating affidavit often will have little bearing on the ability of an experienced judge to assess intelligently the weight and probative value of a document; so why should its absence preclude the judge from giving the document any legal effect whatsoever? The explanation, once again, involves the purpose

unsworn statement from the occasional witness who turns out to be unwilling to testify to the same points at trial under oath. See FED. R. CIV P 56.

58. 2 MCCORMICK ON EVIDENCE, *supra* note 21, § 254, at 142 (noting that "[j]udicial admissions," unlike evidentiary admissions, are "conclusive in the case," and are not "subject to contradiction or explanation"); PARK, *supra* note 38, §§ 11.02, 11.04 ("Once the admission has been obtained, evidence to the contrary is not admissible unless the trial judge relieves the party of the admission."). Of course, the pleadings and responses to a request to admit may be amended or withdrawn in the discretion of the court, FED. R. CIV P 15(b), 36(b), but until that time they are binding on the party who signed them. When presented on a summary judgment motion, therefore, they can fairly be treated as a conclusive indication of how their signers would testify (or be allowed to testify) at trial unless the party who signed them makes an immediate cross-motion to amend them.

59. FED. R. CIV P 56(e).

60. *Hal Roach Studios, Inc. v Richard Feiner & Co.*, 896 F.2d 1542, 1550-51 (9th Cir. 1990); *accord* *Northwestern Nat'l Ins. Co. v Baltes*, 15 F.3d 660, 662 (7th Cir. 1994); *Moore v Holbrook*, 2 F.3d 697, 699 (6th Cir. 1993); *Orsi v Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993).

and scope of a summary judgment motion. Just as affidavits and other sworn witness statements may be considered by the judge as a preview of the likely *testimony* at trial, letters and other papers presented to the judge on a summary judgment motion are relevant only to the extent that they serve as a preview of the admissible *exhibits* we can fairly expect to be available at trial. Unless a party can supply an affidavit from a supporting witness to properly identify or authenticate a letter or other document, there is no basis for believing that a proper foundation can be laid for the admissibility of the document at a trial in the future, regardless of how much light it might shed for historians on what happened in the past.

So how does the "forward looking" aspect of summary judgment practice relate to the question of whether the judge may consider hearsay? Going back to our hypothetical example about Edward's letter,<sup>61</sup> suppose that a civil action involves a contested question of liability arising out of a collision at an intersection. If a party submits Edward's sworn statement — "Last December, I saw the traffic light turn red just before the police car ran through with its siren and lights off" — the judge does not and cannot use that affidavit to decide what the police car did last year. If the affidavit were used in that way to help the judge decide what happened *in the past*, the affidavit would have literally no value whatsoever unless it is true, and so the judge necessarily would be relying on it as evidence of the truth of the matter asserted in it. In that case, it would make sense for the law to insist that we defer that judgment until we hear from Edward live, under oath, and subject to cross-examination before the jury

But that is not what a judge is supposed to be doing when deciding a motion for summary judgment. Rather, as noted above, the judge is authorized to consider Edward's duly authenticated affidavit<sup>62</sup> — like the other materials listed in Rule 56 — solely for the purpose of deciding what testimony, exhibits, and other evidence we can reasonably expect to see and hear *in the future* at a trial if we have one.<sup>63</sup> For that limited purpose, his

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61. See *supra* notes 39-42 and accompanying text.

62. In the context of an affidavit furnished to the judge on a motion for summary judgment, the authentication requirement is typically satisfied by the mere fact that the affidavit is submitted by an attorney who represents, at least implicitly, that it was indeed signed by its purported author. Cf. *Schisler v. Heckler*, 787 F.2d 76, 84 (2d Cir. 1986) (noting that "[a]s an officer of the court," attorney is "under an obligation of candor," and her representations to judge will be accepted "at face value").

63. Of course, the judge then will be required to make the related determination of whether the evidence we can reasonably expect at a trial will present "a sufficient disagreement to require submissions to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The

sworn affidavit has abundant probative value. Regardless of whether it is true, an innocent mistake, or deliberately false, his affidavit still has great predictive value in helping to forecast the testimony we can expect from Edward at a trial.<sup>64</sup> With respect to that forward-looking challenge of anticipating the evidence we would hear at a trial, Edward's affidavit is valuable and relevant regardless of whether it is true or false; either way it gives us a fairly reliable picture of what is in store for the jury if we impanel one. Because the affidavit therefore has legal and logical significance which "lies solely in the fact that it was made, the statement is not hearsay"<sup>65</sup> Bringing Edward in for live testimony might be better than his affidavit for the purpose of deciding whether his claims about the past are honest or true or reliable, but neither method is an inherently better way of deciding what he is likely to say under oath at a trial in the future.<sup>66</sup>

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parameters of that task are discussed more fully in Parts II-III of this Article.

64. See Nelken, *supra* note 31, at 72-73 ("Although an affiant may die or testify differently at trial, as a general rule, a sworn statement is a reliable forecast of the evidence that will be presented at trial."). A judge may and should assume that a trial would turn out to be, at the very least, "a swearing contest, with the parties saying the same things in the witness chair they have said in affidavits." *Panton & Co. v Bourns, Inc.*, 442 F.2d 216, 233 (2d Cir. 1971).

65. FED. R. EVID. 801(c) advisory committee's note.

66. This analysis is not significantly altered in the less common situation where the affidavit is couched in terms of an explicit statement of what the declarant intends to say at trial, such as where Edward says, "*If I am called to testify at a trial in this matter, I intend to testify that the police went through the red light with his siren and lights off.*" See *DeCinto v Westchester County Medical Ctr.*, 821 F.2d 111, 113 (2d Cir.) (involving party-submitted signed statement reciting that signatories "are willing to appear before a Federal Judge and tell him that"), *cert. denied*, 484 U.S. 965 (1987). There is room for debate as to whether that statement, in this context, is hearsay at all; it apparently would not be, at least under "a declarant-oriented definition of hearsay," because the use of such a statement by the judge on a summary judgment motion would not "require reliance upon the credibility of the declarant." See *PARK*, *supra* note 38, § 4.01, at 101. The mere fact that someone *makes* such statements in an affidavit signed under oath is itself valuable (albeit not conclusive) evidence of what he is likely to say at trial, regardless of whether he is generally honest or whether he included the extra italicized words quoted above. For the limited purpose of predicting what the witness is likely to say at a future trial, an affidavit reciting what the declarant "intends to say" arguably has at least some probative "significance [that] lies solely in the fact that it was made." FED. R. EVID. 801(c) advisory committee's note. But even if we were to regard such a statement as "hearsay," it would still be admissible in any case under Federal Rule of Evidence 803(3) as a "statement of the declarant's then existing state of mind, such as intent [or] plan." FED. R. EVID. 803(3). For purposes of our discussion, therefore, even that hypothetical would not entail any qualification to our conclusion that Rule 56 does not authorize the use of "hearsay which would not qualify under these Evidence Rules." FED. R. EVID. 802 advisory committee's note.

This same basic analysis also applies, although in a slightly more subtle fashion, when a party moves for summary judgment on the basis of a legal defense that ultimately must be resolved by the court before trial in any event — for example, a claim that the defendant was not properly served with process.<sup>67</sup> If such a defense cannot be resolved solely on the pleadings, it often is necessary to raise it on a motion for summary judgment supported by affidavits.<sup>68</sup> For example, the defendant may move to dismiss, based upon his own affidavit, swearing that the summons and complaint were never served upon him in any way. Does the admission of such an affidavit constitute the use of hearsay? Technically, no. If the plaintiff admits the facts set forth in the affidavit (either expressly or by failing to dispute them)<sup>69</sup> and merely contests the legal significance of those facts, the factual allegations will be taken as true on the basis of the de facto stipulation of the parties — not because the affidavit recites them.<sup>70</sup> On the other hand, if the plaintiff responds by submitting a contrary affidavit based upon personal knowledge (for example, an affidavit from the process server swearing that

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67 This situation also would include, for example, the defenses listed in Federal Rule of Civil Procedure 12(b) (such as personal and subject matter jurisdiction, venue, sufficiency of process) and any affirmative defenses listed in Federal Rule of Civil Procedure 8(c) that are normally decided by the court (such as statute of limitations). FED. R. CIV. P. 8(c), 12(b). In the normal course, such defenses "shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial." FED. R. CIV. P. 12(d).

68. See 6 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 56.11[1.-2], at 56-99 (2d ed. 1995).

69. When a motion for summary judgment is supported properly, the burden shifts to the adverse party to come forward with an affidavit or other materials that "set forth specific facts showing that there is a genuine issue for trial," FED. R. CIV. P. 56(e), or else to show why he requires additional time for discovery to obtain the facts essential to justify his opposition to the motion. FED. R. CIV. P. 56(f). His failure to do either will be construed against him. See 6 MOORE ET AL., *supra* note 68, ¶ 56.23, at 56-784 ("[T]he trial court will normally not look with indulgence upon a party who has presented neither evidentiary materials in opposition nor any reason for his failure to do so" because he "is not entitled to hold back evidence until trial."); *cf.* FED. R. CIV. P. 8(d) (stating that factual allegations of complaint, if not denied in answer, are deemed admitted).

70. When a judge accepts a fact as established on the basis of the express or implied stipulation of the parties in court, she is not even relying on evidence, much less hearsay. A stipulation, like a fact conceded by both parties in the pleadings, is not really evidence at all but a form of "judicial admission" that defines the scope of the issues before the court. See 2 MCCORMICK ON EVIDENCE, *supra* note 21, § 257, at 141. Moreover, even if the concessions of the plaintiff and his attorneys were being accepted for their truth, they still would not be hearsay if they were used as a basis for granting the defendant's motion against the plaintiff. See FED. R. EVID. 801(d)(2); *United States v. Woodward St.*, 2 F.3d 529, 537 n.2 (3d Cir. 1993) (Seitz, J., concurring and dissenting).

he personally served the defendant) then the judge's responsibility is to decide whether the matter can be resolved without a hearing.<sup>71</sup> That question, like the issue before the judge on a conventional summary judgment motion, does not authorize (much less require) the court to assume anything about the truth or falsity of the affidavits. It merely requires the judge to assume that the parties and their witnesses would testify at a hearing just as they have in their affidavits and then to decide whether such testimony would entail a conflict that might be decided more accurately after observing the witnesses' demeanor at a live hearing. As noted above, when an affidavit is used solely to predict what witnesses are likely to say, its significance lies solely in the fact that it was made, and it is therefore not hearsay.

Even where the judge decides that there is no need for a hearing and grants the motion without one, it does not mean that he is assuming that the affidavits submitted by the prevailing party are "true." It merely means that the affidavits before the judge present no reason to hold a hearing — regardless of what the truth might be. For example, suppose that the process server failed to prepare any affidavit of service and died shortly after he was supposed to have served the defendant, so there is no way to verify or refute the defendant's assertion that he was not served. Or suppose that, in opposition to the defendant's motion for summary judgment, the plaintiff can come up with nothing more than an equivocal affidavit from an (evidently overpaid) process server who admits that he has absolutely no records or recollection as to whether he served the defendant in this case. In either case, the motion for summary judgment should be granted, but that does not mean that the judge "believes" the defendant's affidavit or assumes its truth. Under such circumstances, there would be scant warrant for an objective judge to accept the self-serving assurances of the defendant that the suit must be dismissed because he was never served in the *past*, but we safely can conclude that there would be only one possible outcome at a hearing on the matter in the *future*. That is precisely why the Supreme Court was perfectly correct when it stated that a motion for summary judgment, regardless of whether it is denied *or granted*, neither authorizes nor requires the judge to "determine the truth of the matter."<sup>72</sup>

### *C. Implications for Our Understanding and Description of the Law*

This clarification of the connections between hearsay and summary judgment has a number of important implications for improving both the

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71. See FED. R. CIV. P. 12(d), 43(e).

72. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

accuracy and the clarity of the way in which we describe our law. For starters, of course, the most obvious implication is that the Advisory Committee Notes to Rule 802 (and their many commentators) are simply wrong when they state with one voice that Rule 56 is an exception to that rule and that it authorizes a judge to consider "hearsay" in the form of an affidavit when ruling on a summary judgment motion. Any law student or young lawyer who took those authorities seriously would develop a distorted understanding of the core concepts behind either hearsay or summary judgment, if not both.

Likewise, for similar reasons, the Advisory Committee Notes to Federal Rule of Evidence 104(a) are both misleading and dead wrong when they cite the use of "summary judgment based on affidavits" as an example of "the many important judicial determinations" made by judges on the basis of "affidavits or other reliable hearsay."<sup>73</sup> As noted above, a judge using an affidavit as a basis for granting or denying summary judgment is not using it in any way as proof of its contents; she is merely using it as evidence of what the affiant would be likely to say if called as a witness at trial (much as she might use it for the nonhearsay purpose of deciding whether the affiant can speak English or hold a pen). Allowing such limited nonhearsay use of an affidavit does not reflect *any* trust in a judge's ability to gauge the reliability of hearsay and is not even remotely analogous to the grant of authority in Federal Rule of Evidence 104(a) for judges to consider affidavits (and other inadmissible evidence) when ruling upon preliminary questions such as whether a witness is truly unavailable.<sup>74</sup> Indeed, if one truly understands the limited role authorized for affidavits in summary judgment motions, the use of that analogy to justify Federal Rule of Evidence 104(a) is as senseless as suggesting that judges should be allowed to use affidavits in deciding preliminary questions of historical fact because some judges have used affidavits to wipe up potentially dangerous coffee spills or to stop the bleeding from a serious wound.

All of this unfortunate and unnecessary confusion is doubly ironic. As shown above, the rules governing hearsay and summary judgment, if properly understood, actually have the potential to help clarify and illuminate each other. At least from the perspective of legal education, that potential could be a significant benefit because few concepts are quite as important to the practicing litigator or as challenging to students the first time they are

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73. See *supra* notes 7-9.

74. This illustration is taken from the Advisory Committee Note to Federal Rule of Evidence 104(a).



encountered. Moreover, the Advisory Committee Notes have a unique potential for making such points clear to students and lawyers alike, given the Supreme Court's increasing willingness to cite those Notes as a "well-considered" and "respected source of scholarly commentary"<sup>75</sup> Now more than ever, those Notes are the worst possible place to find inaccurate and confusing claims.

Ideally, if it is possible to do so, the Committee Notes to Federal Rules of Evidence 802 and 104(a) ought to be amended, respectively, to delete any reference to summary judgment affidavits as an example of "hearsay made admissible by other rules" or "an important judicial determination" made on the basis of otherwise inadmissible hearsay. That simple amendment would help eliminate the rampant confusion that has been caused by those errors. Then, in an effort to enhance the heuristic value of those Committee Notes, the Notes to Federal Rule of Evidence 801(c) should be amended to *add* summary judgment affidavits as an example of "statements which are not hearsay" because the "significance of [such a] statement lies solely in the fact that it was made." Such amendments would go a long way toward using the Committee Notes to illuminate that which those same Notes now obscure.<sup>76</sup>

These remarks also point the way toward clarifying many other confusing and inaccurate points that have been made on related topics. For example, it is clear that *Weinstein's Evidence* unwittingly comes closer to the truth than it realizes when it suggests that affidavits would, in any event, be usable on summary judgment motions even if it were not for Rule 56 because of the operation of Federal Rules of Evidence 104(a) and 1101(d).<sup>77</sup>

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75. *Tome v United States*, 115 S. Ct. 696, 702 (1995) (citing cases that rely on Advisory Notes). Even Justice Scalia, who declined to join the majority's apparent willingness to grant to those Notes any authoritative effect as aids to construing the rules, agreed that the Notes, "[h]aving been prepared by a body of experts, are assuredly persuasive scholarly commentaries — ordinarily *the* most persuasive — concerning the meaning of the Rules." *Id.* at 706 (Scalia, J., concurring in part). Even Scalia's opinion lends support to the view that the Notes are deserving of careful study for students and lawyers trying to learn the law.

76. I am not aware of any time when the Committee has amended or supplemented the Committee Notes without making a simultaneous amendment to the Rules themselves — which I obviously do not propose — and it is unclear whether such a procedure is even possible. *See* 28 U.S.C. § 2073(d) (1988) (authorizing Judicial Conference and its standing committees to recommend "a proposed rule [and] an explanatory note on the rule"); *cf.* *Tome*, 115 S. Ct. at 706 (Scalia, J., concurring in part) (noting absence of "any procedure by which we formally endorse or disclaim" Advisory Committee Notes).

77. Actually, to be precise, that authoritative reference work mistakenly says that "*Hearsay* would, in any event, be usable in [summary judgment motions] under these Rules.

Although it is highly dubious whether those two rules actually support that conclusion,<sup>78</sup> it would be more accurate and far more clear to state that affidavits would, in any event, be usable for summary judgment motions under Federal Rule of Evidence 801(c) because they are not even hearsay when used in that context.<sup>79</sup>

By this point in our discussion, most readers can already guess the proper resolution to the perennial dilemma posed by the claim of Professor Moore, among many others, that Rule 56 furnishes a "hearsay exception [that] refers, of course, only to the affidavits themselves as hearsay" but not to the "statements contained therein."<sup>80</sup> As noted above, this popular "explanation" is both inscrutable and implausible because it would be inconsistent with the structure and theory of the Federal Rules of Evidence to fashion a rule that trusts a factfinder with hearsay but not with multiple hearsay.<sup>81</sup> Now we understand, however, that Professor Moore's proposed reconciliation is simply wrong. Rule 56 does not authorize a judge to consider hearsay in any form, not even in part; it allows consideration of affidavits (and other statements, such as deposition transcripts) solely for predicting what those witnesses are likely to say at trial and not for resolving the truth of the matter asserted in those statements.

We are now in a position also to see the answer to another question that rarely has been raised and never correctly answered (until today). On a motion for summary judgment, what is the legal effect or status of an affidavit that was signed by a man who is now dead? As noted above, the only reported decision to consider the question apparently did not squarely resolve it, but indicated in dictum that the death of the affiant arguably would render the affidavit "inadmissible hearsay."<sup>82</sup> That suggestion is not

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See Rule 104(a), Rule 1101(d)." 4 WEINSTEIN ET AL., *supra* note 10, ¶ 802[02], at 802-6 (1995) (emphasis added). As noted above, Rule 801(c) makes affidavits admissible for summary judgment motions but only because they are *not* hearsay. See *supra* part I.B.

78. See *supra* note 31.

79. In future editions of that work, therefore, WEINSTEIN'S EVIDENCE would be accurate if the quoted line were changed in two small ways to read: "*Affidavits* would, in any event, be usable in [summary judgment motions] under these Rules. See Rule 801(c)." (emphasis added). Better still perhaps, and just as easy, would be to simply include a citation to this Article.

80. MOORE, *supra* note 11, pt. 1, at 574.

81. See *supra* notes 25-28 and accompanying text.

82. *Massachusetts v. United States*, 788 F. Supp. 1267, 1271 n.8 (D. Mass. 1992) ("Mr. Hansen is now deceased, so arguably his affidavit, although in standard form for consideration upon a motion for summary judgment, is *now* inadmissible hearsay.") (emphasis added), *aff'd sub nom.* *Massachusetts Dep't of Pub. Welfare v. Secretary of*

merely wrong, it is also senseless on its face. Under the Federal Rules of Evidence, an affidavit can virtually never be transformed into inadmissible hearsay merely by the death of the declarant.<sup>83</sup> In point of fact, as we can now understand, an affidavit submitted on a summary judgment motion is not hearsay regardless of whether the author is now dead or alive; in neither case is it to be considered for the truth of the matter asserted in the affidavit. But if the author of the affidavit is now dead (or otherwise permanently unavailable to testify) by the time the court rules on an application for summary judgment, the affidavit is simply *irrelevant* as a matter of law. Barring his unlikely return from the grave, a dead man's affidavit tells the judge nothing about the testimony we can expect to hear at trial from the available witnesses.

Up to this point, one might claim that most of the points made here are arguably of limited practical significance. After all, everyone was already in agreement that affidavits are admissible and usable on summary judgment motions, regardless of whether they are made admissible as nonhearsay under Federal Rule of Evidence 801(c) or as an exception to the hearsay rules in Rule 56; this Article (thus far) merely has clarified our understanding of the reasons for that conclusion. Even if that were true, this important refinement in the clarity of our analytical framework for understanding the relationship between hearsay and summary judgment is still significant because of the light it sheds on the nature of both concepts, especially for law students and young lawyers. Furthermore, this analytical refinement also permits us to unravel several even more pervasive and insidious errors about the nature of summary judgment — in ways that affect the outcomes of real cases.

For example, this refinement enables us to unravel the nagging debate over what Justice Rehnquist meant when he wrote for the Court in *Celotex Corp. v. Catrett*<sup>84</sup> that a nonmovant is not required to "produce evidence in a form that would be admissible at trial in order to avoid summary judg-

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Agric., 984 F.2d 514 (1st Cir.), *cert. denied*, 114 S. Ct. 81 (1993).

83. Indeed, if anything, the death of a man can only *increase* the likelihood that his prior affidavit may thereby become admissible under the hearsay rules. *See* FED. R. EVID. 804(b) (listing four categories of statements that become admissible if author of statement dies). There are two kinds of "statements" that might be rendered inadmissible hearsay by the death of the declarant before trial, but they involve unusual situations that would rarely, if ever, apply to affidavits submitted to the court on a summary judgment motion. *See* FED. R. EVID. 801(d)(1)(C) (statement of identification of person after perceiving him); FED. R. EVID. 803(5) (statement of recorded recollection).

84. 477 U.S. 317 (1986).

ment."<sup>85</sup> This single line has unleashed a torrent of academic and judicial debate and commentary, most of it devoted to whether the Court thereby overrode the apparent requirement in Rule 56(e) that all supporting and opposing affidavits set forth facts that would be admissible in evidence.<sup>86</sup> There is an evolving general agreement that this apparent discrepancy can best be resolved by suggesting that this notorious passage from *Celotex* should be read with the emphasis on the word *form*, with the implication that the *content* of those affidavits and other materials must still be admissible.<sup>87</sup>

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85. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

86. See authorities cited *supra* note 31. The terrible confusion among the academic analysts is mirrored by the rampant disagreement among the courts of appeals — which often divide among themselves. Despite the Supreme Court's plain holding that Rule 56(e) forbids the consideration of sworn statements containing inadmissible hearsay, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 & n.19 (1970), several circuits have read this single line from *Celotex* as effectively overruling *Adickes*, changing the requirements of Rule 56(e) and allowing summary judgment to be successfully opposed by inadmissible evidence, including hearsay. See *Williams v. Borough of West Chester*, 891 F.2d 458, 466 n.12 (3d Cir. 1989) (holding that *Celotex* allows "hearsay evidence produced in an affidavit [to] be considered if the out-of-court declarant could later present that evidence through direct testimony"); *Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013, 1015-16 & n.1 (11th Cir. 1987) (holding by margin of 2-1 that *Celotex* allows consideration of "inadmissible hearsay" contained in letter); *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 38 (D.C. Cir. 1987) (holding 2-1 that *Celotex* allows consideration of inadmissible hearsay letter if "the substance of the letter is reducible to admissible evidence in the form of trial testimony"), *cert. denied*, 484 U.S. 1066 (1988); *Bushman v. Halm*, 798 F.2d 651, 654-55 n.5 (3d Cir. 1986) (interpreting *Celotex* as allowing nonmoving party to present evidence that would not be admissible at trial, including unauthenticated letter). Other circuits have reached the opposite conclusion — that *Celotex* did not change the rule that affidavits may not contain hearsay or other inadmissible evidence. See *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 191-92 (5th Cir. 1991) ("It has long been settled law that a plaintiff must respond to an adequate motion for summary judgment with admissible evidence."); *Financial Timing Publications, Inc. v. Compugraphic Corp.*, 893 F.2d 936, 942 (8th Cir. 1990) ("A party may not rely solely on inadmissible hearsay in opposing a motion for summary judgment, but instead must show that admissible evidence will be available at trial."); *Canada v. Blam's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) ("It is well settled that unauthenticated documents cannot be considered on a motion for summary judgment."); see also *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990) ("Hearsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment."). One circuit has even tried to reconcile *Celotex* with Rule 56(e) by adopting the intermediate, but utterly cryptic, position that hearsay is "normally" insufficient to raise an issue of fact for summary judgment purposes. *Kimberlin v. Quinlan*, 6 F.3d 789, 797 n.15 (D.C. Cir. 1993) (citations omitted), *vacated on other grounds*, 115 S. Ct. 2552 (1995). Exactly when it *might* be sufficient in that circuit apparently remains a mystery.

87 See, e.g., *BRUNET ET AL.*, *supra* note 31, § 5.06, at 119 ("The critical word in the

Despite the fabulous popularity of this proposed resolution of the *Celotex* mystery, it has spawned confusion and disagreement in the lower courts on a massive scale.<sup>88</sup> Even more to the point, I doubt that anyone truly and fully understands this supposed distinction between defects in the "content" and the "form" of the evidence presented on a summary judgment motion, especially in connection with objections raised under the hearsay rules.<sup>89</sup> I respectfully submit that Justice Rehnquist's statement can be

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quotation is 'form.' By limiting the exception from the Rules of Evidence to matters of 'form,' the Court preserved application of the evidence rules to the content of the evidence."); Brunet, *supra* note 52, at 656 ("Justice Rehnquist's seeming leniency on *form* should not be misread as tolerating leniency on *content*."); John E. Kennedy, *Federal Summary Judgment: Reconciling Celotex v Catrett with Adickes v Kress and the Evidentiary Problems Under Rule 56*, 6 REV LITIG. 227, 239 (1987) ("Justice Rehnquist still meant to say that in any event the *content* must be admissible."); William W. Schwarzer, *Summary Judgment: A Proposed Revision of Rule 56*, 110 F.R.D. 213, 220-21 (1986) (noting that Rule 56 does not "require[ ] the opponent to present facts in a *form* in which they would be admissible as evidence"); Schwarzer et al., *supra* note 13, at 478 (stating that materials submitted on summary judgment motion must "[set] forth facts admissible in evidence, although the facts need not be presented in admissible form"); see also *Offshore Aviation v Transcon Lines, Inc.*, 831 F.2d 1013, 1016 (11th Cir. 1987) (Edmondson, J., concurring) (quoting *Celotex* with emphasis added to word "form"). One circuit has taken the similar — but equally opaque — position that the party opposing summary judgment need not "tender evidence in a form that would be admissible at trial," although "the evidence set forth must be of a *kind* admissible at trial." *Waldrige v American Hoechst Corp.*, 24 F.3d 918, 921 & n.2 (7th Cir. 1994).

88. For example, as noted above, this supposed "solution" has spawned a tremendous debate over whether a party may defeat summary judgment by offering an affidavit or letter signed by one person but containing information about what some other person will say when he is called at trial, on the theory that the "defect" in such an affidavit is merely a matter of form, not content, and may be remedied before trial. See authorities cited *supra* notes 31, 86. I, for one, think the very suggestion makes a mockery out of the plain language of Rule 56(e), which insists that the affidavit "shall be made on personal knowledge," as well as the Court's contrary holding in *Adickes*. The very existence of this dispute confirms the imprecision and ambiguity of the supposed distinction between hearsay defects that go to content and those that go only to form.

89. For example, consider a multiple hearsay affidavit that states: "I heard that Sheila says Mike told her that Lois claims she saw the light was red." Do the defects in such an affidavit go to its content, its form, or both? The numerous authorities describing that supposed "distinction," *supra* note 87, shed no light on the answer to this question. Theoretically, the substance of this almost worthless report is potentially "reducible to admissible evidence" by the time of trial if that were the only requirement for making the affidavit sufficient to defeat summary judgment (as some courts have held). *E.g.*, *Catrett v Johns-Manville Sales Corp.*, 826 F.2d 33, 38 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). As one judge has correctly observed, however, it "has long been recognized [that] hearsay has weaknesses that go beyond questions of mere form." *Offshore Aviation*, 831 F.2d at 1017 (Edmondson, J., concurring) (citations omitted).

understood far better by reading it with the emphasis supplied elsewhere, to say that the nonmoving party is not required to "produce evidence in a form that would be admissible *at trial* in order to avoid summary judgment" — but without altering in any way Rule 56(e)'s requirement that the affidavit must be admissible, both in content *and* form, *at the summary judgment stage*, where the court is deciding an altogether different question. As we have seen, where an affidavit is being considered on a summary judgment motion and is based on the personal knowledge of the affiant, it is not hearsay at all, either in content or form, even though the same affidavit will be hearsay if it is later offered at trial to prove the truth of the events described in the affidavit.

One related reason for this persistent and pervasive confusion is surely attributable to the next line in that same opinion. Just after stating in *Celotex* that the evidence offered in opposition to summary judgment need not be "in a form that would be admissible *at trial*,"<sup>90</sup> Justice Rehnquist also wrote for the Court that "[o]bviously, Rule 56 does not require the nonmoving party to depose her own witnesses."<sup>91</sup> This line has likewise generated a great deal of academic commentary, much of it concluding that the Court thereby opened the door for parties to resist summary judgment simply by submitting affidavits signed by the plaintiff, listing who her witnesses will be and what they are expected to say.<sup>92</sup> Others disagree, pointing out that such a reading clearly would conflict with the unambiguous text of Rule 56(e), but have been unable to explain how Rehnquist's remark can be taken literally.<sup>93</sup>

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90. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (emphasis mine — all mine).

91. *Id.*

92. See authorities and cases cited *supra* notes 31, 86.

93. See authorities and cases cited *supra* notes 31, 86. One circuit has taken a third approach and has stated that Justice Rehnquist merely meant to make it plain that the party opposing summary judgment "need not depose its own witnesses" because they can simply be asked to sign affidavits instead. *Financial Timing Publications v. Compugraphic Corp.*, 893 F.2d 936, 942 n.6 (8th Cir. 1990). That guess is plausible, but it overlooks the fact that the word "depose," as a legal term of art, typically includes the act of taking a written affidavit from someone as well. See, e.g., *Wrenn v. Benson*, 490 U.S. 89, 90 n.3 (1989) (noting that Supreme Court clerk's own form affidavit asks those who sign to verify that "I, [John Doe], being first duly sworn, depose and say"); *United States v. United States Dist. Ct.*, 407 U.S. 297, 300 n.2 (1972) (noting that United States Attorney General submitted affidavit reciting that "John N. Mitchell being duly sworn deposes and says"); BLACK'S LAW DICTIONARY 438 (6th ed. 1990) (defining "deponent" to include "one who makes oath to a written statement, an affiant"). I suspect that Justice Rehnquist had this broader sense of the word in mind and that he meant to deny that it always was necessary for a nonmoving party to depose her own witnesses, either through affidavits or oral questioning.

Fortunately, there is an available explanation. The answer to this mystery, I submit, is that Justice Rehnquist really meant to say, and obviously should have said, that "Rule 56 does not *always* require the non-moving party to depose her own witnesses," although sometimes it does. Why are there some times when the rule does not entail such a requirement? I am convinced that Justice Rehnquist had in mind here the relatively unusual sort of situation that was squarely before the Court in that very case: namely, where the defendant offered *no* evidence of its own as to what happened in the past but moved for summary judgment based on its contention that the opposing party had the burden of proof on some issue and would have "no witnesses" who could support that crucial fact at trial.<sup>94</sup> In a separate concurring opinion, Justice White made this assumption explicit by stating that a party need not depose his witnesses "to defeat a summary judgment motion asserting *only* that he has failed to produce any support for his case."<sup>95</sup> If plaintiff actually thought she had such witnesses, but she had not been asked to disclose them,<sup>96</sup> it would be unreasonable to insist that she depose her own witnesses and submit their affidavits or deposition transcripts; she simply should be able to sign an affidavit stating from her own personal knowledge that she *did* have such witnesses and let discovery proceed on its normal course from there.<sup>97</sup>

But that logic does not apply to the far more common case where the defendant moves for summary judgment and comes forward with a seemingly compelling showing that the claims alleged by the plaintiff were not simply unproven but actually *false* (for example, if defendant Celotex Corp.

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94. See *Celotex*, 477 U.S. at 320. In *Celotex*, the defendant had alleged in its motion that Mrs. Catrett had been unable to identify in discovery the names of any witnesses who could testify that her deceased husband had been exposed to the defendant's products. See *id.*

95. *Id.* at 328 (White, J., concurring) (emphasis added). Indeed, because Justice White supplied the fifth vote in *Celotex* and concurred on grounds narrower than those put forth by the plurality, his position evidently is controlling. See *Romano v Oklahoma*, 114 S. Ct. 2004, 2010 (1994) (indicating that when justice supplies fifth vote and concurs on narrower grounds, that justice's position is controlling).

96. Or perhaps she had disclosed them — in answers to interrogatories for example — but the defendant had not even bothered to take their depositions. A defendant who made such a motion in that case would be effectively "bluffing" in the hopes of forcing the opposing party to furnish some free disclosure of witness statements.

97. By normal course, I naturally mean that the witnesses would be questioned at a deposition under oath by the defendant. In effect, such a response from the opposing party would be tantamount to advising the court that the defendant's motion for summary judgment was simply inaccurate and that it did not show the absence of a genuine issue concerning whether the plaintiff had any potential witnesses for trial.

had supplied affidavits from numerous eyewitnesses or employers attesting that Mrs. Catrett's husband had never been exposed to its product).<sup>98</sup> In that case, by contrast, it would be contrary to the plain language and purpose of Rule 56 to allow the plaintiff to respond to such a seemingly compelling showing by filing her own affidavit in which she lists only what her witnesses have told her they saw. A defendant who succeeds in supporting that kind of motion plainly is entitled under the rule to "demand at least one sworn averment of fact before the lengthy process of litigation continues"<sup>99</sup> and to insist that such averment "be made on personal knowledge."<sup>100</sup> If the Court meant to say otherwise in *Celotex*, which is highly doubtful, it was only mistaken dictum.

One final, related mystery remains to be unraveled. If this analysis is sound, then just what did the Supreme Court mean in *Anderson* when it stated that "findings of fact" are not required when a judge rules on a motion for summary judgment, but that they often "are extremely helpful to a reviewing court"?<sup>101</sup> This remark, although literally true, has contributed to much misunderstanding. The pertinent authority states that when a case cannot be fully disposed of on a motion for summary judgment, the judge may and should "if practicable ascertain what material facts exist *without substantial controversy* and what material facts are actually and in good faith controverted."<sup>102</sup> That standard authorizes a judge to make findings of fact not about the past but about the *future* and what would be likely to happen at a trial if one is held.<sup>103</sup>

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98. When I speak of evidence tending to show that a plaintiff's claim is "false," I do not mean to suggest that such a motion would invite the judge to resolve the "truth of the matter" asserted in the affidavits. Rather, as noted above in Part I.B., the judge's function is solely to consider such affidavits as evidence of what the declarants *will* say at a future trial if there is one and to decide if such testimony would present a genuine issue for a jury to resolve.

99. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

100. FED. R. CIV. P. 56(e).

101. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 & n.6 (1986); *accord Johnson v. Jones*, 115 S. Ct. 2151, 2159 (1995).

102. FED. R. CIV. P. 56(d) (emphasis added).

103. For example, suppose the defendant in a civil action moves for summary judgment based upon his self-serving affidavit denying his liability, and the plaintiff has no witnesses or evidence — not even circumstantial evidence — to disprove that claim because the plaintiff's only eyewitness unexpectedly died since the complaint was filed. It would be absurd for a judge to presume or to find that the defendant did not do it based on such a record, but he can safely "find" that there *will be* no "substantial controversy" or "genuine issue as to any material fact" if the case goes to trial.



## II. May a Judge "Weigh the Evidence" on a Summary Judgment Motion?

### A. The Traditional Answer

Without a doubt, one of the most unfortunate and pervasive myths surrounding summary judgment was spawned unwittingly by the Supreme Court in *Anderson*, when Justice White stated for the Court that "at the summary judgment stage the judge's function is not himself to weigh the evidence."<sup>104</sup> Later in the same opinion, the Court again stated that "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."<sup>105</sup>

This controversial rule from *Anderson* has been quoted frequently in countless subsequent opinions by lower courts and continues to be quoted by the Supreme Court itself, even as recently as this last term.<sup>106</sup> Yet academic commentators cannot agree even on whether the rule is ambiguous, much less on what it means. At one extreme, a distinguished panel of experts recently commented that the prohibition in *Anderson* against "weighing evidence" on a summary judgment motion "is an unambiguous and conventional statement of the judge's function [that] should present no difficulty for judges confronted with a dispute over historical facts."<sup>107</sup> But as many other observers correctly have observed, this passage appears, at least on its face, to be hopelessly inconsistent with other parts of the same opinion.<sup>108</sup>

For example, two sentences after claiming that a judge may not "weigh the evidence" when deciding a summary judgment motion, Justice White wrote that the judge must decide if the evidence is "merely colorable or is not significantly probative."<sup>109</sup> Only a few paragraphs earlier, the Court

104. *Anderson*, 477 U.S. at 249.

105. *Id.* at 255.

106. *Schlup v Delo*, 115 S. Ct. 851, 869 (1995).

107. Schwarzer et al., *supra* note 13, at 487.

108. Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 433, 462 (1987) ("So replete is the decision with contradictory pronouncements that opposing counsel can in the future legitimately cite *Anderson's* dicta for completely repugnant propositions."); 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, 115-16 (1988) (lamenting "internal contradictions" in Justice White's opinion for Court). Justice Brennan made the same accusation, without contradiction, in his dissenting opinion in *Anderson*. See *infra* note 116.

109. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted).

stated that the district judge must decide whether there is "sufficient evidence" supporting the claimed factual dispute.<sup>110</sup> A few pages later, the Court describes the test in terms of whether the evidence presents "a sufficient disagreement" to require a jury trial.<sup>111</sup> To complicate matters further, the Advisory Committee Notes to Rule 56 contain an explicit statement that the very mission of summary judgment is "to assess the proof in order to see whether there is a genuine need for trial."<sup>112</sup> Moreover, in language that has gone almost totally overlooked, the Committee also stated that the Rule was designed to permit summary judgment where the party opposing the motion "does not produce any evidentiary matter, or produces *some but not enough* to establish that there is a genuine issue for trial."<sup>113</sup> And in a case decided almost contemporaneously with *Anderson*, *Matsushita Electric Industrial Co. v Zenith Radio Corp.*,<sup>114</sup> the Court stated that summary judgment should be more readily granted, at least in some cases, if the opposing party's claims appear to be "implausible."<sup>115</sup>

To be perfectly candid, all of this certainly seems to call for what most people would describe as "weighing the evidence."<sup>116</sup> Nevertheless, despite all of these explicit directions for federal judges to assess the probative value and sufficiency of the parties' proof, virtually all observers have adopted a contrary reading that they believe is compelled by a literal reading of the Supreme Court's direction to refrain from "weighing the evidence." Labor-

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110. *Id.* at 249 (quoting *First Nat'l Bank v Cities Serv Co.*, 391 U.S. 253, 288-89 (1968)).

111. *Id.* at 251-52.

112. 1963 amendment to FED. R. CIV P 56(e) advisory committee's note (emphasis added); *see also* *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2798 (1993) (noting that summary judgment may be granted where "the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true") (dictum).

113. 1963 amendment to FED. R. CIV P 56(e) advisory committee's note (emphasis added).

114. 475 U.S. 574 (1986).

115. *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). This important but controversial proposition is discussed more fully later in this Article. *See infra* part III.

116. Justice Brennan made the same point when he correctly noted that the majority opinion in *Anderson* "is replete with boilerplate language to the effect that trial courts are not to weigh evidence when deciding summary judgment motions [but] is also full of language which could surely be understood as an invitation — if not an instruction — to trial courts to assess and weigh evidence much as a juror would." *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 265-66 (1986) (Brennan, J., dissenting). The majority in *Anderson* made no response to this accusation.

ing under the mistaken view that this language prevents a court from assessing the weight or strength of a party's evidence, courts and commentators unanimously have adopted the erroneous view that *Matsushita* only permits a judge to assess the "plausibility" of inferences from circumstantial evidence but not direct evidence of historical facts.<sup>117</sup> Thus, where a party opposing a motion for summary judgment submits direct evidence of a historical fact, lower courts routinely have adopted the view that "the court may not assess the credibility of this evidence nor weigh it against any conflicting evidence presented by the moving party"<sup>118</sup> Indeed, one court of appeals has gone so far as to state that a judge in such a position cannot grant summary judgment even if he is convinced that the facts alleged in an affidavit descend "to the level of the irrational or the wholly incredible"<sup>119</sup> or the "fantastic"<sup>120</sup> because summary judgment supposedly does not permit the district judge to "assess credibility"<sup>121</sup> Needless to say, these holdings stand in stark contrast with the Advisory Committee's clear direction that "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to *assess* the proof."<sup>122</sup>

### B. *The Truth of the Matter*

Faced with all these seemingly irreconcilable signals, one observer has reasonably complained: "How, one may ask rhetorically, can the court determine whether the nonmovant's evidence is sufficient or significantly probative unless the court weighs the evidence?"<sup>123</sup> Unfortunately, nobody ever has been able to answer this riddle until today, and only a few have even given it a serious attempt.<sup>124</sup> But there is an explanation, and it is

117 This limiting reading has been tenaciously defended by numerous courts and academic commentators. See authorities cited *infra* notes 172-95. The error in this reading of *Matsushita* is discussed more fully later in this Article. See *infra* part III.

118. *McLaughlin v Liu*, 849 F.2d 1205, 1209 (9th Cir. 1988) (quoting *T.W Elec. Serv., Inc. v Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987)).

119. *Bator v Hawaii*, 39 F.3d 1021, 1026 (9th Cir. 1994) (quoting *Denton v Hernandez*, 112 S. Ct. 1728, 1733 (1992)).

120. *Id.* at 1026 n.6.

121. *Id.* at 1026.

122. 1963 amendment to FED. R. CIV P 56(e) advisory committee's note (emphasis added).

123. *Stempel*, *supra* note 108, at 116.

124. One set of authors recently has tried to resolve this inconsistency by essentially wishing it away. In *Summary Judgment: Federal Law and Practice*, the authors concede that the summary judgment rule permits (indeed, requires) a judge "to assess or evaluate

surprisingly simple. When Justice White wrote for the Court that judges are not permitted to "weigh the evidence," in his highly unfortunate choice of words, he was using a word that can have two distinct connotations. The metaphor of evidence being "weighed" can be understood in two different ways, reflecting two different sorts of scales with which we are all familiar.

(1) "*The bathroom scale.*" In one sense, to "weigh" something could mean to determine whether it is heavy or light, by *measuring* or assessing its degree of substantiality. We weigh ourselves on a bathroom scale, for example, to get a more or less precise reading of our weight. This sense is probably the most natural one in which most observers would likely understand the phrase "to weigh," and it is obviously the way that all lower courts and legal commentators have interpreted Justice White's direction that federal judges cannot "weigh the evidence" on a summary judgment motion. If that is what the Court had in mind, of course, as numerous confounded critics have observed,<sup>125</sup> then this direction would be in obvious conflict with the indications elsewhere in the same opinion and in the Committee Notes that a judge must "assess the proof" to determine if it meets the preliminary threshold test of being "sufficient" or "significantly probative" to raise a question of fact. That is exactly what most of us would describe as "weighing the evidence."

(2) "*The Scales of Justice.*" There is, however, another slightly less common way in which one can use the word "weigh." That word also can describe the weighing one might do with the kind of balance typically associated in legal lore with the "scales of justice." Such scales may not give a precise reading of something's weight, but they can be used to balance or *compare* it against something else to see which is heavier or more substantial.<sup>126</sup> This is admittedly a slightly less natural interpretation of the word in ordinary parlance (as evidenced by the fact that it has escaped the

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evidence" and that this process certainly "does bear some similarities to the weighing of evidence traditionally performed by the finder of fact at trial." BRUNET ET AL., *supra* note 31, at 80. The authors conclude that the contradiction posed by the language of *Anderson*, if any, "appears to be one that is inherent in the nature of summary judgment." *Id.* That may well be an accurate description of the way that summary judgment works, but as a putative answer to the problem of *why* the Supreme Court said a judge may not "weigh the evidence" under Rule 56, this supposed "explanation" is tantamount to pretending simply that the Court never said such a thing at all or that it was not meant to be taken literally. That is hardly a satisfactory way of dealing with such confusing language from such a high-placed source.

125. See *supra* notes 108, 116, 124.

126. Cf. *Daniel* 5:27 (noting that Daniel told Belshazzar that "[y]ou have been weighed in the balances, and found wanting").

attention of all those who could not solve Justice White's unintended riddle).<sup>127</sup> But it is a fairly common use of the metaphor in judicial instructions and the openings and closings of trial attorneys who are trying to describe the burden of proof in a civil case or to contrast it with the burden in a criminal case.<sup>128</sup> A leading reference work on jury instructions recommends that federal judges describe the preponderance of evidence standard to civil juries as a comparison of the "weight" of the parties' cases on a set of "scales" and refers to this language as an instruction on "the weighing of the evidence."<sup>129</sup> There can be absolutely no doubt that this is the sort of scale that Justice White and the majority had in mind when the

127 See sources cited *supra* notes 108, 116, 124.

128. See JAMES J. GOBERT, *JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY* § 9.28, at 348 (2d ed. 1990) ("[S]ome lawyers use their hands to represent scales of justice, elevating one to indicate how much the scales must be tipped to meet the burden of proof."). For example, noted trial lawyer Gerry Spence once used *voir dire* to tell prospective jurors:

Now, in this case we have to prove our case first to you by a preponderance of the evidence — and the Judge says that is an adjusting of the scales — that isn't proof beyond a reasonable doubt like in a criminal case where a man's life is at stake — but you have to just tip the scales. If you *weigh* up all the evidence on both sides, which is the *most believable* case, Karen Silkwood's case or Kerr-McGee's case? In other words, if we tip the scales which makes the evidence preponderate, if we tip the scales in our favor, will you return a verdict, a full uncompromised verdict in this case?

ROBERT V. WELLS, *SUCCESSFUL TRIAL TECHNIQUES OF EXPERT PRACTITIONERS* 175 (1988) (emphasis added). Likewise, Robert Habush, former president of the Association of Trial Lawyers of America, told the jury near the outset of his opening statement on behalf of a plaintiff:

Moreover, unlike the old District Attorney in Perry Mason, Hamilton Berger, I don't have to prove anything to you beyond a reasonable doubt [b]ut, rather, by the greater weight of the credible evidence. If you have two scales of justice and one party's evidence seems to *weigh with more persuasive power*, that will be sufficient for us to have met our obligation to you.

*Id.* at 183 (emphasis added).

129 See 3 LEONARD B. SAND ET AL., *MODERN FEDERAL JURY INSTRUCTIONS* ¶ 73.01, at 73-4, 73-11 (1995). This highly regarded reference work, written by United States District Judge Leonard B. Sand and others, advises federal judges to instruct civil juries that:

[a] preponderance of the evidence means the *greater weight* of the evidence. So long as you find that the *scales* tip, however slightly, in favor of the party with the burden of proof — that what the party claims is more likely true than not true — then that element will have been proved by a preponderance of evidence.

*Id.* at 73-4 (emphasis added). The authors aptly describe this analogy as an instruction "on the *weighing* of the evidence." *Id.* at 73-11 (emphasis added).

Court stated, in its regrettably ambiguous choice of words, that federal courts cannot "weigh the evidence" on a summary judgment motion.

This simple distinction between the two meanings of the verb "to weigh" furnishes a clear and accurate resolution of the apparent inconsistency in Justice White's opinion for the Court in *Anderson*. As that case held, when ruling on a motion for summary judgment it is both necessary and proper for a federal judge to *measure* (or, some might be tempted to say, to "weigh") the evidence of both sides in the limited sense of determining if it is substantial enough to create at least some genuine factual issues that "may reasonably be resolved in favor of either party"<sup>130</sup> In the words of *Matsushita*, this rough measurement entails a limited consideration of the "plausibility" of the parties' claims, regardless of whether they are supported by direct or circumstantial evidence.<sup>131</sup> But if the opposing party's evidence survives that limited assessment or measurement of its substantiality and it appears that such evidence is plausible enough to conceivably support a verdict, the judge cannot go further and "weigh" — that is, *compare* — the evidence for the two sides in the proverbial scales of justice to determine who has the comparatively stronger case. If the question is close enough to leave any room for reasonable doubt as to how the evidence for the parties might weigh in the balance, summary judgment must be denied. *That* sort of "weighing" is reserved solely for the jury. It really is just that simple.

Indeed, this interpretation of Justice White's intended meaning is inescapable. Only three months before the Court announced his opinion for the Court in *Anderson*, Justice White wrote in another case that summary judgment does not permit a federal judge to "decide for himself whether the *weight* of the evidence favors the plaintiff,"<sup>132</sup> to "*balance* all the evidence pointing toward [one side's case] against all the evidence pointing toward [the other side's theory of the case],"<sup>133</sup> or to decide "if the evidence makes the inference [offered by one side] *more probable than not*."<sup>134</sup> It is inconceivable that Justice White did not have the same imagery

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130. *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

131. *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (explaining evidentiary requirements if factual context renders party's claim implausible). Although this conclusion is contrary to the conclusion reached by all other observers, see *infra* notes 172-94, it is true, for reasons set forth more fully below in Part III of this Article.

132. *Matsushita*, 475 U.S. at 600 (White, J., dissenting) (emphasis added).

133. *Id.* at 600 n.1 (emphasis added).

134. *Id.* at 601 (emphasis added).

in mind when he condemned the "weighing of evidence" just a few months later in *Anderson*.<sup>135</sup>

When Justice White wrote for the Court that a judge ruling upon summary judgment cannot "weigh the evidence," he did not mean to imply that the judge is obligated to accept the evidence of the opposing party with unconditional blind faith or that she is barred from assessing whether the evidence might be accepted by a rational jury. This is not merely my guess; it is a fact. No clearer proof of this fact could be imagined than Justice White's own opinion for the Court one year earlier in another case with a strikingly similar title. Only one year before writing the majority opinion in *Anderson v Liberty Lobby*, Justice White also authored the opinion of the Court in another landmark case, *Anderson v City of Bessemer City*.<sup>136</sup> In that earlier case, the Court explained the legal standard to be applied by federal appellate courts when reviewing a challenge to a district court's findings of fact as "clearly erroneous."<sup>137</sup> Justice White wrote that an appeals court in that position is not to ask whether it "would have weighed the evidence differently"<sup>138</sup> and cannot conduct "a *de novo* weighing of the evidence in the record."<sup>139</sup>

So what role is left for a federal appellate judge who cannot "weigh" the evidence in such a situation? Far more than you might guess. In

135. This inference follows with even greater force when one considers the nature of the two opinions written by Justice White. In the ordinary course of events, the majority opinion for an appellate court is finished first, at least in its preliminary draft, in order to give the dissenters time to respond to it. Because Justice White's opinion in *Matsushita* was the only dissent and because the majority opinion in that case did not once cite or respond to his dissent, it safely can be inferred that his dissenting opinion probably was finished not long before the case was decided on March 26, 1986 — which was almost four months after *Anderson* was argued before the Court. By that point in time, it is quite likely that White had substantially completed at least his first draft of the majority opinion in *Anderson* because two separate and lengthy dissents were completed in that case before that decision was announced less than three months later.

136. 470 U.S. 564 (1985). Given the degree of similarity between the logic and the language of the two opinions, one is sorely tempted to refer to them as "*Anderson I*" and "*Anderson II*." I will not do so, of course, because they involved totally unrelated parties and cases. For the sake of clarity and simplicity, I will continue throughout this Article to follow the standard convention observed by other writers on summary judgment and will use "*Anderson*" to refer to the Court's holding in *Anderson v Liberty Lobby, Inc.*

137. *Anderson v City of Bessemer City*, 470 U.S. 564, 573-76 (1985). Under federal law, findings of fact by a district judge in a civil case may not be set aside on appeal unless they are "clearly erroneous." *Id.* at 573 (quoting Federal Rule of Civil Procedure 52(a)).

138. *Id.* at 574.

139. *Id.* at 576.

deciding whether a factual finding is clearly erroneous, Justice White explained in *Bessemer City*, an appeals court cannot "weigh the evidence," but is still authorized to assess whether the testimony accepted by the district judge is "a coherent and facially plausible story that is not contradicted by extrinsic evidence."<sup>140</sup> In explaining what facts might suffice to establish "clear error," the Court specifically noted the possibility that "[d]ocuments or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it."<sup>141</sup> This language makes it plain beyond any doubt that a federal judge ordered by Justice White to refrain from "weighing the evidence" is not barred from assessing the evidence to insure that it is at least facially plausible and capable of being accepted by a rational factfinder.<sup>142</sup> That is precisely the same role that White obviously intended to leave open for judges ruling upon summary judgment motions, despite his identical statement in *Anderson* that they are not to "weigh the evidence."

If there was any room for doubt about this interpretation of Justice White's direction that evidence cannot be "weighed" on a summary judgment motion, it is utterly dispelled by recalling the context in which that claim was made. Writing for the Court in *Anderson*, White stated that "the weighing of the evidence[ ] and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."<sup>143</sup> When White wrote that evidence cannot be "weighed" — not even on a motion for a

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140. *Id.* at 575; see also *id.* at 577 (noting that district court's findings of fact were neither "illogical [n]or implausible"); *id.* at 579 (noting that none of evidence accepted by lower court "is implausible on its face, and none is contradicted by any reliable extrinsic evidence").

141. *Id.* at 575.

142. Two other landmark opinions by the Supreme Court, both of them joined by Justice White, also have underscored this same point. For example, the Court has recently stated that a federal judge resolving a disputed fact of conditional relevance is not to "weigh[ ] credibility," but is still authorized and required to decide "whether the jury could reasonably find the conditional fact by a preponderance of the evidence." *Huddleston v United States*, 485 U.S. 681, 690 (1988). And a federal judge reviewing the sufficiency of the evidence supporting a state court conviction must preserve and respect "the factfinder's role as weigher of the evidence," but is still permitted to determine whether the evidence supporting the conviction is sufficient to permit "any rational trier of fact [to] have found the essential elements of the crime beyond a reasonable doubt." *Jackson v Virginia*, 443 U.S. 307, 319 (1979). Both of these opinions, just like *Anderson*, are obviously using the word "weigh" to describe the process by which the jury compares two plausible claims in the proverbial balance to decide which is *more* plausible.

143. *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (emphasis added).



directed verdict — it is inconceivable that he meant that it must be accepted with unconditional blind faith and that a judge has no power even to consider whether the evidence is substantial enough to support a rational jury's verdict. Under well-settled federal law, as the Court noted in *Anderson*, a motion for a directed verdict need not be denied "merely because some evidence has been introduced by the party having the burden of proof"<sup>144</sup> and must be granted if the evidence weighs "so strongly and overwhelmingly in favor of one party, such that reasonable men could not arrive at a contrary verdict."<sup>145</sup> That sort of "weighing" has always been perfectly proper for a judge, regardless of whether he is deciding a motion for either summary judgment or a directed verdict, to assess whether the party opposing the motion has a minimally viable and plausible case. The only "weighing" that the Court meant to forbid in *Anderson* is the type of comparison one might do in the proverbial scales of justice to decide which of two plausible cases is comparatively stronger. Although this is contrary to the reading of *Anderson* that has been universally accepted by the lower courts for almost a decade, I guarantee that the Court will confirm I am right the first time someone invites them to do so.<sup>146</sup>

### III. What Evidence Must a Judge "Believe" When Ruling on a Summary Judgment Motion?

#### A. The Traditional Answer

There is an old story, *perhaps* apocryphal, of a newly appointed federal district judge who received the following instructions on summary judgment procedure from a senior member of the bench:

"Let's consider your age to begin with — how old are you?"

"I'm seven and a half, exactly "

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144. *Id.* at 251 (quoting *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442, 448 (1871)).

145. *Enlow v. Tishomingo County, Miss.*, 45 F.3d 885, 888 (5th Cir. 1995); *accord* *Stockstill v. Shell Oil Co.*, 3 F.3d 868, 870 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1307 (1994); *Hinds v. General Motors Corp.*, 988 F.2d 1039, 1045 (10th Cir. 1993); *Davis v. Wal-Mart Stores, Inc.*, 967 F.2d 1563, 1567 (11th Cir. 1992).

146. I am confident enough to make this standing offer: If you cite this Article in a brief to the Supreme Court and the Court tells you I am wrong about this point, I will personally reimburse your printing expenses for that portion of the brief if you and your client have a combined net worth that is less than mine. (Offer also good for pro se litigants, but void where prohibited by local laws against games of chance.)

"You needn't say 'exactly,'" the Queen remarked. "I can believe it without that. Now I'll give *you* something to believe. I'm just one hundred and one, five months and a day "

"I can't believe *that!*" said Alice.

"Can't you?" the Queen said in a pitying tone. "Try again: draw a long breath, and shut your eyes."

Alice laughed. "There's no use trying," she said: "one *can't* believe impossible things."

"I daresay you haven't had much practice," said the Queen. "When I was your age, I always did it for half-an-hour a day Why, sometimes I've believed as many as six impossible things before breakfast."<sup>147</sup>

Although it may only be a coincidence,<sup>148</sup> this supposedly absurd account bears a striking resemblance to what the Supreme Court has been telling federal judges to do for years when confronted by summary judgment motions.

The genesis of this confusing judicial nonsense lies in a single unfortunate line from the *Anderson* opinion, which has proven to be one of the most pernicious and widely cited mistakes ever made by the Court. When a motion for summary judgment is decided, the Court said, "[t]he evidence of the non-movant is to be *believed*, and all justifiable inferences are to be drawn in his favor."<sup>149</sup> Prior to that time, the lower courts generally agreed that there was no such requirement and that a federal judge was authorized to determine whether an opposing party's affidavit was at least arguably worthy of belief.<sup>150</sup> Although the Court cited no authority that supported

147 LEWIS CARROLL, *THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS* 251 (Bramhall House 1960).

148. Summary judgment statutes were first enacted in several American states in the late 1800s, and the first recorded federal case invoking the procedure was decided in 1876. Schwarzer et al., *supra* note 13, at 446. The passage quoted here from Alice's hypothetical visit to the Federal Judicial Center was first written and published just five years earlier in 1871.

149. *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (emphasis added). It is noteworthy that this sentence about "believing" one side's evidence immediately follows a sentence in which the Court claimed that "the weighing of evidence" is not allowed on the motion. *Id.* This is certainly an important reason why so many commentators and lower courts have mistakenly reached the erroneous conclusion that they are not permitted to engage in even the most rudimentary assessment of the probative value of either side's case. *See supra* part II.

150. Long before *Anderson*, lower courts had uniformly held that evidence submitted by the opposing party was not sufficient to raise a genuine issue of fact and defeat summary judgment if it was "too incredible to be accepted by reasonable minds." 6 MOORE ET AL., *supra* note 68, ¶ 56.15[4], at 56-295 nn.42-47 & 52 (collecting more than two dozen cases

this remarkable and unprecedented requirement that the nonmovant's evidence must be "believed,"<sup>151</sup> this single line has been uncritically accepted as gospel around the nation. Indeed, this line is part of the same passage that one prominent group of authorities hailed as "an unambiguous and conventional statement" that "should present no difficulty for judges confronted with a dispute over historical facts."<sup>152</sup> That newly minted rule was not questioned by either of the dissenting opinions in the case<sup>153</sup> and has been cited repeatedly and followed by the Court in subsequent cases — in opinions joined by a total of thirteen different Justices.<sup>154</sup> This rule also has been quoted in literally hundreds of lower court opinions, even to this

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decided prior to 1976, more than 10 years before *Anderson* was decided). As it happens, I fully believe that this remains an accurate statement of the law, for reasons outlined below. But Professor Moore's current "explanation" of this statement, which is taken verbatim from his first edition, consists merely of citations to several dozen reported cases all decided more than 10 years before the Supreme Court's announcement in *Anderson* that the nonmoving party's evidence *must* be believed. Professor Moore does not cite one case decided since *Anderson* upholding the supposed right of a federal judge to reject opposing affidavits as "incredible," and the lower courts almost unanimously have assumed that there is no longer such power, as I note below. See *infra* notes 155, 161, 177-95. With all due respect, the value of this statement of the law by Professor Moore (although still accurate in my view) is compromised severely by his failure to reconcile it with what the lower courts have consistently stated in the decade since *Anderson* was decided. I attempt to offer that reconciliation here.

151. Not one word in the text or Advisory Committee Notes to Rule 56 states or implies that the judge must "believe" anything. The only case cited by Justice White for this proposition, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), did not state that the district judge is required to "believe" anything, but only that the "inferences to be drawn" from the evidence must be "viewed in the light most favorable to the party opposing the motion." *Id.* at 158-59 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). That is not the same thing as "believing" either side's evidence, as this Article will demonstrate. The question of *why* the Supreme Court would say something so mistaken for so long is important but a bit complicated; it is dealt with below. See *infra* part III.C. It will suffice for now to show both why the Court's statement is wrong and the horrible confusion it has caused in the lower courts.

152. Schwarzer et al., *supra* note 13, at 487

153. See *Anderson*, 477 U.S. at 257-68 (Brennan, J., dissenting); *id.* at 268-73 (Rehnquist, J., dissenting).

154. *E.g.*, *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1175 n.3 (1993) (Souter, J., dissenting); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072, 2077 (1992); *Palmer v. BRG, Inc.*, 498 U.S. 46, 49 n.5 (1990); see also *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 883 (1995) (noting that "summary judgment procedures require us to assume" truth of plaintiff's claims when deciding defendant's summary judgment motion); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (affidavits of opposing party "for purposes of the summary judgment motion will be taken to be true").

day,<sup>155</sup> as well as many leading reference works on summary judgment and civil procedure.<sup>156</sup> It is now about as "well-settled" as anything ever written about summary judgment.

Despite the unquestioned acceptance with which lower courts and academic commentators have embraced the rule that the nonmoving party's evidence must be "believed," the suggestion is both wrong and nonsensical.<sup>157</sup> At least in theory, the rule might be plausible in a case like *Anderson*, where only one side was moving for summary judgment. But in the common situation where two or more parties file cross-motions for summary judgment and submit conflicting and flatly inconsistent affidavits, what is the judge supposed to do? Believe two mutually exclusive stories? Or perhaps take turns believing one thing and then believing the opposite when ruling on the cross-motion? Obviously, none of this corresponds with what any of us would normally describe as "believing."<sup>158</sup> If the district

155. As of December 1995, a Westlaw search revealed that *Anderson* has been cited for this proposition over 100 times by the United States courts of appeals alone — not to mention the innumerable district court opinions that have done the same. Indeed, just within the past year alone, almost every circuit court of appeals has cited *Anderson* or its progeny for the "rule" that the evidence of the nonmoving party must be "believed." See, e.g., *Underwager v Channel 9 Australia*, 69 F.3d 361, 368 n.8 (9th Cir. 1995); *Allied Colloids, Inc., v American Cyanamid Co.*, 64 F.3d 1570, 1575 (Fed. Cir. 1995); *Rolscreen Co. v Pella Prods.*, 64 F.3d 1202, 1211 (8th Cir. 1995); *Multistate Legal Studies, Inc. v Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 63 F.3d 1540, 1545 (10th Cir. 1995), cert. denied, No. 95-587, 1995 WL 625402 (U.S. Jan. 8, 1996); *Willis v Roche Biomedical Lab., Inc.*, 61 F.3d 313, 315 (5th Cir. 1995); *Amirmokri v Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1134 n.3 (4th Cir. 1995); *Romstadt v Allstate Ins. Co.*, 59 F.3d 608, 610 (6th Cir. 1995); *Semco, Inc. v Amcast, Inc.*, 52 F.3d 108, 110 (6th Cir. 1995); *Tabas v Tabas*, 47 F.3d 1280, 1287 (3d Cir.), cert. denied, 115 S. Ct. 2269 (1995). Other circuits also have cited this supposed rule in the very recent past. E.g., *Goldman v Bequai*, 19 F.3d 666, 669 n.1 (D.C. Cir. 1994); *Derrico v Bungee Int'l Mfg. Co.*, 989 F.2d 247, 249 (7th Cir. 1993); *Velten v Regis B. Lippert, Intercat, Inc.*, 985 F.2d 1515, 1523 (11th Cir. 1993); *Rogers v Fair*, 902 F.2d 140, 143 (1st Cir. 1990).

156. E.g., Schwarzer et al., *supra* note 13, at 487

157. In addition to other more substantial problems noted below, Justice White's choice of words exhibits less than ideal clarity when he said that a judge must believe the evidence of "the non-movant." That may be an accurate designation of the appropriate party if there are only two parties in the case and only one moves for summary judgment. But there may be more than one "non-movant" in multiparty litigation (some of whom may file papers in support of the motion), and surely the Court did not mean to require all such evidence to be accepted as true. Or there may be no "non-movants" at all, in the common case where both parties file cross-motions. For the sake of analytical clarity, it is more accurate to refer to the "adverse party" or the "party opposing the motion," just as the Rule does. See FED. R. Civ. P. 56(c), (e), (f).

158. Try this little epistemological test on your spouse over breakfast: "Honey, you've

judge has an unusually heavy motions calendar in the early morning, a literal application of this rule might very well require him to believe as many as six impossible things before breakfast!<sup>159</sup>

Naturally, many will be quick to respond to the absurdity of this suggestion by observing that the Supreme Court's poorly chosen phrase was not meant to be taken literally and that what the Court obviously meant to say was that the district judge must *assume the truth* of any evidence submitted by the opposing party<sup>160</sup> Although that is not the same as "believing," of course, that is precisely how most lower courts and commentators have uniformly interpreted the district judge's duty under *Anderson*.<sup>161</sup> This refinement at least has the important advantage of being

got to believe me — of course I *believe* you when you say that you clean the house while I am at the office. But I *also* believe the kids when I talk to them and they tell me that you don't." Don't be surprised if he throws something at you because you will deserve it for talking such nonsense.

159. The very idea calls to mind the suggestion of the young trial lawyer who told his sweetheart, just a few years after the adoption of the Federal Rules of Civil Procedure, "Faith is believing in things when common sense tells you not to." *MIRACLE ON 34TH STREET* (Twentieth Century Fox 1947). Although the film does not indicate exactly where he got that idea, it is probably safe to assume that he had recently argued a motion for summary judgment in federal court.

160. Or perhaps, some might say, the judge should "pretend to believe" that evidence — but even that would not be an accurate description of what a judge is doing when denying summary judgment. No lawyer who reads the decision is fooled into thinking that the judge is actually indicating what he believes, and no judge expects them to think so.

161. Schwarzer et al., *supra* note 13, at 479 ("Because credibility is not an issue on summary judgment, the nonmovant's evidence must be accepted as true for purposes of the motion."); *see also* Johnson v Multnomah County, Or., 48 F.3d 420, 427 (9th Cir.) ("[W]e presume for the purposes of summary judgment that Johnson's allegations were true. "), *cert. denied*, 115 S. Ct. 2616 (1995); Lam v University of Haw., 40 F.3d 1551, 1563 (9th Cir. 1994) ("We accept as true for purposes of summary judgment" adverse party's allegations of fact); Fuller v Vines, 36 F.3d 65, 66 (9th Cir. 1994) ("We must accept the [plaintiffs'] portrayal of the facts as set forth in the sworn affidavits as true."), *cert. denied*, 115 S. Ct. 1361 (1995); Iacobelli Constr., Inc. v County of Monroe, 32 F.3d 19, 23 (2d Cir. 1994) (noting that adverse party's allegations "must be taken as true"); Adams v Metiva, 31 F.3d 375, 382 (6th Cir. 1994) (noting that direct evidence presented by adverse party "must be accepted as true"); Knox v Lederle Lab., 4 F.3d 875, 880 (10th Cir. 1993) (noting that "evidence of non-movant [is] to be taken as true on summary judgment"); Jackson v Cam, 864 F.2d 1235, 1238 (5th Cir. 1989) ("Because we are reviewing a summary judgment motion we accept Jackson's allegations as true."); McLaughlin v Liu, 849 F.2d 1205, 1208 (9th Cir. 1988) (noting that party opposing summary judgment "is clearly entitled under *Anderson*" to have his affidavit "taken as true"); Eisenberg v Ins. Co. of N. Am., 815 F.2d 1285, 1289 (9th Cir. 1987) (stating that "the non-moving party's evidence is to be taken as true"); Bushman v Halm, 798 F.2d 651, 656 (3d Cir. 1986) ("Plaintiff's allegations as to the accident and attendant injuries must be taken as true, even if in

coherent, but it is still a seriously erroneous description of a judge's responsibility under the rules. In fact, as we shall see, a judge ruling on a motion for summary judgment need not, and should not, assume the truth of (much less "believe") anything he reads in the affidavits or evidence of either party

Although this point has not been noticed previously, it really should have been more obvious than it has been. Even within the *Anderson* opinion itself, remember, Justice White stated that summary judgment may be denied if the opposing party's evidence is "merely colorable or is not significantly probative"<sup>162</sup> or if it is "of insufficient caliber or quantity to allow a rational finder of fact" to find in favor of that party.<sup>163</sup> Likewise, the Advisory Committee has expressly urged trial judges to "assess the proof" of the opposing party, in part to weed out those cases where that party "produces some [evidence] but not enough" to get to trial.<sup>164</sup> More recently, the Court also has said in dictum that "[s]ome improbable allegations might properly be disposed of on summary judgment."<sup>165</sup> At least in a great number of cases, it obviously will be impossible for a judge to discharge *any* of these responsibilities if he categorically assumes the truth of everything the opposing party says in an affidavit, no matter how absurd or implausible it may be.<sup>166</sup>

Despite all these points, lower courts and commentators have labored under the terribly mistaken view that *Anderson* compels a judge to place unconditional faith in the truth of any direct evidence submitted by the opposing party on a historical fact — such as the statement of an alleged eyewitness in an affidavit — no matter how implausible or unbelievable it

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conflict with those of the moving party."). The Supreme Court itself evidently has embraced this standard in its most recent comments on summary judgment procedure; it has stated that the affidavits of the opposing party "for purposes of the summary judgment motion will be taken to be true." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

162. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted).

163. *Id.* at 254.

164. 1963 amendment to FED. R. CIV. P. 56(e) advisory committee's note.

165. *Denton v. Hernandez*, 112 S. Ct. 1728, 1733 (1992). The implications of this interesting dictum for our discussion are analyzed more fully *infra* part III.B.

166. Some might counter this demonstration by urging that a judge's duty is to "assume the truth" of the opposing party's affidavits *unless* the judge decides that those affidavits are not "significantly probative enough" to be believed. That sort of procedure is not even remotely analogous to what logicians and scientists do when they assume the truth of some proposition or take something as a given for the sake of argument (much less what anyone would normally mean by "believing" a statement). Besides, that is not the way the lower courts have interpreted their obligations under *Anderson*. See cases cited *infra* notes 177-95.

might be.<sup>167</sup> This view, which would be compelled by a literal reading of the direction to "believe" such evidence, is reinforced also by the Supreme Court's statement in that same opinion that a judge ruling on summary judgment cannot make "[c]redibility determinations."<sup>168</sup> This error has, in turn, led most observers to make a series of related mistakes about summary judgment. Most notably, it has caused them to give an unduly cramped reading to the significance of the Supreme Court's holding in *Matsushita* — a case that ultimately will be recognized as a major landmark in summary judgment jurisprudence although it has been distinguished and limited almost to the point of oblivion by lower courts and academic observers.<sup>169</sup>

In that antitrust case, decided only three months before *Anderson*, the Court held that parties seeking to survive summary judgment must "come forward with more persuasive evidence to support their claim than would otherwise be necessary" if the "factual context renders [their] claim implausible."<sup>170</sup> In making this statement, the Supreme Court, of course, was doing nothing more than following well-settled principles applicable to all summary judgment motions, which require a judge to assess the adverse

167 This nearly universal tendency among the lower courts is, unfortunately, only further supported by a literal reading of the Court's subsequent dictum that "[i]n ruling upon a Rule 56 motion, 'a District Court must resolve any factual issues of controversy in favor of the non-moving party' only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion *must* be denied." *Lujan v National Wildlife Fed'n*, 497 U.S. 871, 888 (1990) (dictum) (emphasis added). As it happens, however, no court has given this quotation a literal reading because they universally have assumed that such a conflict would not necessarily prevent summary judgment when the opposing party specifically avers facts that constitute only circumstantial evidence. See cases cited *infra* notes 177-95.

168. *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Then again, the Court also has said in dictum — both before and after it decided *Anderson* — that "a district court *generally* cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Schlup v Delo*, 115 S. Ct. 851, 869 (1995) (emphasis added) (quoting *Agosto v INS*, 436 U.S. 748, 756 (1978)). That language certainly seems to suggest there is room for an occasional exception although the Supreme Court has not yet explicitly said so.

169. This situation is, fortunately, only temporary. When the points made in this Article ultimately become accepted as commonplace, as they inevitably will, the *Matsushita* decision will be recognized as setting a standard that governs *all* summary judgment motions.

170. *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis added). The full quote goes on to say that more persuasive evidence may be required "if the factual context renders respondent's claim implausible — if the claim is one that simply makes no economic sense." *Id.* This last phrase unfortunately has induced many to reach the mistaken conclusion that this line of the opinion is possibly limited to antitrust cases and perhaps other comparable forms of commercial litigation. See *infra* notes 172-73.

party's proof to determine if it is substantial enough to possibly support a jury verdict in his favor.<sup>171</sup>

Unfortunately, this very natural and important reading of *Matsushita* (and the other lines cited above) has been tenaciously resisted in literally every quarter of the legal world, which insists that the case simply cannot mean what it rather plainly seems to say.<sup>172</sup> That reading is utterly inconceivable to all those who labor under the universal (but profoundly mistaken) view that a judge must assume the truth of the adverse party's evidence and cannot assess its weight in any way. Consequently, a veritable chorus of analysts has risen up, all crying out with one voice that *Matsushita* must be limited somehow to the special case of a judge asked to draw inferences from circumstantial evidence — and perhaps limited even further to antitrust cases<sup>173</sup> — but does not permit a judge under any circumstances

171. See *supra* notes 109-15 and discussion *supra* part II. Only two sentences earlier in the same opinion, the Supreme Court had quoted the Advisory Committee Note stating that the purpose of summary judgment is to "pierce the pleadings and assess the proof." *Matsushita*, 475 U.S. at 587. That is exactly why the Court correctly perceived that it has the authority to make at least a rudimentary assessment of whether the nonmoving party's claims are facially "implausible." *Id.*

172. See Schwarzer et al., *supra* note 13, at 491 ("Some language in *Matsushita* suggests that summary judgment is appropriate where a plaintiff's case rests on 'implausible' inferences. Courts should use care in accepting this language at face value when ruling on summary judgment motions.").

173. It frequently has been suggested that *Matsushita* might authorize a judge to inquire into the "plausibility" of a party's circumstantial evidence only in antitrust cases. *E.g.*, *Williams v Borough of West Chester, Pa.*, 891 F.2d 458, 460 n.2 (3d Cir. 1989) ("*Matsushita*'s principles arguably apply only to summary judgment motions in antitrust cases."). The continued persistence of that suggestion is remarkable because the Supreme Court explicitly has declared that the "requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases." *Eastman Kodak Co. v Image Technical Servs., Inc.*, 112 S. Ct. 2072, 2083 (1992). The Court added that *Matsushita*'s demand "that the nonmoving party's inferences be reasonable in order to reach the jury [was] a requirement that was not invented, but merely articulated, in that decision," *id.*, and the Court underscored the point by citing the *Anderson* opinion, a libel suit that did not involve antitrust law at all. *Id.* at 2083 n.14. Incredibly, despite these explicit disclaimers by the Court in *Kodak*, many commentators and courts continue to insist that the logic of *Matsushita* must be limited to antitrust cases. *E.g.*, William W. Schwarzer & Alan Hirsch, *Summary Judgment After Eastman Kodak*, 154 F.R.D. 311, 316 (1993) ("*Matsushita*, rather than making a statement about implausible inferences in summary judgment motions generally, rests on a specific point of antitrust law"). In one recent case, the Ninth Circuit even went so far as to suggest that the "plausibility" inquiry authorized by *Matsushita* is permissible only in a narrow class of cases — including antitrust cases, where "economic rationality might safely be presumed" — and therefore does not apply to the assessment of even circumstantial evidence in a case



to assess the plausibility of *factual claims* supported by direct evidence of a historical fact,<sup>174</sup> such as a sworn affidavit from an alleged eyewitness to the color of a traffic light.<sup>175</sup> Under this view, it has been said that a judge may grant summary judgment rejecting a claim based on her conclusion that it is an implausible inference from the facts but may *never* reject direct evidence of a claim about historical fact on the grounds that it is implausible or unbelievable.<sup>176</sup> Only in this way, it is generally thought, can *Matsushita* be reconciled with the teachings of *Anderson* and the constitutionally protected province of the jury

This limited reading of *Matsushita* has been embraced by at least three circuit courts of appeals. In the first of these three cases, *Leonard v Dixie Well Service & Supply, Inc.*,<sup>177</sup> the district judge granted summary judgment after rejecting the plaintiff's recollections about work assignments that were contradicted by the employer's detailed work records.<sup>178</sup> After giving passing lip service to the Supreme Court's direction that "more persuasive evidence" might be required of parties making an "implausible" claim,<sup>179</sup> the United States Court of Appeals for the Fifth Circuit then quoted the holding in *Anderson* that the evidence of the opposing party must be "believed."<sup>180</sup> In attempting to reconcile the holdings of those two cases, the Fifth Circuit concluded that a district judge's power to assess the persuasiveness of evi-

charging discrimination under Title VII, which "involves a very different kind of motivation." *Lam v University of Haw.*, 40 F.3d 1551, 1563 n.22 (9th Cir. 1994).

174. Under the traditional definition, direct (as opposed to circumstantial) evidence "is evidence which, if believed, resolves a matter in issue." 1 MCCORMICK ON EVIDENCE, *supra* note 21, § 185, at 339. The testimony of an alleged eyewitness is the classic example.

175. This view has been defended with remarkable diligence and tenacity, considering that it apparently has never been criticized before today. *E.g.*, WILLIAM D. QUARLES ET AL., SUMMARY ADJUDICATIONS: DISPOSITIVE MOTIONS AND SUMMARY TRIALS § 5.14, at 118 (1991); Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV 770, 781-82 (1988); Schwarzer & Hirsch, *supra* note 173, at 327-28; Schwarzer et al., *supra* note 13, at 491; Daniel P. Collins, Note, *Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV 491, 493-96 (1988). This unanimous scholarly consensus has been swallowed by most circuit courts to consider these issues. See cases and authorities cited *infra* notes 177-95.

176. See cases cited *infra* notes 177-95.

177. 828 F.2d 291 (5th Cir. 1987).

178. See *Leonard v Dixie Well Serv & Supply, Inc.*, 828 F.2d 291, 293 (5th Cir. 1987).

179. *Id.* at 294 & n.7 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

180. *Id.* at 294 n.11.

dence is limited to "discount[ing] such evidence as unspecific or immaterial, but not as unbelievable."<sup>181</sup>

The Fifth Circuit's reasoning was adopted the next year by the United States Court of Appeals for the Ninth Circuit. In *McLaughlin v Liu*,<sup>182</sup> the Government brought an action against Liu for failing to make overtime payments to his employees as required by federal law.<sup>183</sup> In support of its motion for summary judgment, the Government put forward an impressive array of undisputed factual evidence which, although circumstantial, gave rise to at least a colorable argument that Liu's story was literally incredible,<sup>184</sup> and the district court granted the motion.<sup>185</sup> The Ninth Circuit reversed solely because Liu filed an affidavit claiming to have made the payments.<sup>186</sup> Citing the *Anderson* opinion's direction that the nonmovant's evidence must be "believed"<sup>187</sup> and a law review note that argued that "[a] conflict of direct evidence concerning a material historical fact may *never* be settled by the judge on a motion for summary judgment,"<sup>188</sup> the Ninth Circuit held that a district judge has no power under Rule 56 to even *entertain* an argument that the sworn story of an alleged eyewitness is implausible or unbelievable.<sup>189</sup> In a more recent case, that same circuit has taken this reasoning to its logical conclusion and has gone so far as to hold that summary judgment may not be granted in the face of conflicting affidavits, even if the district judge believes that the facts of some claim

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181. *Id.* at 294.

182. 849 F.2d 1205 (9th Cir. 1988).

183. *See* *McLaughlin v Liu*, 849 F.2d 1205, 1206 (9th Cir. 1988).

184. Although he had destroyed his financial records in violation of federal law, Liu claimed that he always did make such payments, *except* for a limited two-week span of time when he inexplicably claimed to have adopted a different pay computation practice on the casual advice of a friend — the *exact* same two-week period when the Government had obtained copies of his financial records (funny coincidence!) — and even that he did not admit until he learned that the Government had the goods on him for those two weeks. *Id.* at 1207 n.5. Even the court of appeals, in a masterpiece of understatement, acknowledged that these facts cast "doubt" on Liu's claims. *Id.*

185. *Id.* at 1206.

186. *See id.* at 1209.

187. *Id.* at 1208 (citing *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

188. *Id.* at 1209 n.9 (emphasis added) (citing Collins, *supra* note 175, at 494-95).

189. *See id.* at 1207-09 (holding that judge has no power to reject direct evidence as "implausible" or "unbelievable"). This case is still good law in the Ninth Circuit. *See Lam v University of Haw.*, 40 F.3d 1551, 1563 (9th Cir. 1994) ("The rule established in *Matsushita* pertains only to the plausibility of inferences drawn from circumstantial evidence."); *Cassidy v United States*, 875 F Supp. 1438, 1446 (E.D. Wash. 1994).

descend "to the level of the irrational or the wholly incredible."<sup>190</sup> Although this position is indeed extreme and in fact erroneous, it must be conceded that no other result would be faithful to a literal reading of the Supreme Court's repeated directions that the evidence of the party opposing summary judgment "is to be believed."

Likewise, in *Adams v Metiva*,<sup>191</sup> the United States Court of Appeals for the Sixth Circuit reversed a summary judgment that had been granted by a district judge who had supposedly made the mistake of thinking that he had "at least *some* discretion to determine whether the respondent's claim is plausible."<sup>192</sup> The court of appeals disagreed with the district judge and agreed instead with the Ninth Circuit that "the trial court may only inquire into the plausibility of *circumstantial* evidence, and that when the non-moving party presents *direct* evidence refuting the moving party's motion for summary judgment, the court *must* accept that evidence as true."<sup>193</sup> The court reasoned that this result was compelled by the Supreme Court's direction that "[t]he judge may not make credibility determinations or weigh the evidence."<sup>194</sup>

Other circuits have not gone quite as far as these three but have taken compromise positions that lead to even more incongruous and inconsistent results. For example, following the Supreme Court's lead, the United States Court of Appeals for the Second Circuit has stated for years that the affidavits and other evidence of the party opposing the motion for summary judgment "must be taken as true."<sup>195</sup> Yet that same court evidently has

190. *Bator v Hawaii*, 39 F.3d 1021, 1026 (9th Cir. 1994) (quoting *Denton v Hernandez*, 112 S. Ct. 1728, 1733 (1992)). The quotation here is taken from the test in *Denton* for dismissals of in forma pauperis complaints as frivolous under 28 U.S.C. § 1915(d) (1988). The Ninth Court expressly declined to accept such grounds as a basis for "summary judgment dismissals, where the district court cannot assess credibility." *Bator*, 39 F.3d at 1026. The Court went so far as to say that summary judgment may not be granted even where the facts alleged were apparently "fantastic." *Id.* at 1026 n.6.

191. 31 F.3d 375 (6th Cir. 1994).

192. *Adams v Metiva*, 31 F.3d 375, 382 (6th Cir. 1994) (emphasis added) (quoting opinion of district judge).

193. *Id.* (emphasis added) (citing and distinguishing *Matsushita*).

194. *Id.* at 379 (citing *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Not having seen the actual record in this case or in *McLaughlin*, I do not take any position as to whether summary judgment should have been denied, but I am most definitely criticizing the methodological approach used to reach that conclusion by those courts of appeals.

195. See *Iacobelli Constr., Inc. v County of Monroe*, 32 F.3d 19, 23 (2d Cir. 1994). It is noteworthy that the panel that decided *Iacobelli* included Judges Pratt and Feinberg, who were two of the three judges who had decided *United States v 15 Black Ledge Drive*, 897

adopted a different rule to deal with the recurring frustration posed by defendants in civil forfeiture actions who make outrageous and unbelievable claims under oath to prevent (or at least postpone) the seizure of their homes and other assets. For example, in two different cases, female defendants sought to oppose summary judgment by filing sworn affidavits denying any knowledge that their husbands were using their homes for storing or trafficking in illegal drugs despite circumstantial evidence that cast such denials into great doubt.<sup>196</sup> Such sworn denials, of course, constitute direct (not circumstantial) evidence based upon personal knowledge and comply in every detail with the requirements for opposing affidavits set forth in Rule 56(e). Nevertheless, without even mentioning its supposed "rule" that the evidence of the nonmoving party "must be believed," the Second Circuit held in both cases that such sworn statements may be disbelieved and rejected by the court if they are "untenable" in light of extensive drug paraphernalia or cash found in the home.<sup>197</sup> That approach might strike some as a satisfying response to the common problem of lying forfeiture defendants, but it is totally inconsistent with the Second Circuit's holdings in all other summary judgment contexts, where the court has paid lip service to the supposed rule that sworn statements by the nonmoving party must be "believed."

The Third Circuit Court of Appeals has been guilty of the same flagrant inconsistency. In civil forfeiture proceedings, that circuit has followed the Second Circuit in holding that a sworn denial that the defendant knew about drugs being used by her husband in their home will not defeat summary judgment if it is thoroughly "impeached" or "incredible."<sup>198</sup> Yet in other

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F.2d 97 (2d Cir. 1990), discussed *infra* at notes 196-97

196. See *United States v 755 Forest Rd.*, 985 F.2d 70 (2d Cir. 1993); *15 Black Ledge Drive*, 897 F.2d 97 (2d Cir. 1990).

197. See *755 Forest Rd.*, 985 F.2d at 71, *15 Black Ledge Drive*, 897 F.2d at 102. In support of its conclusion that summary judgment might be granted where affidavits concerning "state of mind" are incredible and untenable, the Second Circuit cited its own prior holding in *Quarles v General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985). See *15 Black Ledge Drive*, 897 F.2d at 102-03 (citing *Quarles*). That reliance was completely misplaced, however, because *Quarles* affirmed the dismissal of a racial discrimination charge despite the sworn allegations of the *plaintiff* about the allegedly discriminatory mental state of the *defendant*, of which the plaintiff obviously had no direct personal knowledge. See *Quarles*, 758 F.2d at 840; see also FED. R. CIV. P. 56(e) (requiring all affidavits to be made on personal knowledge). That is almost the opposite of what the court did in *15 Black Ledge Drive*, when it rejected a woman's sworn statements about her *own* knowledge and mental state, despite the fact that the moving party (the Government) had *no* direct evidence to the contrary, nor *any* evidence by anyone with personal knowledge of her mental state! See *15 Black Ledge Drive*, 897 F.2d at 101-03.

198. See *United States v 717 S. Woodward St.*, 2 F.3d 529, 533, 534 (3d Cir. 1993).

contexts, the Third Circuit has said, in complete contradiction, that the sworn allegation of a party opposing summary judgment "is to be believed."<sup>199</sup> And to top it all off, the Third Circuit has cited the Supreme Court's opinion in *Anderson* to justify both so-called "rules"<sup>200</sup> Thus has that Court unwittingly fulfilled the prophetic warning of one observer that someone easily could be tempted to "cite *Anderson's* dicta for completely repugnant propositions."<sup>201</sup>

To summarize, under the prevailing view embraced by virtually every commentator and now accepted by every court of appeals to squarely address the issue, the Supreme Court's holding in *Matsushita* authorizes a federal judge to reject a party's claims as "implausible" only if they involve proposed inferences from circumstantial evidence but never if they are supported by direct evidence — such as a sworn statement of an alleged eyewitness — no matter how incredible or unbelievable it might seem (unless perhaps the witness is the defendant in a civil forfeiture proceeding). This commonly accepted reading of *Matsushita*, like much of what is written these days about summary judgment, is both incoherent and wrong. It is incoherent because this supposed distinction between direct and circumstantial evidence has no basis in the way such evidence is handled at trial,<sup>202</sup> in the traditional division of powers between the American judge and jury, or in the language of *Anderson*, which held that a judge ruling on a motion for summary judgment must let the jury handle "[c]redibility deter-

199. See *Tabas v Tabas*, 47 F.3d 1280, 1287 (3d Cir.), cert. denied, 115 S. Ct. 2269 (1995).

200. See *id.* (quoting *Anderson* for rule that judge must "believe" opposing party's evidence); 717 S. *Woodward St.*, 2 F.3d at 533 (citing *Anderson* for rule that judge must decide whether opposing party's evidence could "be credited by a rational juror").

201. Mullenix, *supra* note 108, at 462.

202. The Supreme Court itself has made it clear that the probative value of circumstantial evidence "is intrinsically no different from testimonial evidence," *Holland v United States*, 348 U.S. 121, 140 (1954), and such evidence sometimes can be "more certain, satisfying, and persuasive than direct evidence." *Michalic v Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960). In fact, that is exactly what we routinely tell juries in federal court. See COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, DISTRICT JUDGES ASSOCIATION, SIXTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS Instr. 1.06 committee commentary 1.06 (1991) ("The purpose of this instruction is to define direct and circumstantial evidence, to make clear that the jury should consider both kinds of evidence, and to dispel the television notion that circumstantial evidence is inherently unreliable."). As one judge correctly observed, "direct evidence can consist of something as incredible and unreliable as the testimony of a convicted perjurer who asserts that the defendant confessed his intent and motive to him." *Kimberlin v. Quinlan*, 6 F.3d 789, 808 (D.C. Cir. 1993) (Edwards, J., dissenting), vacated on other grounds, 115 S. Ct. 2552 (1995).

minations, the weighing of the evidence, and the drawing of legitimate inferences from the facts."<sup>203</sup> Nobody has explained why a judge should be allowed to take a case away from a jury based upon his rejection of an utterly implausible inference but never based upon his rejection of a totally implausible claim about a historical fact. Either ruling poses equal "threat" to the province of the jurors, who will both decide witness credibility and draw inferences from circumstantial evidence if we let them get the case.

This common reading of *Matsushita* suffers from another major flaw as well: It is also patently inconsistent with what those same circuit courts have said in another, closely analogous context. In deciding what sorts of allegations or evidence may be reasonably required of a plaintiff seeking to defeat a summary judgment motion based upon the defense of qualified immunity, the Fifth, Sixth, and Ninth Circuits (among others) have explicitly rejected the suggestion that the plaintiff must produce direct rather than circumstantial evidence. All three circuits have correctly reasoned that it would be irrational and unfair to permit such an arbitrary distinction to determine whether a case could survive summary judgment.<sup>204</sup> Yet outside the context of qualified immunity, those same circuits have tried to reconcile *Anderson* and *Matsushita* by adopting a rule that provides that the ability of an "implausible" claim to survive summary judgment turns entirely on whether the claim is supported by direct or circumstantial evidence!<sup>205</sup> This is typical of the inconsistency that is rampant in our so-called "understanding" of summary judgment.

Besides, even if the logic of *Matsushita* were artificially limited to circumstantial evidence cases, as everyone insists, none of these academic commentators or lower courts has yet explained what we are to make of that opinion's direction that judges faced with implausible claims must ask that party to produce not merely *more* evidence, but "more *persuasive* evidence."<sup>206</sup> If a judge is categorically barred from assessing the strength of

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203. *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (emphasis added).

204. See *Tompkins v Vickers*, 26 F.3d 603, 609 (5th Cir. 1994) ("Circumstantial evidence is equally as probative as direct evidence in proving illegitimate intent."); *Branch v Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991); *Crutcher v Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989); see also *Fowler v Smith*, 68 F.3d 124, 127 (5th Cir. 1995); *Elliott v Thomas*, 937 F.2d 338, 345 (7th Cir. 1991) ("[T]here is no principled difference between direct and circumstantial evidence."). The Supreme Court recently heard argument on whether such a distinction might be proper in the qualified immunity context but disposed of the appeal on other grounds. *Kimberlin v Quinlan*, 115 S. Ct. 2552 (1995).

205. See cases cited *supra* notes 177-94.

206. *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U.S. 574, 578 (1986) (emphasis added).

evidence on a summary judgment motion, as so many have insisted for so long, then how on earth could the judge determine what evidence is "more persuasive"? The very idea is absurd. There is a very simple reason why the prevailing reading of *Matsushita* is so incoherent: because it is wrong.

### B. *The Truth of the Matter*

As the foregoing review makes plain, our law governing summary judgment is in a state of profound disarray and incoherence. The depth of the analytical problem and the proper route out of this mess are probably best illustrated by considering a common hypothetical scenario. Among the Greek chorus of voices crying out to federal judges that they can never reject a factual claim as implausible if it is supported by some direct evidence, academic commentators have frequently used an automobile collision as the paradigmatic example of the supposedly "summary judgment-proof" case.<sup>207</sup> One of the most prominent authorities on the Federal Rules of Civil Procedure even went so far as to make this claim:

Whenever one party moves for summary judgment with sufficient supporting materials, the opposing party will *always* be able to defeat the motion by putting in direct evidentiary material supporting its side of the case. Thus if a defendant, who is charged with negligently driving into the plaintiff, moves on the basis of an affidavit that he was not driving at the time in question, plaintiff can defeat the motion with his own affidavit that he saw the defendant operating the car when the accident occurred.

It makes *no difference* how strong a case the defendant presents.

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207 See, e.g., QUARLES ET AL., *supra* note 175, § 5.14, at 118 ("When judges are confronted with conflicting assertions of historical fact, for example, plaintiff's witness asserts that the light was red, while defendant's witness is equally adamant that the light was green, there is an issue of material fact that may not properly be resolved on summary judgment."); Schwarzer et al., *supra* note 13, at 487 ("[W]hen the dispute is over which driver entered the intersection first, conflicting testimony will normally raise a genuine dispute. In such cases, a bare denial under oath (even if impeached) suffices to preclude summary judgment."); Collins, *supra* note 175, at 494 ("Thus, a witness' claim that 'I saw the light, and it was green' necessarily implies that the light was, in fact, green provided the witness is speaking honestly and recalling correctly. Since direct evidence concerning a historical fact therefore hinges on the witness' credibility and cognitive abilities, a true conflict concerning such evidence is exclusively within the province of the jury and may not be removed from its consideration by the judge without violating the seventh amendment."). In an actual automobile collision case, one federal court of appeals held shortly after *Anderson* that "[p]laintiff's allegations as to the accident and attendant injuries *must* be taken as true, even if in conflict with those of the moving party." *Bushman v Halm*, 798 F.2d 651, 656 (3d Cir. 1986) (emphasis added).

The court *must* assume, for purposes of the motion, that a trier of fact would not believe *any* of the moving party's witnesses.<sup>208</sup>

Admittedly, this analysis of current law is universally accepted,<sup>209</sup> but it is nonsense. Let us take a moment to consider just how strong the defendant's case might be. Suppose that the defendant, who happens to be the incumbent President of the United States, supplies his sworn affidavit that he was being inaugurated at the Capitol at the very moment of the plaintiff's unfortunate car accident, which allegedly took place in Hawaii. The defendant further submits supporting affidavits from three dozen "alibi witnesses" who were with him on the platform at the swearing-in ceremony, including the Chief Justice of the Supreme Court (who administered the oath of office), the Pope (who said the blessing), and the entire reunited cast of Fleetwood Mac. The defendant also supplies the Court with duly authenticated films of the ceremony, taken by every major news network, and supporting affidavits from the cameramen. Not persuaded yet? The President also furnishes affidavits from eight of his personal physicians, complete with authenticated x-rays, all attesting that he has been unable to drive and paralyzed below the waist because of childhood polio *and* a devastating spinal injury twenty years ago so he could not be the man the plaintiff claims to have seen driving a car that day on the island of Maui.<sup>210</sup> In response to all this, the plaintiff offers nothing but his own coffee-stained handwritten affidavit, which states:

I don't know *how* the President could have fooled so many people into thinking that he was in Washington or how he managed to get out of that

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208. Friedenthal, *supra* note 175, at 781 (emphasis added). Dean Friedenthal goes on to voice the standard view that a different result might obtain if the case involved circumstantial evidence. *See id.* at 781-87.

209. *See* authorities cited *supra* note 207; *see also* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 9.3, at 445 (2d ed. 1993) ("If, however, the responding party does produce information contradicting that of the moving party, summary judgment *must* be denied") (emphasis added); Collins, *supra* note 175, at 495 ("In summary, a conflict of direct evidence concerning a material historical fact may *never* be settled by the judge on a motion for summary judgment.") (emphasis added).

210. Still not satisfied that this case is ripe for summary judgment? We could go on. What if the President also offers affidavits from the *plaintiff's* physicians, who all attest that he was undergoing extended surgery in Denver at the time and that he has been hospitalized for severe mental health problems for 30 years? What if the plaintiff claims the accident took place in a former lifetime or on the bridge between Hawaii and California in a blinding snowstorm? And that he was smoking marijuana at the time but swears that he did not inhale? There must come a point where even sworn statements of personal knowledge about certain so-called historical "facts" are simply too implausible to defeat summary judgment.



wheelchair and drive that car or who that impostor was at the inauguration. But I have seen the President on television at least three times, and I know him when I see him, and, although I admit my eyesight ain't what it used to be, I swear to God that he is the man who drove into my car in Maui and then threatened to break my legs if he ever saw me around town again. I *know* it was him because I was pretty drunk at the time and he scared me so bad I sobered up real quick.

What result? Should the President's motion for summary judgment be granted? If you believe everything you read in law reviews or decisions by the courts of appeals, the answer is easy: Because the case involves a direct conflict between alleged eyewitnesses over historical facts, the judge cannot "weigh" the evidence and must "believe" the plaintiff's affidavit — or at least assume its truth — and assume that the jury will not believe the defendant or any of his witnesses. The plaintiff's claim obviously is implausible and unbelievable, but we are told that *cannot* be a basis for rejecting his sworn allegations of first-hand knowledge about historical facts. If we truly believed this poor victim's remarkable story, after all — or at least assumed its truth — he has got a very good case, perhaps even for punitive damages. And so, under the conventional logic, the motion must be denied. But is there really anyone mad enough to think this case should go to trial?<sup>211</sup>

Unfortunately, the absurd result sketched out here is not confined to the pages of law reviews. Influenced by such writers, federal courts uniformly have applied the same principles to real cases.<sup>212</sup> But what is the proper

211. If summary judgment cannot be granted on such facts (assuming that the plaintiff paid the required filing fee), it will go to trial because it obviously cannot be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Motions made under that rule "operate[ ] on the assumption that the factual allegations in the complaint are true" and may not be granted "based on a judge's disbelief of a complaint's factual allegations." *Neitzke v Williams*, 490 U.S. 319, 326-27 (1989); *accord Denton v Hernandez*, 112 S. Ct. 1728, 1733 (1992) (noting that when making determination based solely on pleadings, court is normally bound "to accept without question the truth of the plaintiff's allegations"). If the plaintiff is proceeding in forma pauperis, of course, the court has slightly broader authority to dismiss the complaint as "frivolous," *Neitzke*, 490 U.S. at 327, but that power only applies to plaintiffs who do not pay the filing fee. It gives a court no power to dismiss complaints by paying plaintiffs or the frivolous and fantastic claims of the many lying defendants who will say anything to save their necks and homes. *See cases cited supra* notes 195-99. A poor litigant who is not paying filing fees and court costs "lacks an economic incentive to refrain from filing frivolous [and] malicious" claims, *Neitzke*, 490 U.S. at 324, but in federal court there are no fees required of lying defendants who wish to file frivolous defenses.

212. *See cases cited supra* notes 177-95. Ironically, under current law in most circuits, summary judgment might be granted on the basis of such facts — but *only* if the plaintiff said something ambiguous at his deposition that *arguably* contradicts or disproves his affidavit, even if he insists under oath that his comments were not inconsistent, that his deposition

answer? In what principled way can a trial judge effectively safeguard the plaintiff's Seventh Amendment right to a jury and still remain faithful to his obligation "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"<sup>213</sup> and to the Supreme Court's instruction to weed out cases where "the evidence presented in the opposing affidavits is of insufficient caliber or quantity"<sup>214</sup> to permit a rational jury to find in favor of the party opposing the motion? The answer is quite plain.

For starters, the judge *must* forget all that nonsense about "assuming the truth" of the plaintiff's affidavit, much less "believing" it. In fact, as noted above in Part I, the judge should not even be trying to decide what happened in the past, much less considering the affidavit for its truth. The judge should focus only on the future and ask himself only one question: "If I assume that *all* of these witnesses — including the plaintiff himself — would testify at trial just as they have in their affidavits, is there any way this case could survive a motion for a directed verdict?"<sup>215</sup> The answer to that question, on the facts of our hypothetical Hawaiian lawsuit, is "no," and the motion for summary judgment must be granted. Without a trial, we cannot say for sure if this man is lying, mistaken, or insane — but we do not need a trial to know that he is wrong.<sup>216</sup>

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testimony was misunderstood, or that he was confused when he said it, and even if he demands that a jury resolve such disputes. This monstrous incongruity is discussed more fully later in this Article. *See infra* part IV

213. 1963 amendment to FED. R. CIV. P. 56(e) advisory committee's note.

214. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

215. This procedure is suggested by the Advisory Committee's suggestion that the "admissibility of depositions, answers to interrogatories, and affidavits should be determined as if the deponent, person answering interrogatories, or affiant were testifying in person." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 149-50 (1991). In deciding this question, of course, the court will assume that the affiants would be allowed to testify only to the facts in their affidavits that would be admissible at trial. FED. R. CIV. P. 56(e). The judge also would make all reasonable allowances for the superior opportunity of the jury to observe the demeanor of the witnesses, just as a court does when deciding a motion for a directed verdict during the trial. In *Anderson*, the Supreme Court made it quite clear that the summary judgment standard is designed to mirror the standard for a directed verdict and to intercept those cases where "there can be but one reasonable conclusion as to the verdict." *Anderson*, 477 U.S. at 250. In federal court, such motions have more recently been renamed as motions for "Judgment as a Matter of Law." FED. R. CIV. P. 50.

216. I am not so foolish as to suggest that *no* jury could possibly rule in his favor; the modern jury has proven that it is quite capable of doing just about anything. *See, e.g.*, *United States v. Heller*, 785 F.2d 1524, 1526 (11th Cir. 1986) (involving Florida jurors deciding criminal tax charges that told anti-Semitic jokes about defendant and his witnesses

We live in an age of moral and epistemological relativism, and it is fashionable to suggest that there is no "absolute truth."<sup>217</sup> But that is false. Outside of academia, there are a great number of hard facts that are "not subject to reasonable dispute."<sup>218</sup> These facts, which are the subject of judicial notice,<sup>219</sup> include those that are known generally by all sane members of the community or those that can be verified through unimpeach-

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and joked early in trial that they were "just going to hang him" because he was "a Jew"); *Powell v Allstate Ins. Co.*, 652 So.2d 354, 355 n.2 (Fla. 1995) (describing behavior of all-white Florida jury deciding personal injury claims of black couple as including speculation that couple's children were drug dealers, joking about "niggers," and comparing couple to chimpanzees); Clyde Haberman, *Color-Blind? Justice, Maybe, But Not Juries*, N.Y. TIMES, Nov 26, 1995, at 39 (describing jury that was bitterly deadlocked along racial lines over whether to convict two minority defendants charged with violent crime against white victims, after one black juror reportedly told another, "We have to stick together and protect our boys"); *Jurors Recommend 30,000-Year Sentence*, CHI. TRIB., Dec. 16, 1994, at 29 (quoting Oklahoma jury explanation that it recommended sentence of 300 centuries for convicted child rapist "to send a message to the offender that we are not going to tolerate it" — evidently in case he proved to be slow learner); *Ouija Board Verdict Spells Out a Mistrial*, PLAIN DEALER (Cleveland), Oct. 27, 1994, at 21-A ("A man jailed for life for a double murder has won a retrial because four members of the jury used a ouija board to consult the spirit of one of his alleged victims."). But a verdict based upon such factors would not be allowed to stand, and a civil case cannot get to trial solely in the hopes that the jury might return an irrational verdict on the basis of impermissible influences. See Schwarzer et al., *supra* note 13, at 476 n.193.

217 See, for example, Justice Blackmun's remarkable assertion that "arguably, there are no certainties in science." *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2795 (1993). To borrow a phrase from another member of the Court, that is precisely the sort of "theory that only the most removed appellate court could love." *Kyles v Whitley*, 115 S. Ct. 1555, 1581 (1995) (Scalia, J., dissenting). As a matter of fact, even those who talk that way really do not mean it. Justice Blackmun himself once complained in another case that psychiatric predictions about future dangerousness at a man's capital sentencing hearing were "probably wrong and *certainly* prejudicial" and would make "the Eighth Amendment's well established requirement of individually focused sentencing a *certain* loser." *Barefoot v Estelle*, 463 U.S. 880, 929-35 (1983) (Blackmun, J., dissenting) (emphasis added). More recently, Justice Blackmun warned that "the inevitability of factual, legal, and moral error gives us a system that we *know must* wrongly kill some defendants." *Callins v Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from denial of certiorari) (emphasis added). The fact of the matter is that even the most ardent self-professed skeptics are perfectly "certain" of at least one thing or another.

218. FED. R. EVID. 201(b); see DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("We hold these truths to be Self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.").

219. A court is entitled to rely on judicial notice when ruling on a motion for summary judgment. 6 MOORE ET AL., *supra* note 68, ¶ 56.11[9].

able sources,<sup>220</sup> such as certain basic truths about geography, biology, history, physics, mathematics, chemistry, and medicine.<sup>221</sup> Anyone who claims to have seen something inconsistent with those truths is either lying or mistaken, and no jury will be permitted to find otherwise, regardless of what that witness is willing to put in an affidavit. Even if the case were to go to trial, the judge will not let a witness testify contrary to those fundamental truths.<sup>222</sup>

On a slightly lower plane of certainty, there are certain basic claims that witnesses might make that are not provably false but are so wildly implausible and unbelievable that no rational jury would be allowed to return a verdict on the basis of such testimony.<sup>223</sup> These consist of claims and defenses that "rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them,"<sup>224</sup> and they are no rarity in federal courts.<sup>225</sup> For more than a

220. See FED. R. EVID. 201(b).

221. These would include, of course, "theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics." *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2796 n.11 (1993). For a typical list of such facts, see any textbook surveying the case law applying the judicial notice rule. *E.g.*, WEISSENBARGER, *supra* note 10, § 201.9.

222. In a civil action, a federal judge who takes judicial notice instructs the jury that they must take that fact as conclusive; the judge will not allow either party to offer the jury evidence to the contrary. See FED. R. EVID. 201(g) advisory committee's note. It is curious that this time-honored rule has not come under withering constitutional attack from the many analysts who cry out that it would violate the Seventh Amendment to take part of a case away from the jury under Rule 56 any time the objecting party claims to have direct contrary evidence to a historical fact. See cases and authorities cited *supra* notes 172-95. That is *exactly* what happens almost every time a federal judge takes conclusive judicial notice in a civil case over someone's objection!

223. As noted above, one of the most common categories of such cases involves claims asserted by defendants in civil forfeiture proceedings who are seeking to stave off summary judgment by the Government in an effort to avoid (or at least postpone) the seizure of their homes or other valuable assets. See *United States v 15 Black Ledge Drive*, 897 F.2d 97, 99-102 (2d Cir. 1990) (involving defendant opposing summary seizure of her home who filed affidavit denying any knowledge of her husband's extensive drug activities, even though cocaine, drug paraphernalia, weapons, and large sums of cash were found throughout house); see also cases cited *supra* notes 196-200. These claims are not too surprising because few other litigants have as much to gain merely by avoiding summary judgment and postponing the trial, even if they know they have no hope of winning at trial.

224. *Denton v. Hernandez*, 112 S. Ct. 1728, 1733 (1992).

225. Even the Supreme Court has taken judicial notice of the abundance of claims in federal court that are "clearly baseless," including those "describing fantastic or delusional scenarios, claims with which federal district judges are all too familiar." *Id.* at 1728 (quoting *Neitzke v Williams*, 490 U.S. 319, 327-28 (1989)). "Moreover, indigent litigants

century, our legal system has provided that a factual question will not reach a jury "merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such character that it would warrant the jury in finding a verdict in favor of that party"<sup>226</sup> The judge cannot discharge that responsibility unless he is willing, when necessary, to reject even the sworn claims of an eyewitness that are literally incredible — even on a motion for summary judgment.<sup>227</sup>

I am not suggesting, of course, that a judge is empowered to grant summary judgment merely because *she* does not believe the affidavit of an alleged eyewitness; that is clearly forbidden.<sup>228</sup> But that is not at all the

hardly corner the market on frivolous filings. We receive a fair share of frivolous filings from paying litigants." *In re Sindram*, 498 U.S. 177, 181 (1991) (Marshall, J., dissenting on other grounds).

226. *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986) (quoting *Improvements Co. v Munson*, 81 U.S. (14 Wall.) 442, 448 (1872)).

227 This conclusion does not presuppose any metaphysical view as to whether the proverbial "laws of nature" can admit of occasional and unexpected deviations in the form of "miracles," and I do not mean to imply that they cannot. For the sake of the present discussion, it suffices to observe that our federal rules of procedure, as presently drafted, tolerate a slight risk of occasional factual error for the sake of enhanced judicial efficiency. See FED. R. CIV. P. 1 ("These rules shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."); FED. R. EVID. 102 ("These rules shall be construed to secure fairness in administration [and] elimination of unjustifiable expense and delay"). Those rules, by design, knowingly run the risk that they "inevitably on occasion will prevent the jury from learning of authentic insights" because our legal system is "designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes." *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2798-99 (1993) (discussing Federal Rule of Evidence 702). For that reason, even those who are unwilling to concede that anything is "absolutely certain," see *supra* note 217, can readily agree that the demands of efficient judicial administration permit us to take many factual propositions as being sufficiently established to serve as the basis for summary judgment. If the mere metaphysical possibility of a miraculous suspension of the ordinary "laws of nature" were sufficient to defeat summary judgment, the motion could virtually never be granted and would lose much of its utility.

228. Even at trial, with respect to the simple question of whether to admit an item of evidence, "[f]or a judge to exclude evidence because [s]he does not believe it has been described as 'altogether atypical, extraordinary.'" FED. R. EVID. 801 advisory committee's note (quoting James H. Chadbourn, *Bentham and the Hearsay Rule — A Benthamite View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932, 947 (1962)); see also *An Amendment to the Federal Rules of Evidence*, 154 F.R.D. 508, 534 (1994) (explaining that one sentence of Rule 412 was eliminated because it "would appear to authorize a trial judge to exclude evidence of past sexual conduct based upon the judge's belief that such acts did not occur," thus raising "questions of invasion of the right to a jury trial"). Because a judge normally cannot exclude even a single item of testimony or evidence merely because she personally does not believe it, it follows with even greater force that the judge

same as a judge who grants summary judgment based upon her informed professional assessment that the story is *unbelievable*; that is, that no reasonable jury could accept such a claim in the face of all the available evidence. This determination is the same type we routinely permit and expect judges to make when ruling on motions for a directed verdict, in taking judicial notice over a party's objection, or in deciding whether to grant habeas corpus relief.<sup>229</sup> There is no sound reason why the exercise of such power in the context of a summary judgment motion would pose any greater insult to the Seventh Amendment right to a jury trial.

This conclusion, although unorthodox to the point of heresy, actually is borne out by the Advisory Committee Notes as well. In 1963, Rule 56 was amended to severely limit the ability of an adverse party to survive summary judgment merely by relying on the allegations of his pleading. The standard explanation for that amendment is that the Committee supposedly decided that pleadings ought to have no evidentiary value — but the Committee actually gave an explanation that was much more subtle. In fact, the Committee explained: "The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be *overwhelmingly contradicted by the proof* available to his adversary."<sup>230</sup>

Sounds rather like "weighing the evidence," doesn't it? Of course it does (in the sense of assessing whether it is sufficient to go to a trial) because that is what judges are supposed to do when deciding a summary judgment motion. It would be remarkable if the Advisory Committee intended to allow summary judgment in such cases but to utterly forbid it if the plaintiff converted his complaint into an affidavit that, despite his best efforts at accuracy, was still "overwhelmingly contradicted by the proof." In an analogous context, the Court has correctly held that it would undermine the purposes of summary judgment if a party could successfully oppose the motion merely by "replac[ing] conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."<sup>231</sup> In a similar

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could not grant summary judgment and deny a party a trial altogether on the same grounds.

229. When ruling upon a habeas corpus petitioner's claims of newly discovered evidence of innocence, the decision whether to grant the petition does not depend upon "the district court's independent judgment as to whether reasonable doubt exists"; "rather[,] the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Schlup v Delo*, 115 S. Ct. 851, 868 (1995).

230. 1963 amendment to FED. R. CIV P 56(e) advisory committee's note (emphasis added).

231. *Lujan v National Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

way, it would greatly compromise the utility of Rule 56 if an incredible allegation that is "overwhelmingly contradicted by the proof" can be transformed magically from a worthless bunch of words into a guaranteed non-stop ticket to trial simply by transferring it from an incredible pleading into an incredible affidavit. A sworn story that is overwhelmingly contradicted by the evidence will not get past a motion for a directed verdict;<sup>232</sup> there is no reason why it should survive summary judgment, which is supposed to be governed by the same legal standard.<sup>233</sup>

This conclusion also is supported, perhaps unwittingly, by the Supreme Court's recent dictum that "[s]ome *improbable* allegations might properly be disposed of on summary judgment."<sup>234</sup> How could that ever happen under current law? This dictum was made in passing, and the Court gave no explicit indication of when that might be the case. If you subscribe to the almost universal view taken by the courts and commentators quoted above, you would conclude that the Court was talking here only about the very unusual situation in which a party has no direct evidence to support a crucial portion of his claim or defense and is relying on nothing more than circumstantial evidence to support an inherently "improbable" inference. If the thesis defended here is sound, however, that narrow and cramped reading misses the full significance of this remark — which is actually a fair description of the power judges have to dispose of inherently fanciful and unbelievable claims in every case, regardless of whether someone swears to have seen them happen with his own eyes.

It is safe to assume that these simple points have gone unnoticed for so long because of the closely related confusion caused by the Supreme Court's statement in *Anderson* that a judge ruling on summary judgment cannot make "[c]redibility determinations."<sup>235</sup> Countless observers have assumed from this language and the direction to "believe" the adverse party's evidence that a judge may *never* grant summary judgment rejecting a factual

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232. Under federal law, judgment as a matter of law (formerly called a directed verdict) may be granted during the trial "[i]f the facts and inferences point so strongly and overwhelmingly in favor of one party, such that reasonable men could not arrive at a contrary verdict." *Enlow v Tishomingo County, Miss.*, 45 F.3d 885, 888 (5th Cir. 1995); *accord* cases cited *supra* note 145.

233. See *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 250-52 (1986).

234. *Denton v Hernandez*, 112 S. Ct. 1728, 1733 (1992) (emphasis added). The same suggestion is also contained in the Court's even more recent remark that summary judgment may be granted where "the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true." *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2798 (1993) (dictum).

235. See *supra* note 105 and accompanying text.

story or claim on the grounds that it is incredible, inconceivable, or implausible.<sup>236</sup> That is surely the inference one would get from many (albeit not all) of the Supreme Court's pronouncements on this topic. But that is not the law. The Advisory Committee had it quite right when it said that: "Where an issue as to a material fact *cannot be resolved without* observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate."<sup>237</sup>

We must take care to observe precisely what this comment does and does not say. It does *not* say that the judge is forbidden from making all "credibility determinations" or that he may *never* decide if a story is credible enough to have any chance of success at trial.<sup>238</sup> Rather, the Note forbids summary disposition of a question of fact that "cannot be resolved" without an assessment of the credibility of a witness, where that assessment might be affected by observation of their demeanor. That is simply another way of saying, as we noted earlier, that a judge may not "weigh" the evidence in the sense of comparing to see whose case is stronger where it appears, on paper, that the question is close enough that it could "reasonably be resolved in favor of either party" by the jury.<sup>239</sup> But that is not the same as weighing (in the sense of "assessing") the credibility of *a claim or a story* to determine if it at least meets the test of minimal plausibility or if it has any chance of being accepted by a rational jury.

In most cases, that question cannot be resolved without an opportunity to meet the witnesses in person and to gauge their demeanor — but sometimes it can. If someone claims that he actually met Napoleon Bonaparte last week on the bridge between Hawaii and California, I do not need to meet him to decide whether his story is incredible, and no jury on earth will be in a better position than I am to decide that question after meeting him.<sup>240</sup> The unfortunate reality is that our courts are visited not infrequently —

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236. See authorities cited *supra* notes 172-95.

237. 1963 amendment to FED. R. CIV. P. 56(e) advisory committee's note (emphasis added).

238. If the Committee had intended to say such a thing, of course, it merely would have said that summary judgment is not appropriate "where there is a dispute over the facts." That rule, which has been advocated vigorously by countless observers in cases turning on direct evidence, see *supra* notes 172-95, would effectively read the word "genuine" right out of the requirement that there must be a "genuine issue as to any material fact." FED. R. CIV. P. 56(c).

239. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); see *supra* part II.

240. If anything, the jurors may well be in a worse position to decide that issue, if their assessment of the poor man's "demeanor" makes them prey to emotional factors that have no rational or permissible bearing on the reliability of his testimony. See *supra* note 216.



although sometimes involuntarily, in the case of defendants — by liars and lunatics with stories so absurd and fanciful that nobody in his right mind could ever believe such a thing and with literally no hope of success at trial.<sup>241</sup> These claims are destined to be impaled on the horns of a directed verdict, if not judicial notice. To intercept these cases under Rule 56 would be a mercy killing.

Some might be tempted to respond that my reading of Rule 56 would collapse the difference between summary judgment and 28 U.S.C. § 1915(d), which already gives courts the power to dismiss certain claims that descend "to the level of the irrational or the wholly incredible."<sup>242</sup> If judges were given the power to dismiss claims on such grounds under § 1915, the argument might go, there would have been no reason for Congress to have given judges the power to do the same thing in the summary

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241. As anyone who has ever worked in a federal court can tell you, one of the easiest ways to locate some of the most extreme examples of such cases is to run a search on Westlaw or Lexis for cases containing the words "trillion" and "dollars" in the same sentence. *See, e.g.*, *Garcia v Chernetsky*, No. 91-16412, 1993 WL 8723, at \*1 (9th Cir. Jan. 19, 1993) (noting that pro se prisoner sought \$4.5 trillion for "corrupt conspiracy" between Jehovah's Witnesses, Arizona Civil Liberties Union, F.B.I., Arizona Supreme Court, and federal judiciary); *Windsor v Pan Am. Airways*, 744 F.2d 1187, 1188 (5th Cir. 1984) (noting that pro se plaintiff demanded over \$400 trillion, claiming that major airway conspired with President Carter and family of President Kennedy to commit "nuclear sabotage on Flight 759," that Carter stole over \$40 trillion from plaintiff in copyright and patent violations, and that widow of Dr. Martin Luther King intended to take over Catholic Church and "install herself as a self-proclaimed 'Black Popess'"); *Nationline*, USA TODAY, June 6, 1995, at 3A (noting that Supreme Court refused to hear appeal of death row inmate Fredric Jermy, who was convicted of killing his mother and who "claimed to be a Nobel-Prize winning author, trillionaire, and time traveler who talks to God"). Others with slightly more modest claims are generally willing to settle for something in the range of billions of dollars. *See America v United States Passport Agency*, No. 93 CIV 6540, 1993 WL 427421, at \*1 (S.D.N.Y. Oct. 15, 1993) (involving pro se plaintiff named "Mr. America" who threatened in his complaint to kill a number of federal officials and demanded over \$10 billion, passport, birth certificate, immediate rank of "honorary general" in Air Force, and reminder to President Clinton of plaintiff's support and vote in last election); *Schmidt v Utah*, No. 90-3536, 1990 WL 74255, at \*1 (E.D. Pa. June 1, 1990) (involving pro se plaintiff suing Utah and Mormon church for Establishment Clause violations who requested over \$1 billion and "an order directing that all members of the Church be branded on the forehead or hands"), *aff'd*, 919 F.2d 732 (3d Cir. 1990), *cert. denied*, 501 U.S. 1221 (1991).

242. *Denton v. Hernandez*, 112 S. Ct. 1728, 1733 (1992); *see also Neitzke v Williams*, 490 U.S. 319, 322-23 (1989). The Ninth Circuit relied on similar logic in concluding that the power to dismiss "frivolous" claims under § 1915 has no analogy to "summary judgment dismissals, where the district court cannot assess credibility." *Bator v Hawaii*, 39 F.3d 1021, 1026 (9th Cir. 1994).

judgment context.<sup>243</sup> The short answer to that objection is the fact that § 1915 was not designed as the exclusive source of a court's power to dismiss frivolous claims.<sup>244</sup> But even under my proposed reading of Rule 56, the two provisions overlap only partially and serve very distinct purposes.<sup>245</sup> Unlike summary judgment, dismissals under § 1915(d) are permitted only in the case of claims filed in forma pauperis by plaintiffs; it gives courts no power over claims, however incredible, that are filed by defendants (who are not required to pay costs and filing fees) or by plaintiffs who can pay the minimal filing fee. In the limited class of cases where § 1915(d) applies, however, such dismissals "are often made *sua sponte* prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints,"<sup>246</sup> which is not the case with summary judgment.<sup>247</sup>

Indeed, the analogy to § 1915 actually *supports* my interpretation of the extent of a federal court's power under Rule 56 because only my reading is

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243. Section 1915 was passed by Congress in 1892, *see Neitzke*, 490 U.S. at 324, long before the adoption of the current Federal Rules of Civil Procedure, but several years after the first recorded grant of summary judgment in a federal court. *See supra* note 148.

244. "Statutory provisions may simply codify existing rights or powers. Section 1915(d), for example, authorizes courts to dismiss a 'frivolous or malicious' action, but there is little doubt they would have power to do so even in the absence of this statutory provision." *Mallard v United States Dist. Court*, 490 U.S. 296, 307-08 (1989) (dictum). The Supreme Court did not specify what other rule or procedural device would permit a federal judge to dismiss "frivolous" claims, but the Court presumably had summary judgment in mind; dismissals under Rule 12(b)(6) cannot serve that function as long as the plaintiff's complaint, if true, states a viable claim for relief, no matter how unlikely or incredible the claims might be. *See cases cited supra* note 211.

245. *Cf. Neitzke*, 490 U.S. at 326-28 (noting and explaining that "the failure-to-state-a-claim standard of Rule 12(b)(6) and the frivolousness standard of § 1915(d) were devised to serve distinctive goals, [and] the considerable common ground between these standards does not mean that the one invariably encompasses the other").

246. *Id.* at 324; *accord Denton*, 112 S. Ct. at 1733.

247. Technically, nothing in Rule 56 would literally forbid a judge from granting summary judgment against a plaintiff before the defendant has even been served, although such *sua sponte* rulings are permissible only if the plaintiff "was on notice that she had to come forward with all of her evidence." *Celotex Corp. v Catrett*, 477 U.S. 317, 326 (1986) (dictum). But that would never happen in the real world, where district judges have neither time nor incentive to resort to such complex procedures to screen out frivolous complaints in the short time span between their filing and their service on the defendant. *See FED. R. Civ. P.* 4(m). The only reason judges can do so where the plaintiff seeks to proceed in forma pauperis is because the court will not even issue the summons in such cases until the court has made at least a cursory review of the complaint's potential merit. *See* 28 U.S.C. § 1915(a).

"consonant with Congress' over-arching goal in enacting the *in forma pauperis* statute" of "assur[ing] equality of consideration for all litigants" and "putting indigent plaintiffs on a similar footing with paying plaintiffs."<sup>248</sup> Under that statute, Congress gave federal judges the power to dismiss a complaint filed by a poor man if the judge believes the complaint is "wholly incredible," and the judge may do so *sua sponte* before the defendant learns about the action.<sup>249</sup> But suppose the same "utterly fantastic" allegations were filed in a complaint by a slightly wealthier man who can afford to pay filing fees. Under the current state of the law as the lower courts universally understand it, the federal judge is utterly powerless to dismiss the complaint by summary judgment, even after the parties have been given years to complete all discovery and even if the defendant is able to come forward with a seemingly insurmountable mountain of evidence to prove that the plaintiff's claims are both false and incredible. The poor man's case may end up in the trash without being served, it is widely thought, while the slightly richer man's frivolous and incredible complaint supposedly will find itself on an unstoppable track to a full trial. That hardly would be consistent with the overarching congressional intent of putting all plaintiffs on a roughly equal footing — unless, of course, I am right about my contention that Rule 56 *does* give a federal judge an analogous power to intercept and dismiss claims that are too incredible or implausible for reasonable minds to possibly believe.<sup>250</sup>

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248. *Neitzke v Williams*, 490 U.S. 319, 329-30 (1989) (citations omitted).

249. *See Denton v Hernandez*, 112 S. Ct. 1728, 1733 (1992). Of course, this discretion is not unlimited and must take into account several factors, such as whether the plaintiff had a lawyer. It will not prevent the plaintiff from filing another complaint with the same allegations, but such a dismissal could "have a *res judicata* effect on frivolousness determinations for future *in forma pauperis* petitions." *Id.* at 1734. Consequently, in the common case where the indigent plaintiff has insufficient funds to pay court costs, a dismissal under § 1915 is quite literally the end of the road.

250. To all those who think the sacrosanct constitutional right to a jury trial is threatened irreparably by taking the case away from the jury under such facts, *see* authorities cited *supra* notes 172-95, I also must make the following response: If my heretical interpretation of Rule 56 is unconstitutional, then by what logic can anyone defend the draconian strictures of Federal Rule of Civil Procedure 38, which has been interpreted to deprive even *pro se* litigants of their constitutional right to a jury because of some minor slip-up in the timing or service of their demand for a jury? *See* FED. R. CIV. P. 38; *King v Patterson*, 999 F.2d 351, 353 (8th Cir. 1993) (holding that *pro se* prisoner suing for alleged beating waived jury by filing demand approximately nine weeks late); *Favors v Coughlin*, 877 F.2d 219, 220-21 (2d Cir. 1989) (holding that *pro se* prisoner waived jury because demand on civil cover sheet was filed with his complaint on time but was not served on defendant); *Jackson v Cain*, 864 F.2d 1235, 1242 (5th Cir. 1989) (holding that *pro se* prisoner suing for claimed physical

For the sake of clarity, which is so desperately needed in this area, the Supreme Court must stop saying that a judge is forbidden from making "credibility determinations" in the summary judgment context.<sup>251</sup> That unfortunate phrase is much too ambiguous and has caused serious confusion. It would be far more accurate to state, as the Advisory Committee has said by clear implication, that a judge *may* dispose of questions about credibility — whether it is the credibility of people, stories, or evidence — but only if the evidence is so one-sided that the issue cannot be decided either way by a trier of fact; if the question is close enough that it could be affected by a rational jury's assessment of witness demeanor, the motion must be denied. That is the only conclusion one can reach from a fair reading of the entire opinion in *Anderson*, as this Article has shown, but it has been almost totally obscured by the Court's cursory and confusing condemnation of "credibility determinations."<sup>252</sup>

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abuse waived his right to jury because his demand was served seven weeks late); *Tushner v United States Dist. Court*, 829 F.2d 853, 854 (9th Cir. 1987) (reversing, on other grounds, district court's holding that right to jury trial should be denied if demand was filed *one day* late); *Washington v. New York City Bd. of Estimate*, 709 F.2d 792, 797-98 (2d Cir.) (stating that, even where plaintiff is pro se, failure to make timely demand is binding waiver "even though it was inadvertent and unintended and regardless of the explanation or the excuse"), *cert. denied*, 464 U.S. 1013 (1983); *Rutledge v Electric Hose & Rubber Co.*, 511 F.2d 668, 674-75 (9th Cir. 1975) (holding that antitrust plaintiff waived right to jury trial because his written demand was typed at top of complaint rather than at end of complaint, as required by local court rules). Moreover, it has been held that a judge has the power to decide disputed questions of fact in this context — and thereby deprive a litigant of a jury — by making findings of fact about credibility! *E.g.*, *Lewis v Thigpen*, 767 F.2d 252, 262-63 (5th Cir. 1985) (holding that blind pro se litigant may be relieved of his waiver only if lower court found his claimed ignorance as to Rule 38 to be "credible"). Which of these unfortunate real-world litigants honestly can be said to be less deserving of a jury trial than our hypothetical lunatic from Maui? I gladly will meet anyone in a public debate as to whether the Seventh Amendment is threatened more profoundly by Rule 38 or my interpretation of Rule 56.

251. If that poorly chosen language were taken literally, as I have said, we could not make sense out of the Court's holding that "more persuasive evidence" may be required of those whose claims are rendered "implausible" by "the factual context." *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). You cannot decide what is "plausible" and what is "more persuasive" without making a few decisions about the extent to which the parties' evidence and claims are "credible."

252. I will be the first to concede, however, that the Court shows no signs of realizing the error of its ways any time soon (unless perhaps it sees this Article). In one of its most recent comments on the subject, the Court expressly contrasted summary judgment with habeas corpus by noting that the latter permits a court to "assess the probative force of the newly presented evidence [of innocence]" and to "consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence."

C. *How Did the Supreme Court Get the Absurd Idea That the Evidence of the Adverse Party "Must Be Believed"?*

Now that we have seen the folly behind the Supreme Court's insistence that the evidence of the nonmoving party must be "believed" — and the terrible confusion sown in the lower courts as a result — one question remains: How could so many justices of the Court be so wrong? Where did they get the profoundly mistaken idea that summary judgment procedures require a judge to believe the nonmoving party's evidence? After all, if the thesis outlined here is sound, there must be at least a plausible explanation of where the Court went wrong and why.<sup>253</sup> The answer probably can be illustrated best by considering the Court's most recent comment on the subject, in a case decided just last term.

In *McKennon v Nashville Banner Publishing Co.*,<sup>254</sup> the plaintiff charged that her former employer had dismissed her, in violation of federal law, because she was sixty-two years old.<sup>255</sup> In its defense, her ex-employer made, among others, the following two claims: (1) Mrs. McKennon was not dismissed because of her age but because of a work force reduction forced by cost considerations, and (2) in the alternative, regardless of why McKennon was truly fired, undisputed facts turned up later would have justified her dismissal in any event.<sup>256</sup> At least in theory, the *Banner* could have moved for summary judgment on the basis of either one of those two defenses. As it happened, the *Banner* elected to move for summary judgment solely on the basis of the latter defense.<sup>257</sup> The motion was granted, and McKennon appealed.<sup>258</sup>

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Schlup v Delo, 115 S. Ct. 851, 869 (1995). Citing its earlier statement in *Anderson*, the Court then stated in dictum that this was "[o]bviously" not the same "standard appropriate for deciding a motion for summary judgment." *Id.*

253. There is an outside possibility that this error might be influenced in some small part by a bit of confusion with the law governing motions to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), which requires the judge to "accept without question the truth of the plaintiff's allegations." *Denton v Hernandez*, 112 S. Ct. 1728, 1733 (1992). There is no way to know if such confusion may have played any role in the Court's pronouncements on summary judgment, but it seems safe to say that the primary reason for the Court's confusion is the one I outline here in the text.

254. 115 S. Ct. 879 (1995).

255. *McKennon v Nashville Banner Publishing Co.*, 115 S. Ct. 879, 882-83 (1995).

256. *Id.*

257. *See id.* at 883.

258. *See id.*

Before turning to the merits of the appeal, Justice Kennedy, in an opinion written for a unanimous Court, stated: "We shall assume, *as summary judgment procedures require us to assume*, that the sole reason for McKennon's initial discharge was her age, a discharge violative of the ADEA."<sup>259</sup> Justice Kennedy cited no rule or authority for his relatively casual assertion that summary judgment procedures required the Court to "assume the truth" of McKennon's claim, although it can be safely inferred that he was referring to the line of Supreme Court cases holding that the nonmoving party's evidence must be "believed."<sup>260</sup>

But is that really what Rule 56 requires a federal judge to do in that position? Of course not. Suppose that the *Banner* had come forward with seemingly overwhelming evidence that McKennon's claims were simply false. Imagine, for example, that they produced conclusive documentary proof — including videotapes, birth records, and authenticated affidavits from McKennon's own parents and doctors, among others — proving that she never worked there or anywhere else, that she has been in a prison hospital since a devastating head injury ten years earlier, that she is only twenty-eight years old right now, and that the company has never employed anyone within 1000 miles of North America. Despite all these facts, McKennon filed nothing more than a reply affidavit, handwritten on prison stationery, in which she states: "I don't know why all these people would lie about me, including my own parents, but I feel sure that I was at least sixty years old when the *Banner* fired me a few years ago right here in Tennessee." What should be the result? Would the Court still say in such a case that "summary judgment procedures require us to assume" that McKennon was fired because of her age, just like she says? Of course not.<sup>261</sup>

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259. *Id.* (emphasis added).

260. See cases cited *supra* note 154. As noted above, most lower courts have likewise interpreted the Court's direction to "believe" the adverse party's evidence as an instruction to "assume its truth." See cases cited *supra* note 160. By the way, it is noteworthy that the Court applied its old "assume the truth" rule to Ms. McKennon's claims of discriminatory motive, even though those claims were supported by nothing other than her proposed inferences from circumstantial evidence! So much for the view of all those who have argued that *Matsushita* authorizes a federal court to examine the "plausibility" of such inferences. See authorities cited *supra* notes 172-95. The truth is that many of the Court's statements in this area are inconsistent and cannot be taken literally without leading to radical incoherence.

261. Of course, if you listen to everything that has been written on the subject before today, see authorities cited *supra* notes 172-95, 207-09, you would say that this is an "easy" decision: Summary judgment must be denied as long as she swears to such facts in an affidavit because we would have to "believe" McKennon, we must assume that the jury also will believe her claims, and we cannot resolve such a dispute in the direct evidence. If you think that conclusion seems odd, you are beginning to perceive the absurdity of current law.

So what on earth would justify this assertion by a unanimous Court? What fact about that case supposedly required the Court to "assume" that McKennon had been the victim of age discrimination? Certainly it was not because McKennon had made such an assertion in her complaint because a party's own pleadings themselves are not taken as true for such a motion and cannot defeat a properly supported motion for summary judgment.<sup>262</sup> Nor would the Court say such a thing merely because McKennon had filed a sworn affidavit asserting that her age was the reason for her termination because she would have no personal knowledge of such a thing and Rule 56 requires opposing affidavits to be based on "personal knowledge."<sup>263</sup>

In fact, there is only one reason why it was proper for the Court to assume that McKennon was fired for her age, and it has nothing to do with "summary judgment procedures." The Court was entitled to make that assumption, just as the lower courts did, for one simple reason: *because the defendant invited them to do so for the sake of ruling on the defendant's own motion.*<sup>264</sup> The *Banner* conceded the point *arguendo*, or "for the sake of argument." This rhetorical device is an ancient and time-honored staple of logical and moral reasoning and has been employed for centuries by logicians, politicians, and philosophers. It is in no way unique to lawyers, much less summary judgment motions, and it is used from time to time by lawyers making virtually every motion described in the Federal Rules of Civil Procedure.

Whenever the Supreme Court speaks about the supposed need to "believe" the adverse party's evidence or to assume its truth, you safely can assume that the Court has temporarily forgotten a vital distinction between two different (but equally common) kinds of summary judgment motions.

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262. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (citing Rule 56(e)).

263. FED. R. CIV. P. 56(e). Indeed, in the absence of an admission of discriminatory purpose by the defendant (which is most unusual), a plaintiff who alleges employment discrimination rarely will have any proof of discriminatory motive other than circumstantial evidence. For that reason, a plaintiff's sworn statement that he has been the victim of discrimination, even if sincere, will not save his suit from summary judgment if the circumstantial evidence of nondiscrimination is literally overwhelming. *Quarles v. General Motors Corp.*, 597 F. Supp. 1037, 1042-43 (W.D.N.Y. 1984), *aff'd*, 758 F.2d 839 (2d Cir. 1985).

264. "For purposes of summary judgment, the *Banner* conceded its discrimination against McKennon." *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 883 (1995). In that same case, the Court of Appeals noted that there was conflicting evidence as to whether McKennon had been fired because of her age, *McKennon v. Nashville Banner Publishing Co.*, 9 F.3d 539, 541 n.2 (6th Cir. 1993), *rev'd*, 115 S. Ct. 879 (1995), but that "[t]he *Banner's* summary judgment motion assumed, for the purposes of the motion, that it would be liable to Mrs. McKennon under the ADEA in discharging her for age discrimination." *Id.* at 541.

As the Court itself has noted on occasion, there are, broadly speaking, two general forms that a defendant's summary judgment motion can take:<sup>265</sup>

(1) "There is no *genuine* issue of fact here." That is, on some crucial factual issue, the plaintiff literally has no evidence, or her only evidence is neither significantly probative nor sufficient to support a verdict by any reasonable jury in her favor. There is irrefutable and overwhelming documentary evidence that will compel the jury to conclude that one of the crucial allegations of her complaint is false or at least that she cannot prove it is true (for example, that McKennon ever worked for the *Banner*, that she was ever fired, or that she was fired because of her age).<sup>266</sup>

(2) "There is no issue of *material* fact here." Even if we were to assume that some (or perhaps even all) of the facts were as plaintiff claims, she still would be required to lose, as a matter of law, because there is some other fact that renders those claims inadequate to permit recovery under the governing law (for example, because we later acquired undisputed evidence of wrongdoing that validated her removal after the fact).

Of these two kinds of summary judgment motions, only the latter permits the Court, at the invitation of the moving party, to assume the truth of certain allegations made by the opposing party for the sake of showing that those claims are not "material."<sup>267</sup> The other type of summary judgment

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265. This distinction and much of the language used here is taken directly from *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

266. This type of summary judgment motion closely resembles the motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), with the main difference being that such motions must be made under Rule 56 if they require that the Court consider affidavits or other materials outside the pleadings. See FED. R. CIV. P. 12(b)-(c). (For example, where the defendant moves for judgment dismissing the complaint on the basis of the statute of limitations, such motions might be made under either Rule 12 or Rule 56, depending on whether the dates and facts necessary to establish the defense can be found in the plaintiff's own complaint.) It bears repetition that this sort of summary judgment motion, although it may confront the judge with evidence about the past or about the falsity of plaintiff's claims, does not invite (much less require) the judge to decide the "truth of the matter." For the purposes of the summary judgment motion, the judge treats the affidavits and other exhibits containing historical information solely as evidence of what the available witnesses are likely to say at a trial in the future. Even if the judge grants the motion, it is based on his assessment that the likely future testimony does not warrant a trial, and his ruling does not entail any necessary implications about the ultimate truth or falsity of the parties' claims about the past. See *supra* notes 72, 103.

267. The word "material," as used in Rule 56(c), reflects the same concept embodied in the rule that evidence is irrelevant, and therefore inadmissible, if it does not affect the probability of "any fact that is of consequence to the determination of the action." FED. R. EVID. 401, see *id.* advisory committee's note. A court decides which alleged facts are "of consequence to the determination of the action" by assuming their truth and asking whether



ment motion, by contrast, asks the Court to assume nothing about the truth of the plaintiff's claims, much less to believe them, but rather requires the Court to determine whether those claims are supported by sufficient evidence to permit a jury to accept them as true.<sup>268</sup>

Rule 56 is broad enough, by design, to permit a party to make a motion under either one of these theories. I would not hazard a guess as to which of these two kinds of summary judgment motions is more common, but every experienced practitioner knows that both are employed with great frequency. In *McKennon*, for example, the *Banner* raised both types of claims in its defense but only the latter in its summary judgment motion. If the *Banner* instead had based its motion on the grounds that *McKennon* never worked for it and offered seemingly conclusive proof to that effect, it would be folly for the Court to "assume the truth" of her contrary affidavits, no matter how absurd and implausible her allegations appeared to be.

Thus, the Supreme Court was quite mistaken to suggest in *McKennon* (and earlier cases) that there is anything inherent in or unique to "summary judgment procedures" that requires a federal court to "assume the truth" of any or all of the adverse party's claims for the sake of ruling on a motion for summary judgment. The only reason the Court was tempted to say such a thing in *Anderson* and *McKennon*, among other cases, is because the Court (like all federal courts) often is confronted by summary judgment motions in which the defendant is willing to concede certain factual allegations and dispute their sufficiency as a matter of law. But there are just as many cases where the moving party makes no such concession and instead seeks to exercise its right to press for a judicial resolution as to whether the opposing party's evidence is sufficiently plausible to justify a trial. In such a case, it is illogical, poor judicial administration, and contrary to law to insist that the opposing party's evidence must be believed. To be far more precise, therefore, the *McKennon* opinion should have said simply: "We shall assume, *as defendant invites us to do for the sake of argument*, that the sole

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the outcome of the case might be affected by that assumption.

268. For example, this sort of motion was made by the defendant in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), who argued that the plaintiff had no evidence that her husband had been exposed to the defendant's asbestos. *Id.* at 319-20. In that case, even though the defendant admitted that it had no knowledge or evidence either way as to whether the decedent had been exposed to its asbestos, the Court held that summary judgment could be granted if *Celotex* could show that Mrs. Catrett had no idea either. *Id.* at 322-23. The Court thereby overruled sub silentio its earlier statements that summary judgment may be granted only "where it is quite clear what the truth is." *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 467 (1962) (quoting *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944)); *see supra* note 44.

reason for McKennon's initial discharge was her age." But next time, leave Rule 56 out of it. That rule requires no such thing.

*IV When May a Court "Strike" or Disregard a "Sham Affidavit" Because It Is Inconsistent with the Prior Testimony of the Same Witness?*

As noted above in Parts II and III, the administration of summary judgment has been bedeviled by various pervasive myths that deceive judges into believing that they have no power to entertain some summary judgment motions that may well be meritorious, out of an exaggerated fear of "usurping the province of the jury" or violating the Seventh Amendment rights of litigants with implausible or unbelievable claims. Ironically, but not by coincidence, there has emerged a countervailing error in the law in a more or less unconscious reaction to the excesses of the absurd view that evidence cannot be "weighed" and can only be "believed." In an artificial effort to limit the problems posed by that mistaken view, lower courts and commentators have developed a rule that does, in fact, truly and routinely threaten the Seventh Amendment.

This stunted development in the law finds its roots in the judiciary's reaction to a problem that is relatively common, judging from the reported cases. The scenario is as follows. A party, usually the plaintiff, makes certain admissions in a statement, typically at a deposition, that are at least arguably fatal to some aspect of that party's claims.<sup>269</sup> At that point, the defendant moves for summary judgment, relying in whole or in part on the plaintiff's admission. In response to that motion, the plaintiff comes forward with an affidavit to "correct" the problem. The parties then take predictable positions. The defendant argues that the new affidavit is a deliberate lie and a flagrant contradiction designed for the sole purpose of

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269. This scenario does not always involve the plaintiff, or even a party. On rare occasions, it may involve nonparty witnesses who change their story between their deposition and their affidavit, although it normally would have to be a witness sufficiently close to one of the parties to give rise to a plausible argument that the witness knowingly would lie for the sake of that party. *See, e.g.,* Darnell v Target Stores, 16 F.3d 174, 176-77 (7th Cir. 1994) (involving plaintiff's former co-workers); Rohrbough v Wyeth Lab., Inc., 916 F.2d 970, 972-76 (4th Cir. 1990) (involving plaintiff's retained expert witness); Adelman-Tremblay v Jewel Cos., Inc., 859 F.2d 517, 521 (7th Cir. 1988) (involving plaintiff's sole expert witness); *cf.* Johnson v. Washington Metro. Area Transit Auth., 883 F.2d 125, 127-29 (D.C. Cir. 1989) (involving inconsistencies in statements by "disinterested witnesses" who contradicted themselves, creating factual issue precluding summary judgment), *cert. denied*, 494 U.S. 1027 (1990). For the sake of simplicity, this section will refer to the ordinary case of a plaintiff who changes his story, although the same principles are applicable to defendants and many nonparty witnesses.

saving the lawsuit from dismissal, perhaps in the hopes of salvaging some sort of settlement value out of the case.<sup>270</sup> The plaintiff swears that there is no real inconsistency, that the affidavit was meant only to clarify an answer that was confused or ambiguous, or that the variation (if any) was the innocent product of a recollection that has been refreshed now.<sup>271</sup> To complicate matters further, suppose — as is often the case — both sides claim to have at least some circumstantial evidence to support their proposed explanation of the alleged variation. When confronted with this apparent question of "credibility" on a motion for summary judgment, what should the judge do?

#### A. *The Traditional Answer(s)*

The circuit courts and commentators addressing this supposed problem have adopted three different approaches, all of them wrong. At one extreme, some have suggested that the inconsistency always raises a question of fact that prevents summary judgment and that the jury always should be allowed to consider both the deposition and the allegedly inconsistent affidavit. This view has been adopted by one circuit court of appeals, at least in dictum.<sup>272</sup> Although this standard has been criticized by other

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270. Every experienced litigator knows that every claim has *some* settlement value — even if it has virtually no chance of winning at trial — as long as it can get past summary judgment and, indeed, even if it loses at trial. *Blue Chip Stamps v Manor Drug Stores*, 421 U.S. 723, 740 (1975) (noting that even marginal complaint "has a settlement value to the plaintiff out of proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment"); see *Sports Illustrated Gives Iverson Plaintiff \$15,000*, VA. PILOT & LEDGER-STAR, May 7, 1994, at D2 (noting that, after her libel suit against Sports Illustrated was dismissed at trial, losing plaintiff "agreed not to appeal the case in exchange for a \$15,000 settlement"). That is why offers to settle by defendants do not necessarily represent a concession that the claim has any merit and one reason why the law in turn makes such offers inadmissible to prove the validity of the claim. See FED. R. EVID. 408 advisory committee's note.

271. Our law of evidence is modeled on the assumption that the memories of even honest witnesses sometimes get better and more reliable after they have been jogged by some stimulus. If not for that assumption, it would make no sense for us to allow recollections to be refreshed, especially while the witness is on the stand. See FED. R. EVID. 612. Judging from the reported cases, it seems that nothing refreshes human memories quite like the pause one is given when he finds himself quoted in his opponent's motion for summary judgment! See cases cited *infra* notes 272-83.

272. The Fifth Circuit has stated that such inconsistencies "present credibility issues properly put to the trier-of-fact. Credibility assessments are not fit grist for the summary judgment mill." *Dibdale, Inc. v American Bank & Trust Co.*, New Orleans, 916 F.2d 300, 307-08 (5th Cir. 1990) (citations omitted); accord *Kennett-Murray Corp. v Bone*, 622 F.2d

circuits, it at least has the notable advantage that it is the only one that is consistent with a literal reading of the Supreme Court's repeated insistence that the judge is required to "believe" the evidence of the party opposing summary judgment. If courts truly were serious about the supposed requirement of assuming that the jury would believe the party's affidavit, we also would be required to presume that he somehow would manage to persuade the jury to discount or forgive his earlier inconsistency

A few circuits have criticized this approach on the grounds that it would permit lying parties to evade summary judgment, even after making damaging admissions at a deposition, through the simple expedient of contradicting themselves in a later affidavit. These courts have gone to the opposite extreme of simply disregarding the inconsistent affidavit as a "sham."<sup>273</sup> In so doing, the courts taking this position almost invariably quote or cite the Second Circuit's statement, more than a quarter century ago, that "[i]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."<sup>274</sup> Ironically, this alleged concern for "screening out sham issues of fact" continues to be

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887, 894 (5th Cir. 1980) ("In light of the jury's role in resolving questions of credibility, a district court should not reject the content of an affidavit even if it is at odds with statements made in an earlier deposition."). This language arguably was dictum in both cases because in each case the Fifth Circuit also found that the alleged inconsistencies were not inherently irreconcilable conflict.

273. *E.g.*, *Darnell*, 16 F.3d at 176 ("party should not be allowed to create issues of credibility by contradicting his own earlier testimony") (quoting *Babrocky v Jewel Food Co.*, 773 F.2d 857, 861 (7th Cir. 1985)); *Trans-Orient Marine Corp. v Star Trading & Marine, Inc.*, 925 F.2d 566, 572 (2d Cir. 1991) ("a party may not, in order to defeat a summary judgment motion, create a material issue of fact by submitting an affidavit disputing his own prior sworn testimony"); *Gagné v Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 315 (6th Cir. 1989) ("a party may not create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts his earlier deposition testimony"); *Mack v United States*, 814 F.2d 120, 124 (2d Cir. 1987) ("a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment").

274. *Perma Research & Dev Co. v Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969). Ironically, although this line is still widely quoted today, the *Perma* case itself actually held that "the court may *not* exclude the affidavit from consideration." *Id.* at 578 (emphasis added) (quoting 6 MOORE'S FEDERAL PRACTICE ¶ 56.22[1], at 2814 (2d ed. 1965)). In the context of that case, both lines were dictum in any event because the court concluded that even the allegations of the affidavit did not raise "any triable issue" or "any issue which we can call genuine," *id.* at 577, 578, so there was no need for the court to decide whether the new affidavit should be credited, considered, or disregarded.

cited widely by the circuit courts even since *Anderson*, at the same time these courts labor under the perception that, in all other situations, Rule 56 supposedly leaves a court powerless to dismiss a sworn claim that seems utterly incredible.

The vast majority of the circuits have taken an intermediate position that allows district judges to strike *some* allegedly inconsistent affidavits as sham — but not in every case. These courts correctly have observed that an inflexible rule striking all inconsistent affidavits does not account for the fact that even honest witnesses may have innocent confusion or lapses of memory and is not fair to the witness or the jury<sup>275</sup> After all, not every prior inconsistency is devastating to the credibility of a witness; there is always the possibility that the apparent change was the product of an innocent misunderstanding of a question, nervousness at a deposition, or maybe a suddenly refreshed recollection. Under this intermediate position taken by most circuits, the district judge is required to distinguish in each case "between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence."<sup>276</sup> This approach has been adopted by the clear majority of circuit courts to consider the issue<sup>277</sup> and has been endorsed by many of the most prominent writers in the field.<sup>278</sup>

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275. "To allow every failure of memory or variation in a witness's testimony to be disregarded as a sham would require far too much from lay witnesses and would deprive the trier of fact of the traditional opportunity to determine which point in time and with which words the witness (in this case, the affiant) was stating the truth." *Tippens v Celotex Corp.*, 805 F.2d 949, 953-54 (11th Cir. 1986).

276. *Id.* at 953; accord cases cited *infra* note 277

277. *Rios v Bigler*, 67 F.3d 1543, 1551 (10th Cir. 1995); *Sinskey v Pharmacia Ophthalmics, Inc.*, 982 F.2d 494, 498 (Fed. Cir. 1992), *cert. denied*, 113 S. Ct. 2346 (1993); *Munz v Parr*, 972 F.2d 971, 973 (8th Cir. 1992); *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266-67 (9th Cir. 1991); *Rohrbough v Wyeth Lab., Inc.*, 916 F.2d 970, 975 (4th Cir. 1990); *Richardson v Bonds*, 860 F.2d 1427, 1433 (7th Cir. 1988); *Adelman-Tremblay v Jewel Cos.*, 859 F.2d 517, 520-21 (7th Cir. 1988); *Martin v Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 706 (3d Cir. 1988); *Franks v Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986).

278. QUARLES ET AL., *supra* note 175, § 5.17, at 124 (stating that "a contradictory affidavit that does not explain the variance between the affidavit and the deposition testimony may be treated as a sham and disregarded by the district court"); 10A WRIGHT ET AL., *supra* note 44, § 2726 (Supp. 1995); Schwarzer et al., *supra* note 13, at 480. Professor Brunet suggests that it is "inappropriate for the court effectively to usurp the jury's function by resolving issues of credibility on a summary judgment motion," Brunet, *supra* note 52, at 668, but still concludes that these "decisions that permit courts to strike sham affidavits create an appropriate safeguard which is useful to the summary judgment process." BRUNET ET AL., *supra* note 31, § 5.10, at 137

But how does one draw the line between inconsistencies that render an affidavit a worthless sham and those that will not? Any time the party moving for summary judgment asserts that the opponent's affidavit is a sham, the opponent almost invariably responds that there is no inconsistency or that the variation (if any) is attributable to some innocent misrecollection or misunderstanding. How are those disputes to be decided, and by whom? The leading reference works currently suggest that the court may strike the inconsistent affidavit as a sham unless the deponent can give "a *credible* explanation for the contradiction"<sup>279</sup> or "a *satisfactory* explanation of why the testimony is changed [and] why this later assertion should be *taken seriously*."<sup>280</sup> This standard, or one like it, also has been endorsed by most of the federal circuits to consider the issue.<sup>281</sup>

And who makes this critical decision as to whether there really is a true inconsistency and whether the explanation is "satisfactory" when those disputes are litigated with all the vigor that normally attends an issue that will spell life or death for a lawsuit? Proceeding on the basis of the rule that preliminary questions of admissibility are normally to be decided by the judge,<sup>282</sup> these circuit courts all have held that whether the affidavit is a

279. Schwarzer et al., *supra* note 13, at 480 (emphasis added).

280. 10A WRIGHT ET AL., *supra* note 44, § 2726, at 31-32 (Supp. 1995) (emphasis added).

281. See, e.g., *Sinskey v Pharmacia Ophthalmics, Inc.*, 982 F.2d 494, 498 (Fed. Cir. 1992) (stating that affidavit will be "disregarded" unless party can "provide a satisfactory explanation for the discrepancy"), *cert. denied*, 113 S. Ct. 2346 (1993); *Richardson v Bonds*, 860 F.2d 1427, 1433 (7th Cir. 1988) (stating that "[a] party may not create a genuine issue of fact by contradicting his own earlier statements" unless he offers "a plausible explanation for the sudden change of heart"); *Martin v Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 706 (3d Cir. 1988) (noting that district court may "disregard" affidavit if party offers "no satisfactory explanation"); see also *Munz v Parr*, 972 F.2d 971, 973 (8th Cir. 1992) (stating that plaintiff's changed story may be rejected if Court finds alleged inconsistency "implausible"); *Kennedy v Allied Mut. Ins. Co.*, 952 F.2d 262, 267 (9th Cir. 1991) (noting that affidavit is to be disregarded unless it was "the result of an honest discrepancy, a mistake, or the result of newly discovered evidence"); *Rohrbough v Wyeth Lab., Inc.*, 916 F.2d 970, 975 (4th Cir. 1990) (inquiring whether "affidavit is in such conflict with his earlier deposition testimony that the affidavit should be disregarded as a sham issue of fact"); *Adelman-Tremblay v Jewel Cos.*, 859 F.2d 517, 520 (7th Cir. 1988) (stating that affidavit is to be disregarded unless it "clarif[ies] ambiguous or confusing deposition testimony" or is "based on newly discovered evidence"); *Tippens v Celotex Corp.*, 805 F.2d 949, 954-55 (11th Cir. 1986) (noting that inconsistent affidavit may be "disregarded as a sham" only if it is "inherently inconsistent" and offered "without explanation").

282. See FED. R. EVID. 104(a) ("Preliminary questions concerning the admissibility of evidence shall be determined by the court"). This process normally requires the judge to make the necessary findings solely by the preponderance of the evidence. *Bourjaily*

"sham" (and therefore subject to a motion to strike) is a question of fact for the judge, not the jury.<sup>283</sup> It should be obvious that this standard authorizes a judge to engage in the "weighing of the evidence" far more than any judge normally would be allowed to do on summary judgment, even under the expansive interpretation of Rule 56 advanced in this Article.

The irony of these cases is palpable. As noted in the preceding sections of this Article, lower courts unanimously have swallowed the mistaken view that an affidavit submitted in opposition to a summary judgment motion, if allegedly based on personal knowledge of historical facts, normally *must* be believed and necessarily will defeat the motion, even if it is rendered literally incredible by a seemingly overwhelming mountain of extrinsic evidence. Such extremism is absolutely necessary, we are told, to preserve the inviolable right of the jury to decide issues of credibility. And yet almost all of those same courts have carved out an illegitimate and arbitrary exception for affidavits that are allegedly "incredible" because they supposedly contradict prior statements by the witness. If that same affidavit allegedly conflicts with nothing more than a few lines of *arguably* inconsistent transcript taken from the middle of a five-day deposition, we are told, the affidavit is a potential "sham" that may be stricken and utterly disregarded, possibly resulting in dismissal of the action with prejudice, depending entirely on whether the *judge* deems the putative explanation for the variation to be "satisfactory" or "credible." The incongruity and incoherence of that disparate treatment is ludicrous.

In fact, this body of "law" is misguided and illegitimate. It is suspect on its face because it singles out only one of a number of equally plausible reasons for rejecting a sworn story as incredible.<sup>284</sup> Even at trial, moreover, the alleged existence of a devastating prior inconsistent statement merely goes to the weight of a witness's intended testimony and not to its admissibility.<sup>285</sup> It also flies in the face of the Supreme Court's supposed insistence

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v United States, 483 U.S. 171, 175-76 (1987).

283. All of the cases cited *supra* notes 276-77 have reached this conclusion. *E.g.*, Kennedy v Allied Mut. Ins. Co., 952 F.2d 262, 267 (9th Cir. 1991) (remanding with directions for district judge to make finding as to whether affidavit was "sham" or merely "the result of an honest discrepancy, a mistake, or the result of newly discovered evidence").

284. Under the law and rules governing impeachment of witnesses at trial, there are a great many different well-recognized ways for trying to undermine the credibility of a witness or his story. See FED. R. EVID. 608-613; MCCORMICK ON EVIDENCE, *supra* note 21, ch. 5. Impeachment by prior inconsistent statement is only one of those many ways. See FED. R. EVID. 613.

285. The alleged existence of a prior inconsistent statement is made grounds for impeachment of a witness, *see* FED. R. EVID. 613, but is not a ground for holding a witness

that a judge is not to weigh the evidence, make credibility determinations, or do anything but believe the adverse party's evidence.<sup>286</sup> Indeed, although the Supreme Court has not yet squarely addressed this line of cases, it has recently and unambiguously indicated (albeit in dictum) that summary judgment does *not* permit a judge to decide whether the affidavit of a witness may be rejected on the grounds that it conflicts with his earlier sworn testimony.<sup>287</sup>

This line of cases also is contradicted by the fairly unambiguous language of Rule 56(e), which outlines a number of detailed requirements for supporting and opposing affidavits but contains no requirement that they be "consistent with all prior statements made by the witness." Under normal principles of statutory construction, fully applicable to the Federal Rules of Civil Procedure, the specification of certain detailed requirements normally implies the deliberate exclusion of all others.<sup>288</sup> Indeed, Rule 56 affirmatively states that affidavits may include "such facts as would be

incompetent to testify and will not prevent a witness from testifying at trial simply because there is evidence that he has testified differently in the past. *See* FED. R. EVID. 601. This is because the law has always recognized that "[i]nconsistent testimony by [a witness] seriously impairs and *potentially* destroys his credibility," *Mathews v. United States*, 485 U.S. 58, 65 (1988) (emphasis added) (quoting *United States v. Demma*, 523 F.2d 981, 985 (9th Cir. 1975)), but not necessarily. *Cf. id.* at 68 (Scalia, J., concurring) (stating that, even in criminal cases, allowing parties to contradict themselves does not threaten interests of justice because such conduct is generally self-penalizing).

286. One might attempt to get around the last of these three rules by splitting hairs over what is "the plaintiff's evidence": the testimony he gave at his deposition (and that was tendered to the court by the defendant) or the affidavit subsequently signed and submitted to the court by the plaintiff himself? But even if we put that almost metaphysical difficulty to the side, that hardly gets one past the Supreme Court's supposed ban on "credibility determinations," as long as the court is deciding which of the plaintiff's stories is more believable or whether his explanation for the change is "credible."

287. In *Schlup v. Delo*, 115 S. Ct. 851 (1995), the Court addressed the proper scope of review of habeas corpus claims by prisoners claiming to have newly discovered evidence of innocence. The petitioner in that case had come forward with an exculpatory affidavit from a witness, but the Court of Appeals had discounted the affidavit without an evidentiary hearing because, among other reasons, it was inconsistent with his earlier trial testimony in the case. *Id.* at 859. The Supreme Court held that it was proper for the lower courts to "assess the probative force of the newly presented evidence" and in particular to "consider how the *timing* of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." *Id.* at 869 (emphasis added). The Court expressly contrasted this aspect of habeas corpus procedures with summary judgment, noting that this inquiry was not the "standard appropriate for deciding a motion for summary judgment." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

288. *Leatherman v. Tarrant County Narcotics & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993).



admissible in evidence,<sup>289</sup> which would include all statements of a witness who claims to have first-hand knowledge, even if the judge knows in advance that those statements are inconsistent with what the witness has said before.<sup>290</sup>

To make matters even less defensible, most (if not all) of these same courts have made up and enforced a spurious rule that an affidavit may be disregarded and stricken as a sham only if the other party makes a motion to strike the affidavit on the basis of that supposed defect. This rule, which has nothing to recommend it in this context,<sup>291</sup> leads to the unnecessary multiplication of papers and additional motions, along with the additional delay that is required under the local rules of most district courts for the

289 FED. R. CIV P 56(e).

290. See *supra* note 285. Such an "inconsistent statement" may have little probative value in some cases, but it has enough to fit the deliberately broad definition of "relevant evidence," FED. R. EVID. 401, and the law clearly states that all relevant evidence is admissible unless excluded by the Constitution, by some specific rule, by an act of Congress, or by other rules prescribed by the Supreme Court. FED. R. EVID. 402. There is no such rule that makes "inconsistent statements" inadmissible, see FED. R. EVID. 613, and the judicially made case law that has done so under Rule 56 is a usurpation of authority that is expressly denied to the federal courts by Federal Rule of Evidence 402.

291. It has been suggested that insisting on a motion to strike a defective affidavit can be justified in the name of fairness and judicial efficiency, see, e.g., *In re* Teltronics Servs., Inc., 762 F.2d 185, 192 (2d Cir. 1985); BRUNET ET AL., *supra* note 31, at 129-30, even when attacking the papers of the party opposing summary judgment, see FRIEDENTHAL ET AL., *supra* note 209, § 9.2, at 441-42; see also *DeCintio v Westchester County Medical Ctr.*, 821 F.2d 111, 114 (2d Cir.), *cert. denied*, 484 U.S. 965 (1987). That logic arguably makes some sense when applied to allegedly defective papers filed in support of summary judgment because the opponent otherwise might have an incentive to "sandbag" by first waiting to see if he can win the motion without having to file any response or disclose any of his evidence. As applied to the affidavits of the party opposing summary judgment, however, that argument is senseless because (1) the party seeking summary judgment has the burden of proof on the motion, nothing to hide, no conceivable interest in sandbagging, and nothing to gain by failing to move to strike an arguably defective affidavit opposing the motion, and (2) the failure to make such a motion to "strike" the responding party's defective affidavit will not bar the moving party from prevailing or perhaps even obtaining a directed verdict at trial, see *Schwarzer et al.*, *supra* note 13, at 482. If a party makes an otherwise meritorious motion for summary judgment on the grounds that his opponent has absolutely no evidence to overcome an indisputable fact but forgets (through inadvertence) to make a meritorious motion to strike when the opponent replies with a transparently worthless sham affidavit, it is ridiculous to "penalize" the moving party by denying his motion and forcing the case to a trial with only one possible outcome. To justify that sort of gratuitous waste of court time on a pathetic technicality not even grounded in the Federal Rules of Civil Procedure — in the name of "judicial efficiency," of all things — is unadulterated lunacy

minimum time period between the filing of motion papers and the argument of the motion.

### B. *The Truth of the Matter*

In most other contexts, as we have seen, the United States courts of appeals rigorously and literally have enforced the Supreme Court's admonition that evidence cannot be "weighed" on a summary judgment motion. But when the factual dispute presented involves an alleged inconsistency between an affidavit and prior statements by the same witness, those courts allow the lower court extremely broad discretion to disregard the affidavit altogether if there is a motion to strike, if the judge concludes that there is an inconsistency, and if the judge does not deem the explanation for the variation to be sufficiently "satisfactory" or "credible." This procedure has no basis in the text of Rule 56, is inconsistent with both the text of the rule and the Supreme Court's comments on it, creates an unnecessary and unproductive multiplication of motion practice, and poses a direct threat to the integrity of the jury's role as fact-finders on disputable matters of fact. With all those strikes against it, what on earth would possess so many courts and commentators to embrace such a procedure?

The answer, of course, goes back to the other myths outlined above. Confronted with the specter of the false and "sham" affidavit filed in opposition to a summary judgment motion, federal judges today assume that it will be a major obstacle to the administration of justice unless it is *stricken* from the record because they still are laboring under the mistaken view that the nonmovant's evidence cannot be weighed and must be taken as true so long as it remains in the record before the court — even if it is false (and perhaps even incredible). As this Article has shown, however, those fears are unfounded.<sup>292</sup>

To anyone who has read closely up until this point, the route out of this mess is plain. When a judge ruling upon a summary judgment motion is confronted with an affidavit in opposition that is at least arguably inconsis-

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292. As noted above, the seminal case in this line did not authorize the conflicting affidavit to be stricken; quite to the contrary, it held that the inconsistent affidavit may *not* be excluded from consideration by the court. *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969) (quoting 6 MOORE'S FEDERAL PRACTICE ¶ 56.22[1], at 2814 (2d ed. 1965)). But that case was decided long before *Anderson*, back in the halcyon days when federal judges did not fear that every piece of incredible evidence in the record was an insuperable impediment to the granting of summary judgment and still understood that they had the power to disregard such evidence if it is simply too incredible to be accepted by any reasonable jury. *See supra* note 150.

tent with prior testimony or statements by that same witness on a material question, the judge need not, and should not, "assume the truth" of the affidavit nor even worry about what the truth is (as the Supreme Court seems to have directed). Nor should he try to make any findings concerning whether there is an inconsistency, whether he is satisfied with the explanation for the variation, or which version is more credible (as virtually all of the lower courts have done). Rather, in keeping with the procedure outlined above, the judge should ask himself one simple question: "Assuming that all of the witnesses would testify at a trial just as they have in their most recent affidavits, that they are cross-examined about the allegedly inconsistent statements they made at their depositions, and that the jury hears the same explanation I have been given (if any) about the variation, is there *any* genuine possibility that the jury might find in favor of the adverse party?"

This simple solution, unlike the three approaches currently taken by the federal courts, is simple in application, coherent, and correct. It eliminates the current need for worthless and time-consuming motion practice over whether the alleged "sham" affidavit should be stricken or whether the defect was waived by the failure of the moving party to also file a written motion to strike the affidavit. It preserves and safeguards the constitutionally guaranteed role of the jury as arbiters of disputable factual issues. And it still permits the judge to weed out those truly sham affidavits that have no possibility of being accepted by any jury

Some might be tempted to suggest that this standard would permit any lying snake to survive summary judgment, no matter what he inadvertently admitted in a rare moment of candor while his guard was down at his deposition, because he *always* can make a plausible claim that a genuine question of fact will be raised by his subsequent retraction in an affidavit.<sup>293</sup> That suggestion is false. As the Supreme Court recently has noted, common sense teaches that there are some occasions when "the evolution over time of a given [witness's testimony] can be fatal to its reliability."<sup>294</sup> Such changes in a witness's story sometimes are capable of "destroying confidence in [the witness's] story and raising a substantial implication that [his lawyer] had coached him to give it."<sup>295</sup> But of course that is not always the

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293. This is the fear voiced by those circuits that seemingly have adopted the extreme position of always disregarding statements that are inconsistent with prior deposition testimony. See cases cited *supra* note 273.

294. *Kyles v. Whitley*, 115 S. Ct. 1555, 1571 (1995); see also *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985) (noting that testimony of witness "may be so internally inconsistent that a reasonable factfinder would not credit it").

295. *Kyles*, 115 S. Ct. at 1570.

case, as the Court also has noted.<sup>296</sup> There always will be plenty of cases in which reasonable minds can disagree over whether a witness's claim of an improved memory is believable, depending on a host of factors such as the nature of the testimony itself, and whether his latest version of the story, if true, is the sort of thing that anyone possibly could have forgotten. Indeed, such matters are frequently and explicitly entrusted to the jury at trial.<sup>297</sup> In those cases, summary judgment must be denied.

Of course, the legal standard proposed here will continue to weed out many of the most frivolous cases that otherwise would be saved only by an unlikely last-minute change of a party's story, but not as many as presently are being dismissed under current law. In contrast with the law in most circuits, this proposal admittedly would give judges a much narrower range of discretion to grant summary judgment based on the decision to "strike" an affidavit merely because the judge thought that the putative explanation for certain inconsistencies was not sufficiently credible or satisfactory. Some certainly would argue, as many courts already have,<sup>298</sup> that this reduced level of discretion "would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."<sup>299</sup> The numerous circuit courts that have accepted that claim fear the specter of countless "sham" cases slipping through the cracks of Rule 56 and wending their way inexorably to the courthouse doors, with no way to stop their onslaught. With all due respect, these fears are also greatly exaggerated.

It might be helpful to take stock for a moment of all the ways in which a judge can deal with the allegedly rampant problem of witnesses who change their sworn testimony to protect themselves from summary judgment. To make the case as compelling as possible, let us take the worst case scenario. Imagine that a plaintiff in a personal injury suit has ghastly

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296. See *supra* note 285.

297. See COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS WITHIN THE EIGHTH CIRCUIT, MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT ¶ 3.03 (1993) ("In deciding whether or not to believe a witness, [y]ou need to consider therefore whether a contradiction is an innocent misrecollection or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail."). Anyone could understand if the victim of police brutality claims at his deposition that there were four cops and then remembers a fifth after his head injuries got a little better or after he saw pictures of all five in a mug book. But there are certain facts that no reasonable person possibly could forget and some claims that no reasonable jury possibly could accept from a man who claims that he "forgot" about them at his earlier deposition. In such extreme cases, summary judgment is appropriate.

298. See cases cited *supra* notes 273-81.

299. *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969).

and devastating injuries. He has a relatively weaker claim of liability, but one that potentially could involve protracted and sensitive discovery of the defendant's confidential records. Moreover, he has made an admission at his deposition that appears to be fatal to his claim under the applicable law (for example, an admission that shows he never read some warning, that he misused the product, or that he actually used a product made by the defendant's competitor).<sup>300</sup> But in response to a summary judgment motion, he retracts and changes that admission in a later affidavit that complies in all respects with Rule 56(e). If the judge has no power to "strike" that affidavit from the record, as I have argued, what can the judge do to curtail this possible abuse of the judicial system? Let me count the ways.

(1) First, of course, the judge can and should apply the test I have outlined above and determine whether there is any genuine possibility that a reasonable jury could possibly believe the plaintiff's changed story. If the reasons for the change literally are too incredible for any reasonable mind to accept, as will sometimes be the case, the judge should not strike the affidavit but should simply grant summary judgment on the grounds that the statement is not sufficient to raise a genuine issue of fact that merits a trial. But what if (as will often be the case) the judge is persuaded that the new affidavit is false and a sham and that the earlier deposition testimony was the truth but that there is room for some doubt about whether a reasonable jury could conclude otherwise after observing the demeanor of the witness? Under the analysis proposed here, the judge may not grant summary judgment, but there are a number of things he can still do if he suspects that the judicial system is being abused deliberately by a calculating liar.

(2) After denying summary judgment in a suspicious case, if the judge has serious doubts about whether the plaintiff truly is deserving of a trial, the judge can and should call an immediate pretrial conference under Rule 16 to apprise the plaintiff of his misgivings and to encourage the plaintiff to seriously consider accepting a nuisance settlement or to accept a voluntary dismissal of the lawsuit.<sup>301</sup> If the plaintiff has difficulty taking those suggestions seriously, the judge can make sure the plaintiff's attorney understands

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300. I call this the "worst case" because a sympathetic plaintiff with terrible injuries but no case for liability is the one party who is probably most likely to benefit from a system that permits him to get his case before the jury, which is more likely than a judge to be moved by the emotional appeal of his plight. See *TXO Prod. Corp. v Alliance Resources Corp.*, 113 S. Ct. 2711, 2728 (1993) (O'Connor, J., dissenting). And if there is the potential for extensive or sensitive discovery, the pressure on the defendant to settle will be greater.

301. See *FED. R. CIV. P.* 41(a)(1).

the risks he takes by persisting and the road that is likely to lie ahead of him. (Perhaps the easiest way would be to give the lawyer a copy of this Article and tell him to start reading right about here.)

(3) If the plaintiff's lawyer strikes the judge as obstinate and unreasonable and if the judge has doubts about whether the plaintiff himself is being manipulated by unscrupulous counsel, the judge can take necessary steps to make sure the client also understands the possible perils that lie ahead. Even if there is any doubt about the authority of the judge to force a represented party to attend a Rule 16 settlement conference,<sup>302</sup> the judge has explicit authority to decide that he wishes to conduct a brief hearing with oral testimony before ruling on the summary judgment motion and to bring the plaintiff in as a witness under oath.<sup>303</sup> (If the judge already has ruled on the motion, he can decide *sua sponte* to re-open the matter for further consideration.) At that hearing, the judge himself will be able to question the plaintiff under oath.<sup>304</sup> For the plaintiff who is new to either lying or litigation, the experience of being examined by a judge under oath will prove to be far more disconcerting than the process of signing a bogus affidavit in his attorney's office. Either during the hearing or afterwards in chambers, the judge can make sure that the plaintiff understands the personal risks he runs in persisting with the uphill battle that his case became the day he changed his own story under oath. (Perhaps he can give the plaintiff a copy of this Article and tell him to start reading right about here.)

(4) If the plaintiff still has not withdrawn his claim voluntarily or settled the case, the judge should make sure that the plaintiff and his counsel do not leave chambers until both are intimately and personally familiarized with the provisions of Rule 56(g), which authorizes the court to impose substantial sanctions, including attorneys' fees and contempt, if he later concludes that the affidavit was filed in bad faith.<sup>305</sup> The plaintiff should be

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302. See 1993 amendment to FED. R. CIV. P. 16(c) advisory committee's note.

303. See FED. R. CIV. P. 43(e). Of course, the purpose of such a hearing is not to see if observation of witness demeanor might help the judge resolve the dispute because that is not a factor in the judge's ruling. But it always is possible that more penetrating questioning will bring out a more detailed explanation of the plaintiff's inconsistent statements, and the resulting testimony conceivably could tip the balance in the judge's determination. (For example, if the party confesses under examination that he never read the affidavit before signing it or that his attorney told him he had to sign it.)

304. See FED. R. EVID. 614(b).

305. A judge has ample discretion to find an affidavit to have been made in "bad faith" and subject to sanction if it "flatly contradicted earlier sworn depositions." *In re Gioioso*, 979 F.2d 956, 962 (3d Cir. 1992); accord *Richardson v. Bonds*, 860 F.2d 1427, 1433 (7th Cir. 1988) ("Attempts to manufacture issues of fact in response to a motion for summary

personally apprised of how much money that is likely to entail and of the fact that the judge presently is inclined to make such a finding if the jury agrees with him that the new affidavit is not reliable.

(5) If the threat of financial penalties is not compelling, the judge should offer plaintiff and his counsel one more cup of coffee before leaving chambers and give them a highlighted copy of 18 U.S.C. § 1623(c), which is designed to make it easy for the Government to obtain a criminal perjury conviction against a witness who makes two or more statements under oath "if they are inconsistent to the degree that one of them is necessarily false" — even if the Government cannot prove which one was false. (If the statements are not false to that degree, the judge should not be considering summary judgment in the first place.) He also should read them Section 1623(d) out loud, which gives the plaintiff a complete defense if he "recants" the statement before the declaration has "substantially affected the proceeding" and tell the plaintiff he will make such a finding on the record if the case is withdrawn immediately. There may be plenty of plaintiffs who will sign a lying sham affidavit on the advice of counsel to keep a civil suit alive; how many have the nerve to risk a felony conviction?

(6) Still no settlement or voluntary dismissal? The judge then should notify the parties (if the defendant has not yet made this request) that the court has decided *sua sponte* to sever out for a separate jury trial the single, narrow factual issue on which the plaintiff testified differently at his deposition and in his affidavit.<sup>306</sup> He also should notify the parties that he has likewise decided, *sua sponte* if necessary, to limit the scope of discovery prior to that trial so that the plaintiff will not be able to obtain discovery on any other issue.<sup>307</sup> Now he has eliminated the opportunity to extort a nuisance settlement through the threat of extensive and sensitive pretrial discovery and also has minimized the plaintiff's incentive to hope that he might swing a jury in his favor on liability after they have heard emotional testimony about pain and suffering.

(7) Is the plaintiff still determined to go ahead and risk a prison term, even though his odds of winning are getting slimmer? Then the court will summon a jury to hear and determine the single narrow issue on which the plaintiff has contradicted himself (for example, did he actually remove the safety guard, just as he testified at his deposition?). At that trial, the judge shall be free, within limits, to make reasonable comment on his

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judgment may be a basis for sanctions.").

306. See FED. R. CIV. P. 42(b) ("Separate Trials").

307. See FED. R. CIV. P. 26(c)(4).

assessment of the weight of the evidence and the credibility of the witnesses.<sup>308</sup> The judge also may give the jury any one of a number of standard judicial instructions on how to weigh testimony that is contradicted by prior inconsistent statements, especially where the witness is a party with a financial stake in the outcome of the case.<sup>309</sup> To minimize the risk of the jurors being influenced improperly by emotion or sympathy, the judge also should ask them to return a special verdict on the narrow factual question that has been litigated before them.<sup>310</sup> A trial conducted along these lines rarely would involve more than one witness and usually could be completed in just a few hours of the judge's time.<sup>311</sup> If the jury finds for the defendant, the case is over, and the plaintiff has no substantial grounds for complaining on appeal.

(8) If the jury finds in favor of the plaintiff and the judge still is convinced that there has been a possible miscarriage of justice, he may grant a new trial *sua sponte*.<sup>312</sup> The judge may weigh the evidence presented at the trial and grant a new trial if he is firmly convinced that the jury's verdict

308. This is permissible as long as the judge does not convey his purely personal reaction and makes it clear to the jury that they are final judges of such matters. *Quercia v United States*, 289 U.S. 466, 469 (1933); *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 199-200 (1973) ("Summing Up and Comment By Judge") (containing advisory committee's note to proposed Federal Rule of Evidence 105) (not enacted).

309. See COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS WITHIN THE EIGHTH CIRCUIT, *MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT* ¶ 3.03 (1993).

310. See FED. R. CIV. P. 49(a).

311. For judges too busy to conduct such an abbreviated jury trial themselves, this proceeding may be tried before a magistrate judge with the consent of the parties. See 28 U.S.C. § 636(c)(1) (1988). Even in the worst case scenario, such a trial would take less than one full day, and the losing plaintiff then would have no substantial grounds for an appeal. To all those who think that this would represent an intolerable strain on the resources of the court, ask yourselves this: How many hours of judicial manpower would be consumed instead if the district judge had granted summary judgment, written an opinion explaining that decision, and the three-judge panel of the court of appeals then had been required to consider and decide the inevitable appeal by the plaintiff who claimed that he was denied his right to a jury and that the lower court erred in granting summary judgment? See cases cited *supra* notes 272-83. Not to mention the additional court time that will be involved in those cases where the grant of summary judgment is reversed and the case is returned to the district court for further proceedings. *E.g.*, *American Metal Forming Corp. v Pittman*, 52 F.3d 504, 507 (4th Cir. 1995) (reversing grant of summary judgment after concluding that district judge should not have stricken affidavit as sham). A three hour trial with one witness starts to sound fairly efficient by comparison, doesn't it?

312. See FED. R. CIV. P. 59(a).



was manifestly against the weight of the evidence, even if he still is unable to say that no reasonable jury could have so found.<sup>313</sup>

(9) Now we try again at a second trial, conducted along the same lines as the first. If the judge is correct in his strong suspicion that the plaintiff's affidavit is truly a sham and a lie, we should not expect two different juries to find otherwise. Besides, the defendant's chances of prevailing at the second trial can only have improved because the defendant now will have access to a *third* detailed statement by the plaintiff on the same topic, thus magnifying the chances of the plaintiff contradicting himself or being caught in some inconsistency.<sup>314</sup> If the second jury finds against the plaintiff, the case is over.

(10) But what if all nine steps fail? What if two different juries find in favor of the plaintiff, even after they have heard him vigorously cross-examined about the supposedly prior inconsistent statement? Perhaps then we will know why this particular plaintiff had the tenacity to persist to the very end. Then the time will have come for the judge to swallow a bit of his pride, admit that he evidently might have been wrong in his assessment of the case and the value of the jury system, and acknowledge that a miscarriage of justice apparently would have been done if he had adhered to the old system of "striking" inconsistent affidavits and granting summary judgment in the case.

This ten-step process, I submit, would far better insure the primacy of the Seventh Amendment right to a jury trial, while still protecting the judicial system from the abuse of those who knowingly would perjure themselves just to avoid summary judgment. In fact, this arrangement probably would do a better job than current law does of achieving *both* of those goals. The current body of case law, in its obsession to stave off the supposed threat to the ability of Rule 56 to screen out sham cases, ends up trampling upon the jury's domain while generating many time-consuming appeals.<sup>315</sup> In comparison with the procedure of simply tossing out an affidavit as a "sham" (and the plaintiff's case with it), the system outlined

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313. FRIEDENTHAL ET AL., *supra* note 209, § 12.4, at 558.

314. Because of the hearsay rules, the plaintiff's testimony from his first trial ordinarily cannot be offered by him at his second trial in support of his case, no matter how helpful it might be to him, FED. R. EVID. 801(d)(1); *see* *Tome v United States*, 115 S. Ct. 696, 700 (1995), but it may be used *against* him freely if it contradicts his later testimony, FED. R. EVID. 801(d)(1)(A), or if it helps the defendant's case in any way, FED. R. EVID. 801(d)(2)(A). For primarily this reason, it truthfully can be said that, the more often a party is compelled to tell his story under oath, the more of an advantage his opponent receives.

315. *See* cases and authorities cited *supra* notes 272-83, and 311.

above admittedly would entail a little extra work for the district judge in certain cases. But, in the long run, it surely would entail less work and less threat to the integrity of the judicial system as a whole.

Under the current regime where judges are empowered to throw out unsatisfactory affidavits — ironically, in the name of "efficiency" and protecting the system's integrity — the reported cases reflect that the trial and appellate courts continue to be inundated with complicated legal challenges to such dismissals and that litigants continue to file supposedly sham affidavits with impunity. As long as federal courts continue to simply "strike" sham affidavits and do nothing else about such abuses, unscrupulous litigants and lawyers will see no good reason to refrain from trying it. After all, an affidavit that merely ends up being stricken leaves them no worse off, and they just might get lucky and find that their overworked opponent forgets to make the required "motion to strike."

Under the system proposed here, by contrast, almost every one of the ten steps outlined above involves a way in which a little bit of extra work can close the case without giving anyone any substantial grounds for appeal and potentially will encourage lawyers and litigants to think twice before attempting such tactics in the future. Judging from the remarkable frequency with which the courts continue to find themselves resolving disputes over whether an affidavit is a spurious and worthless sham, perhaps it is time for us to worry a little bit less about the supposed threat that sham affidavits might pose to Rule 56 and a little more about the threat that our current approach poses to the integrity and the efficiency of the entire judicial system.

### *Conclusion*

In both theory and practice, our current system of summary judgment is crippled by a great number of pervasive myths that are attributable to ambiguities and errors that have been made by the Supreme Court and the Advisory Committee on the Federal Rules of Evidence.<sup>316</sup> These errors have created an incoherent and confused regime in which judges mistakenly believe they are utterly powerless to disregard incredible claims, the courts of appeals are bitterly divided as to whether summary judgment may be resisted by inadmissible evidence, indigent and wealthy litigants unjustly

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316. In fact, the careful reader will note this Article has identified and solved a total of "Twenty Common Myths" about summary judgment. But I decided to organize this discussion around the skeleton of four central misconceptions — because how many of you would have read an article with a title like *that*?

find themselves on unequal footing, and courts react by impermissibly arrogating to themselves the authority to dispose of genuine and close issues of fact concerning the credibility of inconsistent statements. These assorted misconceptions have done — and will continue to do — great damage to our understanding of the law and to the efficiency and integrity of our system of justice. This web of interrelated misconceptions now pervades the case law in every circuit and virtually all of the leading manuals and reference works on these topics.

Fortunately, although the present state of confusion has been decades in the making, there is now a clear way out of all this chaos. This Article has laid out that path and has shown how all of these mysteries can be clarified with just a little bit of help from the Supreme Court, the Advisory Committee of the United States Judicial Conference, and the authors of the leading manuals on civil procedure and evidence. Unfortunately, although I have been blessed with all the answers, I do not yet have much influence with those people or institutions myself. But if any prominent reader with such influence sees the wisdom of this essay, you could help me do our system of justice a great favor by sending a copy of this Article to them with your cover letter.<sup>317</sup>

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317 I hereby consent to the copying of this Article for the purpose of sharing it with a court, judge, or author named in this Article.