Book Review

Jeffrey B. Morris, *Leadership on the Federal Bench: The Craft and Activism of Jack Weinstein*, New York: Oxford University Press, 2011, pp. 398, $85 (cloth).

Reviewed by Elizabeth M. Schneider

Jack Weinstein is one of the most important and influential federal district judges in the United States. He is widely respected for his extraordinary intellect and scholarly productivity, as well as his innovative approach to judging. Known for his work on important cases, including such major mass tort actions as Agent Orange, DES, Zyprexa and asbestos cases, he has shown incredible creativity in achieving resolution. He has been called a "judge for the situation" and a "creator of temporary administrative agencies,"[1] for taking on social problems and "situations," not just deciding individual cases. In this book, legal historian Jeffrey Morris offers a thorough and detailed analysis of Judge Weinstein's work as a district judge over the past 47 years.

Morris has written histories of numerous courts and other legal institutions[2] and was given unique access to Judge Weinstein's papers and opinions by the judge himself (ix-xi).[3] For teachers and scholars of all the fields to which Weinstein has made important contributions–evidence, civil procedure and

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1. Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 Colum. L. Rev. 2010 (1997).

2. *See, e.g.*, Jeffrey Brandon Morris, Establishing Justice in Middle America: A History of the United States Court of Appeals for the Eighth Circuit (2007); Jeffrey B. Morris, Federal Justice in the Second Circuit: A History of the United States Courts in New York, Connecticut & Vermont, 1787 to 1987 (1987); Jeffrey B. Morris, To Administer Justice on Behalf of All the People: The United States District Court for the Eastern District of New York 1965-1990 (1992). Morris also wrote a book on the history of Brooklyn Law School, and an essay on its former Dean, United States District Judge David Trager. Jeffrey Brandon Morris, Brooklyn Law School: The First Hundred Years (2001); Jeffrey Brandon Morris, Tribute, *David Trager: Jurist*, 77 Brooklyn L. Rev. 181 (2011). Morris, a professor at Touro Law School, was a Visiting Professor at Brooklyn Law School from 1988-1990.

3. Morris and Judge Weinstein created an oral history during twenty three interviews in the judge's home that covered every published and unpublished opinion from his first twenty five years on the bench, as well as his personal papers.

mass torts, just to name a few—and as an encyclopedic overview of the work of an extraordinary district judge, this book is a valuable read. Weinstein has been a "leader on the federal bench," and the dimensions of his leadership are fascinating (ix-xi). He is brilliant, incredibly productive and puts a "human face on the law," (62)[4] as both an innovative judge and prolific scholar.

The book aspires to focus on Weinstein and also to provide a larger picture of the federal bench. This is not surprising given Morris' prior work on courts and legal institutions.[5] The book begins with a chapter that puts Weinstein in the context of the job of a federal district judge. It then chronicles Judge Weinstein's personal life in two chapters, the years before he was appointed to the bench, and the political and legal environment within which Weinstein judged from 1967 until the present. A fourth chapter describes what Morris calls the "characteristics" of Jack Weinstein's judging; the fifth, sixth and seventh chapters then move chronologically through Weinstein's first three decades on the bench; the eighth chapter focuses on his judicial decision-making on criminal sentencing; the ninth chapter looks at his work from 1997 to 2011; and the final two chapters focus on Weinstein's work in mass tort and class actions.

Given the breadth and depth of Judge Weinstein's innovative judicial decision-making, scholarship, intellectual interests, it is not surprising that the book was difficult to organize. Morris' organization of the book, interspersing a chronological history of Weinstein's career with more substantive analysis of Weinstein's judging in such areas as criminal sentencing and mass torts makes it a little hard to read. Undeniably, the book is a successful review of Weinstein's life and work, as a personal and professional biography in encyclopedic detail, providing scholars of the federal judiciary with a wealth of useful information, and much grist for the mill of further study on district court judging. However, Morris' efforts to provide a broader analysis of district court judging may have been unrealistic in terms of the compelling focus on Weinstein. But, of course, Weinstein is the giant, the "hero" of district court judging.[6] As another reviewer of this book, a federal judge who also sits in the Eastern District of New York, observed, "...the truth is one learns about as much about federal judges from a book about Jack Weinstein as can be learned about boxers from a book about Muhammad Ali."[7]

However, as I discuss below, changes in federal district practice over the years Weinstein has been on the bench, such as "the vanishing trial" and restricted access to federal court,[8] are not explored in detail. From my vantage

4. Quoting Judge Weinstein.

5. *See* sources cited *supra* note 2.

6. David Luban, *Heroic Judging In An Antiheroic Age*, 97 COLUM.L. REV. 2064 (1997).

7. John Gleeson, Book Review, N. Y. L. J., Jan. 4, 2012, at 6.

8. *See* Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?* 55 SMU L. REV. 1405, 1405-07 (2002) (expressing "concerns over trial numbers"and noting a "decline in trials" and an "attending decline in participation of lay citizens ... in our justice system"); *see also* Judith

point as a teacher and scholar of civil procedure, a course that closely studies federal district court judging, these are significant omissions.[9] In this review, I examine highlights of the book from this civil litigation perspective and briefly raise larger questions about trends in contemporary federal district court judging that could have strengthened Morris' analysis of the uniqueness of Weinstein's judicial approach.

Judge Weinstein's Life and Work

In *Leadership on the Federal Bench: The Craft and Activism of Jack Weinstein*, Jeffrey Morris takes a close look at Judge Weinstein's personal and intellectual qualities, and his decision-making. According to Morris, the book grew out of a conversation with Weinstein in 1993, when he contacted the author and "appeared to be seeking advice about putting his papers together for his "retirement." Morris suggested that they undertake an oral history together.[10] They met regularly over 17 years, producing an oral history transcript in which Weinstein spoke about his life and his work; those transcripts became the basis of this biography.[11] Although many law review articles have discussed Weinstein and his work,[12] notably a symposium in the Columbia Law Review in 1997,[13] a Roundtable in Brooklyn Law School's Journal of Law and Policy in 2003,[14] and a symposium at DePaul University College of Law earlier this year,[15] this is the first book written just on the judge (xi).

Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494 (1986).

9. I also teach an upper-class seminar, Federal Civil Litigation, Public Law and Justice, that examines many facets of district court judging and some appellate judging.

10. "When we spoke," Morris writes, "it seemed to me that what he might be seeking was a vehicle for putting his career in perspective … What I may have had in mind was the then current "model" of oral histories of judges: two to four sessions focusing primarily on events prior to appointment to the bench with comparatively little discussion of cases."(ix).

11. In the Preface, Morris raises the question of whether the biography is "authorized," saying: that is a difficult question to answer" (xi). He notes that Judge Weinstein made available every resource the author requested, and the transcribed oral history was the primary source material for the book, although he did conduct other research. But Morris says that Weinstein never gave (and never was asked to give) any suggestions about the content of the book. The judge's only request to Morris was to "[m]ake it as critical as possible." *Id.*

12. *See, e.g.*, Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 Colum. L. Rev. 1971 (1997); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 Rutgers L. Rev. 705, 711, 731-33, 754 (2007).

13. Symposium, *Tribute to the Honorable Jack Weinstein*, 97 Colum. L. Rev. 1947 (1997).

14. *B. Weinstein and the Public Good: A Roundtable Discussion to Honor One of America's Great Trial Judges on the Occasion of His 80th Birthday*, 12 J. Law and Pol'y 149 (2003).

15. The 2014 Annual Clifford Symposium on Tort Law & Social Policy, held at DePaul University on April 24, 2014 focused on "Judge Jack Weinstein's Impact on Civil Justice in America." DePaul University College of Law, *Justice Breyer to Speak at Law Symposium Exploring Federal Judge Jack Weinstein's Work*,, DePaul L. News (Oct. 10, 2013, 9:46 AM), http://depaullaw.typepad.com/depaul_law_school/2013/10/justice-breyer-to-speak-

Jack Weinstein came from a Jewish family that emigrated from Eastern Europe and spent most of his childhood in Brooklyn. He attended Brooklyn College at night and, after serving on a submarine in the Pacific in WWII, decided to pursue law. He went to Columbia Law School, where he was a strong student, and loved the study of law. After graduation he clerked for Judge Stanley Fuld of the New York Court of Appeals, was invited to join the faculty at Columbia Law School and worked for Democratic political leader Seymour Halpern on various New York state law reform commissions. He worked on the briefs in *Brown v. Board of Education*.[16] After serving as Nassau County Attorney, he got to know Robert Kennedy through his law reform work and was invited to be nominated to the Southern District of New York; he declined, suggesting his Columbia colleague Marvin Frankel instead. But he later agreed to be nominated to the Eastern District of New York and was appointed to the bench in 1967, with the modern-day civil rights movement in full flower. He continued to teach, write and be active in many extrajudicial and law reform efforts and still sits as a senior judge with a full docket at the age of 92.

Although much has been written about Judge Weinstein,[17] one of the valuable aspects of the book is that it identifies some general dimensions of judging–in federal district court, as well as unique aspects of Weinstein's approach to judging. Morris discusses aspects of the job of federal district court judging: the judge sits alone, and so makes the decision on his or her own and in isolation; relies on law determined from above; may work closely with his staff in chambers; and often must rule very quickly (11-21). Like most commentators, Morris sees Weinstein as sui generis, with unique energy, intellectual ability, and creativity. Several characteristics of Weinstein's unique work as a judge stand out: his ability to sustain a high level of productivity; his reliance on a rich smorgasbord of sources when deciding cases; his mastery of the craft of opinion writing; his ability to make legal decisions on a wide variety of factors; his deep concern for and awareness of the humanity of the parties who come before him; his capacity to shape and sometimes to transform cases through ingenious procedural strategies; his fierce sense of judicial independence; his vigorous participation in a range of extrajudicial activities; his unusual innovativeness and creativity in employing procedural rules and making substantive law; and his great capacity to gain attention for his ideas, decisions and activities(89).

All of these are indisputable facets of Weinstein's judging. A cross-cutting theme that runs throughout Morris' discussion of these characteristics is that Weinstein is sitting on the bench to solve human problems, not legal issues; to deal with "all the facts of real life revealed in our work" (as he put it); to

at-2014-Clifford-symposium-exploring-federal-judge-jack-weinsteins-work.html.

16. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

17. *See supra* notes 12-14.

give people access to courts (11).[18] He is a lawmaker, but he emphasizes that "the statement of facts is more important than the statement of law" (91). As I discuss more fully below, this attitude is in sharp contrast with district judge model promulgated by the most recent 25 years of U.S Supreme Court decisions suggesting that federal district judges should make preliminary legal decisions to end cases as quickly as possible and get civil litigants out of the courtroom before discovery.

Weinstein is genuinely interested in people and their problems; he is curious about the world and tries to listen to people and to solve these problems. He is not a gatekeeper, writing technical decisions to shut off access to the court and the possibility of trial, but a "gate-opener", who wants to open the courthouse door to the kaleidoscope of life and "the facts of real life". He does not want to shut out the world but to bring the court to it. A report that he wrote on *Daubert* and scientific evidence was titled "Opening the Gates of Law to Science", says it all. He likes to listen to litigants, wants to see the places where accidents happen even if they require a trip, and uses a wide range of sources to take the law into account. He originally preferred being a judge on the state courts because they dealt more with people on the issues that affected them most. He talks about opening doors a lot.

Weinstein's manner and mode of operation—as the "human face of the law" (62)[19]—also sets him apart. For example, he doesn't always wear his judicial robes and frequently goes down into the courtroom where people sit and talks with them at eye level (101). He has also conducted on-site visits to physical locations involved in litigation before him (90-91). Primarily he is a problem-solver who sets up "temporary administrative agencies" and does not focus on the technicalities of the law.[20] Morris emphasizes that, to Weinstein, facts are more important than law, and settlement may be most important (91, 98, 100). Weinstein shows tremendous confidence (60-63), but also humility and humor (65, 101). Some of Weinstein's most masterful judging resulted in settlements, not decisions (324-34).[21] Incredibly creative (105, 108),[22] he is a problem solver but also a lawmaker on a grand scale (93, 95-96). Although a member of the elite federal bench, Weinstein is neither insulated nor isolated from other legal authorities or "the world," and this comes through in his knowledge and use of a wide range of sources and in his compassion and empathy for litigants (61, 65, 96, 98). On substantive issues (96, 109), Judge Weinstein has used the bench as bully pulpit (64, 65) and his judicial position to educate (91,

18. Weinstein apparently uses this phrase to describe the job of federal district judges generally, but I am using it here to emphasize Weinstein's specifically.

19. Quoting Judge Weinstein.

20. Minow, *supra* note 1.

21. Discussing Judge Weinstein's management of the "Agent Orange" Cases, *In re* "Agent Orange" Prod. Liab. Lit. (Fairness Opinion), 597 F. Supp. 740 (Sept. 25, 1984).

22. *See generally* Minow, *supra* note 1.

92).[23] He has also expressed dislike for the overuse of summary judgment in employment discrimination cases (not to mention, because of their subjective nature, employment discrimination claims themselves) (307).

Weinstein's legacy is not confined only to specific settlements or trials. Many of the cases he decided–like *Nicholson v. Williams*,[24] an important case on domestic violence and child welfare policy in New York, where extensive evidence was present–show his thoughtfulness, brilliance, and consideration of international human rights (99, 100, 295-299). As a problem solver in court (and a theoretician outside court), what he does perhaps is not transferable to other judges who are less extraordinary, as many commentators have suggested.[25] However, Weinstein's humility about what a judge should decide, as compared with a jury, imparts a real sense of the importance of the jury.[26] And under decades of increasing workload in the federal courts, Judge Weinstein has been a heavy docket manager and clears his and others' dockets (100, 106).

Contemporary District Court Judging: Gatekeeping, Bench Presence and Judicial Background

Morris sets Weinstein's characteristics as a judge against traditional aspects of district court judging. But I want to suggest three contemporary dimensions of federal district court judging that Morris does not fully develop: the role of the federal district judge as gatekeeper, the issue of "bench presence," and the professional career paths of the federal judiciary.

Varying Supreme Court doctrines have restricted access to courts.[27] As Morris notes, federal judges manage dockets of approximately 300 cases per year, with less than 5 percent going to trial (as of 2008). The other 95 percent of disputes are diverted to mandatory arbitration, settlement conferences with a magistrate judge or district judge who pressures parties to settle, summary bench trials, directed pre-trial verdicts, and dismissal of complaints for insufficiency or implausibility. Despite the seemingly benign focus on efficiency and conserving judicial resources for "important" or "big" cases (Morris refers to large class action suits and political corruption trials), scholars are finding

23. *See also* Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 Colum. L. Rev. 1971 (1997).

24. 203 F. Supp. 2d. 153 (E.D.N.Y. 2003).

25. *See generally* Minow, *supra* note 1.

26. Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir. 1998) (Judge Weinstein wrote, "[t]oday, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation.").

27. *See* Helen Hershkoff et al., Joint Comments on Proposed Amendments to Federal Rules of Civil Procedure (Feb. 5, 2014), http://www.afj.org/wp-content/uploads/2014/02/Professors-Joint-Comment.pdf. *See also* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. Pa. L. Rev. 517 (2010).

that the increase in pre-trial diversions from litigation, enabled by earlier and steeper procedural hurdles, often results in negative consequences.

Under the smokescreen of conserving resources, a dramatic shift in the role of judges has occurred during much of Weinstein's tenure. Weinstein joined the bench in 1967, at the crest of the 20th century embrace of liberal notice pleading, discovery, and preference for jury trial to adjudicate disputes. With the ascendance of conservative judicial activism, beginning in the 1970s, federal district courts have been told by the Supreme Court to become more aggressive gatekeepers, clearing dockets with minimal discovery and fewer jury trials.[28]

Morris certainly mentions the gatekeeping function of district judges. But he sees this function in a very technical and traditional sense: the judge's initial determination of "jurisdiction, ripeness, mootness, political questions, immunity, abstention". (21) As Morris notes, a significant part of a district judge's job has historically been to find foundational facts and apply those findings of fact to the applicable law at the pre-trial stage and then turn over the material issues of fact in the case to a jury. However, the Supreme Court has now turned district judges into gatekeepers, with heightened pleading standards, *Daubert* and class certification rulings, and then, if discovery has not been successfully avoided, summary judgment. The Supreme Court's *Iqbal*, *Twombly* and *Dukes* decisions have dismissed cases on early pre-trial procedural decisions involving pleading and class certification.[29] Discovery is now the locus of attack, as the Advisory Committee on Civil Rules seeks to restrict it.[30]

These trends are effectively shutting litigants out of court for insufficient factual and legal support at an early stage that cuts off discovery, the process that is often the only means for plaintiffs to find evidence in the defendant's control.[31] Terminating cases at the pre-trial stage also creates a dearth of case law to guide courts and litigants in future cases and on appeal.[32] Denying the right to a trial all but eliminates access for aggrieved litigants, puts the judge in the role better-suited to a diverse jury pool, and may violate state

28. *See* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 Iowa L. Rev. 821, 823 (2010) (discussing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) and Ashcroft v. Iqbal, 556 U.S. 662, 679, (2009)). *See also* Stephen Burbank & Stephen Subrin, *Litigation and Democracy: Restoring A Realistic Prospect of Trial*, 46 Harv. C.R.-C.L. L. Rev. 399 (2011) (56 percent of all 12(b)(6) motions were granted to dismiss complaints for insufficiency after *Iqbal*, with 60 percent in constitutional civil rights cases, and a 60 percent decrease in cases going to trial over the past to 30 years ago).

29. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009); Wal-Mart Stores, Inc., v. Dukes, 131 S. Ct. 2541 (2011).

30. *See* Hershkoff et al., *supra* note 27.

31. *See* Elizabeth M. Schneider & Hon. Nancy Gertner, *"Only Procedural," Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases* 57 N.Y. L. Sch. L. Rev. 767, 772 (2012-2013).

32. Patricia Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897 (1998).

constitutions.[33] As warned fifteen years ago by Patricia Wald, former Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, the development of federal jurisprudence is being limited.[34] Finally, the decline in the number of jury trials is dramatic and has serious implications for democracy.[35]

Another problematic facet of contemporary district judging is what District Judge William Young and Jordan Singer have described as less "bench presence"—the valuable time district judges spend on the bench in open court, presiding over the adjudication of issues in a public forum.[36] In 2012, Young and Singer observed that "[m]ore than two-thirds of the 94 federal district courts reported fewer hours in the courtroom in [fiscal year] 2012 than they did four years earlier. Total courtroom hours nationwide dropped more than 8 percent during that same time frame. Moreover, during that span some district courts averaged fewer than 200 total courtroom hours per judge per year, the equivalent of less than one hour per judge per day."[37] Federal district judges are recognizing these problems. Several district and magistrate judges including Judge Young discussed this issue on a panel, "Innovations in the District Court: How Judges and Districts Can Address Cost, Delay and Access to Justice," at the Association of American Law Schools Section on Civil Procedure Program at the Annual Meeting in New York in January 2014.[38] Judge Weinstein's judging and his presence to litigants and to jurors in the courtroom highlight the important public function of "bench presence" and courts as public forums.

Finally, Morris suggests that Weinstein's working-class background, his work in many different kinds of jobs as a boy, his family's work in the Brooklyn Navy Yard, his experience as a night student in college and his early lawyering in a small private practice, as well as in government and on law review commissions (44, 68-89), instilled a lasting empathy for poor and middle-class litigants who came before him as well as a belief in the power of government to improve lives (60-66). In this sense, it is significant that Weinstein wanted to be a state court judge, rather than a federal court judge, because it would make him more of a "people's judge." Today, district court judges are disproportionately drawn from the ranks of former United

33. Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. Rev. 1037, 1040 n.11 (1999) ("stating that all fifty states provide for preservation of the jury trial right, in certain kinds of cases, either by constitution or by statute") *cited approvingly in* Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute of the Jury Trial*, 38 U.S.F. L. Rev.17, 24 n. 46 (2003).

34. Wald, *supra* note 32 .

35. Burbank & Subrin, *supra* note 28.

36. Jordan M. Singer & Hon. William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom 2008-2012*, 118 Penn. St. L. Rev. 243 (2013).

37. *Id*. at 247.

38. Schedule-at-a-Glance: 2014 Annual Meeting, Assoc. of Am. L. Sch., http://aals.org/am2014/Glance.pdf (last visited May 30, 2014).

States Attorneys, and among associates or partners in white-shoe law firms who primarily represented corporate defendants.[39] There certainly are some law professors, like Weinstein. But there are almost no recent nominees or appointees to the district court bench who had been in small private practices, or worked for legal services or legal aid, or done any law reform work. Recent criticism of these default career pathways to the federal judiciary and efforts to "broaden the bench" have focused on the need for more federal district judges to come from these more diverse practice backgrounds.

Judge Weinstein and Contemporary Judging

Morris' analysis of Weinstein's judicial career suggests many questions for assessing contemporary developments and contradictions in the federal judiciary.[40] Weinstein has taken on huge "global" settlements but is present in a major way for litigants and lawyers, shaping the law and facts and "doing justice." He is not a proceduralist; if anything, he could be viewed as an anti-proceduralist.[41] For Weinstein, procedure is a vehicle to get to substance, as he has observed in numerous contexts.[42] Although his "settlement approach" could be argued as a substitute for the development of substantive law,[43] Weinstein is steeped in the substantive law.[44]

In sum, *Leadership on the Federal Bench* highlights the complex and magisterial impulses of one towering federal judge, and in so doing offers an invaluable perspective on the contours of current federal district court judging.

39. Broadening the Bench: Judicial Nominations and Professional Diversity, Alliance for Justice (Feb. 5, 2014), http://www.afj.org/reports/professional-diversity-report ("[T]he federal judiciary is currently lacking in judges with experience (a) working for public interest organizations; (b) as public defenders or indigent criminal defense attorneys; and (c) representing individual clients–like employees or consumers or personal injury plaintiffs–in private practice.").

40. Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 Colum. L. Rev. 1971 (1997).

41. Howard M. Erichson, paper presented at DePaul University Conference on Judge Weinstein, April 2014. *See supra* note 15.

42. Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 Brook. L. Rev. 827 (1993).

43. Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 Wash. U. L. Rev. 1027 (2013).

44. *Gallagher*, 139 F.3d at 342 (Judge Weinstein wrote, "[t]oday, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation."); *see also* Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 Rutgers L. Rev. 705, 753 (2007). ("In Gallagher v. Delaney, Judge Weinstein, sitting on a panel of the Second Circuit, wrote an opinion reversing summary judgment in a sex discrimination case. In it, Judge Weinstein emphasizes the reasons why a district judge should not decide this type of case and the importance of having a jury decide these kinds of issues.").