MARCH 2008 DRAFT

SHOULD SUMMARY JUDGMENT BE GRANTED?

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SHOULD SUMMARY JUDGMENT BE GRANTED?

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One of the most significant trends in federal civil litigation has been the increasing conference of discretion on the United States District Courts by the Federal Rules of Civil Procedure. This trend was again manifested in the recent "restyling" of the Rules, particularly as it related to summary judgment. Whereas previously Rule 56 provided that a district court "shall" grant a "properly made and supported" motion for summary judgment, now it only "should" grant such a motion. Thus, though the district courts previously appeared to have no discretion in this regard, they may now properly deny a proper motion for summary judgment, at least if they have sufficient reasons for doing so.

This change from "shall" to "should"—which could have a dramatic impact on federal court practice—raises a number of questions. Did this change reflect current understandings regarding the law of summary judgment? If not, was this change, which was intended to be stylistic only, in fact more substantive? More importantly, should "should" even be the standard here? This Article will conclude that the change from "shall" to "should" in Rule 56 results in a substantive change in meaning that is not supported by the former text of that rule or by Supreme Court precedent. This Article also will conclude that "should" should not be used to describe a district court's duty in this context, for a district court should have no discretion to deny a properly made and supported motion for summary judgment. The reasons heretofore proffered for denying such a motion are wanting, and such exercises of discretion are contrary to a proper understanding of the judicial role.

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"Courts must apply judgment, to be sure. But judgment is not discretion."[1]

INTRODUCTION

On December 1, 2007, the long-awaited "restyling" of the Federal Rules of Civil Procedure finally took effect.[2] The primary purpose of the restyle project was to bring greater clarity and consistency to the Rules.[3] Substantive change generally was to be avoided.[4] Nonetheless, given the breadth of the project—no rule was unaffected[5] —the

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1 Telltabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2515 (2007) (Scalia, J., concurring in the judgment).

2 *See* Supreme Court Order dated April 30, 2007. The restyling of the Federal Rules of Civil Procedure (hereinafter, "Rules") actually was accomplished in four parts. *See* Excerpt from the Report of the Judicial Conference 3, *available at* http://www.uscourts.gov/rules/supct1106/Excerpt_JC_Report_CV_0906.pdf. In concert with the restyling of the Rules themselves, the Official Forms that accompany the Rules also were restyled. *See id.* at 4. Moreover, some of the revisions made in the course of restyling were regarded as possibly resulting in "substantive" (as well as stylistic) change. Those revisions were separated from the more general restyling revisions and approved under a separate heading. *See id.* at 3. Finally, stylistic changes made to rules added or amended effective December 1, 2006 also were completed as a separate set. *See id.* at 4. Collectively, these revisions will hereinafter be referred to as the "restyle project."

Incidentally, unless otherwise indicated, all references to the Rules in this Article are to the current, restyled Rules.

3 *See, e.g.*, FED. R. CIV. P. 56 advisory committee's note (restyle) ("The language of Rule 56 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."). *See also* Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761, 1761 (2004) [hereinafter, Cooper, *Restyling*] (describing the purpose of the restyling project as "to translate present text into clear language that does not change the meaning"). (Incidentally, Professor Cooper served as the Reporter for the Advisory Committee on the Federal Rules of Civil Procedure during the restyling project. *See id.* n.*.)

Though perhaps unstated, there might have been other purposes as well. For example, it appears that the Committee also sought to correct obvious errors and oversights, at least to some extent. *See, e.g.*, FED. R. CIV. P. 56 advisory committee's note (restyle):

> Former Rule 56(a) and (b) referred to summary-judgment motions on or against a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment. The list was incomplete. Rule 56 applies to third-party claimants, intervenors, claimants in interpleader, and others. Amended Rule 56(a) and (b) carry forward the present meaning by referring to a party claiming relief and a party against whom relief is sought.

Another possible purpose—arguably less legitimate—might have been to accomplish changes not as easily (or as quickly) achieved through other means. *See infra* note 73 and accompanying text.

4 *See supra* note 3. *See also* Cooper, *Restyling*, *supra* note 3, at 1780 ("Deliberate substantive changes, even slight changes, must be addressed by other means."). Again, obvious exceptions were those revisions expressly identified as potentially resulting in some substantive change. *See supra* note 2.

5 Actually, the text of Rule 3 ("A civil action is commenced by filing a complaint with the court.") was not changed, but the title (or "caption") was. *Compare* former FED. R. CIV. P. 3 ("Commencement of Action") *with* restyled FED. R. CIV. P. 3 ("Commencing an Action").

extent of the change was considerable. Doubtless, it will take years for the bench and bar to assimilate the new terminology.

Whether the restyle project was worthwhile is a subject of debate. Certainly, some changes of this nature were desirable. Many of the provisions formerly in effect were horribly drafted,[6] terminological inconsistencies abounded,[7] and oversights were evident.[8] Many of these problems have been corrected, and, for the most part, the Advisory Committee on the Federal Rules of Civil Procedure should be commended. Indeed, unlike some,[9] the author of this Article is willing to concede that, on balance, the changes were positive.

The restyle project was not a complete success, though. In some instances, the Advisory Committee failed to make desirable changes.[10] In other instances, the changes

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6 *See, e.g.*, Bradley Scott Shannon, *Action Is an Action Is an Action Is an Action*, 77 WASH. L. REV. 65, 101-02 (2002) (discussing the first paragraph of former Rule 26(c), which consisted of a single sentence of more than 200 words).

7 *See, e.g.*, *id.* at 100 (discussing instances where the former Rules used the words "case" or "lawsuit" rather than the more appropriate term "action").

8 *See, e.g.*, *supra* note 3.

9 For a good discussion of some of the problems associated with the restyle project, see Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155 (2006).

10 For example, in many instances, ambiguity remains because of the use of the same word to express more than one meaning. *See, e.g.*, FED. R. CIV. P. 14(a)(1) (using "may" to express both permission and possibility); 16(d) (using "action" to describe both the court's ruling and the proceeding itself). In other instances, the Rules continue to use different words to express the same concept. *See, e.g.*, FED. R. CIV. P. 16(a), (b) (interchanging "court" with "judge"); 50(a)(2)(b) (interchanging "case" with "action"). In still other instances, internal inconsistencies remain unaddressed. *Compare* FED. R. CIV. P. 12(b) ("A motion asserting [defenses (1) through (7)] must be made before pleading if a responsive pleading is allowed.") *with* FED. R. CIV. P. 12(h)(2), (3) (permitting the assertion of defenses (1), (6), and (7) by motion, post-pleading); *compare* FED. R. CIV. P. 4(k) (prescribing the personal jurisdictional reach of the district courts) *with* FED. R. CIV. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts . . . ."). And in some instances, the changes that were made seem incomplete. For example, former Rule 81(e) defined state "law" as including "the statutes of that state and the state judicial decisions construing them." Restyled Rule 81(d)(1) redefines state "law" as including "the state's statutes and the state's judicial decisions." But does not state law, for Rules purposes, include more than state statutes and judicial decisions? If so, why are those other authorities not described? Why is this term not defined in terms of what it is, rather than what it includes? Why is it even defined at all? (For what it is worth, all of the above concerns were raised with the Committee on Rules of Practice and Procedure prior to the conclusion of the restyle project. *See* Letter from Bradley Scott Shannon to Peter G. McCabe dated November 30, 2005, *available at* http://www.uscourts.gov/rules/CV%20Comments%202005/05-CV-009.pdf.)

made by the Committee—contrary to the stated purpose of the project—likely resulted in substantive change.[11] But rather engage on a general critique of this project, this Article will focus on just one aspect: the change from "shall" to "should" to describe the standard by which a federal district court is to decide a proper (i.e., "properly made and supported"[12]) motion summary judgment.[13] This seemingly innocent change[14] might well result in a radical transformation of federal summary judgment practice,[15] a significant aspect of modern federal civil litigation.[16]

The remainder of this Article is divided into three parts. In Part I, the Article will discuss the change from "shall" to "should" in Rule 56. The Article will consider first the prior usage and meaning of "shall" both in the Rules generally and in Rule 56 in particular. The Article will then discuss the Advisory Committee's elimination of "shall" from the Rules and the various terms substituted therefor. In particular, the Article will consider the change from "shall" to "should" in Rule 56 and the Advisory Committee's justification for that change. In Part II, the Article will then consider what might be the

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[11] The change that is the subject of this Article arguably falls into this category. *See infra* Part I.C. *See also* Hartnett, *supra* note 9, at 164 ("[T]he Advisory Committee has not cleared up all of the ways the proposed restyled rules might change the meaning of the existing rules.").

[12] FED. R. CIV. P. 56(e)(2). In other words, a "proper" motion for summary judgment, as that term is used in this Article, is a motion where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

[13] In order to fully appreciate the nature and scope of this change, the full text of former and restyled Federal Rule of Civil Procedure 56 is reproduced in Appendices A and B, respectively.

[14] The change from "shall" to "should" in Rule 56 was almost completely unopposed. In fact, when the restyled rules as proposed were released for public comment, the author of this Article was the only person who formally objected. *See* 2005 Civil Rules Comments Chart, *available at* http://www.uscourts.gov/rules/CV%20Rules%202005.htm.

[15] *See infra* notes 88-96 and accompanying text. This change also could have a dramatic impact on *state* court practice, though whether any state adopts this language remains to be seen. Of course, to the extent the states decline, this change could have a dramatic impact on the federal-state court balance.

[16] Consider, for example, the fact that *Anderson v. Liberty Lobby, Inc.*, and *Celotex Corp. v. Catrett*, both celebrated Supreme Court summary judgment decisions, "are by far the top-two cases in terms of federal court citations, each with over 70,000." Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 87 (2006).

ultimate question: the normative efficacy of utilizing a discretionary summary judgment standard. This Article will conclude that, as a textual matter and as a matter of Supreme Court precedent, "shall" as used on Rule 56 cannot plausibly be construed as meaning "should." Because the change from "shall" to "should" in Rule 56 was not justified by those authorities cited by the Advisory Committee, this change should have been regarded as substantive, not stylistic. More importantly, this Article also will conclude that "should" is an inappropriate choice for the standard to be used in deciding a motion for summary judgment. A district court should have no discretion to deny a proper motion for summary judgment, and Rule 56 should be amended accordingly.

I. THE CHANGE FROM "SHALL" TO "SHOULD" IN FEDERAL RULE OF CIVIL PROCEDURE 56

A. The Prior Usage and Meaning of the Term "Shall" in the Rules Generally and in Rule 56

Prior to the restyle project, "shall" was a term that "permeate[d] the rules."[17] What did that term mean?

The best answer, of course, is that the meaning of "shall" depended (at least to some extent) on the particular context in which that term is used.[18] For like many words, "shall" is a word with more than one meaning.[19] So let us consider a single (and presumably uncontroversial) example. Former Rule 4(c)(1), the rule governing service of process, provided: "A summons *shall* be served together with a copy of the complaint."[20] As used in that rule, what was the most likely meaning of that term? Surely, the idea being conveyed was that the service of the summons together with a copy of the complaint was *mandatory*—i.e., that the person responsible for serving process was *required* to serve the summons and a copy of the complaint more or less simultaneously. And this is, in fact, the way in which "shall" typically is used in legal drafting.[21]

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[17] Cooper, *Restyling*, *supra* note 3, at 1766. In fact, according to a WESTLAW search conducted just prior to the effective date of the restyled rules, "shall" appeared in the Rules 510 times.

[18] *See* Deal v. United States, 508 U.S. 129, 132 (1993) (invoking the "fundamental principle of statutory construction (and indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used").

[19] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2085-86 (1993) (defining "shall" alternatively as meaning "a command or exhortation," "what is inevitable," and "determination"). Even when confined to law, "shall" can have several meanings. *See* BLACK'S LAW DICTIONARY 1407 (8th ed. 2004) (defining "shall" alternatively as meaning "[h]as a duty to" (or "is required to"), "[s]hould," "[m]ay," "[w]ill," and "[i]s entitled to"). Of course, this does not mean that "shall," at least as it is used in the Rules, can reasonably mean *anything*. Moreover, it is one thing to consider how a word *can* be used; it is quite another to consider how, in any given context, it is *ordinarily* used. *See* Smith v. United States, 508 U.S. 223, 242-43 (1993) (Scalia, J., dissenting).

[20] Former FED. R. CIV. P. 4(c)(1) (emphasis supplied).

[21] *See* BLACK'S LAW DICTIONARY 1407 (8th ed. 2004) (explaining that "[t]his is the mandatory sense that drafters typically intend and that courts typically uphold," and that only this sense "is acceptable under strict standards of drafting"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2085 (1993) (explaining that "shall" is a word that is "used in laws, regulations, or directives to express what is mandatory"). *See also* 1A NORMAN L. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 25.4, at 610

It should come as no surprise, then, that in a similar context, the Supreme Court reached the same conclusion. In *Anderson v. Yungkau*,[22] the Court was called upon to interpret Rule 25(a), which at that time provided: "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action *shall* be dismissed as to the deceased party."[23] Interpreting this rule, the Court held:

> In contrast to the discretion of the court to order substitution within the two year period is the provision of Rule 25(a) that if substitution is not made within that time the action "Shall be dismissed" as to the deceased. The word "shall" is ordinarily "The language of command". And when the same Rule uses both "may" and "shall", the normal inference is that each is used in its normal sense—the one act being permissive, the other mandatory.[24]

It is equally unsurprising that the Court has reaffirmed this holding in similar contexts several times since.[25]

Let us now consider Rule 56 and summary judgment. Former Rule 56(c) provided: "The judgment sought *shall* be rendered forthwith if the pleadings,

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(6th ed. 2002) ("Unless the context otherwise indicates the use of the word "shall" (except in its future tense) indicates a mandatory intent."); Joseph Kimble, *The Many Misuses of* Shall, 3 SCRIBES J. LEG. WRITING 61, 64 (1992) [hereinafter Kimble, *The Many Misuses*] ("Every single authority on legal drafting . . . insists that *shall* must be used . . . to recite an obligation in a contract, or to give a command in a statute."). (Incidentally, Professor Kimble served as the Style Consultant for the restyle project. *See* Memorandum from Joseph Kimble on behalf of the Committee on Rules of Practice and Procedure dated Feb. 21, 2005 ("Guiding Principles for Restyling the Civil Rules").)

[22] 329 U.S. 482 (1947).

[23] *Id.* at 484 (emphasis supplied).

[24] *Id.* at 485 (citation omitted).

[25] *See, e.g.*, Alabama v. Bozeman, 533 U.S. 146, 153 (2001) (regarding the meaning of "shall" to be "absolute," citing *Yungkau*); Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (describing the use of "the mandatory 'shall,' which normally creates an obligation impervious to judicial discretion," again citing *Yungkau*).

Admittedly, in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), the Court recently discussed the meaning of "shall" in connection with the duties of law enforcement officers upon violation of a restraining order, and rejected the notion that such language "made enforcement of restraining orders *mandatory*." *Id.* at 760. But the Court based its interpretation on the unique nature of the order at issue, the relevant statutory scheme, and the "deep-rooted nature of law-enforcement discretion." *Id.* at 761. Notably, the Court failed to mention *Yungkau* or any of the other cases cited above.

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is *entitled* to a judgment as a matter of law."[26] Similarly, former Rule 56(e) provided:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, *shall* be entered against the adverse party.[27]

As used in this rule, what did "shall" mean? Certainly, if a motion for summary judgment was "made and support as provided in this rule,"[28] a district court was *permitted* to grant the motion. But was it *required* to?

The answer seems to be yes. The context in which this term is used strongly suggests this result, and nothing in former Rule 56 itself indicates to the contrary.[29] Moreover, though the Supreme Court has yet to confront this precise issue, prior decisions seem to be in accord. For example, in *Celotex Corp. v. Catrett*,[30] the Court stated that

> the plain language of Rule 56(c) *mandates* the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.[31]

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[26] Former FED. R. CIV. P. 56(c) (emphasis supplied).

[27] Former FED. R. CIV. P. 56(e) (emphasis supplied). It might be observed that, like the rule at issue in *Yungkau*, former Rule 56 used both "may" and "shall."

[28] Former FED. R. CIV. P. 56(e).

[29] Indeed, why *must* an adverse party respond to a proper motion for summary judgment (*see* former FED. R. CIV. P. 56(e)) if a district court had the power to deny that motion in any event?

[30] 477 U.S. 317 (1986).

[31] *Id.* at 322. *See also* Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 Hofstra L. Rev. 91, 103 (2002) ("The *Celotex* opinion is surely correct that the 'plain language' of Rule 56 mandates that courts enter summary judgment when the movant has demonstrated that no disputed issues of material fact exist.").

Similarly, in *Anderson v. Liberty Lobby, Inc.*,[32] the Court stated that the standard for summary judgment

> mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge *must* direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. . . .
>
> . . . In essence, . . . the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party *must* prevail as a matter of law.[33]

In sum, considering the text of former Rule 56 and language found in prior Supreme Court cases, there is no question but that "shall," as used in connection with a district court's duty with respect to a proper motion for summary judgment, meant that the court was required to grant the motion.

[32] 477 U.S. 242 (1986).

[33] *Id.* at 250-52 (emphasis supplied). Of course, some might observe that, strictly speaking, the *Celotex* and *Liberty Lobby* Courts might have been simply interpreting the language of Rule 56 as then in force, meaning this interpretation probably should not be taken as making any normative statement about how a motion for summary judgment *ought* to be decided in the absence of any express direction. Still, if the issue is the meaning of Rule 56 prior to restyling, that meaning seems fairly clear.

B. The Elimination of "Shall" and the Substitutes Therefor

Despite the clear meaning of "shall" in the contexts just discussed, the Advisory Committee regarded this term as ambiguous, and therefore problematic.[34] As a result, the Committee, as part of the restyle project, decided to substitute what it regarded as less ambiguous terms. Specifically, the Committee "replace[d] 'shall' with 'must,' 'may,' or 'should,' depending on which one the context and established interpretation make correct in each rule."[35]

The term most frequently substituted for "shall" was "must."[36] Consider (again) Rule 4(c)(1). Former Rule 4(c)(1) provided: "A summons *shall* be served together with a copy of the complaint."[37] As restyled, Rule 4(c)(1) now reads: "A summons *must* be served with a copy of the complaint."[38] In this context, "must" makes sense, for though "shall" and "must" do not mean exactly the same thing,[39] "must" comes very close (and probably closer than any other single word) to expressing the idea being conveyed in Rule 4(c)(1)—namely, the *requirement* that a summons and a copy of the complaint be served together.[40]

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[34] *See* FED. R. CIV. P. 1 advisory committee's note (restyle) ("The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact that "shall" is no longer generally used in spoken or clearly written English."). *See also* Cooper, *Restyling*, *supra* note 3, at 1766 ("Ambiguity nowhere presents a more pervasive problem than arises from 'shall.'"); Kimble, *The Many Misuses*, *supra* note 21, at 61 ("[S]hall is the most misused word in the legal vocabulary.").

[35] FED. R. CIV. P. 1 advisory committee's note (restyle).

[36] Comparisons between the former and restyled Rules are difficult because in some places, redundant material was eliminated or condensed, whereas in others, new provisions were added for greater clarity. In any event, it is estimated that "must" was substituted for "shall" approximately 340 times.

[37] Former FED. R. CIV. P. 4(c)(1) (emphasis supplied).

[38] FED. R. CIV. P. 4(c)(1) (emphasis supplied).

[39] Ideally, "shall" should be used to connote a duty, whereas "must" is more directory, and should used to express a condition precedent. *See* Kimble, *The Many Misuses*, *supra* note 21, at 64-67. Thus, by eliminating "shall" in favor of "must," "we do give up a potentially useful distinction, or at least we have to make the distinction in other ways." *Id.* at 70.

[40] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1492 (1993) (defining "must" first as "is commanded or requested to"). *See also* UNIF. STATUTE AND RULE CONSTR. ACT § 4(a) (1995) ("'Shall' and 'must' express a duty, obligation, requirement, or condition precedent."); Kimble, *The Many Misuses*,

In a few places, the Advisory Committee substituted "may," rather than "must," for "shall."[41] For example, former Rule 33(a) provided that leave to serve more than 25 interrogatories on another party "*shall* be granted to the extent consistent with the principles of Rule 26(b)(2)."[42] Restyled Rule 33(a) provides that such leave "may" be granted.[43] Thought "must" might have been more appropriate here also, in that Rule 26(b)(2) presumably encapsulates all of the factors relevant to this determination, this use of "may" seems fairly unobjectionable. "May" expresses permission,[44] and that is essentially what this passage provided for previously, given the rather open-ended nature of Rule 26(b)(2)(C). Moreover, former Rule 26(b)(2)(A) itself conferred broad power on the district courts to alter the limit on the number of interrogatories, thus effectively undermining any attempt to impose a more rigid standard elsewhere in the Rules. Finally, given the relatively low stakes involved (the ability to permit the service of more than 25 interrogatories by one party on another party), and the likely ability of a party wrongfully denied leave to obtain essentially the same information through other means, the use of "may" here is unlikely to result in any significant change in federal court practice.

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supra note 21, at 64 ("[I]n legal usage *shall* is close in meaning to *must*.") (internal quotation marks omitted). Actually, when one considers only the technically appropriate uses of these terms (*see supra* note 39), "must" arguably was always the better choice, as Rule 4 does not require the service of anything; rather, it provides only that if a summons is served, it is to be served together with a copy of the complaint.

[41] Again, though precise comparisons between the former and restyled Rules are difficult (*see supra* note 36), it is estimated that "may" was substituted for "shall" approximately 29 times.

[42] Former FED. R. CIV. P. 33(a) (emphasis supplied).

[43] FED. R. CIV. P. 33(a).

[44] *See* BLACK'S LAW DICTIONARY 1000 (8th ed. 2004) (defining "may" first as "[t]o be permitted to"). It would be more accurate to say that "may" *can* express permission, for (as noted previously), it can also express possibility, and (regrettably) the Rules use this term to express both meanings, sometimes even in the same paragraph. *See supra* note 10. Certainly, though, the use of "may" to express permission is unobjectionable, and confining the use of this term in the Rules to that meaning arguably would be preferable.

Finally, in a handful of places, "shall" was changed to "should."[45] For example, former Rule 1 provided that the Rules "*shall* be construed and administered to secure the just, speedy, and inexpensive determination of every action."[46] Rule 1 now provides that the Rules only "should" be so construed and administered.[47]

Whether the problems associated with "shall" were as dire as those perceived by the Advisory Committee is debatable. Given its pervasiveness, it is difficult to believe that the original drafters of the Rules did not have a firm understanding as to what that term meant in the various contexts in which it was used.[48] There is also some question as to whether the terms selected by the Advisory Committee truly mean the same thing as "shall," even in seemingly uncontroversial applications,[49] and certainly any change in terminology is going to result in some level of disruption.[50] Nonetheless, it is difficult to argue that "must," "may," and "should" are less clear than "shall." Thus, to the extent that the meaning of the restyled rules is reasonably consistent with that of the former rules, the changes made by the Advisory Committee still may be regarded as positive.

Trouble arises, though, when the new term selected by the Advisory Committee results in a discernable change in meaning. Consider, again, Rule 56. As a textual matter and as suggested by the Supreme Court, the granting of a proper motion for summary judgment used to be mandatory. But did the Committee change "shall" to "must" in Rule

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[45] It is estimated that "should" was substituted for "shall" approximately 14 times.

[46] Former FED. R. CIV. P. 1 (emphasis supplied).

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

[48] Ironically enough, the Supreme Court itself used this very word in its order approving the restyled rules. *See also infra* note ***. It is therefore difficult to believe that the Court also did not understand what that term meant.

[49] The change from "shall" to "should" in Rule 1 arguably falls into this category. *See supra* notes 46-47 and accompanying text.

[50] *See* Shannon, *supra* note 6, at 81 (discussing the problems potentially associated with the interchange of synonymous words).

56? No. Instead, the Committee changed "shall' to "should."[51] So now, even when a motion for summary judgment is "properly made and supported," it need not be granted. Such a motion *may* be granted—indeed, it *should* be granted—but it does not *have* to be granted. And this seems clearly wrong—or at least it seems to go beyond mere restyling.

[51] *See* FED. R. CIV. P. 56(c), (e)(2). Actually, in several instances, "shall" was changed to "must" even within Rule 56. *See* FED. R. CIV. P. 56(c) (describing the time by which a motion for summary judgment is to be served); 56(d)(1) (describing the manner in which partial summary judgments are to be regarded at trial); 56(e)(1) (describing the requirements for supporting or opposing affidavits); 56(g) (describing the consequences for submitting affidavits in bad faith). It is at least somewhat difficult to understand how the meaning of "shall" could shift as it is used within this rule.

C. The Justification for the Change from "Shall" to "Should" in Rule 56

Given the dubious nature of the change from "shall" to "should" in Rule 56, one might be tempted to ask how (or why) the Advisory Committee arrived at this decision.

Part of the answer might lie in the manner in which the Advisory Committee viewed its role with respect to the restyle project. Though one might have expected the Committee to opt for more literal translations of the Rules, there are indications that it saw its role differently, as to reflect current understandings.[52] Certainly, the notion that current understandings might have been at work in the restyling of Rule 56 is reflected in the note accompanying restyled Rule 56, which explains:

> Former Rule 56(c), (d), and (e) stated circumstances in which summary judgment "shall be rendered," the court "shall if practicable" ascertain facts existing without substantial controversy, and "if appropriate, shall" enter summary judgment. In each place "shall" is changed to "should." It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-257 (1948). Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2728. "Should" in amended Rule 56(c) recognizes that courts will seldom exercise discretion to deny summary judgment when there is no genuine issue as to any material fact. Similarly sparing exercise of this discretion is appropriate under Rule 56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.[53]

Whether "current understandings" represents an appropriate approach to restyling seems debatable. Should the courts, in effect, be permitted to amend the Rules (which

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[52] *See* FED. R. CIV. P. 1 advisory committee's note (restyle) (explaining that the choice of the term to replace "shall" was based, in part, on "established interpretation").

[53] FED. R. CIV. P. 56 advisory committee's note (restyle). Professor Cooper further explains:

> There is a real risk that meaning will be changed in choosing whether to substitute "must" . . . for "shall." This risk may occur even when it is clear that "shall" was originally intended to mean "must." Actual practice may have added some measure of discretion. The dilution of the original command may reflect that practice has shown a better way: discretion is more useful, even more important, than the drafters understood.

Cooper, *Restyling*, *supra* note 3, at 1777-78.

are, after all, rules, and not just guidelines or suggestions[54]) in this fashion? Arguably not. Federal courts are duty-bound to abide by the Federal Rules, which are regarded as having essentially the same binding force as a federal statute.[55] It therefore seems that any changes that might be considered substantive, vis-à-vis actual rule text, might be more appropriately accomplished through the standard amendment process.[56]

Be that as it may, the more important question here is whether this change from "shall" to "should" truly reflected current practice. Did it? Was it in fact "established" that a district court had discretion to deny a motion for summary judgment even when there was no genuine issue as to any material fact? Let us examine the authorities cited by the Advisory Committee more closely.

The Advisory Committee cited *Kennedy v. Silas Mason Co.*[57] as support for the proposition that a district court properly may deny a valid motion for summary judgment.[58] *Kennedy* involved questions regarding the application of the overtime provisions of the Fair Labor Standards Act to employees of contractors with the War Department.[59] The defendant contractor filed a motion for summary judgment, which was granted.[60] The court of appeals affirmed.[61]

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[54] *See* Shannon, *supra* note 6, at 86 n.83 (discussing this point).

[55] *See* 28 U.S.C. § 2072(b) ("All laws in conflict with [the Federal Rules of Civil Procedure] shall be of no further force or effect after such rules have taken effect."); Henderson v. United States, 517 U.S. 654, 668 (1996) (holding that Rules supersede conflicting statutory authority).

[56] Certainly, the number of amendments made to the Rules in recent years, as well as the frequency with which the Rules have been amended, show that the Advisory Committee knows how to initiate the amendment process and that it is not afraid to do so.

[57] 334 U.S. 249 (1948).

[58] *See* FED. R. CIV. P. 56 advisory committee's note (restyle).

[59] *See* 334 U.S. at 251.

[60] *See id.* at 253. The defendant argued that neither party was covered by the Act in that neither was engaged in interstate or foreign commerce or in the production of goods for commerce. *See id.* at 252. Though the district court held that "the plaintiffs, whatever the forms of the transaction, were in reality employed by the Government and, hence, the Fair Labor Standards Act by its own terms did not cover them," it initially denied the motion on the ground that "they were covered by § 4 of the Act of July 2, 1940, and were entitled to recover overtime under it." *Id.* at 253 (footnote omitted). But on rehearing, the

In reaching its decision, the Supreme Court began by observing that this case involved "an extremely important question, probably affecting all cost-plus-fixed-fee war contractors and many of their employees immediately, and ultimately affecting by a vast sum the cost of fighting the war."[62] The Court then stated:

> We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.
>
> We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.[63]

Thus, "[w]ithout intimating any conclusion on the merits," the Court vacated—not reversed—the judgments below and remanded the case to the district court "for reconsideration and amplification of the record in the light of this opinion and of present contentions."[64]

The *Kennedy* Court thus held no more than that it considered it unwise to decide issues of great importance based on a scant district court record.[65] In no way did that

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district court "concluded . . . that no remedy under this latter Act was available to them in this action as it was not pleaded," and ultimately granted the motion. *Id.*

[61] *See id.* at 253.

[62] *Id.* at 256.

[63] *Id.* at 256-57 (footnote omitted).

[64] *Id.*

[65] It might be observed that such a tack is hardly unique. *Cf.* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 419 n.13 (1984) ("We decline to consider adoption of a doctrine of jurisdiction by necessity—a potentially far-reaching modification of existing law—in the absence of a more complete record.").

Court hold that a district court has the discretion to deny a motion for summary judgment in the absence of a genuine issue of material fact.[66]

The Advisory Committee also stated that many lower courts have held that a district court has the discretion to deny a valid motion for summary judgment.[67] It is true that some decisions to this effect can be found in the treatise cited.[68] But what the Committee fails to mention was that many *other* lower federal courts have held that a district court has *no* such discretion.[69] Thus, even among the lower federal courts, the results here are mixed—presumably not the sort of authority on which to make a change

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[66] The *Kennedy* Court also gave no indication that it intended to essentially overrule its (then) very recent decision in *Yungkau* regarding the usual meaning of "shall" in the Rules. *See supra* notes 22-24 and accompanying text.

Admittedly, the *Kennedy* Court did state in a footnote:

> Rule 56 provides that the trial court *may* award summary judgment after motion, notice and hearing, provided the pleadings, depositions, admissions and affidavits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Id. at 252 n.4 (emphasis supplied). Though some might interpret this footnote as authority for the proposition that a grant of summary judgment is discretionary, it should be observed that the Court did *not* say that summary judgment may be *denied* in this context. In other words, this language is as consistent with a mandatory reading of Rule 56 as it is with a discretionary reading. More significantly, in a later footnote, the Court stated: "Rule 56 *requires* that summary judgment shall be rendered if 'there is no genuine issue as to any material fact * * *.' See note 4." *Id.* at 257 n.7 (emphasis supplied). In light of this later footnote, it would be difficult to conclude that the Court regarded the district court's obligation here as anything other than mandatory.

Though not mentioned by the Advisory Committee, some might point out that the Court more recently suggested that a court may deny a motion for summary judgment when it has "reason to believe that the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). But the only authority cited in support of this statement was *Kennedy* (*see id.*), and we now know that the *Kennedy* Court made no such holding. Moreover, as it appeared in *Liberty Lobby*, this statement was clearly dicta, for it had nothing to do with the holding in that case. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065 (2005) ("A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta."). Finally, this statement seems contrary to other language in that opinion suggesting an absence of discretion in this context. *See supra* note 33 and accompanying text.

[67] *See* FED. R. CIV. P. 56 advisory committee's note (restyle).

[68] *See id.* (citing 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2728 (3d ed. 1998) ("Judicial Discretion in Deciding a Rule 56 Motion")).

[69] *See* Friedenthal & Gardner, *supra* note 31, at 104 ("Federal courts of appeals are currently split over whether judges must grant summary judgment if it is technically appropriate."). Moreover, the treatise cited by the Advisory Committee also states that "[i]n some situations, the court may have an *obligation* to grant summary judgment." *Id.* at 524 (emphasis supplied). It is somewhat difficult to

that is "intended to be stylistic only."[70] That many lower courts have reached a contrary conclusion also does not speak well of the notion that this issue was settled by the Supreme Court in *Kennedy*.[71]

In sum, prior to the restyle project, it was not at all established that a district court had discretion to deny a proper motion for summary judgment. Thus, even if one regards it appropriate to make "stylistic" amendments reflective of current understandings, there is substantial doubt that the change from "shall" to "should" in Rule 56 in fact reflected current understandings.

Before leaving this subpart, one might be further tempted to ask, if it had not previously been established that a district court has discretion to deny a proper summary judgment motion, why did the Advisory Committee nonetheless make this change? And why did it make this change in this manner? Unless one believes that the Committee believed what it wrote, the answers to these questions are unclear. But one can speculate that the answer to the first question might be that this was a change the Committee simply desired. The Committee might have thought that district courts *should* have more decisional latitude, either generally or as to summary judgment in particular.[72] As for the

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understand how a district court could have an obligation to grant a proper motion for summary judgment in some situations but not in all.

[70] *See* FED. R. CIV. P. 56 advisory committee's note (restyle).

[71] Indeed, though Professor Friedenthal and Mr. Gardner are quite sympathetic to the notion of discretionary summary judgment (*see infra* notes 123-144 and accompanying text), even they admit that "the *Kennedy* decision itself is somewhat contradictory." *Id.* at 102. Another reason why this issue was unsettled in the lower courts might have been contrary language found in more recent Supreme Court cases—specifically, *Celotex* and *Liberty Lobby*. *See supra* notes 30-33 and accompanying text. Somewhat curiously, the Advisory Committee failed to mention any such conflicting authority.

[72] As Professor Cooper once remarked:

> Discretion is a useful rulemaking technique when it is difficult—as it almost always is—to foresee even the most important problems and to determine their wise resolution. Reliance on discretion is vindicated only when district judges and magistrate judges use it wisely most of the time and in most cases. The ongoing revisions of the Civil Rules time and again reflect an implicit judgment that confidence is well placed in the discretionary exercise of power by federal trial judges. In a wonderful way, there may be an interdependence at work—the very fact that there is discretionary

second question, perhaps the Committee thought that this change might be accomplished more easily (and more quickly) if regarded as restyling, rather than as something more substantive.[73] Regardless, these questions, as interesting as they might be, are now moot. For even if not established previously, it is now firmly established that we live in a world of discretionary summary judgment.

> authority to guide litigation to a wise resolution may enable us to attract to the bench judges who will use the authority wisely. It is not clear beyond dispute, but let us assume that the open-textured reliance on trial-judge discretion is working well.

Edward H. Cooper, *Simplified Rules of Federal Procedure*, 100 MICH. L. REV. 1794, 1795 (2002).

[73] *Cf.* Cooper, *Restyling*, *supra* note 3, at 1762:

> Cheer is good when it rejoices at the prospect that the Civil Rules will become more accessible, conveying unchanged meaning more clearly and more efficiently. Cheer is not so good when it springs from hope that change can be manipulated to partisan advantage in ways that never were intended.

Along this line, it might be observed that although some restyling amendments were deemed substantive (*see supra* note 2), the changes made to Rule 56 were not among them. Regardless of whether the changes made to Rule 56 should have been included in this group, it is probably safe to presume that its inclusion would have drawn at least somewhat more attention to those changes. As far as "officially" substantive changes, it also might be observed that although the Advisory Committee is currently undertaking something of a major overhaul with respect to Rule 56, *see* Memorandum from the Honorable Mark R. Kravitz, Chair, Advisory Comm. on Federal Rules of Civil Procedure, to the Honorable Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure (Dec. 17, 2007), *available at* www.uscourts.gov/rules/Reports/CV12-2007.pdf, those changes have yet to be released for public comment.

II. *Should* "Should" Be the Standard?

It appears that the change from "shall" to "should" in Rule 56 was not justified by the text of that rule or by Supreme Court precedent. But this does not answer what might be the most important question, and that is the normative one. Irrespective of how we got here, *should* "should" be the standard with respect to summary judgment?

Before answering this question, it might be observed that "should" is a rather curious standard for use in a rule.[74] To see why this is so, let us consider a different example. Suppose that the following law has been proposed to a state legislature: "All motor vehicles should be driven at or below the posted speed limit."[75] Should a rational legislator vote in favor of such a law? Is it enough that the legislator believes that driving at or below posted speed limits is a good idea? Or should the legislator also consider how a rational driver is supposed to apply this standard? For what would be a sufficient reason for exceeding the posted speed limit? Superior driving ability? Greater fuel economy? Would it be enough if the driver were to say, "Well, maybe I *should* drive the

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[74] This does not mean that the use of the word "should" is always illegitimate in this context. In fact, even prior to the restyle project, it appears that the term "should" was used in the Rules approximately 35 times, and most of those uses were uncontroversial. For example, former Rule 56(f) provided:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

As used in this subdivision, "should" simply meant "if" (and that is precisely the word used in restyled Rule 56(f)). But this is a far different usage from that currently found in Rule 56 regarding the standard to be applied to a decision on a motion for summary judgment.

[75] Such a statute is not purely hypothetical. For example, § 61-8-303(1) of the Montana Code once provided:

> A person operating or driving a vehicle of any character on a public highway of this state shall drive the vehicle in a careful and prudent manner and *at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation*, taking into account the amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to the view ahead. The person operating or driving the vehicle shall drive the vehicle so as to not unduly or unreasonably endanger the life, limb, property, or other rights of a person entitled to the use of the street or highway.

State v. Stanko, 974 P.2d 1132, 1135 (Mont. 1998) (emphasis added by the court).

posted speed limit, but I just feel like driving a little faster today"? And if a law enforcement officer were to disagree with the decision made by the driver and issue a citation, on what basis would a court determine who was right? The general unworkability of such a standard—not to mention the potential for injustice—seems manifest.[76]

Now consider the use of "should" in Rule 56. Why should summary judgment be discretionary? On what basis may a properly made and supported motion for summary judgment properly be denied? Rule 56(f) has long provided that the resolution of the motion may be postponed if the party opposing a motion for summary judgment is then unable to present facts in support of its position.[77] Reasonable requests for postponing the resolution of a motion for summary judgment not covered by Rule 56(f) presumably may be accommodated by continuing the hearing on that motion.[78] Is there any legitimate reason for denying (even temporarily) a proper motion for summary judgment that is not covered by these procedures? The answer is difficult to imagine.[79]

A second problem with restyled Rule 56 relates to the rather open-ended nature of the standard provided. Though Rule 56 now expressly permits a district court to deny a proper motion for summary judgment, it provides no guidance as to what might constitute a legally sufficient reason for doing so. Presumably, such a motion could not properly be denied for *any* reason. After all, the rule specifies that the motion "should" be granted,

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[76] *Cf. Stanko*, 974 P.2d at 1138 (holding former Montana Code § 61-8-303(1) unconstitutionally vague). Incidentally, Montana Code § 61-8-303 now provides for a definite speed limit. *See* MONT. CODE ANN. § 61-8-303 (2007).

[77] *See* FED. R. CIV. P. 56(f). Though Rule 56(f) expressly states that the motion may be denied in this situation, this language should not be interpreted as providing the opposing party a free pass to a trial. *See infra* note ___ and accompanying text.

[78] Hahn v. Padre/other. Again, though, any such postponement would have to be brief.

not simply that it "may" be granted, and even the latter undoubtedly would be construed as constraining a district court to some extent.[80] The Advisory Committee's note accompanying Rule 56 further suggests that the exercise of this discretion should be "sparing."[81] This "sparing" language failed to find its way into the text of Rule 56, though, and the rule otherwise provides no express basis for cabining the discretion

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[79] At least to the author of this Article. Others have attempted to formulate arguments along that line, though. For a discussion of these arguments (and some possible responses thereto), *see infra* notes ___ and accompanying text.

[80] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1977) (defining "discretion" as "making decisions subject to standards set by a particular authority"); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 144 (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994) (defining "discretion" as "the power to choose between two or more courses of action each of which is thought of as permissible"). Still, a decisionmaker in this context would be afforded considerable latitude. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1965 (2007) ("a decisionmaker has discretion in a normative sense when she is under no moral or legal obligation to make a particular choice and no one can authoritatively demand that she do so").

Incidentally, such exercises of discretion, whether of the "should" or "may" variety—which might be referred to as exercises of "legal" discretion—should be distinguished from pure or "personal" discretion. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1966 (2007) ("When someone has complete freedom to choose based purely on personal preference without any constraint, we do not usually refer to this as an exercise of 'discretion' . . . ."). But the exercise of "legal" discretion (or what Professor Dworkin might call discretion in the strong sense) also should be distinguished from what some (like Justice Scalia; *see supra* note 1 and accompanying text) might simply refer to as the exercise of judgment. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1977) ("Sometimes we use 'discretion' in a weak sense, simply to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment."); Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1562 (2003) (observing that "discretion is an inescapable aspect of legal decisionmaking . . . .").

[81] *See* FED. R. CIV. P. 56 advisory committee's note (restyle). *Accord* 10A WRIGHT ET AL., *supra* note ___, at 526-27 ("Of course, too frequent exercise of discretion to deny summary judgment by the courts could vitiate the utility of the procedure. . . . Thus, the court's discretion to deny summary judgment when it otherwise appears that the movant has satisfied the Rule 56 burden should be exercised sparingly.") Professor Friedenthal and Mr. Gardner elaborate:

> Concerns of inappropriate judicial activism in denying summary judgment may be alleviated by recognition of the actual practice of federal courts that have allowed denials of technically appropriate motions. . . . [I]t appears that only in a handful of cases have trial judges actually denied summary judgment when it was otherwise appropriate. It is doubtful that specifically providing for judicial discretion would substantially increase the number of denials. Fears that judges will refuse summary judgment in deserving cases are ameliorated by the structural incentives against denying such a motion unless good reason exists. Judges have an increasingly large docket to manage. By denying summary judgment in a particular case, a judge would be forced to oversee a case that she could have otherwise thrown out, thereby contributing to her overburdened docket. Thus, a judge would be unlikely to deny an otherwise appropriate summary judgment motion unless she has a significant reason for doing so.

Friedenthal & Gardner, *supra* note ___, at 119-20. Of course, if the discretion to deny a proper motion for summary judgment is to be exercised only rarely, some might reasonably ask whether a discretionary standard is worth the bother.

conferred. And as one prominent scholar has cautioned, "[d]iscretion can be quite dangerous . . . when it is unbounded."[82]

The most obvious concern with a discretionary standard for summary judgment is that it "increases the opportunity for judges to base their decisions on personal biases or other impermissible reasons rather than on the merits of the motion."[83] Even exercises of discretion in the name of case management could "diminish certainty and increase litigation costs."[84] Moreover, "even if such management resulted in the promotion of substantive justice, it [might] do so in a haphazard way, because the ultimate outcome would depend upon the individual judge's skill as a case manager rather than the judicial application of substantive rules of law."[85]

The absence of any express guidance as to how to apply restyled Rule 56 also leads to another problem. Because a district court now has the discretion to deny a proper motion for summary judgment, an appellate court presumably may overturn such a decision only for an abuse of discretion.[86] But just as the reasons why a proper motion for summary judgment properly may be denied are difficult to discern, so are the bases for determining whether those reasons are legally insufficient. As a result, appellate

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[82] David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1995 (1989). *See also* Bone, *supra* note 80, at 1964 (arguing that "rulemakers should be much more skeptical of delegating discretion to trial judges and should seriously consider adopting rules that limit or channel discretion more aggressively"). Indeed, even proponents of discretionary summary judgment have called for something a little less open-ended. *See, e.g.*, Friedenthal & Gardner, *supra* note 31, at 95 ("[T]his discretion should not be unbridled; judges should be given guidelines for deciding when a denial of summary judgment is appropriate.").

[83] Friedenthal & Gardner, *supra* note 31, at 117.

[84] *Id.* (footnotes omitted).

[85] *Id.* at 118. It should be mentioned that the foregoing does not reflect the views of the authors of that article, but rather of their critics. *See id.* at 117-18.

[86] By contrast, it was well established that the standard of review of a decision rendered pursuant to former Rule 56 was de novo. (Incidentally, if this is so, then how can former Rule 56 be construed as discretionary?)

review of district court rulings on motions for summary judgment has been made much more complicated, and the results in such cases have been made much harder to predict.[87]

But the most significant problem with discretionary summary judgment might be its effect on the modern federal civil procedure scheme. For the discretion at issue here does not relate to some non-dispositive matter, such as the discretion to fix a trial date[88] or to alter the limits on the number of depositions that may be taken.[89] Rather, this discretion relates to a *dispositive* matter—specifically, the ability to deny a judgment, on the merits, in favor of a party that is otherwise "entitled"[90] to it. This alone is remarkable.[91] But equally remarkable is the effect this approach to summary judgment might have on the balance that signifies modern federal court practice. As explained by the Court in *Celotex*:

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[87] As Professor Friedenthal and Mr. Gardner explain:

> If such a denial were to fall within one of the rare exceptions to the final judgment requirement, the nature of the review by the court of appeals would itself depend on the question of whether the denial is within the trial court's discretion. If the denial were within the trial court's discretion, then, in a case in which the denial was based on the trial court's discretion, the standard of review would be whether the trial court has abused that discretion. . . . Moreover, if discretion can play a role in the denial of a motion for summary judgment, that fact could impact an appeal even when a trial court has granted the motion. In an extremely rare case, the appellate court could conceivably hold that a trial court abused its discretion by not denying the motion.

Friedenthal & Gardner, *supra* note __, at 93. It also might be observed that there is no rule requiring the district courts to justify the denial of a motion for summary judgment. *See* FED. R. CIV. P. 52(a)(3) ("The court is not required to state findings or conclusions when ruling on a motion under Rule . . . 56 . . . ."). Though some have suggested that the Rules should require that the district courts provide some guidance in this regard (*see infra* notes 141-144 and accompanying text), no such amendment has yet been forthcoming.

[88] *See* FED. R. CIV. P. 16(b)(3)(v).

[89] *See* FED. R. CIV. P. 26(b)(2)(A). This is not to say that a court's exercise of discretion with respect to such matters cannot have a profound impact on the course of the litigation; sometimes it can. But it is a difference in kind, if not also in degree, from the discretion to deny a proper motion for summary judgment.

[90] FED. R. CIV. P. 56(c).

[91] *Cf.* FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court *must* dismiss the action.") (emphasis supplied); FED. R. CIV. P. 55(b)(1) ("If the plaintiff's claim is for a sum certain . . . the clerk . . . *must* enter judgment for that amount and costs against a defendant who has been defaulted for not appearing . . . .") (emphasis supplied). Even a judgment as a matter of law, a procedure that is thought to include some discretion, ultimately must be granted if appropriate. *See infra* notes ___ and accompanying text. Admittedly, an action dismissed for lack of subject-matter jurisdiction often may be recommenced in state court, and parties may be granted relief from

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.[92]

Thus, "[a]llowing judges discretion to deny summary judgment when it would technically be appropriate does not come without a price."[93] Most obviously, "[p]arties will be required to continue with a case that otherwise would have ended or have been limited in scope."[94] Not only will this add to the parties' costs, but it will "burden the courts' already overcrowded dockets."[95] And at the pleading stage, discretionary summary

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any judgment under certain circumstances, *see* FED. R. CIV. P. 60(b). But these facts do not (and should not) have any bearing on the decision whether to dispose of the action in the first instance.

92 *Celotex*, 477 U.S. at 327 (citations omitted). *See also* Friedenthal & Gardner, *supra* note 31, at 116-17 (observing that "the very existence of summary judgment may serve to lessen the filing of coercive and harassing litigation").

93 Friedenthal & Gardner, *supra* note 31, at 120.

94 *Id.* This also supplies the response to those who might argue that the denial of a proper motion for summary judgment results in little harm to the moving party. For one thing, even if the denial was wrongful, the moving party is unlikely to be fully vindicated. As Professor Friedenthal and Mr. Gardner explain:

> [A] denial of summary judgment is virtually unappealable. Such a decision is interlocutory in nature and, in the federal system, with rare exceptions, only a final judgment can be appealed. Once a case has proceeded to trial and final decision, the preliminary ruling denying summary judgment is unlikely to be given serious consideration on appeal.

Friedenthal & Gardner, *supra* note 31, at 92-93 (footnotes omitted). Thus, the moving party likely will be able to appeal the denial of the motion only following trial, and then only if that party loses at trial. Even if the moving party prevails at trial—which it almost certainly will—it will have been forced to incur a considerable and possibly needless expense.

95 *Id.* at 120. Conceivably, some parties with meritorious summary judgment motions might nonetheless decide to forego this procedure entirely—for if the court may deny the motion in any event, why bother?

judgment might well place additional pressure on the district courts to scrutinize the parties' claims *ab initio*—precisely the sort of practice the Rules have sought to avoid.[96]

In the face of these concerns, some might wonder how discretionary summary judgment can be justified. Perhaps the most prominent proponents of this view are, again, the authors of the treatise cited by the Advisory Committee.[97] What do they have to say?

The treatise authors begin their defense of discretionary summary judgment by observing that Rule 56(c) "establishes the standard for granting summary judgment by providing that a court may enter judgment only when it appears that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'"[98] The authors explain—and on this point they surely are correct—that the "district court has no discretion to enlarge its power to grant summary judgment beyond the limits prescribed by the rule," meaning "[i]t may grant a Rule 56 motion only when the test set forth therein has been met and must deny the motion as long as a material issue remains for trial."[99]

"On the other hand," the authors continue,

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[96] Indeed, some have read the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), as a partial response to the district courts' collective failure to apply the summary judgment procedure as originally intended.

[97] *See* FED. R. CIV. P. 56 advisory committee's note (restyle) (citing 10A WRIGHT ET AL., *supra* note 68).

[98] 10A WRIGHT ET AL., *supra* note 68, at 517.

[99] *Id.* at 517-18.

> Accordingly, summary judgment cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits. The same is true even when the court is convinced that if the case went to trial and a verdict was returned for the nonmoving party, it would have to set aside the verdict as against the weight of the evidence and grant a new trial. Nor does a court have discretion to resolve disputed factual issues on a summary-judgment motion. The duty of the court under Rule 56 is to determine whether a genuine issue remains for trial; once it determines that a triable issue exists the inquiry is at an end and summary judgment must be denied.

Id. at 518-24 (footnotes omitted).

> in most situations in which the moving party seems to have discharged his burden of demonstrating that no genuine issue of fact exists, the court has discretion to deny a Rule 56 motion. This is appropriate since even though the summary-judgment standard appears to have been met, the court should have the freedom to allow the case to continue when it has any doubt as to the wisdom of terminating the action prior to a full trial.[100]

So when, precisely, would such an exercise of discretion be appropriate? According to the treatise authors,

> federal courts [may] exercise their discretion to deny summary judgment when the nonmoving party has failed to offer any counter-affidavits or to provide any explanation under Rule 56(f) as to why opposing affidavits are unavailable. Although in theory summary judgment normally should be granted in these situations, if the opposing party is suffering from some handicap that prevents him from satisfying Rule 56(e) or Rule 56(f), such as if the opposing party is a prisoner unrepresented by counsel, a court should be hesitant to grant summary judgment.[101]

Certainly, it would not be unreasonable for a district court to make some minimal inquiry as to why the nonmoving party failed to present anything in response to a proper motion for summary judgment. But why should a failure to respond be a ground for denying the motion? Even if the court is somehow able to determine that the nonmoving party is suffering from some "handicap," what sort of "handicap" would be sufficient? And how is a court to know whether this is the reason for the failure to respond, as opposed to there simply being no factual basis for opposing the motion? Is a court to presume that contrary evidence nonetheless exists? And if so, that the non-responsive party will be able to properly present it at trial? The answers to these and related imponderables should compel one to conclude that there is nothing unjust about granting a motion for summary judgment when the opposing party, after having received reasonable notice and a reasonable opportunity to respond, does nothing. If necessary

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[100] *Id.* at 525-26.
[101] *Id.* at 527 (footnotes omitted).

and appropriate, relief from such a judgment may be sought.[102] But prior to the entry of a judgment, the court must presume that the lack of any response whatsoever is due to the lack of any legitimate basis for opposing the motion, and not due to some other reason.

The treatise authors continue:

> Another factor that may motivate the court to refrain from granting summary judgment even though it theoretically could do so is if the noncompliance with the rule merely is technical and the opposing party appears to be proceeding in good faith. For example, when the evidence offered in opposition to the motion is defective in form but is sufficient to apprise the court that there is important and relevant information that could be proffered to defeat the motion, summary judgment ought not to be entered. The judge should exercise discretion and grant the adversary a continuance to remedy the defect. Similarly, when the party opposing the motion has complied with Rule 56(f), the court has discretion to decide whether the reasons offered for the failure to come forward with countering evidence are sufficient to preclude summary judgment.[103]

Undoubtedly, when the requirements of Rule 56(f) have been met, the opposing party may—perhaps even should—be given more time to present its evidence. (Indeed, for the poorly represented, Rule 56(f) is probably a vastly under-utilized procedure.) Moreover, at least as to some litigants, a district court probably should provide some guidance as to how to meet "technical" requirements, such as how to present evidence in a proper form.[104] But such procedures should not result in a free pass to trial. There must be a day of reckoning, and if, after a reasonable amount of time, the opposing party still is unable to present contrary evidence in proper form, a proper motion for summary

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[102] *See* FED. R. CIV. P. 60(b).

[103] 10A WRIGHT ET AL., *supra* note 68, at 528-29 (footnotes omitted).

[104] *Cf.* Erickson v. Pardus, 551 U.S. ___, ___ (2007) ("A document filed *pro se* is 'to be liberally construed,' and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'") (citations omitted) (quoting Estelle v. Gamble, 428 U.S. 97, 106 (1976)).

judgment must be granted. There is, again, no reason for believing that the result at trial will be better.[105]

The treatise authors next argue:

> Judicial discretion also comes into play in evaluating the material that has been made available to the court to resolve the legal issues presented by the action. . . . [A]lthough the general rule is that difficult legal issues do not preclude summary judgment, it also has been held that difficult or complicated legal issues should not be adjudicated upon an inadequate record. As a result, an appraisal of the legal issues may lead a court to exercise its discretion and deny summary judgment in order to obtain the fuller factual foundation afforded by a plenary trial. This is especially true if disposing of the summary-judgment motion would require as much time as a full trial on the merits; in that event Rule 56 no longer serves the purpose of saving the court's and litigants' time.[106]

It is difficult to dispute the notion that "difficult or complicated legal issues"—or any legal issues, for that matter—"should not be adjudicated upon an inadequate

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[105] Prior to the restyle project, some refuge from "technical" requirements might have been sought in Rule 1, which used to provide that the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Former FED. R. CIV. P. 1. Regrettably, "shall" was changed to "should" here also, *see* restyled FED. R. CIV. P. 1, apparently relieving the district courts of any firm obligation along these lines. A second problem with any invocation of Rule 1 relates to its applicability. For now that summary judgment is discretionary, what need is there for an escape device? Yet another problem with the application of Rule 1 is that the supposed "justness" of a denial of a proper motion for summary judgment must be balanced against the effect of such a decision on the speed and cost of the eventual determination of the action. *See supra* note 94 and accompanying text.

[106] 10A WRIGHT ET AL., *supra* note 68, at 529-30 (footnotes omitted). *Accord* Friedenthal & Gardner, *supra* note 31, at 121 (arguing that discretionary summary judgment would enable judges to "forego investing scarce time and resources into cases that are particularly complicated or complex, or intertwined with issues not appropriate for summary judgment"). Professor Friedenthal and Mr. Gardner go so far as to propose the following test:

> In deciding whether to deny summary judgment, judges should conduct a balancing test, taking into account the interests of both the plaintiff and the defendant relative to the efficiency concerns of the federal judiciary. If the burden on the court in deciding summary judgment would be substantially greater than the adverse effect of a denial on the movant, then a denial may be appropriate, without determining the existence of a factual dispute. In evaluating the costs and benefits of denying summary judgment, courts should consider such factors as whether the claim involves motive, state of mind, or credibility, whether the matter is particularly complex, and whether issues ripe for summary judgment are intertwined with issues not proper for summary adjudication. Ultimately, the judge should be given the discretion to deny summary judgment, when in her judgment, the matter is better suited to adjudication by trial rather than through summary procedures.

Id. at 95.

record."[107] The sad reality, though, is that the record—even at trial—is never perfect, and that cases are probably decided on "inadequate" records daily.[108] But this is all beside the point. At summary judgment, either the motion is "properly made and supported"[109] or it is not, and if it is, that motion presumably must be granted unless the opposing party can properly "set out specific facts showing a genuine issue for trial."[110] Nothing in Rule 56 expressly permits a court to await a "fuller factual foundation,"[111] nor should it.[112]

Regarding what might be described as a cost-benefit argument—i.e., the notion that a motion for summary judgment may be denied whenever a court determines that deciding the motion would take more time than trying the case—this might make sense, if Rule 56 expressly so provided. It does not. The sad reality again is that many motions (summary judgment and otherwise) take more time to decide than they are "worth," and yet the Rules provide no express exception along this line. Even aside from the difficulty of comparing the "burden on the court" with the "adverse effect of a denial on the movant,"[113] it seems doubtful this is a route the federal courts ought to take. There must be better ways of dealing with motions (not to mention actions) that are not "worth" the

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[107] 10A WRIGHT ET AL., *supra* note 68, at 529. Indeed, this was essentially the holding of the Supreme Court in *Kennedy*. *See supra* notes 57-66 and accompanying text.

[108] At least this is true at the district court and court of appeals levels. To the extent the Supreme Court's jurisdiction is discretionary, it might have the luxury of deciding only cases having "adequate" records. Again, that seems to be what the Court was saying in *Kennedy*. But the lower federal courts (and particularly the district courts) have little choice but to "decide a litigated issue that is otherwise within their jurisdiction" (Herbert Weschsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965)), no matter how poorly that issue was presented.

[109] FED. R. CIV. P. 56(e)(2).

[110] *Id.*

[111] 10A WRIGHT ET AL., *supra* note 68, at 530.

[112] As for the "intertwined issues" argument (*see supra* note 106), is this not an appropriate use of partial summary judgment? *See* FED. R. CIV. P. 56(d)(1) ("If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. . . . The facts so specified must be treated as established in the action."). Alas, following the "restyling' of Rule 56(d), a district court only "should" perform this exercise (and even then, only if "practicable"), meaning partial summary judgments also might be harder to come by.

[113] Friedenthal & Gardner, *supra* note 31, at 95.

"cost."[114] Moreover, even if Rule 56 were to be construed as including such an exception, it would be difficult to implement. For how does a court know how long it will take to decide a motion for summary judgment until it actually decides it? Or how long it would take to try a case until it is tried? How much time is the court to devote to estimating these figures? How does the court know whether there will be a trial, even if the motion is denied? And even if it did take as long to decide a motion for summary judgment as it would to try the case—an extremely dubious proposition[115]—is there anything terribly wrong with that, at least so long as the motion is granted?

The treatise authors then argue:

> The timing of the summary-judgment motion also may influence the court to exercise its discretion under Rule 56 and refuse to grant summary judgment because it believes that further development of the case is needed in order to be able to reach its decision. One situation in which this may occur is with respect to a summary-judgment motion made prior to the close of the pleadings. Although the motion may be decided at this point, in some situations completion of the pleadings would serve to clarify the issues. Consequently, the court might conclude that the better course is to postpone consideration of the motion until further pleadings are served. In a related vein, even after the pleadings courts have denied summary judgment without prejudice to renewing the motion after discovery or at trial, a procedure that occasionally has led to a subsequent grant of the motion. Courts also have reserved their ruling on a motion for summary judgment until after the trial of a separate issue. Indeed, when the motion is pressed for the first time at trial, the court may ignore it and proceed with the trial.[116]

It is readily conceded that a court may deny a motion for summary judgment made at trial, though such a motion makes so little sense it barely warrants discussion.

[114] It might be observed that the federal judiciary is a remarkable resource in that a relatively modest filing fee enables parties to impose a potentially enormous burden on the system. Perhaps the parties should be required to bear a larger share of this cost.

[115] For one thing, it must be acknowledged that "[d]efendant's motions for summary judgment are far more common than plaintiffs' motions." Joe S. Cecil et al., *A Quarter Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 886 (2007). A defending party typically need prevail only as to a single element of a claim, thus obviating the need to hear the claiming party's entire case. Moreover, aside from oral argument, summary judgment motions typically are decided on a paper record, which tends to be much quicker to consider than a record produced through testimony.

For in this instance, the discretion to deny the motion would come not from Rule 56, but from other sources, as the denial would be based solely on the lateness of the motion.[117] Such a motion therefore would be denied summarily, prior to any consideration of the merits.[118]

Conversely, what sense does it make to deny a motion for summary judgment because it was made "too soon"? Is not this problem adequately addressed by Rule 56(f)? In other words, is not a brief postponement, rather than outright denial (or postponement until trial), the more appropriate course?[119] Moreover, why is it so important to await the responsive pleading, which typically are regarded as irrelevant in this context?[120] And would not a denial in this context potentially obviate what is often regarded in practice as a salutary and cost-saving procedure?[121]

Finally, the treatise authors argue that

> the court is authorized by the last sentence of Rule 56(c) to make interlocutory summary adjudications and by Rule 56(d) to enter a partial summary judgment. By using these alternatives to a total grant or denial of summary

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[116] 10A WRIGHT ET AL., *supra* note 68, at 530-31 (footnotes omitted).

[117] *See* FED. R. CIV. P. 16(c)(2)(E) (empowering the district courts to issue pretrial orders regarding the "timing of summary adjudication under Rule 56").

[118] Indeed, it seems unlikely that such a motion (as well as any renewed motion) would even be made, as most competent district courts, pursuant to Rule 16, utilize some form of pretrial scheduling order requiring that motions for summary judgment be made much sooner. Of course, if for some reason the court *were* to consider the motion and decide that it is meritorious, what sense would it make to deny it as untimely?

[119] *See supra* note 105 and accompanying text.

[120] *See* FED. R. CIV. P. 56(e)(2) (providing that a party opposing a motion for summary judgment "may not rely merely on allegations or denials in its own pleading"). Presumably, this would not be the case in the unlikely event that the defending party *admits* all or almost all of the allegations in the claiming party's pleading. But the lack of a responsive pleading would not prevent the defending party from making the same admissions at summary judgment (and if that is the defending party's intent, the action is likely to settle in any event).

[121] Summary judgment is frequently sought early in the proceedings by one or both parties in actions involving predominantly legal, as opposed to factual, disputes precisely so that they may achieve a swift resolution at relatively low cost. For example, the Supreme Court repeatedly has approved of the use of this procedure in the area of qualified immunity. *See* Saucier v. Katz, 533 U.S. 194, 200 (2001) ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. . . . [W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.").

> judgment the court is able to shape the litigation and make certain it progresses in an orderly fashion. Resort to these powers largely is a discretionary matter. Courts sometimes have exercised their discretion to deny summary judgment on only a portion of the case when they feel that a more expeditious approach would be to adjudicate the entire case at one time.[122]

One must agree that Rule 56(d) indeed provides for partial summary judgment where appropriate. But the rest of this paragraph does not even make sense. If a grant of full summary judgment is justified, how does a grant of partial summary judgment render the progression of the litigation more "orderly"? And why is the delayed adjudication of the entire action "at one time" more "expeditious" than the adjudication of only that portion of the action that remains in dispute? The answers to these questions are defying.

Though not cited by the Advisory Committee, additional arguments in favor of a discretionary approach to summary judgment are offered by Jack H. Friedenthal and Joshua E. Gardner in what appears to be the leading article on this subject.[123] Friedenthal and Gardner begin by observing: "In considering whether judges should have discretion to deny an otherwise appropriate motion for summary judgment, consideration must be given to the policies and purposes served by summary judgment, concerns of judicial activism, and costs and benefits to plaintiffs, defendants, and the judiciary."[124] Though Friedenthal and Gardner argue that the benefits of discretionary summary judgment outweigh any costs associated with this approach, let us look at their arguments more closely.

Friedenthal and Gardner begin by arguing that "aggressive use of Rule 56 may unduly burden both the court and the parties to the case. Preparing, arguing, and ruling

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[122] 10A WRIGHT ET AL., *supra* note 68, at 531-32 (footnotes omitted).

[123] *See* Friedenthal & Gardner, *supra* note 31. Indeed, it might be the only such article. *See id.* at 91 (observing that "[n]either commentators nor courts have explained th[is] issue in any depth") (footnote omitted).

upon summary judgment motions increase litigation costs and consume judicial resources."[125] In other words, "'the incorrect use of the summary judgment procedure obviously increases delay and expense in the final disposition of litigation and thus aggravates the very problem the procedure was devised to solve.'"[126]

Several responses. First, to the extent that an "aggressive" use of Rule 56 may be deemed "incorrect," it seems that there are already procedures (not to mention monetary disincentives) in place to deal with that problem.[127] Second, as for the notion that an "incorrect" use of summary judgment causes delay, this seems highly unlikely in a world where trial dates are assigned irrespective of what might precede them. The competent district court will schedule the deadline for motions for summary judgment far enough in advance of trial so as to avoid any delays of this nature.[128] And third (and most importantly), how do concerns regarding the "aggressive" or "incorrect" use of Rule 56 justify the denial of a proper motion for summary judgment? Indeed, how could a proper motion for summary judgment be deemed "incorrect"?

Friedenthal and Gardner also argue that modern courts "have recognized an additional, more controversial, use for summary judgment as a tool to 'ease docket pressures by enhancing the case management power of the federal courts.'"[129] The

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124 *Id.* at 115.

125 *Id.* at 117 (footnote omitted).

126 *Id.* at 117 (quoting John A. Bauman, *A Rationale of Summary Judgment*, 33 IND. L.J. 467, 467 (1958)).

127 *See, e.g.*, Fed. R. Civ. P. 11. *See also* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 114-18 (1990) (discussing other possible means of discouraging the unwarranted use of this procedure, including fee shifting).

128 *See supra* note 117-118 and accompanying text.

129 Friedenthal & Gardner, *supra* note 31, at 117 (quoting Robert J. Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 FLA. ST. U. L. REV. 689, 704 (1996)). *See also id.* at 104 ("In an atmosphere in which summary judgment is favored, it appears increasingly important to allow courts discretion to deny motions that they believe are inappropriate under all of the circumstances, lest meritorious cases be "automatically" eliminated when they should have gone to trial.").

meaning of this argument is not entirely clear; perhaps the idea is that district courts today are more likely to encourage the use of summary judgment, or are more inclined to grant summary judgment sua sponte. If that is the point, then these also seem to be means of promoting litigation efficiency, if not also fairness. On the other hand, to the extent that these authors are suggesting that district courts, simply to "ease docket pressures," are now granting motions for summary judgment that fail to meet the requirements of Rule 56, this would be an argument for greater appellate court scrutiny of summary judgment rulings, not discretionary summary judgment.

Friedenthal and Gardner further argue that "fears of an increase in judicial activism seem overstated."[130]

> [A]llowing the trial court discretion to deny summary judgment constitutes discretion as creativity, a form of institutionally recognized discretion justifying appellate court deference. Such discretion is permissible . . . because it is treated as an exercise of equitable discretion in the individual case, and therefore does not threaten the preexisting rule structure. This notion of equitable discretion is consistent with the intentions of the committee that designed the Federal Rules in 1938, and [sic] consciously chose to leave much to the intelligence, wisdom, and professionalism of those who would apply the Rules.[131]

"Moreover," Friedenthal and Gardner continue,

> allowing judges discretion in denying summary judgment seems no more threatening than the discretion judges already exercise in denying an otherwise proper motion for judgment as a matter of law . . . [A]s the Court in *Anderson* [*v. Liberty Lobby, Inc.*] made clear, the standard for directed verdict mirrors that for summary judgment. Yet if directed verdict and summary judgment share a common standard, it makes little sense to allow judges discretion in denying motions in the former category and not the latter.[132]

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130 *Id.* at 118.

131 *Id.* (footnotes and quotation marks omitted).

132 *Id.* at 118-19 (footnote omitted). Friedenthal and Gardner further analogize motions for summary judgment to motions for a new trial and for a temporary restraining order (*see id.* at 118-19), as well as to criminal sentencings (*see id.* at 115-16 n.153), though those examples seem far less apposite.

First of all, merely stating that fears of an increase in judicial activism seem overstated does not mean that discretionary summary judgment cannot result in judicial activism or that such an increase might not in fact occur. Moreover, though the Advisory Committee that drafted the original Federal Rules of Civil Procedure might have incorporated some degree of "equitable discretion," it should be recognized that same committee consciously omitted such discretion in its version of Rule 56.[133]

As for the second point, though it does appear that a district court has some measure of discretion with respect to the resolution of a motion for judgment as a matter of law, the discretion inherent in Rule 50[134] is limited to the *timing* of the granting of such a motion. A proper motion for judgment as a matter of law made pre-verdict properly *may* be granted at that juncture, or it *may* be denied, in which case it is deemed preserved.[135] But if it is denied, and if the jury returns a verdict in favor of the nonmoving party, then a *renewed* motion for judgment as a matter of law *must* be

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[133] *See* ___ F.R.D. ___.

[134] Rule 50(a)(1), the rule governing initial motions for judgment as a matter of law, provides:

> If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
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> (A) resolve the issue against the party; and
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> (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

FED. R. CIV. P. 50(a)(1). Rule 50(b), which governs renewed motions for judgments as a matter of law, further provides:

> If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), . . . the movant may file a renewed motion for judgment as a matter of law (following trial) and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:
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> (1) allow judgment on the verdict, if the jury returned a verdict;
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> (2) order a new trial; or
>
> (3) direct the entry of judgment as a matter of law.

FED. R. CIV. P. 50(b).

[135] *See* FED. R. CIV. P. 50(a)(1), (b). As the Supreme Court explained:

> [T]he District Court's denial of respondent's preverdict motion cannot form the basis of respondent's appeal, because the denial of that motion was not error. It was merely an exercise of

granted.[136] Generally speaking, there is no exercise of discretion at this later stage in the proceedings.[137] As explained by the Supreme Court:

> The weight of the evidence . . . must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.[138]

Thus, summary judgment (at least formerly) and judgment as a matter of law differ operationally only in that a final ruling on the latter motion may be delayed slightly.[139] But in both situations, a proper motion ultimately must prevail.[140]

> the District Court's discretion, in accordance with the text of the Rule and the accepted practice of permitting the jury to make an initial judgment about the sufficiency of the evidence.

Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 405 (2006).

[136] *See, e.g.*, 9 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 50.06[5][b], at 50-37 (year) ("[A] court *must* grant judgment as a matter of law if there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmovant under controlling law.") (emphasis supplied and citations omitted). Admittedly, this might not be true where the motion is made prior to the close of all the evidence and the nonmoving party's case somehow improves following the admission of additional evidence. But this is a relatively rare occurrence.

[137] Consider also that the standard of review with respect to the denial of a motion for judgment as a matter of law is de novo, *see* 9 MOORE, *supra* note 136, § 50.92[1], at 50-123—meaning (again) that this issue is considered a question of law, and not a matter left to the discretion of the district court.

[138] Brady v. Southern Ry. Co., 320 U.S. 476, 479-80 (1943) (citations omitted). Incidentally, it does not appear that the Court's use of the word "should" in this passage was intended to confer any degree of discretion in this matter.

[139] Actually, it is somewhat unclear why there should be any discretion to deny a proper *pre-verdict* motion for judgment as a matter of law, despite the fact that such a denial is only temporary. Indeed, there are indications that this was not always the recognized practice. *See, e.g.*, Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 447 (1871) ("[I]t is settled law that it is error to submit a question to a jury in a case where there is no evidence upon the subject."); Greenleaf v. Birth, 34 U.S. (9 Pet.) 292, 299 (1835) ("Where there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested . . . ."). As explained by the *Improvement Co.* Court:

> When a prayer for instruction is presented to the court and there is no evidence in the case to support such a theory it ought always to be denied, and if it is given, under such circumstances, it is error; for the tendency may be and often is to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue. Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. . . . [I]n every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

81 U.S. at 448.

The same treatise that endorses discretionary summary judgment justifies the current practice with respect to judgments as a matter of law as follows:

> The court has power under the rule to grant judgment as a matter of law at the close of the plaintiff's case. Nevertheless it has been said to be the better and safer practice to defer a ruling upon the motion until both sides have finally rested. That sentiment has been echoed in a number of cases. The exercise of restraint may prevent the entry of an erroneous judgment.
>
> Even at the close of all the evidence, it may be desirable to refrain from granting a motion for judgment as a matter of law, despite the fact that it would be possible for the district court to do so. If judgment as a matter of law is granted and the appellate court holds that the evidence in fact was sufficient to go to the jury, an entire new trial must be had. If, on the other hand, the trial judge submits the case to the jury, even though he or she thinks the evidence insufficient, final determination of the case is expedited greatly. If the jury agrees with the trial court's appraisal of the evidence, as a matter of law, the case is at an end. If the jury brings in a different verdict, the trial court can grant a renewed motion for judgment as a matter of law. Then, if the appellate court holds that the trial court was in error in its appraisal of the evidence, it can reverse and order judgment on the verdict of the jury, without any need for a new trial.

9B ARTHUR R. MILLER & CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2533, at 515-17 (3d ed. 2008) (footnotes and quotation marks omitted). The Supreme Court seems to be in accord.

> [W]hile a district court is permitted to enter judgment as a matter of law when it concludes that the evidence is legally insufficient, it is not required to do so. To the contrary, the district courts are, if anything, encouraged to submit the case to the jury, rather than granting such motions.

Unitherm Food Systems, 546 U.S. at 405.

The pragmatic appeal of this approach is difficulty to deny. But there are problems as well. As Professor Cooper himself once observed:

> Direction before the jury has a chance to return a verdict, however, has advantages which ensure its continued employment. The more obvious advantages lie in the direction of "efficiency"—the directed verdict obviates the need for argument, instructions, and what may be a lengthy jury deliberation. Some cases may call so clearly for a directed verdict that these advantages easily outweigh the potential advantages of judgment notwithstanding the verdict . . . . An advantage more difficult to evaluate is that direction before the jury has had an opportunity to deliberate changes the nature of the confrontation between judge and jury. Although the directed verdict is a clear exercise of a control which might have been avoided by awaiting rendition of the verdict, there is an offsetting uncertainty whether the control has functioned so as to do anything more than expedite a result which any jury would inevitably reach anyway. Judgments notwithstanding the verdict, on the other hand, place the fact of control in stark relief—the jury's actual verdict has been superseded by an exercise of judicial power.

Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 903 n.1 (1971). In other words, a decision on a motion for judgment as a matter of law 1) is a matter on which the district courts are rarely wrong, 2) has the potential for saving considerable time and money, and 3) avoids an awkward "reversal" of an erroneous jury verdict. Whether the benefits of deferring such a decision outweigh these costs is at least debatable.

[140] Undoubtedly, an "exception" exists in those situations where the inability to prove one's case was caused by the erroneous preclusion of relevant evidence, in which case a new trial presumably would be the appropriate remedy. Moreover, there is some precedent (dubious as it might be) for the notion that a plaintiff lacking sufficient proof might be able to obtain relief pursuant to Rule 41(a), and be granted a voluntary dismissal, even post-trial. *See* Neely v. Martin K. Eby Constr. Co., Inc., 386 U.S. 317, 328 (1967) ("A plaintiff whose jury verdict is set aside by the trial court on defendant's motion for judgment *n. o. v.* may ask the trial judge to grant a voluntary nonsuit to give plaintiff another chance to fill a gap in his proof."). But neither of these possible, alternative forms of relief detracts from the general rule. *Cf.* Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940) ("Each motion, as the rule recognizes, has its own office.").

Friedenthal and Gardner conclude by arguing that "the costs associated with discretionary denials of summary judgment can be outweighed by the benefits to the administration of justice."[141] In particular, Friedenthal and Gardner would require that district courts "provide a written explanation for their denials of technically appropriate motions for summary judgment."[142] Though "[t]his requirement would clearly contribute to the workloads of the already overburdened judiciary," "the 'cost' of a written decision would ultimately result in a 'benefit' to litigants in terms of guidance on their case and in a 'benefit' to the judiciary itself in terms of legitimacy."[143]

Regrettably for Friedenthal and Gardner, the Rules do not require an explanation for a discretionary denial of summary judgment.[144] But even if they did, it is not at all clear that the benefits of such a rule would outweigh the costs. It is also unclear that such a course would add to the legitimacy of the judiciary. Consider, for example, how an order of this nature might read:

> The Court finds that there is no genuine issue as to any material fact, and that those facts, as well as the relevant law, favor the moving party. Nonetheless, because [insert reason], the Court concludes that the moving party's motion for summary judgment should and will be denied, meaning trial will proceed as scheduled. Of course, based on the record as it now stands, the Court has no doubt that the moving party will prevail at that trial. Indeed, if the evidence proffered at trial were to mirror that presented in conjunction with this motion, the moving party would be entitled to a judgment as a matter of law.

Such an order would provide some guidance to the parties in the action. Whether it would add to the legitimacy of the federal courts is another matter.

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141 Friedenthal & Gardner, *supra* note 31, at 120.
142 *Id.* at 122.
143 *Id.*

CONCLUSION

Discretionary summary judgment is but the latest example of the growing use of discretion in the Federal Rules of Civil Procedure,[145] and the battle over the proper role of discretion in the Rules is but part of the larger battle over the proper role of discretion in law generally.[146] Though discretion might have its virtues, it also must be recognized that discretion "often concentrates unbridled power in few hands, fails to create clear or predictable guidelines, and permits disparate treatment of like cases."[147] As one legal scholar explains:

> The most prominent drawbacks of discretion hardly need elaboration. Discretion makes it easier than rules usually do for decision-makers to consult illegitimate considerations, and it does nothing to keep them from making "mistakes". Less prominently, discretion may have untoward psychological effects on decision-makers. Discretion is a kind of power, and power corrupts. Discretionary power seems conducive to an arrogance and carelessness in dealing with other people's lives that judges already have too many incentives to succumb to.[148]

And regardless of the appropriateness of discretion as to minor procedural matters, its use is inappropriate when it comes to summary judgment.

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[144] *See supra* note ___ (discussing Rule 52(a)(3)).

[145] *See* Thomas D. Rowe, Jr., *Authorized Managerialism under the Federal Rules—and the Extent of Convergence with Civil Law Judging*, 36 SW. U. L. REV. 191, 193 (2007) ("If one theme can fairly be said to dominate in the rounds of Civil Rule amendments adopted since [1982], that theme is the authorization of both numerous specific measures that district courts can use and the wide discretion they have in pretrial litigation management."). *See also* Bone, *supra* note 80, at 1962 ("Federal district judges exercise extremely broad and relatively unchecked discretion over many of the details of litigation.").

[146] *See* ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 54 (rev. ed. 1954) ("Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion, of administration of justice by law and administration of justice by the more or less trained intuition of experienced magistrates."); Bone, *supra* note 80, at 1966 ("Determining the optimal degree of discretion is an issue that pervades all law and legal regulation . . . .").

[147] Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 300 (1991)). *See also* Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1571 (2003) ("The current concern about procedural discretion is whether unconstrained discretion about procedure could subvert substantive justice.").

[148] Carl E. Schneider, *Discretion and Rules : A Lawyer's View*, *in* THE USES OF DISCRETION 68 (Keith Hawkins, ed.) (1992). *See also* Bone, *supra* note 80, at 1963 (discussing risk of abuse and competency concerns).

Summary judgment, where proper—i.e., where the material facts are essentially undisputed and the law favors the moving party—must be granted. Just as with trial itself, there can be no "discretion" beyond the judgment always inherent in the ascertainment of the relevant law and the application of law to fact. Stripped of its veneer, it is the stakes that drives the discretionary summary judgment movement. But stakes alone cannot supply the need for this doctrine. If the district courts cannot be trusted to apply this procedure properly, perhaps its elimination would be the better course.[149] But so long as summary judgment is retained, it must be applied as designed.

[149] At least one legal scholar has advocated precisely that. *See* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. ___ (2007).

APPENDIX A – FORMER FEDERAL RULE OF CIVIL PROCEDURE 56[**]

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and the trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

[**] The version of Rule 56 reproduced here is the version that was in effect immediately prior to the effective date of the restyle amendments, December 1, 2007. *See* Supreme Court Order dated April 30, 2007. To the extent current Rule 56 is deemed inapplicable, this version presumably would control. *See infra* note *** (describing the effective date of the restyled rules).

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX B – CURRENT FEDERAL RULE OF CIVIL PROCEDURE 56[***]

Rule 56. Summary Judgment.

(a) **By a Claiming Party.** A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

(1) 20 days have passed from commencement of the action; or

(2) the opposing party serves a motion for summary judgment.

(b) **By a Defending Party.** A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) **Serving the Motion; Proceedings.** The motion must be served at least 10 days before the last day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) **Case Not Fully Adjudicated on the Motion.**

(1) ***Establishing Facts.*** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts — including items of damages or other relief — are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) ***Establishing Liability.*** An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

[***] This version of Rule 56 is "shall take effect on December 1, 2007, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending." (One cannot help but notice the irony of the Court's repeated use of the word "shall" in its order approving the restyled rules. Surely the Court understood the meaning of this word, did it not? And is not the Court using this word in its mandatory sense?)

(e) Affidavits; Further Testimony.

(1) ***In General.*** A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) ***Opposing Party's Obligation to Respond.*** When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable. If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

(g) Affidavit Submitted in Bad Faith. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.