

THE FALLACY OF DISPOSITIVE PROCEDURE

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Abstract: The U.S. Supreme Court has held that judges can dismiss cases before, during, or after trial if they decide that no reasonable jury could find for the plaintiff. The Court has also held that judges cannot dismiss cases based on their own views of the sufficiency of the evidence. I contend, however, that judges do exactly that. Judges dismiss cases based simply on their own views of the evidence, not based on how a reasonable jury could view the evidence. This phenomenon can be seen in the decisions dismissing cases. Judges describe how they perceive the evidence, interchangeably use the terminology of reasonable jury, reasonable juror, rational juror, and rational factfinder, among others—although the terms are all different in meaning—and indeed, disagree among themselves on what the evidence shows. I further argue that the reasonable jury standard is a legal fiction that involves a false factual premise: that courts can actually apply the reasonable jury standard. Evidence that courts cannot apply the standard includes the current substitution of a judge’s views for a reasonable jury’s views and the speculative, indeed impossible, determination that a judge would be required to perform to determine whether any reasonable jury could find for the plaintiff. As a result, I conclude that the basis upon which judges dismiss cases under the major dispositive motions is fatally flawed.

INTRODUCTION

Under the major dispositive motions of summary judgment, the directed verdict, and judgment as a matter of law, judges can dismiss cases if they decide that no reasonable jury could find for the plaintiff.¹

* Copyright © 2009 Suja A. Thomas, Professor of Law, University of Illinois College of Law. I am grateful for the comments of, or discussions with, the following individuals: Mark Bennett, Louis Billionis, Albert Borgmann, Caitlin Borgmann, Lisa Bressman, Paul Caron, Brian Fitzpatrick, Benjamin Glassman, Mark Godsey, Scott Goldman, Chris Guthrie, Wendy Parker, Michael Solimine, Larry Solum, Adam Steinman, Tod Thompson, Ingrid Wuerth, Julian Wuerth, and the *Boston College Law Review* Editors.

¹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (“[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”). Under judgment as a matter of law, judgment is entered against the party when “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” FED. R. CIV. P. 50(a). Judgment as a matter of law is the new term for both the directed verdict (which

The U.S. Supreme Court has held that when judges decide whether a reasonable jury could find for the plaintiff, they should not decide whether they would find for the plaintiff—or in other words whether they think the evidence is sufficient.² The importance of this qualification is that cases can be properly dismissed only if judges determine no reasonable jury could find for the plaintiff as opposed to whether the judges themselves would not find for the plaintiff.³ According to the Court, the proper standard is whether there is sufficient evidence for any reasonable jury to decide for the plaintiff.⁴

Despite this holding, I argue that in the decision whether to dismiss a case—under the mantra of whether a reasonable jury could find for the plaintiff—judges do indeed decide whether they could find for the plaintiff or whether they think that the evidence is sufficient, not whether a reasonable jury could find for the plaintiff or whether a reasonable jury could think that the evidence is sufficient. This argument is based on three findings. First, when judges use the standard of whether a reasonable jury could find for the plaintiff in a decision, they generally state why they believe the evidence is insufficient and do not state why no reasonable jury would find the evidence sufficient.⁵ Second, neither the Supreme Court nor the lower courts have defined the “reasonable jury.” Indeed, the terms “reasonable jury,” “reasonable juror,” “rational juror,” “rational factfinder,” and others are used interchangeably in decisions regarding dispositive motions, even though the terms are capable of significantly different meanings.⁶ This lack of definition makes it more likely that judges decide dispositive motions based on their own views of the evidence, as opposed to what a reasonable jury could find. Third, when judges use the reasonable jury standard in deciding the same motion, they often disagree.⁷ This disagree-

would occur after the plaintiff presented his or her case) and judgment notwithstanding the verdict (which would occur after the jury verdict), although the terms directed verdict and judgment notwithstanding the verdict are still used at times. *See id.* at advisory committee’s note (1991 Amendment).

Defendants bring and prevail on the vast majority of dispositive motions. *See* JOE S. CECIL ET AL., FED. JUD. CTR, TRENDS IN SUMMARY JUDGMENT PRACTICE: 1975–2000, at 13–16 (2007) (documenting that motions for summary judgment filed by defendants are far more common than those filed by plaintiffs and that plaintiffs’ motions are less likely to be successful than defendants’ motions); *see also* Sujia A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 688 n.9 (2004) (citing articles regarding this proposition).

² *Anderson*, 477 U.S. at 249.

³ *See id.* at 248–49.

⁴ *See id.*

⁵ *See infra* notes 80–89 and accompanying text.

⁶ *See infra* notes 90–93 and accompanying text.

⁷ *See infra* notes 94–99 and accompanying text.

ment indicates that judges decide the motions based on their own individual views of the evidence, not what a reasonable jury could find. Taken together, these findings lead to the conclusion that the reasonable jury standard is a misnomer because judges dismiss cases based on their own views, not on the views of a “reasonable jury.”

This standard by which judges dismiss cases before, during, and after jury trials—using their own views of the evidence—permits overt judicial factfinding, contrary to any notion of the Seventh Amendment right to a jury trial.⁸ An alternative to judges individually deciding whether they think that the evidence is sufficient would be for judges actually to attempt to determine whether a reasonable jury itself could find for the plaintiff. This would, however, involve a legal fiction. An underlying factual premise of the reasonable jury standard is that judges can determine whether any reasonable jury could find for the plaintiff. As described below, judges do not have the ability to make this determination.

Part I of this Article describes the reasonable jury standard, which is the basis of the major dispositive motions before, during, and after trial in civil cases.⁹ Part II argues that the current application of the reasonable jury standard improperly involves only each judge’s individual assessment of the facts of a case.¹⁰ Finally, Part III argues that the reasonable jury standard is a legal fiction incapable of determination, and thus should not form the basis of dispositive procedure.¹¹

I. THE BASIS OF DISPOSITIVE CIVIL PROCEDURE: THE REASONABLE JURY STANDARD

A. “Whether a Reasonable Jury Could Find”

When a court decides whether to dismiss a civil case, it usually determines whether “a reasonable jury could return a verdict for the [plaintiff].”¹² In decisions before, during, and after trial, judges consider this question of whether a reasonable jury could find for the plaintiff.¹³ Before trial, under motions for summary judgment, judges

⁸ U.S. CONST. amend. VII. For a discussion of the U.S. Supreme Court’s interpretation of the Seventh Amendment and the English common law, see Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 146–48 (2007).

⁹ See *infra* notes 12–74 and accompanying text.

¹⁰ See *infra* notes 75–99 and accompanying text.

¹¹ See *infra* notes 100–136 and accompanying text.

¹² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); see also FED. R. CIV. P. 50(a), 56.

¹³ See FED. R. CIV. P. 50, 56; *Anderson*, 477 U.S. at 248. After a jury has convicted a defendant, a judge also determines whether a reasonable jury could have found the defen-

determine whether no reasonable jury could find for the plaintiff and thus, whether the case can be dismissed because no genuine issue of material fact exists.¹⁴ During trial, upon motions for a directed verdict (or under the new judgment as a matter of law terminology) after plaintiffs present their cases, judges decide whether no reasonable jury could find for the plaintiff and thus, whether the case can be dismissed before the jury decides it.¹⁵ Finally, upon motions for judgment as a matter of law after both sides present their evidence, judges decide whether no reasonable jury could find for the plaintiff and thus, whether the case can be dismissed before the jury decides the case or even after the jury finds for the plaintiff.¹⁶

B. *The Supreme Court's Recent Discussion of the Reasonable Jury Standard: Scott v. Harris*

In 2007, the Supreme Court decided *Scott v. Harris*, its most recent discussion of the reasonable jury standard.¹⁷ In that case, the plaintiff driver, Victor Harris, alleged that the police used excessive force against him while pursuing him, which resulted in an unreasonable seizure under the Fourth Amendment.¹⁸ The defendant, deputy Timothy Scott, responded with a motion for summary judgment on the basis of qualified immunity.¹⁹ Based upon its viewing of a videotape of the po-

dant guilty. See *Cuellar v. United States*, 128 S. Ct. 1994, 2006 (2008) (“[W]e conclude that the evidence introduced by the Government was not sufficient to permit a *reasonable jury* to conclude beyond a reasonable doubt that petitioner’s transportation was ‘designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds.’” (emphasis added) (quoting 18 U.S.C. § 1956(a)(2)(B)(i) (2006)). This type of “reasonable” terminology is also seen in the context of habeas corpus. See *House v. Bell*, 547 U.S. 518, 537 (2006) (“[I]t is more likely than not that no *reasonable juror* would have found petitioner guilty beyond a reasonable doubt.” (emphasis added) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995))); see also *Penry v. Johnson*, 532 U.S. 782, 804 (2001) (using “reasonable juror” standard to determine whether a specific jury instruction adequately informed jurors that they were permitted to consider mitigating circumstances for the purpose of deciding whether the death penalty should be imposed); *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992) (“[T]o show ‘actual innocence’ one must show by clear and convincing evidence that, but for a constitutional error, no *reasonable juror* would have found the petitioner eligible for the death penalty under the applicable state law.” (emphasis added)).

¹⁴ See FED. R. CIV. P. 56; *Anderson*, 477 U.S. at 248.

¹⁵ See FED. R. CIV. P. 50(a).

¹⁶ See *id.* The new trial motion also may use this reasonable jury standard. See Cassandra Burke Robertson, *Judging Jury Verdicts*, 83 TUL. L. REV. 157, 184–86 (2008).

¹⁷ See 550 U.S. 372, 374–86 (2007).

¹⁸ See *id.* at 375–76.

¹⁹ See *id.*

lice chase, the Court concluded that no reasonable jury could find for the plaintiff and uniquely invited readers to view the tape.²⁰

The facts of the case included that the plaintiff was traveling at 73 miles per hour in a 55 miles per hour zone.²¹ When the police pursued the plaintiff, he did not stop his car, and the chase that followed involved numerous police officers, including the defendant.²² During the chase, the plaintiff left the road and entered a shopping center parking lot, where he continued to evade the police and hit the defendant's car.²³ Thereafter, back on a road, in an attempt to stop the plaintiff, the defendant rammed the plaintiff's car from behind, and the plaintiff was rendered a quadriplegic after his car went down an embankment.²⁴

The U.S. District Court for the Northern District of Georgia denied the defendant's motion for summary judgment.²⁵ The United States Court of Appeals for the Eleventh Circuit, using the plaintiff's version of the facts, affirmed the denial.²⁶ It decided that the defendant's actions could constitute deadly force, that the use of such force would violate the plaintiff's Fourth Amendment right to be free from excessive force during a seizure, and as a result, a reasonable jury could find that the defendant violated the plaintiff's Fourth Amendment rights.²⁷ Further, the Eleventh Circuit held that the defendant did not possess qualified immunity because he possessed sufficient notice that his actions could be unlawful.²⁸

²⁰ See *id.* at 378 n.5 ("Justice STEVENS suggests that our reaction to the videotape is somehow idiosyncratic, and seems to believe we are misrepresenting its contents. We are happy to allow the videotape to speak for itself. See Record 36, Exh. A, available at http://www.supremecourt.us/opinions/video/scott_v_harris.rmvb and in Clerk of Court's case file." (citations omitted)). *Scott* received significant attention because of the Court's use of the videotape. See George M. Dery III, *The Needless "Slosh" Through the "Morass of Reasonableness": The Supreme Court's Usurpation of Fact Finding Powers in Assessing Reasonable Force in Scott v. Harris*, 18 GEO. MASON U. CIV. RTS. L.J. 417, 432–48 (2008); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 881–902 (2009); David Kessler, Comment, *Justices in the Jury Box: Video Evidence and Summary Judgment in Scott v. Harris*, 550 U.S. 372 (2007), 31 HARV. J.L. & PUB. POL'Y 423, 427–35 (2008).

²¹ See *Scott*, 550 U.S. at 374.

²² See *id.* at 374–75.

²³ See *id.* at 375.

²⁴ See *id.*

²⁵ See *Harris v. Coweta County, No. CIV4 3:01CV148 WBH*, 2003 WL 25419527, at *4–6 (N.D. Ga. Sept. 23, 2003), *aff'd in part, rev'd in part*, 433 F.3d 807 (11th Cir. 2005), *rev'd in part sub nom. Scott*, 550 U.S. 372 (2007).

²⁶ See *Harris*, 433 F.3d at 813–16, *rev'd in part sub nom. Scott*, 550 U.S. 372 (2007).

²⁷ See *id.*

²⁸ See *id.* at 817–21.

Writing for the majority, Justice Scalia reversed the Eleventh Circuit's decision and ordered summary judgment.²⁹ The Court decided that no reasonable jury could find for the plaintiff, and as a result, there were no genuine issues of material fact for a jury to decide.³⁰ Justice Scalia stated that while the plaintiff and the defendant had very different views of the facts, the plaintiff's version should be disregarded.³¹ Specifically, he stated that

[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.³²

Justice Scalia described what he and his colleagues saw when they viewed the videotape.³³ He concluded that the police videotape demonstrated that no reasonable jury could believe the plaintiff's version of the facts and that the video also demonstrated that the defendant's decision to ram the plaintiff's car was "objectively reasonable."³⁴

Justice Scalia balanced the Fourth Amendment interests of the plaintiff and the government's interest in protecting the public.³⁵ While the defendant's actions posed a high likelihood of serious injury or death to the plaintiff, there was also significant likelihood of injury to the public or the police from the plaintiff's actions.³⁶ In his decision that the defendant's actions were reasonable, Justice Scalia took into account the culpability of those involved, namely the high culpability of the plaintiff for the situation that he created.³⁷ Justice Scalia also stated that other alternative police actions, including ceasing the pursuit, could have resulted in other undesirable outcomes, including injury to other drivers.³⁸ Justice Scalia concluded that

[t]he car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Scott's

²⁹ *Scott*, 550 U.S. at 374–86.

³⁰ *Id.* at 380–81, 86. Because there were no such genuine issues, the facts need not be examined in the light most favorable to the plaintiff. *See id.* at 380.

³¹ *Id.* at 380.

³² *Id.*

³³ *See id.* at 379–80.

³⁴ *Scott*, 550 U.S. at 381–86.

³⁵ *See id.* at 383–86.

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See id.*

attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment.³⁹

Justices Breyer and Ginsburg concurred that, in light of the videotape, no reasonable jury could find for the plaintiff.⁴⁰

In his dissent, Justice Stevens argued that a reasonable jury could find for the plaintiff.⁴¹ Justice Stevens discussed other facts in the record that showed this, including that the plaintiff had not run any red lights and that the roads had been cleared.⁴² He emphasized that the District Court and Court of Appeals judges who considered the case had decided that a reasonable jury could find for the plaintiff, and that those judges were more likely to understand Georgia roads.⁴³ He stated that “eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are.”⁴⁴

C. *Origins of the Reasonable Jury Standard*

In 1986, in *Anderson v. Liberty Lobby, Inc.*, one of the cases in the famous trilogy regarding summary judgment, the Court set forth the reasonable jury standard.⁴⁵ In holding that heightened evidentiary standards (for example, in this case, the clear and convincing standard in First Amendment cases) apply to motions for summary judgment, the Court also further clarified that “summary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”⁴⁶ In other words, the Court held that “there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a

³⁹ *Scott*, 550 U.S. at 386.

⁴⁰ *Id.* at 386–87 (Ginsburg, J., concurring); *id.* at 387–89 (Breyer, J., concurring). Justice Breyer stated that “[h]aving [reviewed the videotape], I do not believe a reasonable jury could, in this instance, find that Officer Timothy Scott (who joined the chase late in the day and did not know the specific reason why the respondent was being pursued) acted in violation of the Constitution.” *Id.* at 387 (Breyer, J., concurring). Justices Ginsburg and Breyer disagreed, however, with the majority that a per se rule regarding the Fourth Amendment in the context of life threatening injury or serious injury had been created. *See id.* at 386–87 (Ginsburg, J., concurring); *id.* at 389 (Breyer, J., concurring).

⁴¹ *See id.* at 389–97 (Stevens, J., dissenting).

⁴² *See id.* at 391–92; *see also* Kessler, *supra* note 20, at 429–30 (discussing the same).

⁴³ *Scott*, 550 U.S. at 389 (Stevens, J., dissenting).

⁴⁴ *Id.*

⁴⁵ 477 U.S. at 248.

⁴⁶ *Id.*

jury to return a verdict for that party,” or if the evidence is not “one-sided” for the moving party.⁴⁷ The Court emphasized that the decision regarding summary judgment should not rest on the judge’s own view of the evidence, stating that

at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. . . .

. . . .

. . . [T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.⁴⁸

The Court further explained that

this standard 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. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.⁴⁹

Thus, whether a reasonable jury could find for the plaintiff was not whether the judge thought the evidence was sufficient but rather whether a reasonable jury could find for the plaintiff.⁵⁰ Indeed, this standard of whether a reasonable jury could find for the plaintiff mirrors the standard of whether reasonable minds could disagree about the sufficiency of the evidence. Citing *Jackson v. Virginia*, the Court compared the summary judgment standard to the similar standard for acquittal in criminal cases where the inquiry involves a court’s determination of “whether a reasonable jury could find guilt beyond a reason-

⁴⁷ *Id.* at 249.

⁴⁸ *Id.* at 249, 252. In *Sullivan v. Louisiana*, Justice Scalia, writing for the Court, stated that “[a] reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, ‘the wrong entity judge[s] the defendant guilty.’” 508 U.S. 275, 281 (1992) (internal citations omitted) (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)).

⁴⁹ *Anderson*, 477 U.S. at 250–51 (internal citations omitted); see also *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (stating that the summary judgment standard and the standard for judgment as a matter of law are the “same”). Other cases decided prior to this time also mentioned the term “reasonable jury.” See, e.g., *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U.S. 573, 579 (1951) (Black, J., dissenting).

⁵⁰ See *Anderson*, 477 U.S. at 249–52.

able doubt.”⁵¹ The Court further described the acquittal standard as whether a “reasonable mind” could find guilt beyond a reasonable doubt.⁵²

In his dissent in *Anderson*, Justice Brennan expressed grave concerns about the summary judgment standard established in the case.⁵³ In addition to disagreement about the evidentiary standard,⁵⁴ he criticized the Court, stating that it had no direct authority for the new standard that a court could order summary judgment if it determined that no reasonable jury could find for the plaintiff.⁵⁵ He also stated that the Court had no authority for the new reference that summary judgment could be ordered if the evidence was “one-sided.”⁵⁶ Moreover, he noted the shift from the rational factfinder standard used in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, another case in the summary judgment trilogy, to the reasonable factfinder standard in *Anderson*, though he stated he was not sure of the significance.⁵⁷ Justice Brennan compared the changing summary judgment standard in the Court’s case law to a game of telephone where the message changes dramatically from person to person.⁵⁸ He also emphasized that it was not apparent how a judge could determine “how one-sided evidence is, or what a ‘fair-minded’ jury could ‘reasonably’ decide.”⁵⁹ He concluded that, although the Court had continually stated that courts should not weigh evidence on a summary judgment motion, they were required to weigh evidence under the standard that the Supreme Court had established for summary judgment.⁶⁰ Moreover, if judges weighed evidence, the right to a jury trial would be violated.⁶¹

⁵¹ *Id.* at 252 (emphasis added) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)).

⁵² *Id.* at 253.

⁵³ *See id.* at 257–68 (Brennan, J., dissenting).

⁵⁴ Justice Brennan did not agree with the Court’s decision to include the evidentiary burdens when determining “whether a reasonable jury could find,” which he stated was unsupported by precedent. *See id.* at 260, 268.

⁵⁵ *Anderson*, 477 U.S. at 261 n.2 (Brennan, J., dissenting); *see also* Jeff Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 124 (1988) (stating that the language, “no reasonable jury could find,” in *Anderson* did not derive from any summary judgment decision but rather from directed verdict cases).

⁵⁶ *Anderson*, 477 U.S. at 260–61 (Brennan, J., dissenting).

⁵⁷ *See id.* at 261 n.2; *see also* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (using “rational trier of fact” language).

⁵⁸ *Anderson*, 477 U.S. at 264–65 (Brennan, J., dissenting).

⁵⁹ *See id.* at 265.

⁶⁰ *See id.* at 265–67.

⁶¹ *See id.* at 267 (“[I]f the judge on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.”).

As mentioned above, the Court in *Anderson* cited the acquittal standard in *Jackson v. Virginia*.⁶² In *Jackson*, the Court considered the issue of the proper standard of review for a habeas corpus case in which the petitioner, convicted under state law, argued that there was insufficient evidence to convict him.⁶³ Upon a bench trial, the Virginia state judge found the petitioner guilty of first degree murder beyond a reasonable doubt.⁶⁴ In his habeas petition, the petitioner claimed that the prosecution had not proven first degree murder.⁶⁵ The U.S. District Court for the Eastern District of Virginia agreed, finding no evidence of premeditation, but the Court of Appeals for the Fourth Circuit reversed.⁶⁶

The Supreme Court affirmed the Court of Appeals' decision, deciding that a rational trier of fact could find the petitioner guilty of first degree murder beyond a reasonable doubt.⁶⁷ The Court emphasized that in a court's decision whether to reverse a conviction, it should not decide whether it believed the evidence.⁶⁸ The Court decided that the court must instead determine whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.⁶⁹

This standard was adopted with some significant opposition on the Court.⁷⁰ Although the concurrence agreed that the defendant had been properly convicted, Justice Stevens stated that the new rule established by the Court was problematic.⁷¹ Justice Stevens stated that this rule was not required or even consistent with prior precedent.⁷² Prior precedent stated nothing about appellate courts using a reasonable doubt standard or a rational factfinder standard to review lower court decisions.⁷³ Similar to Justice Brennan in *Anderson*, the concurrence also criticized the standard based partly on the fact that it was unclear

⁶² *Id.* at 252 (majority opinion) (citing *Jackson*, 443 U.S. at 318–19).

⁶³ *See* 443 U.S. at 309.

⁶⁴ *See id.* at 309, 311.

⁶⁵ *See id.* at 311–12.

⁶⁶ *See id.* at 312.

⁶⁷ *Jackson*, 443 U.S. at 326.

⁶⁸ *Id.* at 318–19 (“[T]his inquiry does not require a court to ‘ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.’” (quoting *Woodby v. INS*, 385 U.S. 276, 282 (1966))).

⁶⁹ *Id.* at 319.

⁷⁰ *Id.* at 326–39 (Stevens, J., concurring in the judgment).

⁷¹ *See id.*

⁷² *See Jackson*, 443 U.S. at 326–39 (Stevens, J., concurring in the judgment).

⁷³ *See id.* (discussing *In re Winship*, 397 U.S. 358 (1970), among other cases).

how judges were to determine whether the factfinder or factfinders had been rational.⁷⁴

II. JUDGES AND DISPOSITIVE PROCEDURE: JUDGES DECIDE DISPOSITIVE MOTIONS BASED ON THEIR OWN VIEWS OF THE FACTS

Although the standard in *Anderson v. Liberty Lobby, Inc.* and *Jackson v. Virginia* forms the basis of three important dispositive motions in civil litigation, *Anderson* gives little guidance on how courts are to decide whether a reasonable jury could find for the plaintiff.⁷⁵ In addition to stating that the standard of whether a reasonable jury could find for the plaintiff mirrors the standard of whether a reasonable mind could find for the plaintiff, the Court has emphasized that judges themselves should not decide whether they think that the evidence is sufficient.⁷⁶ Regardless of this mandate, this is the determination that in fact takes place.

This phenomenon of judges deciding dispositive motions based on their own views of the facts is evident in the case law. First, judges explain their decisions on motions for summary judgment and other dispositive motions based on their views of the facts.⁷⁷ Second, the standard for dispositive motions has been loosely defined with different words that can have different meaning.⁷⁸ Thus, judges have little guidance but their own views of the facts to make decisions. Third, judges often disagree, again, an indication that they are evaluating the evidence as individuals.⁷⁹

⁷⁴ See *id.* at 331, 334 n.8, 336. Justice Stevens also stated that the new rule appeared to derive from a dissent to the denial of certiorari in *Freeman v. Zahradnick*. *Id.* at 334 n.8 (citing *Freeman v. Zahradnick*, 429 U.S. 1111, 1111–16 (1977) (Stewart, J., dissenting)). Justice Stevens stated that the articulation and application of the rule appeared different in *Freeman*. See *id.* In his dissent in *Freeman*, Justice Stewart noted that “[p]roperly instructed juries . . . occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt—even when it is clear that the defendant was entitled to a directed verdict of acquittal as a matter of law.” 429 U.S. at 1112 (Stewart, J., dissenting).

⁷⁵ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244–57 (1986).

⁷⁶ See *id.* at 249–52. The Court has stated that “[t]he court’s function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.” *House v. Bell*, 547 U.S. 518, 538 (2006). In *Schlup v. Delo*, a habeas case, the Supreme Court described the reasonable juror standard as an “inquiry on the likely behavior of jurors.” 513 U.S. 298, 333 (1995).

⁷⁷ See *infra* notes 80–89 and accompanying text.

⁷⁸ See *infra* notes 90–93 and accompanying text.

⁷⁹ See *infra* notes 94–99 and accompanying text.

A. A Look at the Decisions

The clearest indication that judges decide cases based on their own view of the facts is seen in what they say about the evidence in actual decisions. Judges describe how they view the evidence and then state the mantra that no reasonable jury could find for the plaintiff on the basis of that evidence. As an example, in *Scott v. Harris*, Justice Scalia repeatedly referred to what he and the other justices for whom he wrote saw in the videotape to reach the conclusion that no reasonable jury could find for the plaintiff.⁸⁰ He stated, for example,

we see respondent's vehicle racing down narrow, two-lane roads We see it swerve around more than a dozen other cars We see it run multiple red lights Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort⁸¹

Furthermore, Justice Scalia disagreed with what he described as Justice Stevens' "hypothesi[s]" regarding why the other motorists acted as they did in pulling to the side of the road.⁸² Justice Scalia also disagreed with Justice Stevens on how an ambulance drives in response to an emergency, describing what he stated was his and the other justices' "experience" with what ambulances do.⁸³ He also analyzed the factual conclusions of the Eleventh Circuit.⁸⁴ As another example, in the oral arguments for *Scott*, Justice Alito stated that after viewing the videotape, "[i]t seemed to [him] that [Harris] created a tremendous risk to drivers on that road."⁸⁵ Nowhere does the Court refer to how a jury itself might analyze the evidence and deliberate about the matter.⁸⁶ Instead, the only manner by which the justices determine whether a reasonable jury could find for the plaintiff is to decide what the justices themselves conclude regarding the sufficiency of the evidence.⁸⁷

⁸⁰ See 550 U.S. 372, 374–86 (2007).

⁸¹ *Id.* at 379–80.

⁸² *Id.* at 379 n.6.

⁸³ See *id.*

⁸⁴ *Id.* at 380 n.7. Justice Scalia stated that not "each and every factual statement made by the Court of Appeals [was] inaccurate," including the Court of Appeals' conclusion that the deputy ramming the defendant's car did not pose a threat to other cars or pedestrians. *Id.*

⁸⁵ Transcript of Oral Argument at 27, *Scott*, 550 U.S. 372 (No. 05–1631).

⁸⁶ See *Scott*, 550 U.S. at 374–86; *id.* at 386–87 (Ginsburg, J., concurring); *id.* at 387–89 (Breyer, J., concurring); *id.* at 389–97 (Stevens, J., dissenting).

⁸⁷ See *id.* at 374–86 (majority opinion); *id.* at 386–87 (Ginsburg, J., concurring); *id.* at 387–89 (Breyer, J., concurring); *id.* at 389–97 (Stevens, J., dissenting).

Indeed, in his dissent in *Scott*, Justice Stevens emphasized that the justices decided whether a reasonable jury could find for the plaintiff based on their own views of the sufficiency of the evidence.⁸⁸ Moreover, in their recent article on *Scott*, Professor Kahan and his colleagues assume that, when deciding summary judgment motions, judges engage in this analysis of whether they themselves think that the evidence is sufficient.⁸⁹

B. *Reasonable Jury, Reasonable Juror, Rational Juror,
Rational Factfinder, etc.*

In addition to seeing judges decide motions based on their own views of the facts, there are other indications in the cases that judges have had little guidance to do anything other than to decide on the basis of their own views. The Supreme Court has interchangeably used “reasonable juror,” “rational juror,” and “rational factfinder,” along with “reasonable jury” and other terminology in decisions on dispositive motions.⁹⁰ All of these terms, however, are capable of different meaning. What a reasonable jury would find is not necessarily the same as what a reasonable juror would find because there is at least some possible difference between group decision making versus individual deci-

⁸⁸ See *id.* at 389–97 (Stevens, J., dissenting).

⁸⁹ See Kahan et al., *supra* note 20 at 881–94; see also Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 719 (2007) (“On summary judgment, the judge is effectively sitting as a juror and deciding whether he or she could find for the plaintiff.”). Detailed empirical proof of this argument that judges use their own views of the evidence to decide dispositive motions is beyond the scope of this article. There are, however, several other examples of judges’ examination of their views of the evidence as opposed to any reasonable jury’s views. See, e.g., *Walstrom v. Altoona*, No. 3:2006–81, 2008 WL 5411091, at *4–15 (W.D. Pa. Dec. 29, 2008) (no reference to jury other than in reciting general summary judgment standard); *Robinson v. Paulson*, No. 05–1212, 2008 WL 5411120, at *3–10 (D.D.C. Dec. 29, 2008) (same); *Simpson v. Suliene*, No. 08-cv-54-bbc, 2008 WL 5377921, at *1–4 (W.D. Wis. Dec. 24, 2008) (same); *Stevenson v. Rosemont Coll. of the Holy Child Jesus*, No. 08-cv-1833, 2008 WL 5378153, at *2–4 (E.D. Pa. Dec. 23, 2008) (same).

⁹⁰ See, e.g., *Cuellar v. United States*, 128 S. Ct. 1994, 2006 (2008) (referring to a “reasonable jury”); *United States v. Williams*, 128 S. Ct. 1830, 1846 (2008) (referring to a “reasonable juror”); *Scott*, 550 U.S. at 376, 380, 386 (referencing a “reasonable jury”); *id.* at 396 (Stevens, J., dissenting) (referencing a “reasonable juror”); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (referring to a “rational trier of fact”); see also, e.g., *Ayers v. Belmontes*, 549 U.S. 7, 13 (2006) (“reasonable jurors”); *Weisgram v. Marley Co.*, 528 U.S. 440, 454 (2000) (“reasonable jury”); *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 807 (1999) (“reasonable juror[]”); *United States v. Aguilar*, 515 U.S. 593, 613 (1995) (“rational juror”); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 320 (4th Cir. 2008) (“rational jury”); *Walczak v. San Bernardino County*, 260 F. App’x 982, 986 (9th Cir. 2007) (“reasonable jury” and “reasonable trier of fact”); *Williams v. City of Grosse Pointe Park*, 496 F.3d 482, 484 (6th Cir. 2007) (“rational juror”).

sion making.⁹¹ An individual might be affected by a group, and his opinion might change.⁹² Also, rational may not be the same as reasonable.⁹³ The ease with which the Court interchangeably uses the terms reasonable jury, reasonable juror, rational juror, rational factfinder, and other terms suggests that these labels have no specific meaning in the decisions and that they are all labels for the judges' own views of the sufficiency of the evidence in a case.

C. *Judges Disagree on Whether a Reasonable Jury Could Find for the Plaintiff*

Other evidence that judges decide whether a reasonable jury could find for the plaintiff based on their own views of the facts is actual disagreement among judges on whether a reasonable jury could find for the plaintiff. For example, in 1986 in *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, five justices of the Supreme Court decided that, in the absence of other evidence, summary judgment should be entered against the plaintiff American television manufacturers, which

⁹¹ See Norbert L. Kerr, Robert J. MacCoun & Geoffrey P. Kramer, *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687 (1996) (discussing differences in individual and group decision making).

⁹² See *id.*

⁹³ Cf. *Anderson*, 477 U.S. at 261 n.2 (Brennan, J., dissenting) (noting the Court's change in terminology from "reasonable" to "rational"). Using the term "rationality" also creates further ambiguity because there is much debate about the extent to which people act rationally and what governs their rationality. Compare Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1551-75 (1998) (critiquing common arguments made against the assumption that human behavior is rational), with Russell B. Korobkin & Thomas Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1051-1143 (2000) (critiquing the theory of rational human behavior).

Also, underlying the reasonable jury standard is an assumption that reason is determinable and that people do act with reason. Of course, in *A Treatise of Human Nature*, Hume stated that passions, not reason, motivate human beings to act, and reason aids us only to satisfy passions. DAVID HUME, A TREATISE OF HUMAN NATURE: BEING AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING INTO MORAL SUBJECTS, AND DIALOGUES CONCERNING NATURAL RELIGION 413 (L.A. Selby-Bigge ed., Clarendon Press 1978) (1739-1740) ("Reason alone can never be a motive to any action of the will [and] . . . can never oppose passion in the direction of the will."). Indeed, there can be little dispute that the term reasonableness, by its very nature, is very broad. It can be useful when broadly used and becomes useless when pressed into the service of definite and decisive purposes. The way in which courts attempt to use reasonableness is contrary to this nature because courts attempt to make this determination concrete or mathematical. See Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1180 (2003). Stephen Toulmin criticized the conception that reason and rationality are perfect, with a correct solution to every problem. See STEPHEN EDELSTON TOULMIN, COSMOPOLIS: THE HIDDEN AGENDA OF MODERNITY 199-200 (1990). He stated that "[u]nfortunately, little in human life lends itself fully to the lucid, tidy analysis of Euclid's geometry or Descartes' physics." *Id.* at 200.

had alleged antitrust violations against Japanese television manufacturers.⁹⁴ They concluded that no rational trier of fact could find for the plaintiffs.⁹⁵ Four justices of the Supreme Court disagreed, stating summary judgment should not be entered because a rational trier of fact could find for the plaintiffs.⁹⁶ As another example, in 1997 in *Harbor Tug & Barge Co. v. Papai*, six justices concluded that no reasonable jury could find that the plaintiff was a seaman under the Jones Act, and three justices concluded that a reasonable jury could find that the plaintiff was a seaman under the Jones Act.⁹⁷ Interestingly, the Court of Appeals for the Ninth Circuit had also decided that a reasonable jury could find that the plaintiff was a seaman while the district court had ordered summary judgment.⁹⁸ Finally, in *Scott*, four lower court judges and Justice Stevens found that a reasonable jury could find for the plaintiff, while eight other justices found that no reasonable jury could find for the plaintiff.⁹⁹ That these judges disagree about whether a reasonable jury could find for the plaintiff is some indication that these judges have different views of the facts and that their different decisions are based on these different views of the facts.

⁹⁴ 475 U.S. at 597–98.

⁹⁵ See *id.* at 587, 597–98.

⁹⁶ See *id.* at 598–607 (White, J., dissenting).

⁹⁷ 520 U.S. 548, 560 (1997); *id.* at 560–63 (Stevens, J., dissenting).

⁹⁸ See *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 205–06 (9th Cir. 1995), *rev'd*, 520 U.S. 548. Another case that is illustrative of the Court's internal disagreements in this regard is *Muehler v. Mena*, 544 U.S. 93, 98–112 (2005). In *Muehler*, the Court overturned a verdict for the plaintiff, holding that no reasonable jury could find for her, despite the fact that some judges agreed with the jury's result. *Id.* After the district court and the Court of Appeals for the Ninth Circuit had denied the defendant's summary judgment motion on the basis of qualified immunity, a jury found that the defendant had violated the plaintiff's Fourth Amendment rights. *Id.* at 97. The Supreme Court decided that no Fourth Amendment violation occurred. *Id.* at 102. The Court stated that the plaintiff's detention was reasonable because it occurred during a search of a premises that was pursuant to a valid warrant and because the plaintiff was found on the premises. *Id.* at 98. In a concurrence joined by Justices Souter, Ginsburg, and Breyer, Justice Stevens stated, "I think it clear that the jury could properly have found that this 5-foot-2-inch young lady posed no threat to the officers at the scene, and that they used excessive force in keeping her in handcuffs for up to three hours." *Id.* at 105 (Stevens, J., concurring in the judgment); see also *Francis v. Franklin*, 471 U.S. 307, 321 n.7 (1985) ("It is puzzling that the dissent thinks it 'defies belief' to suggest that a reasonable juror would have related the contradictory intent instructions to the later instructions about the element of malice.").

⁹⁹ See *Scott*, 550 U.S. at 374–86; *id.* at 386–87 (Ginsburg, J., concurring); *id.* at 387–89 (Breyer, J., concurring); *id.* at 389–97 (Stevens, J., dissenting).

III. THE IMPOSSIBLE REASONABLE JURY STANDARD

A. *Applying the Reasonable Jury Standard*

The Supreme Court has made inconsistent statements about the standard underlying dispositive motions. On the one hand, the Court has stated that judges should decide whether a reasonable jury could find for the plaintiff, and it has stated that what a reasonable jury could find is different than what a reasonable juror could find.¹⁰⁰ In deciding how an instruction regarding a death sentence was perceived by jurors, the Court has stated that an “inquiry dependent on how a single hypothetical ‘reasonable’ juror could or might have interpreted the instruction” was not appropriate.¹⁰¹ The Court explained that

[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.¹⁰²

On the other hand, although the Court has recognized these differences between a jury and individual jurors, the Court has also interchangeably used reasonable jury, reasonable juror, rational factfinder, and other terms which can have significantly different meaning.¹⁰³ Moreover, the Court has stated that the standard of what a reasonable jury could find mirrors the standard of what a reasonable mind could find, which could also mean that the standard of what a reasonable jury could find is equivalent to the standard of whether a reasonable juror could find, again contrary to what the Court has recognized.¹⁰⁴ Additionally, although the Court has stated that what a reasonable jury could find is not equivalent to “whether the judge would find,” the latter has been the judge’s inquiry.¹⁰⁵

¹⁰⁰ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (“[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”); see also *Boyd v. California*, 494 U.S. 370, 380–81 (1990) (adopting a reasonable jury standard rather than one based on a “single hypothetical ‘reasonable’ juror”).

¹⁰¹ *Boyd*, 494 U.S. at 380.

¹⁰² *Id.* at 380–81.

¹⁰³ See *supra* notes 90–93 and accompanying text.

¹⁰⁴ See *Anderson*, 477 U.S. at 249–52; see also *supra* notes 48–49 and accompanying text.

¹⁰⁵ See *supra* notes 75–99 and accompanying text.

I argue that of these standards, the reasonable jury standard is the best one, but that the inquiry must indeed be what a reasonable jury could find. Justice Brennan warned of the possibility of the impingement of the constitutional right of a jury trial when the Court adopted the “reasonable jury” standard in *Anderson v. Liberty Lobby, Inc.*,¹⁰⁶ and Justice Black had warned of this even earlier in his 1943 dissent in *Galloway v. United States*.¹⁰⁷ When judges decide cases based on their own views of the facts—as I have shown they do under the mantra of the reasonable jury standard—judges do indeed invade the province of the jury under the Seventh Amendment, which requires in the context of dispositive motions that judges decide law and juries decide facts.¹⁰⁸

¹⁰⁶ 477 U.S. at 268 (Brennan, J., dissenting). Indeed, Justice Brennan ends his opinion by stating that the “decision may erode the constitutionally enshrined role of the jury” *Id.* In his dissent, Justice Rehnquist also criticized the new standard, particularly its inclusion of the evidentiary burdens in summary judgment decisions. *Id.* at 268–73 (Rehnquist, J., dissenting).

¹⁰⁷ 319 U.S. 372, 397 (1943) (Black, J., dissenting). Justice Black stated that “[t]oday’s decision marks a continuation of the gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.” *Id.*

¹⁰⁸ See U.S. CONST. amend. VII. Although the conclusion in this Article does not rely on originalism, I have argued previously that summary judgment and possibly other dispositive procedures are unconstitutional under the Seventh Amendment because those procedures do not comport with the substance or essentials of the English common law jury trial in 1791, which the Supreme Court has stated governs the constitutionality of modern procedures under the Seventh Amendment. See Suja A. Thomas, *Re-examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731 (2003) [hereinafter Thomas, *Remittitur*]; Thomas, *supra* note 8, at 146–48; Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1851–88 (2008); see also Suja A. Thomas, *Why Summary Judgment Is Still Unconstitutional: A Reply to Professors Brunet and Nelson*, 93 IOWA L. REV. 1667, 1667–85 (2008). The Seventh Amendment provides that “[i]n Suits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII. The Supreme Court has consistently stated that the common law that the Seventh Amendment refers to is the English common law of 1791, the year in which the Seventh Amendment was adopted. See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (stating that, since Justice Story’s day, the Court has understood that “[t]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted” (internal citations omitted)). Under this common law, a question of the sufficiency of the evidence could be raised only after a jury trial, and those questions were reserved for the jury even after a judge found the evidence insufficient. See Thomas, *supra* note 8, at 147–48, 157–58. In the context of damages, under this English common law, a judge would order a new trial only when the damages were certain, not for example, in tort-type cases where the jury would determine what damages were appropriate. See Thomas, *Remittitur*, *supra*, at 775–82. Unsurprisingly, under the English common law, the reasonable jury standard was not used. See Thomas, *supra* note 8, at 147–48. Instead, courts used a standard under which courts accepted the facts of the nonmoving party. See *id.* If no claim existed under those facts, the claim would be dismissed. See *id.* Moreover, the evidence of both parties would never be reviewed, except after a jury trial and upon a motion for a new

Thus, the analysis now performed by judges under dispositive procedure involves their determination of the facts, a determination patently prohibited by the Seventh Amendment.

Under the reformulated reasonable jury standard that I propose, courts should use the term “reasonable jury” instead of the interchangeable use of “reasonable jury,” “reasonable juror,” “rational juror,” “rational factfinder,” or any other iteration. In the determination of whether a reasonable jury could find for the plaintiff, the courts should consider that a reasonable jury would consist of people from a fair cross-section of the community, including people with different characteristics and experiences.¹⁰⁹ In their study of how people reacted to the videotape used by the Court in *Scott v. Harris*, Professor Kahan and his colleagues showed that people’s views of the facts are based on many characteristics and experiences, including their race, political affiliation, education, and age.¹¹⁰ A court should also take into account

trial. *See id.* This rule ensured that courts accepted the facts of the nonmoving party in their determination of whether a claim existed under the law. *See id.* Others, including most recently Professor William Nelson, have argued the English common law should not govern our present constitutional jurisprudence on the jury, and, as a result, procedures like summary judgment have no constitutional impediment. *See* William Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653, 1653–66 (2008).

Here, the constitutional problem is apparent without an application of originalism. Other civil procedure scholars have also recognized the tension between summary judgment and the jury trial right. *See* EDWARD BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 16 (3d ed. 2006) (stating that summary judgment rests on “potentially tenuous constitutional foundation”); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1074–1132 (2003) (discussing possible problems with procedure’s constitutionality).

¹⁰⁹ *See* *Colgrove v. Battin*, 413 U.S. 149, 160 n.16 (1973) (“What is required for a ‘jury’ is . . . a likelihood of obtaining a representative cross section of the community.”); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (“The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community.”).

¹¹⁰ *See* Kahan et al., *supra* note 20, at 848–81. The authors studied the responses of a diverse group to the video of the police chase in *Scott*. *See id.* The police generated four videotapes. *Scott*, 550 U.S. at 395 n.7 (Stevens, J., dissenting). Kahan showed a videotape that was derived from two of the videotapes that he contends contain the most influential material. Kahan, *supra* note 20, at 855–56. Although a large majority of the subjects reacted to the video similarly to the Court, 75 percent agreeing that deadly force was warranted, certain subgroups had significantly different reactions to the video. *Id.* at 864–70. Kahan and his colleagues recognized that the results from their study did not include jurors’ actual engagement in deliberations. *Id.* at 849. African American, Democratic, liberal, egalitarian, communitarian, lower income, more educated, single, and older subjects generally appeared more pro-plaintiff than their respective counter groups. *Id.* at 868–69. Kahan and his colleagues argued that these results conflict with the Court’s conclusion that reasonable people agree regarding the risk involved in the chase or the role of the police in increasing or decreasing the risk. *Id.* at 881–902. Because the study shows groups of people can disagree, the authors argue that the Court has referred to such group members as

the particular experiences of the jurors in the locale who might view the evidence differently than jurors from other parts of the country.¹¹¹ Finally, courts should determine how the deliberations of such a group of people would proceed and should determine the results of the deliberations.¹¹² What my reformulation of the reasonable jury standard does that the Court's current formulation of the standard does not do is infuse a jury perspective into the analysis of whether a reasonable jury could find for the plaintiff.

B. *The Legal Fiction of Dispositive Procedure*

Despite the hypothetical appeal of the current reasonable jury standard or my proposed reasonable jury standard, the standard is a legal fiction based on a false factual premise.¹¹³ The false factual prem-

unreasonable, which they are not. *See id.* at 881. This view demonstrates a bias that Kahan and his colleagues refer to as "cognitive illiberalism," or a failure to recognize the connection between perceptions of societal risk and contested visions of the ideal society. *See id.* at 896.

¹¹¹ A purpose of the Seventh Amendment was to protect locality. *See, e.g.,* Nelson, *supra* note 108, at 1655–56 ("Scholars of the history of the jury also agree that the jury's power to determine both law and fact was of constitutional significance; it ensured that central authorities in a state, provincial, or national capital could not impose their will on local communities." (internal citations omitted)); *cf. Scott*, 550 U.S. at 396–97 (Stevens, J., dissenting) (noting the differences between the views of local federal judges and the Supreme Court justices). *But see* Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. 411, 436–43 (2008) (arguing for national juries in some cases of national import).

¹¹² *See* Kahan et al., *supra* note 20, at 885–86 (discussing the dynamics of jury deliberations involving a diverse body of jurors).

¹¹³ Professor Peter Smith defined a "new legal fiction" as a judge "crafting a legal rule on a factual premise that is false or inaccurate." Peter Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1437 (2007); *cf. Note, Lessons from Abroad: Mathematical, Poetic, and Literary Fictions in the Law*, 115 HARV. L. REV. 2228, 2228–39 (2002) (describing law's use of fictions). Smith then writes about why legal fictions exist. Smith, *supra*, at 1439–41. First, it may be that the judges assume incorrectly that the factual premise is true. *Id.* at 1439. Second, judges have rejected proof that factual premises are wrong. *Id.* Third, through these devices, judges can conceal normative decisions. *Id.* Fourth, judges may want to use a particular legal theory, and a legal fiction helps implement this theory. *Id.* at 1439–40. Fifth, certain legal fictions may promote efficiency. *Id.* at 1440. Sixth, continuing legal fictions may serve to prevent the judicial system from being de-legitimized. *Id.* The reasoning that Professor Smith argues underlies legal fictions is present with respect to the reasonable jury standard. *See id.* at 1439–41. It is quite possible judges may be concealing normative decisions when using the reasonable jury standard and promoting judicial efficiency. *See id.* at 1439–40. For example, many dispositive motions occur in the context of civil rights cases that occupy a large part of the federal docket. *See* CECIL ET AL., *supra* note 1, at 10–12. The federal bench may generally have a certain view of civil rights cases that, whether consciously or not, may cause judges to disproportionately find against plaintiffs in these matters. *See* Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 554–67 (2003) (arguing that it is likely

ise underlying the reasonable jury standard is that a court can actually apply the standard. A court cannot do this. First, under the current standard, judges are not supposed to decide what they think about the sufficiency of the evidence.¹¹⁴ That is, however, the analysis that occurs as evidenced by decisions on dispositive motions including Supreme Court decisions.¹¹⁵ Second, under the current standard, judges must decide whether a reasonable jury could find for the plaintiff, but judges do not engage in an analysis of what such a jury could find.

Third, if the courts attempted to do such an analysis, the analysis would be speculative because courts are incapable of such a determination. Although under the reasonable jury standard, courts consider all viewpoints, this standard assumes that judges can perform this analysis.¹¹⁶ There are various hypotheses on how judges decide cases. The different hypotheses generally may be characterized as involving formalism, realism, and most recently, realistic formalism.¹¹⁷ Under the formalistic hypothesis, judges decide cases using deductive, deliberative processes.¹¹⁸ Under the realistic hypothesis, judges decide cases first by deciding the desirable outcome based on their intuition and then justify the outcomes.¹¹⁹ Under the realistic formalism hypothesis, judges generally make decisions based on their intuition but sometimes use deliberation to inform their decisions.¹²⁰ None of these hypotheses is completely accepted by the judiciary, the academy, or otherwise as the method by which judges decide cases.¹²¹ Also, not one of these hy-

that “district courts process employment-discrimination cases with a neutral or even jaundiced eye toward plaintiffs”); cf. Smith, *supra*, at 1473–74 (arguing that in the context of potential *Miranda* violations, federal judges’ decisions are often normative in nature, though cast in terms of a legal fiction). Also, the volume of the cases may encourage the judges to use the legal fiction of the reasonable jury to dismiss cases.

¹¹⁴ See FED. R. CIV. P. 50, 56; *Anderson*, 477 U.S. at 249.

¹¹⁵ See *supra* notes 75–99 and accompanying text.

¹¹⁶ Although Kahan and his colleagues admit that it is not clear that judges can accomplish the task of eliminating the bias, they argue that it may be possible, pointing to some research that shows judges’ potential ability to counteract biases. See Kahan, *supra* note 20, at 897–902.

¹¹⁷ Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 2–6 (2007).

¹¹⁸ See *id.* at 2. Brian Tamanaha has argued that the assumption that judges engaged in formalism from the 1870s to the 1920s is not supported historically. See Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 689–98, 713–16 (2009). Instead judges acted according to realism in this time period as well as in subsequent time periods. See *id.* at 690–92. See generally BRIAN TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (forthcoming 2009).

¹¹⁹ See Guthrie et al., *supra* note 117, at 2.

¹²⁰ See *id.*

¹²¹ See *id.* at 2–3. Rowland and Carp have written about the influence of ideology on decision making at the trial level. See C.K. ROWLAND & ROBERT A. CARP, POLITICS AND

potheses is accepted as being capable of accurate decision making.¹²² In other words, the debate continues on how judges decide cases and their accuracy in doing so. Given this disagreement, it should not be assumed that judges could determine who would sit on a jury and could consider all viewpoints of those jurors in their decision of whether a reasonable jury could find for the plaintiff. In *How Judges Think*, Judge Posner stated that

[p]eople see (literally and figuratively) things differently, and the way in which they see things changes in response to the environment. That is true of judges. As Cardozo said, “We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.”¹²³

In the Kahan article about *Scott*, the authors propose a method for judges to decide summary judgment motions.¹²⁴ They state that when the judge believes no reasonable jury could find for the nonmovant, the judge should imagine what the particular jurors would look like who would find for the nonmovant.¹²⁵ If the judge cannot identify the particular group to which these jurors belong, the judge should order summary judgment.¹²⁶ In other words, if jurors who would perceive a particular situation differently

are *mere* outliers—if they don’t share experiences and an identity that endow them with a distinctive view of reality, if the

JUDGMENT IN FEDERAL DISTRICT COURTS 24–57 (1996). On the other hand, Ahmed Taha has written that parties do not file cases in certain courts because of their beliefs that judges will decide them in a particular manner. Ahmed E. Taha, *Judges’ Political Orientations and the Selection of Disputes for Litigation* 20–26 (Wake Forest Univ. Legal Studies Paper No. 963,468, 2007), available at <http://ssrn.com/abstract=963468>.

¹²² See Guthrie et al., *supra* note 117, at 2–3.

¹²³ RICHARD A. POSNER, *HOW JUDGES THINK* 68 (2008) (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 13 (1921)). A conclusion of one study was that juries should hear cases because judges tend not to be able to ignore inadmissible information. See Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1323–24 (2005); see also ROWLAND & CARP, *supra* note 121, at 24–57; Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787–821 (2001) (concluding that judges are affected by many of the cognitive illusions that affect other humans); cf. Laura A. Heymann, *The Reasonable Person in Trademark Law*, 52 ST. LOUIS U. L.J. 781, 783 (2008) (stating that the “reasonable consumer” in trademark law “tends to look a lot like judges in certain respects,” which “is probably due in larger part to the difficulty in truly putting oneself in another’s shoes, in thinking about how the world might look to someone who doesn’t share one’s own physical and cognitive abilities”).

¹²⁴ See Kahan et al., *supra* note 20, at 894–902.

¹²⁵ See *id.*

¹²⁶ See *id.*

factual perceptions in question don't arise from their defining group commitments—summary judgment will *not* convey the message of exclusion that delegitimizes the law in the eyes of the identifiable subcommunities.¹²⁷

On the other hand, if the judge can identify a particular subcommunity to which the jurors belong, the judge should “think hard” before deciding a case summarily.¹²⁸ If “privileging her own view of the facts risks conveying a denigrating and exclusionary message to members of such subcommunities,” then the judge should not enter summary judgment on the basis that no reasonable jury could find this way.¹²⁹ I argue that what Kahan and his colleagues propose judges should do in deciding whether to grant summary judgment is impossible. Again, there is no evidence that judges have the ability to put aside their views and assess evidence based on another person's or group's viewpoint.

In addition to the false factual premise behind the reasonable jury standard—that judges can apply this standard—there are other problems or inconsistencies that underlie the standard. First, under the current standard, an appellate court can dismiss a case at summary judgment even if some judges (appellate or lower court) decide that a reasonable jury could find for the plaintiff. As Justice Stevens emphasized in his dissent in *Scott*, such a disagreement indicates that a reasonable jury could find for the plaintiff in such cases.¹³⁰ He stated that “[i]f two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events.”¹³¹ Previously, in his 2004 dissent in *Brosseau v. Haugen*, Justice Stevens similarly stated that “reasonable jurors” could disagree regarding qualified immunity, and he also stated similarly that his “conclusion [was] strongly reinforced by the differing opinions expressed by the Circuit Judges who ha[d] reviewed the record.”¹³²

¹²⁷ *Id.* at 886.

¹²⁸ *Id.* at 898.

¹²⁹ See Kahan et al., *supra* note 20, at 898–99.

¹³⁰ See *Scott*, 550 U.S. at 397 (Stevens, J., dissenting).

¹³¹ *Id.*

¹³² 543 U.S. 194, 207 (2004) (Stevens, J., dissenting); see also Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 846 (2002) (arguing that standards for what is sexually harassing behavior should be set by community beliefs not “the suppositions of a single trial judge”); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 180–81 (2000) (“Considering that the standard for summary judgment is whether there exists a genuine issue of material fact for a reasonable jury or judge to decide, it is anomalous that the majority judges in these cases apparently regard their dissenting colleagues' views as

Second, the current standard assumes that a person is unreasonable if that person finds in a manner contrary to the majority or to a higher court. That is not necessarily so. In *Scott*, Justice Stevens indicated that the justices in the majority, by finding no reasonable jury could find for the plaintiff, “implicitly” had called the lower court judges “unreasonable.”¹³³ Outside of some finding of impropriety or mental disability, however, judges should be considered reasonable fact-finders.

Third, the current standard does not assess the jury selection process or the jury instructions in cases where a jury has already found for the plaintiff. If both parties participated in the selection of the jury and the parties do not allege misbehavior on the part of the jurors, the decision of the jury should be considered presumptively reasonable. Both parties choose jurors attempting to maximize their chances of

irrational.”); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court’s New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 37–38 (1988) (test of “what a reasonable jury could find” is “indeterminat[e]” and “delicate” given judges are not to make credibility determinations).

In *Williams v. Taylor*, 529 U.S. 362 (2000), Justice O’Connor, writing for the Court, stated:

The federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation’s jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner’s case. The “all reasonable jurists” standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one. For example, the Fifth Circuit appears to have applied its “reasonable jurist” standard in just such a subjective manner. See *Drinkard v. Johnson*, 97 F.3d 751, 769 (1996) (holding that state court’s application of federal law was not unreasonable because the Fifth Circuit panel split 2–1 on the underlying mixed constitutional question), cert. denied, 520 U.S. 1107 (1997). As I explained in *Wright* with respect to the “reasonable jurist” standard in the *Teague* context, “[e]ven though we have characterized the new rule inquiry as whether ‘reasonable jurists’ could disagree as to whether a result is dictated by precedent, the standard for determining when a case establishes a new rule is ‘objective,’ and the mere existence of conflicting authority does not necessarily mean a rule is new.” 505 U.S. at 304 (citation omitted).

Id. at 409–10.

A final point is that even if the reasonable juror or reasonable mind standard was adopted for dispositive procedures, as opposed to the reasonable jury standard, which I do not believe is correct, disagreement among judges indicates that a reasonable juror or mind could find for the plaintiff and thus the case should not be dismissed.

¹³³ 550 U.S. at 395 (Stevens, J., dissenting) (“Here, the Court has usurped the jury’s factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable.”).

winning. Moreover, jurors are excluded if biased.¹³⁴ Another assessment of the reasonableness of the jury is an assessment of the instructions given to the jury. If there are no problems with the instructions after the jury has been properly selected, the jury should be considered presumptively reasonable.¹³⁵

¹³⁴ Cf. *Mu'Min v. Virginia*, 500 U.S. 415, 431–32 (1991); WILLIAM BLACKSTONE, 3 COMMENTARIES *350–60, *363.

¹³⁵ In *Jackson v. Virginia*, the Court stated that “a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury.” 443 U.S. 307, 317 (1979). The concurrence disagreed, stating:

The very premise of *Winship* is that properly selected judges and properly instructed juries act rationally, that the former will tell the truth when they declare that they are convinced beyond a reasonable doubt and the latter will conscientiously obey and understand the reasonable-doubt instructions they receive before retiring to reach a verdict, and therefore that either factfinder will itself provide the necessary bulwark against erroneous factual determinations.

Id. at 333 (Stevens, J., concurring in the judgment).

One might state that the reasonable jury standard is no more a legal fiction than any other use of reasonableness in law, particularly the reasonable man standard that is used in many areas of the law, including torts and criminal law. See Randy T. Austin, Comment, *Better Off with the Reasonable Man Dead or the Reasonable Man Did the Darndest Things*, 1992 B.Y.U. L. REV. 479, 480–81 (discussing the origins of the reasonable man standard as possibly in late eighteenth century or early nineteenth century). For example, the *Restatement (Second) of Torts* states that “[u]nless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a *reasonable man* under like circumstances.” RESTATEMENT (SECOND) OF TORTS § 283 (1965) (emphasis added); see also Heymann, *supra* note 123, at 783 (discussing the reasonable man standard in the trademark law context); Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 72–73 (2007) (discussing the history of the “reasonable person” across the American legal landscape). According to the *Restatement (Second) of Torts*:

Negligent conduct may be either: (a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.

RESTATEMENT (SECOND) OF TORTS § 284 (1965).

As other examples, in criminal law, the reasonable man standard is used for murder, duress, self-defense, and provocation. Victoria Nourse, *After the Reasonable Man: Getting over the Subjectivity/Objectivity Question*, 11 NEW CRIM. L. REV. 33, 33 (2008); see also CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 201–60 (2003) (discussing the reasonable man concept in the context of self-defense and provocation defenses in murder cases); David Schultz, *From Reasonable Man to Unreasonable Victim?: Assessing Harris v. Forklift Systems and Shifting Standards of Proof and Perspective in Title VII Sexual Harassment Law*, 27 SUFFOLK U. L. REV. 717, 722–44 (1993) (outlining the evolution of the reasonableness standard in the context of Title VII sexual harassment cases).

The false factual premise that underlies the basis of dispositive procedure, in addition to the other problems or inconsistencies with the standard shown above, shows that dispositive procedure is fatally flawed. Although another standard to dispose of cases may be possible—the consideration of only the facts and conclusions of the plaintiff¹³⁶—the reasonable jury standard is itself a legal fiction, incapable of determination.

The reasonable man standard has differed, though, from the reasonable jury standard in important respects. For example, under the reasonable man standard, judges consider the characteristics and experiences of that person, but under the reasonable jury standard, they do not assess what the reasonable jury looks like and thus what a reasonable jury would find. Compare *Scott*, 550 U.S. at 374–86 (not evaluating what a reasonable jury could find), with RESTATEMENT (SECOND) OF TORTS § 70 cmt. b (1965) (“[T]he qualities which primarily characterize a reasonable man [for purposes of self-defense] are ordinary courage and firmness.”), and *id.* § 283C (indicating that the reasonable man must be taken as the man with his particular characteristics, for example, illness or physical disability).

Also, under the reasonable man standard, a jury or other decision maker makes judgments as to what a reasonable person would do, and this seems at least somewhat possible for the decision maker to determine. Cf. Adam Candeub, *An Economic Theory of Criminal Excuse*, 50 B.C. L. REV. 87, 136–37 (2009) (proposing a cost-benefit analysis rubric for juries confronted with such a decision). On the other hand, under the reasonable jury standard, a decision maker attempts to determine what a reasonable jury—a complex entity which, in most cases, has not even been chosen—would do. This occurs in the context in which “reasonable” decision makers disagree on this question and when the decision maker is deciding whether it can decide the case instead of the jury.

Moreover, there is a difference in importance of the effect of the standards. The reasonable man standard generally affects one nondispositive question in the case while the reasonable jury standard generally affects whether the case is dismissed. Regardless of these differences, I do not justify the reasonable man standard, but rather argue that the reasonable jury standard is inappropriate for use for dispositive motions. The reasonable person standard has been otherwise criticized as vague and inaccurate. See, e.g., Candeub, *supra*, at 131–32; Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 450–68 (1981) (concluding that the reasonable man standard is inappropriate in the context of self-defense and provocation defenses to murder); Edward Green, *The Reasonable Man: Legal Fiction or Psychosocial Reality?*, 2 LAW & SOC’Y REV. 241, 245–57 (1968) (outlining the results of a study that found personal characteristics influence individual perceptions of the reasonable man); Tracey Maclin, *“Black and Blue Encounters” —Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250 (1991) (“[T]he Court should disregard the notion that there is an average, hypothetical, reasonable person out there by which to judge the constitutionality of police encounters.”); Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 317–18 (1914) (“What this imaginary person would have done really means what the jury thinks was the proper thing to do; and so long as there is room for a fair difference of opinion on this point the jury has a free hand.” (internal citations omitted)).

¹³⁶ See, e.g., Thomas, *supra* note 8, at 148–54 (discussing the pretrial common law devices of demurrer to the pleadings and demurrer to the evidence, devices that required the court to accept the plaintiff’s allegations and evidence as correct).

CONCLUSION

The standard of whether a reasonable jury could find for the plaintiff underlies three important dispositive motions in civil litigation. Upon motions for summary judgment, a directed verdict, and judgment as a matter of law, judges regularly determine whether no reasonable jury could find for the plaintiff. The Supreme Court has failed to show how judges are to determine whether no reasonable jury could find for the plaintiff. Instead, the justices of the Court and other judges on the lower courts have themselves decided motions based on their own views of the sufficiency of the evidence. This has occurred despite the Court's holding that judges are not to engage in this analysis. Indeed, the determination by a judge of whether a reasonable jury could find for the plaintiff is a legal fiction, incapable of determination. Accordingly, the only analysis that judges perform in their decisions to dismiss cases—under the mantra of the reasonable jury standard—is an improper one based on the judge's own views of the facts.