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## Reforming the Summary Judgment Problem: The Consensus Requirement

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# Reforming the Summary Judgment Problem: The Consensus Requirement

## **Erratum**

Law; Litigation; Civil Procedure; Courts; Judges; Law and Society

# REFORMING THE SUMMARY JUDGMENT PROBLEM: THE CONSENSUS REQUIREMENT

Suja A. Thomas\*

*If one or more federal trial or appellate court judges disagree on whether summary judgment should be ordered, summary judgment can still be granted when an appellate majority finds in favor of summary judgment. The case will be dismissed, and a jury will not try it. Logically, however, should this occur? At least one judge has stated that a reasonable jury could find for the party against whom summary judgment has been ordered. In these situations where judges disagree on whether summary judgment should be granted, they often portray the case's facts in very different ways—what I refer to as “massaging facts.” The massaging of facts, along with the issues of summary judgment's unconstitutionality and the underlying reasonable jury standard's impossibility, make summary judgment legally problematic. At the same time, courts extensively employ summary judgment to dismiss many factually intensive cases, including police brutality and sexual harassment cases. Given that summary judgment has no prospect of being eliminated any time soon, the question is whether the “summary judgment problem” can be reformed to make the procedure more defensible. This Article explains the summary judgment problem including the concept of massaging facts. It then analyzes “the consensus requirement”—an effort to make summary judgment more justifiable given its continued use today.*

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#### INTRODUCTION

In *Salazar-Limon v. City of Houston*,<sup>1</sup> the U.S. Supreme Court denied certiorari for a case alleging the police exercised excessive force.<sup>2</sup> In a concurring opinion, Justice Alito stated: “Every year the courts of appeals decide hundreds of cases in which they must determine whether thin evidence provided by a plaintiff is just enough to survive a motion for summary judgment or not quite enough.”<sup>3</sup> He concluded that the Court “does not typically grant . . . certiorari to review a factual question of this sort.”<sup>4</sup> The question of whether a plaintiff has sufficient evidence to defeat summary judgment is an important one, however. The fates of people who allege wrongs often rest on these determinations.

Salazar-Limon was one of the people who relied on the courts to make the correct decision. The police pulled him over after they observed his car weaving in traffic on a freeway.<sup>5</sup> Later, some time after he was out of the car pursuant to a police officer’s request, one of the police officers shot the unarmed Salazar-Limon in the back claiming that he reached at his waistband for a gun.<sup>6</sup> Subsequently, Salazar-Limon brought a case alleging the police exercised excessive force in using a gun against him.<sup>7</sup> Examining the case on a motion by the police officer for summary judgment, the district court and court of appeals judges agreed with the police officer that a reasonable jury could not find that the officer exercised excessive force. They asserted the facts were undisputed that the motorist reached for his waistband.<sup>8</sup> On appeal, the Supreme Court decided not to grant certiorari.<sup>9</sup> Citing differing factual contentions on whether the motorist had reached for his waistband, Justice Sotomayor, with Justice Ginsburg joining her, stated, “This is not a case that should have been resolved on summary judgment.”<sup>10</sup>

In deciding whether to grant summary judgment, judges decide whether a genuine dispute of material fact exists and, if there is no such dispute, they decide whether the moving party is entitled to judgment as a matter of law.<sup>11</sup> The Supreme Court has stated that a judge can decide whether summary judgment should be granted by determining whether a reasonable jury could

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1. 137 S. Ct. 1277 (2017).  
 2. *Id.* at 1278 (Sotomayor, J., dissenting) (noting that the issue before the Court involved the use of excessive force).  
 3. *Id.* at 1277 (Alito, J., concurring).  
 4. *Id.* at 1278.  
 5. *Salazar-Limon v. City of Houston*, 97 F. Supp. 3d 898, 900 (S.D. Tex. 2015), *aff’d*, 826 F.3d 272 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1277 (2017).  
 6. *Id.* at 901–02.  
 7. *Id.* at 902.  
 8. *Salazar-Limon*, 826 F.3d at 278–79; *Salazar-Limon*, 97 F. Supp. 3d at 907.  
 9. *Salazar-Limon*, 137 S. Ct. at 1277 (denying certiorari).  
 10. *Id.* at 1280 (Sotomayor, J., dissenting).  
 11. FED. R. CIV. P. 56(a).

decide for the nonmoving party.<sup>12</sup> The Supreme Court has never undertaken to explain how a judge can make this determination.

When the standard was created, Justice William J. Brennan, Jr. actually questioned how a judge could decide this question.<sup>13</sup> In the past, using these criticisms as a starting point, I described the impossibility of the reasonable jury standard, showing judges cannot determine what a jury could decide.<sup>14</sup> Instead, we see judges infuse their own opinions of the evidence in determining whether to grant summary judgment,<sup>15</sup> something that the Supreme Court has explicitly stated judges should not do when deciding whether to order summary judgment.<sup>16</sup>

The source of the disagreement in *Salazar-Limon* was the key fact of whether the motorist had reached for his waistband.<sup>17</sup> Although all of the Justices and judges had the same information, they described the facts differently, which resulted in disparate decisions both for and against summary judgment. First, some judges ignored certain alleged facts. Second, although judges are supposed to resolve reasonable inferences in favor of the nonmoving party,<sup>18</sup> some judges represented the facts in a manner favorable to the moving party. This altered portrayal of the facts in judicial opinions is referred to here as the “massaging of the facts.”

*Salazar-Limon* was just one of many civil rights cases that have been dismissed on summary judgment. These types of cases—some of the most factually intensive cases—are dismissed at very high rates.<sup>19</sup>

Summary judgment in these cases occurs in the presence of the Seventh Amendment to the U.S. Constitution. This provision preserved the right to a jury trial in civil cases that existed at English common law in the late eighteenth century.<sup>20</sup> At English common law, juries decided cases with damages, and judges had extremely limited authority to dismiss cases before,

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12. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

13. *See id.* at 257–58 (Brennan, J., dissenting).

14. *See generally* Suja A. Thomas, *Summary Judgment and the Reasonable Jury Standard: A Proxy for a Judge’s Own View of the Sufficiency of the Evidence?*, 97 JUDICATURE 222 (2014) [hereinafter Thomas, *Proxy*]; Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759 (2009) [hereinafter Thomas, *Fallacy*].

15. *See generally* Thomas, *Proxy*, *supra* note 14 (arguing that the reasonable jury standard has become a proxy for the judge’s own view of the evidence); Thomas, *Fallacy*, *supra* note 14 (arguing that judges substitute their views for those of a reasonable jury).

16. *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014).

17. *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1281 (2017) (Sotomayor, J., dissenting) (“Indeed, the courts below needed to ask only one question: Did Salazar-Limon turn and reach for his waistband, or not?”).

18. *See Liberty Lobby, Inc.*, 477 U.S. at 255 (majority opinion).

19. *See* Amanda Farahany & Tanya McAdams, *Analysis of Employment Discrimination Claims for Cases in Which an Order Was Issued on Defendant’s Motion for Summary Judgment in 2011 and 2012 in the U.S. District Court for the Northern District of Georgia* (unpublished manuscript) (Sept. 18, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2326697](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326697) [<https://perma.cc/RE79-865B>]; *see also* Memorandum from Joe Cecil & George Cort to Hon. Michael Baylson, *Estimates of Summary Judgment Activity in Fiscal Year 2006* (June 15, 2007), <https://www.fjc.gov/content/estimates-summary-judgment-activity-fiscal-year-2006> [<https://perma.cc/DW66-3XRK>].

20. Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 146–47 (2007).

during, or after a jury trial.<sup>21</sup> No procedure similar to summary judgment existed whereby a court could dismiss a case based on what it thought the jury could find in the case.<sup>22</sup>

Despite this history, summary judgment is entrenched in the civil system in the United States. Moreover, seemingly irrational results can occur on summary judgment. Despite one or more judges' belief that a reasonable jury could find for party A, a court can grant summary judgment to party B, denying a jury trial to A.

An important question is whether this system where summary judgment is granted under troubling conditions can be reformed. Elsewhere, I briefly proposed the idea of the consensus requirement for summary judgment.<sup>23</sup> Here, this concept is further developed. Under this requirement, if one judge decides a reasonable jury could find for the nonmoving party, summary judgment will be denied.<sup>24</sup> The arguably unconstitutional nature of the procedure, the impossibility of implementing the underlying standard for summary judgment, and the massaging of facts that can occur each and together show that cases should go forward where at least one judge decides a reasonable jury could find for the nonmoving party.

Part I of this Article briefly traces the history of summary judgment. Part II then describes the summary judgment problem. It outlines my previous arguments that summary judgment is unconstitutional and that the reasonable jury standard is impossible. The concept of massaging facts is then introduced using *Salazar-Limon* and other cases. Finally, Part III describes the consensus requirement, an idea to reform summary judgment.

### I. THE HISTORY OF SUMMARY JUDGMENT

The English first introduced a procedure called “summary judgment” in Keating’s Act in 1855.<sup>25</sup> This device permitted plaintiffs to secure a judgment without delay when defendants had no defense to a claim of debt.<sup>26</sup> The result of “economic and social pressures that could be withstood no longer,” the procedure was specifically favored by merchants.<sup>27</sup> Because some debtors claimed false defenses to delay paying creditors such as merchants, Parliament sought to protect creditors through the creation of this

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21. *See id.* at 148–58.

22. *See id.*

23. SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* 237 (2016) [hereinafter THOMAS, *THE MISSING AMERICAN JURY*]; Suja A. Thomas, *What Happened to the American Jury? Proposals for Revamping Plea Bargaining and Summary Judgment*, LITIGATION, Spring 2017, at 25, 29–30 [hereinafter Thomas, *What Happened to the American Jury?*].

24. THOMAS, *THE MISSING AMERICAN JURY*, *supra* note 23, at 237; Thomas, *What Happened to the American Jury?*, *supra* note 23, at 29–30.

25. John A. Bauman, *The Evolution of the Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating’s Act*, 31 IND. L.J. 329, 329 (1956).

26. *Id.* at 342.

27. *Id.* at 329.

procedure.<sup>28</sup> A court could decide whether the debtors set forth genuine defenses, requiring a trial.<sup>29</sup>

In adopting this summary judgment procedure, the English drew on a long history of the use of similar procedures in other countries, including the use of summary diligence in Scotland.<sup>30</sup> Parliament later extended summary judgment to other types of actions.<sup>31</sup> However, certain causes of action including personal injury were not eligible for summary judgment because summary judgment required “factual clarity and proof.”<sup>32</sup> Accordingly, summary judgment was possible only “with a written instrument documenting debt, or actions for a fixed amount of money.”<sup>33</sup>

Summary judgment in the United States had significant similarities to as well as some differences from English summary judgment.<sup>34</sup> There were parallels to the English’s reaction to the wishes of the mercantile; “the needs of the [American] commercial community and the ineptitude of the ordinary procedure to satisfy them” were emphasized.<sup>35</sup> States limited their use to the use in England.<sup>36</sup>

At the same time, in the federal courts, summary judgment was significantly motivated by desires to improve the fate of the plaintiff when corporations wielded too much power.<sup>37</sup> Claiming injuries, plaintiffs brought actions against them and they in turn sought to delay cases to pressure monetarily challenged plaintiffs.<sup>38</sup> Around the time that summary judgment was adopted, it took four years to complete a lawsuit.<sup>39</sup>

When the Advisory Committee on the Federal Rules of Civil Procedure considered summary judgment for the federal courts, they debated which causes of actions should not be dismissed via this mechanism.<sup>40</sup> While it was acknowledged that summary judgment might not be appropriate in many tort cases because of the factually intensive nature of those cases, it was argued that the simple availability of summary judgment for tort cases could not hurt the vast majority of these cases for which summary judgment would not be appropriate.<sup>41</sup>

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28. *Id.* at 333–34.

29. *Id.* at 338–39.

30. *Id.* at 334–37.

31. *Id.* at 339–40.

32. Ilana Haramati, *Procedural History: The Development of Summary Judgment as Rule 56*, 5 N.Y.U. J.L. & LIBERTY 173, 179 (2010); *see also* Bauman, *supra* note 25, at 340–41.

33. Haramati, *supra* note 32, at 178.

34. *See* Bauman, *supra* note 25, at 342–44.

35. *Id.* at 343–44.

36. *Id.* at 344–45. Before its adoption in the federal courts, some states had summary judgment procedures and some permitted summary judgment for defendants. *Id.* at 344 & n.115.

37. Haramati, *supra* note 32, at 185–89.

38. *Id.*

39. *Id.* at 188.

40. *Id.* at 195–97.

41. *Id.* at 197.

In discussing the procedure's use, some questioned whether the procedure was constitutional under the Seventh Amendment.<sup>42</sup> Relatedly, in explaining the limits of the procedure, Advisory Committee members opined that juries should decide all factual issues.<sup>43</sup>

Rule 56, adopted along with the other Federal Rules of Civil Procedure in 1938, expanded the grant of summary judgment to defendants and to all types of cases.<sup>44</sup> The broadening of summary judgment resulted from a desire to make the federal courts more efficient.<sup>45</sup> Edson Sunderland, one of the drafters of Rule 56, discussed the appropriate use of summary judgment: "[T]here is no reason for restricting [summary judgment rules] to any type of case' as '[t]hey will tend to be used . . . only in appropriate cases.'"<sup>46</sup> However, potential problems with the broad change in the scope of summary judgment were recognized early on. It was argued that the procedure encouraged courts to evaluate evidence and dismiss certain cases that juries should instead decide based on their assessments of witness demeanor and credibility.<sup>47</sup>

## II. THE SUMMARY JUDGMENT PROBLEM

In England, summary judgment initially served as a method where courts could evaluate whether a defendant possessed a real defense to a plaintiff's claim of debt.<sup>48</sup> In the United States, it was extended to be available for all claims and to permit defendants to bring summary judgment requests as well.<sup>49</sup>

While, as described above, motions for summary judgment were originally considered inappropriate in most tort-type cases in the United States and were granted only where no issue of fact existed,<sup>50</sup> currently, such motions are actually granted often in tort-type cases such as factually intensive civil rights cases.<sup>51</sup> Also, contrary to the original procedure employed only in favor of plaintiffs, now courts often grant summary judgment against plaintiffs and almost never grant summary judgment in favor of plaintiffs.<sup>52</sup> A study by the Federal Judicial Center (FJC) illustrates these phenomena.<sup>53</sup> The FJC studied motions for summary judgment.<sup>54</sup> In the tort-type cases alleging employment discrimination, where defendant employers requested summary judgment, courts granted summary judgment for the defendant in full or in

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42. *Id.* at 197–99.

43. *Id.* at 198–99.

44. Bauman, *supra* note 25, at 344; *see also* FED. R. CIV. P. 56.

45. Haramati, *supra* note 32, at 202.

46. *Id.* at 205.

47. Bauman, *supra* note 25, at 351.

48. Thomas, *supra* note 20, at 179 n.167; *see also supra* notes 25–26 and accompanying text.

49. *See* FED. R. CIV. P. 56(a).

50. *See supra* note 41 and accompanying text.

51. Memorandum from Joe Cecil & George Cort, *supra* note 19, at 2.

52. *See id.*

53. *Id.*

54. *Id.*



part over 70 percent of the time.<sup>55</sup> Another study of employment discrimination cases in the Northern District of Georgia found worse results for plaintiffs.<sup>56</sup> In that study, where plaintiffs were represented and defendant-employers requested summary judgment, courts granted summary judgment for the defendants in around 80 percent of cases where plaintiffs alleged discrimination.<sup>57</sup>

Previously, I showed summary judgment's conflict with the Seventh Amendment and the irrationality of the underlying reasonable jury standard.<sup>58</sup> In addition, in many cases in which courts grant summary judgment, judges describe the facts, creating an impression that no dispute of fact exists when such differences exist. Each of these issues alone and together present "the summary judgment problem" in federal courts.

#### A. *The Constitutional Problem*

Summary judgment precludes a jury from hearing a case. So, the Seventh Amendment to the U.S. Constitution, which gives certain authority to juries and other power to judges,<sup>59</sup> determines whether summary judgment is constitutional. It provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.<sup>60</sup>

The Supreme Court has stated that common law in the Seventh Amendment means the English common law in 1791, the date when the Seventh Amendment was adopted.<sup>61</sup> In other words, a right to a jury trial in the federal courts exists where a jury trial in England existed in the late eighteenth century.

The English jury decided cases in which plaintiffs claimed damages, and judges had little control over jury verdicts.<sup>62</sup> Prior to and during trial, a panel of three judges could rule respectively on a demurrer to the pleadings or a demurrer to the evidence under which a party argued the other party had no claim or defense that the law recognized.<sup>63</sup> The demurring party accepted as true the alleged facts, evidence, and conclusions of the opposing party.<sup>64</sup>

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55. *Id.*

56. *See generally* Farahany & McAdams, *supra* note 19.

57. *Id.* at 3.

58. *See generally* Thomas, *supra* note 20.

59. *See* U.S. CONST. amend. VII.

60. *Id.*

61. *See, e.g.,* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 436 n.20 (1996); Markham v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996); Galloway v. United States, 319 U.S. 372, 388–92 (1943); Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 656–57 (1935); Dimick v. Schiedt, 293 U.S. 474, 476–77 (1935); Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 497–98 (1931); Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 377 (1913); *see also supra* note 20 and accompanying text.

62. *See* Thomas, *supra* note 20, at 148–58.

63. *See id.* at 148–54.

64. *Id.* at 149–51.

Prior to, during, or after a trial, a court could not decide that the claim was supported by insufficient evidence and dismiss the claim.<sup>65</sup> During the trial, a judge had additional authority. It could direct a jury to find in a certain way, but the jury could refuse to follow the judge's admonition.<sup>66</sup> After a jury trial, a court of three judges could order a new trial before another jury if they thought insufficient evidence supported the jury's verdict.<sup>67</sup> They could not however order judgment for the party that lost before the jury.<sup>68</sup> Under these common law procedures, juries or the parties determined the facts, and only after a trial could judges determine whether insufficient evidence supported the verdict, and if so, they could order only a new trial before another jury.<sup>69</sup> If the second jury agreed with the first, the judges would not order a third jury trial.<sup>70</sup>

As a result of principles derived from the common law procedures, in the past I concluded that summary judgment was unconstitutional.<sup>71</sup> A counterargument that summary judgment is constitutional rests on England's use of summary judgment. Because England had a form of summary judgment<sup>72</sup> and currently has a procedure of summary judgment that permits a court to assess the sufficiency of the evidence,<sup>73</sup> American summary judgment is arguably constitutional because the American jury is based on the English jury.<sup>74</sup>

However, the American jury is based specifically on the English jury in the late eighteenth century, not the English jury in the mid-nineteenth century or now.<sup>75</sup> Furthermore, unlike Congress, Parliament had and has the power to alter the jurisdiction of the English courts and the jury.<sup>76</sup> The jurisdiction of the jury in the federal courts is based on only the Constitution and consequently the English jury in the late eighteenth century.<sup>77</sup> The jury's authority can change only upon a constitutional amendment.<sup>78</sup>

While there are circumstances when a court could constitutionally grant summary judgment, for example, if the parties actually agree to the facts and the judge simply applies the law to the facts, this type of application is not

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65. *Id.* at 150, 153.

66. *Id.* at 156–57.

67. *Id.* at 157–58.

68. *Id.* at 158.

69. *Id.*

70. *See id.* (“If the court believed that the evidence was insufficient it would order a new trial. The court would never order judgment.”).

71. *Id.* at 158–60.

72. *Id.* at 158.

73. CPR 24.2 (UK), <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part24> [<https://perma.cc/ADJ9-9D3F>].

74. *See* Thomas, *What Happened to the American Jury?*, *supra* note 23, at 25.

75. *See id.*

76. *See* Suja A. Thomas, *A Limitation on Congress: “In Suits at Common Law,”* 71 OHIO ST. L.J. 1071, 1102–03 (2010).

77. *See id.* at 1102–06.

78. *See id.* at 1104–06.

the usual situation.<sup>79</sup> And this factual agreement does not occur in the factually disputed cases in which courts most often order summary judgment.<sup>80</sup>

The Supreme Court has never decided the issue of whether summary judgment is unconstitutional.<sup>81</sup> In the event, however, that lower courts believe that the Supreme Court has resolved this issue, the lower courts can revisit it.<sup>82</sup> With that stated, this issue is unlikely to be addressed by the Supreme Court any time soon. For example, various petitions for certiorari have unsuccessfully raised the issue.<sup>83</sup>

### B. The Reasonable Jury Problem

In addition to the constitutional issue, there is a practical issue with summary judgment. On a summary judgment motion, a judge decides whether a reasonable jury could find for the nonmoving party.<sup>84</sup> The reasonable jury standard appears sensible at first glance. If a reasonable jury could not find for one party, a trial could be useless and arguably the other party should win.

For a judge to determine what a reasonable jury could find, it appears that a judge would be required to imagine who would sit on the jury, how the jurors would deliberate, and the conclusion that they would reach. I have described this task as impossible for several reasons. First, jurors' characteristics vary greatly so judges could not accurately predict who would sit on a jury.<sup>85</sup> To imagine who would sit on the jury, judges would have to attempt to cobble together some idea of the characteristics of those who would be picked for the jury in a particular area of the country. Second, even if they could do this, they would also need to know these hypothetical jurors' perspectives.<sup>86</sup> In a case where I was part of a team that represented the plaintiff who accused his employer of race discrimination, we picked a person who was a gay and lesbian rights activist. We felt that he might understand the discrimination that our client faced. However, we do not

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79. See generally Craig M. Reiser, *The Unconstitutional Application of Summary Judgment in Factually Intensive Inquiries*, 12 U. PA. J. CONST. L. 195 (2009) (noting that summary judgment is often troublingly applied in factually intensive cases).

80. See generally *id.* at 208–19 (noting examples of such factually disputed cases and the courts' willingness to grant summary judgment in them).

81. Brief of Professor Suja A. Thomas as Amicus Curiae in Support of Plaintiff-Appellant Jerberee Jefferson and Reversal of District Court at 3, *Jefferson v. Sewon Am., Inc.*, No. 3:15-CV-78-TCB-RGV (11th Cir. Aug. 21, 2017); see Thomas, *supra* note 20, at 144, 163–77.

82. See Brief of Professor Suja A. Thomas as Amicus Curiae in Support of Plaintiff-Appellant Jerberee Jefferson and Reversal of District Court, *supra* note 81, at 9.

83. See, e.g., Petition for Writ of Certiorari at 18–24, *Kidwell v. Eisenhower*, 568 U.S. 963 (2012) (No. 12-226), 2012 WL 3613463, at \*18–24; Petition for Writ of Certiorari at 10–17, *Kramer v. Yokely*, 556 U.S. 1152 (2009) (No. 08-923), 2009 WL 181804, at \*10–17; Petition for Writ of Certiorari at 10–18, *Mendia v. Hawker Beechcraft Corp.*, 557 U.S. 905 (2009) (No. 08-1386), 2009 WL 1304727, at \*10–18. Most of the cases are pro se cases, however, which may have affected the certiorari decisions of the Supreme Court.

84. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

85. Thomas, *Proxy*, *supra* note 14, at 227.

86. *Id.*; Thomas, *Fallacy*, *supra* note 14, at 778–80.

know what he said in the deliberations. Each person brings his own perspective, and a judge cannot make these determinations accurately.<sup>87</sup> Third, a judge could not figure out how jurors would deliberate together.<sup>88</sup> And fourth, a judge could not decide how individual jurors would ultimately vote.<sup>89</sup>

Evidence that judges cannot decide what a reasonable jury could find includes that actual summary judgment opinions show judges stating what they think, not what a jury could think.<sup>90</sup> In these cases, judges substitute their own evaluation of the evidence for that of the hypothetical jury. In the Supreme Court's *Scott v. Harris*<sup>91</sup> case, this was seen explicitly. Each Justice stated what he or she saw on a videotape of a car chase and then stated that the other Justices and judges who had different opinions were wrong.<sup>92</sup> In engaging in this discussion that the other Justices and judges had incorrectly evaluated the evidence, the Justices were having a discourse on the wrong question. The question was not what each Justice or judge thought, but rather what a jury could think.<sup>93</sup>

Another indication that a judge decides only what he thinks, not what a reasonable jury could find, is the disagreement among judges about whether summary judgment should be ordered. Judges regularly disagree on whether a reasonable jury could find for one party. Again, *Scott* shows this dichotomy. In that case, one district court judge,<sup>94</sup> three circuit court judges,<sup>95</sup> and one Supreme Court Justice<sup>96</sup> found a reasonable jury could find for the plaintiff, and eight Justices held the opposite.<sup>97</sup>

The idea of what a reasonable jury could find suggests that only one reasonable result from a jury exists. But, if a reasonable jury could find in only one way, then it seems likely that the judges would agree on the result.

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87. The naïve realism literature shows we tend to think that others have the same views as us and if they do not they are biased or irrational. *See, e.g.*, Emily Pronin, Thomas Gilovich & Lee Ross, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 *PSYCHOL. REV.* 781, 781 (2004); *see also* Daniel J. Simons & Christopher F. Chabris, *Gorilla in Our Midst: Sustained Inattention Blindness for Dynamic Events*, 28 *PERCEPTION* 1059 (1999) (arguing that we can miss events when we do not pay attention).

88. Thomas, *Proxy*, *supra* note 14, at 225; Thomas, *Fallacy*, *supra* note 14, at 771–72, 778–79.

89. Thomas, *Proxy*, *supra* note 14, at 227; Thomas, *Fallacy*, *supra* note 14, at 778–79.

90. Thomas, *Proxy*, *supra* note 14, at 227; Thomas, *Fallacy*, *supra* note 14, at 769–71.

91. 550 U.S. 372 (2007).

92. *See id.* at 378 (“The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.”); *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.” (citation omitted)).

93. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

94. *See Harris v. Coweta County*, No. 3:01-CV-148-WBH, 2003 WL 25419527, at \*4 (N.D. Ga. Sept. 25, 2003), *aff'd in part, rev'd in part*, 433 F.3d 807 (11th Cir. 2005), *rev'd sub nom. Scott*, 550 U.S. 372.

95. *See Harris v. Coweta County*, 433 F.3d 807, 816 (11th Cir. 2005), *rev'd sub nom. Scott*, 550 U.S. 372.

96. *See Scott*, 550 U.S. at 396–97 (Stevens, J., dissenting).

97. *See id.* at 380–81, 386 (majority opinion).

Moreover, as described previously, factually intensive cases are often decided on summary judgment.<sup>98</sup> Because they are factually intensive and in need of determination, two different groups could very well decide in disparate ways. This result does not make one group unreasonable. Justice John Paul Stevens made a similar point in *Scott*, stating that certain judges were not unreasonable just because they had different opinions of the evidence than the majority.<sup>99</sup>

All of these issues illustrate that the reasonable jury standard is impossible to implement. Judges decide whether to order summary judgment based on their own opinions of the evidence.

If judges decide what they think of the evidence on a summary judgment motion, the question remains whether judges think differently from what a reasonable jury could think. If it would be the same, then it would be arguably acceptable to use a judge's opinion if one accepts the notion of a reasonable jury. Michael Pfautz tried to test this question.<sup>100</sup> He examined the cases in which a judge had granted summary judgment, the appellate court reversed the decision, and a jury decided the case.<sup>101</sup> In 25 percent of these cases, the jury found in favor of the party against whom the district court had ruled on summary judgment.<sup>102</sup> In other words, judges and juries decide differently at times. Harry Kalven and Hans Zeisel and others have shown this as well.<sup>103</sup>

### C. *The Massaging Facts Problem*

In *Salazar-Limon*, two Justices determined that a reasonable jury could have found excessive force.<sup>104</sup> However, other Justices did not believe the review of the “factual question” there was appropriate.<sup>105</sup> As a result, the defendant won even though some believed a reasonable jury could find for the plaintiff.<sup>106</sup>

The different conclusions about the propriety of summary judgment in the case occurred as the result of some Justices and judges viewing the facts disparately or, in other words, some “massaging of the facts” taking place. The factual question in the case concerned whether a police officer reasonably feared for his life and as a result whether he exercised excessive

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98. See *supra* notes 19, 51, 80 and accompanying text.

99. *Scott*, 550 U.S. at 396 (Stevens, J., dissenting) (“If 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.”).

100. See generally Michael W. Pfautz, Note, *What Would a Reasonable Jury Do? Jury Verdicts Following Summary Judgment Reversals*, 115 COLUM. L. REV. 1255 (2015).

101. See *id.* at 1270–95.

102. *Id.* at 1275.

103. See generally HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966) (analyzing and explaining that judges and juries often agree but also decide differently).

104. See *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1281–82 (2017) (Sotomayor, J., dissenting).

105. *Id.* at 1277–78 (Alito, J., concurring).

106. See *id.*; *id.* at 1281–82 (Sotomayor, J., dissenting).

force by shooting the motorist.<sup>107</sup> The district court judge concluded that the motorist offered no evidence against the police officer's testimony that the motorist had turned and reached for his waistband.<sup>108</sup> But as Justice Sotomayor stated, the motorist had offered such evidence: he contended that the officer fired before he turned toward the officer.<sup>109</sup>

Massaging facts occurs when judges who possess the same information use it in different manners. Massaging facts can occur in a number of ways. It can occur when a court ignores relevant facts. It also can happen when courts do not consider different ways to view the facts. In other words, they do not take into account the reasonable inferences favoring the party not moving for summary judgment.<sup>110</sup>

*Salazar-Limon* is an important example of judges not considering facts and reasonable inferences. Facts determined whether the officer's actions were reasonable. Instead of recognizing that the statement of the motorist directly implied that he did not reach for his waistband, thus disagreeing with the officer's version of the facts, judges stated that no issue of fact existed because the motorist had not explicitly stated that he did not reach for his waistband.<sup>111</sup> It is unlikely given what the motorist already stated that he would agree that he reached for his waistband. Additionally, given that he was unarmed,<sup>112</sup> the motorist had little reason to reach for his waistband. In fact, just the opposite was true. He had reason not to move as the police officer was armed.

In one of my cases as a lawyer,<sup>113</sup> the court also dissected the evidence and massaged the facts. Our client, a professor of Pakistani descent and of the Muslim religion, alleged a university discriminated against her in denying tenure to her.<sup>114</sup> An ad hoc committee, chaired by a professor of Indian descent and of the Hindu religion, recommended denial of tenure, which the university ratified.<sup>115</sup> The professor who was denied tenure had a graduate

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107. *Salazar-Limon v. City of Houston*, 97 F. Supp. 3d 898, 904 (S.D. Tex. 2015), *aff'd*, 826 F.3d 272 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1277 (2017).

108. *Id.* at 909.

109. *Salazar-Limon*, 137 S. Ct. at 1281 (Sotomayor, J., dissenting).

110. See David L. Lee & Jennifer C. Weiss, *Inferences in Employment Law Compared to Other Areas of the Law: Turning the Rules Upside Down*, 57 N.Y.L. SCH. L. REV. 781, 791 (2012). Judge Bernice B. Donald and her coauthor have argued that if it is not already the standard, on summary judgment, "a judge should liberally construe the Supreme Court's instruction to draw all reasonable inferences in favor of the non-moving party." Hon. Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749, 762–63 (2012); see also Randall John Bunnell, *Summary Judgment Principles in Light of Tolan v. Cotton: Employment Discrimination Implications in the Fifth Circuit*, 63 LOY. L. REV. 77, 106–07 (2017) (arguing that court resources would be used less if judges construed reasonable inferences in favor of the nonmoving party).

111. See *Salazar-Limon*, 137 S. Ct. at 1277–78; *Salazar-Limon*, 826 F.3d at 278–79; *Salazar-Limon*, 97 F. Supp. 3d at 906.

112. *Salazar-Limon*, 97 F. Supp. 3d at 908.

113. See generally *Jalal v. Columbia Univ.*, 4 F. Supp. 2d 224 (S.D.N.Y. 1998).

114. *Id.* at 227.

115. *Id.* at 227–29, 237.

student of Indian descent who engaged in a conversation with the professor who became the chair of the ad hoc committee.<sup>116</sup> The student testified that the professor who chaired the committee initiated a discussion with her about her professor.<sup>117</sup> The professor asked the student “how do you feel about working with a Pakistani.”<sup>118</sup> When the student stated it did not matter to her, the professor responded, ““No, . . . I have heard that [the nontenured professor] holds and expresses distinctly anti-Indian views’ and refused to be dissuaded.”<sup>119</sup> The court concluded that these statements by the tenure committee chair “plainly fail[ed] to show discriminatory animus.”<sup>120</sup> It stated that the first statement was not a disparaging comment about Pakistanis and the second was simply a report of another conversation.<sup>121</sup> The judge explained:

When the comments are read together, it is apparent that the second was made by way of explanation of the first: When [the graduate student] denies having any problem with [the nontenured professor], [the chair] says, in effect, “I ask because I have heard that [the nontenured professor] expresses anti-Indian views.” One could infer from this that [the chair] assumed [the graduate student], as an Indian, would object to [the nontenured professor’s] views and that ethnic tension would result. . . . [The nontenured professor] would have a jury conclude that what [the chair] meant to say was, “Pakistanis hold anti-Indian views.” This reading, however, cannot be reconciled with the words [the chair] is alleged to have used: “I have heard *she* holds . . . anti-Indian views.” Thus, no rational juror could conclude that [the chair] harbored discriminatory animus on the basis of these comments.<sup>122</sup>

Despite the court’s characterization of these facts in deciding to grant summary judgment to the university, the facts could be interpreted differently. The chair could have been expressing her views against the nontenured professor as a Pakistani and used the second statement to buttress her first, regardless of any truth to the statement about anti-Indian views. Indeed, the judge ignored the fact that the graduate student herself believed that the chair who stopped her had acted discriminatorily against her professor, which had caused the graduate student to report the chair’s actions.

Imagine one employee saying to another, “How do you feel working with an African American? I heard he holds distinctly antiwhite views.” The second does not follow from the first. Even if one person heard another person holds antiwhite views, that is no reason to ask how that first person feels working with an African American. Asking how you feel working with an African American could reflect a bias regardless of whether the African American had expressed antiwhite views.

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116. *Id.* at 229.

117. *Id.*

118. *Id.* at 236.

119. *Id.* at 229.

120. *Id.* at 236.

121. *Id.* at 236–37.

122. *Id.*

The judge in *Jalal* picked apart other alleged facts. In her deposition, the chair was asked about her work history.<sup>123</sup> She testified that thirty years ago a less qualified “Muslim” man had been unfairly given a promotion instead of her.<sup>124</sup> Although the deposition question had nothing to do with religion, the chair mentioned religion. The judge again discounted this fact. She said, “Given that [the chair] stood accused of harboring anti-Islamic bias, it is hardly surprising that Hindu/Muslim tension was on her mind when she recounted the story. This statement fails to support even a reasonable suspicion, let alone a rational inference, of discriminatory animus.”<sup>125</sup>

Despite the court’s insistence that the statement was benign, one could argue that the chair was biased—viewing people negatively or positively in terms of religion and national origin—and she was offended that, in her view, a less qualified—indeed, Muslim—man was promoted over her. With respect to what the judge stated, while religion may have been on the professor’s mind, one could at least argue that it should have been the opposite; she was accused of discrimination so she should have been particularly careful not to exhibit discrimination.

David Lee and Jennifer Weiss have written about courts not drawing reasonable inferences.<sup>126</sup> They gave the following example of a case before the Seventh Circuit where the court did not draw reasonable inferences in favor of the plaintiff and excluded facts.<sup>127</sup> A female employee had received excellent performance reviews.<sup>128</sup> Her employer placed her on a performance plan after she missed a day of work because of a family member’s illness.<sup>129</sup> Two months later, she required another day off of work to care for another family member’s medical needs.<sup>130</sup> Her employer fired her that day.<sup>131</sup> Another employee asked the decision maker why the other employee had been fired.<sup>132</sup> The decision maker responded, “Well, I can’t say, but Donna’s dealing with personal family issues that she needs to attend to.”<sup>133</sup>

In reviewing whether summary judgment should have been ordered, Judge Richard A. Posner explained away the comment to the coworker. He said that this response was “more polite” or “much nicer” than giving the real reasons.<sup>134</sup> While a jury could have decided that the decision maker was simply being polite or nice, Judge Posner did not have the constitutional authority to determine what the decision maker meant by her comment. Lee and Weiss also point out other evidence that was not compelling to Posner—

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123. *Id.* at 229–30.

124. *Id.*

125. *Id.* at 237.

126. *See generally* Lee & Weiss, *supra* note 110.

127. *Id.* at 782–84 (citing *Nicholson v. Pulte Homes Corp.*, 690 F.3d 819 (7th Cir. 2012)).

128. *Id.* at 782.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 783.

133. *Id.* (citation omitted).

134. *Id.* (citation omitted).



so much so that he did not include it in the opinion.<sup>135</sup> In a conversation in which another coworker asked why the employee had been fired, the decision maker said she could not discuss it.<sup>136</sup> Although not directly stating she had been fired for having to attend to a family member's medical issues, the decision maker again mentioned that the employee had to attend to family matters.<sup>137</sup> Through the interpretation and exclusion of relevant facts, Judge Posner explained away discrimination or massaged the facts.

The Supreme Court has also engaged in massaging facts. In *Scott v. Harris*, the Court ignored certain facts and reasonable inferences in favor of the plaintiff. There, a motorist, Harris, fled after being summoned by the police to stop for going seventy-three miles per hour in a fifty-five mile per hour speed zone.<sup>138</sup> During the chase, an officer, Scott, rammed the motorist's vehicle with his patrol car resulting in the motorist going down an embankment and becoming a quadriplegic.<sup>139</sup> The motorist sued the officer for excessive force in violation of the Fourth Amendment.<sup>140</sup>

The Supreme Court began the opinion by stating the first step was to determine the relevant facts and then said Harris's "version of events (unsurprisingly) differs substantially from Scott's version."<sup>141</sup> It went on to say that there was only one view of the facts—its view—despite the different views of the lower courts and the dissenter Justice Stevens.<sup>142</sup> The district court and court of appeals decisions made clear that no motorists or vehicles were in danger, partially based on the decision to block intersections.<sup>143</sup> On the other hand, the Supreme Court assumed the presence of bystanders. Its opinion began, "Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?"<sup>144</sup> Later in the opinion, the Court said it was "clear" that Harris's actions posed imminent danger to motorists, any pedestrians, and police officers.<sup>145</sup>

These decisions had many other instances of massaging facts. First, both lower courts stated that it was disputed whether Scott hit Harris or Harris hit Scott in the shopping center parking lot.<sup>146</sup> But the Supreme Court did not describe what the lower courts had stated—Scott heading directly toward

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135. *See id.* at 784 (noting testimony by a nonparty witness that was not included in the opinion's analysis).

136. *Id.*

137. *Id.*

138. *Scott v. Harris*, 550 U.S. 372, 374 (2007).

139. *Id.* at 375.

140. *Id.* at 375–76.

141. *Id.* at 378.

142. *See id.*

143. *See Harris v. Coweta County*, 433 F.3d 807, 816 (11th Cir. 2005), *rev'd sub nom. Scott*, 550 U.S. 372; *Harris v. Coweta County*, No. 3:01-CV-148-WBH, 2003 WL 25419527, at \*2 (N.D. Ga. Sept. 25, 2003), *aff'd in part, rev'd in part*, 433 F.3d 807, *rev'd sub nom. Scott*, 550 U.S. 372.

144. *Scott*, 550 U.S. at 374.

145. *Id.* at 384.

146. *Harris*, 433 F.3d at 810 & n.1; *Harris*, 2003 WL 25419527, at \*1 & n.2.

Harris's car<sup>147</sup>—and instead described that Harris hit Scott's car.<sup>148</sup> Second, the lower courts said that the underlying crime of going seventy-three miles per hour in a fifty-five mile per hour speed zone must be taken into account to determine the reasonableness of the officer's force.<sup>149</sup> The Supreme Court ignored this fact, despite the fact that culpability factored into its decision on whether deadly force was warranted.<sup>150</sup> Third, the lower courts pointed out<sup>151</sup> and the Supreme Court ignored that the officers knew that the vehicle had not been reported stolen so that they could find the motorist if they abandoned the chase. Fourth, the Court "omitted" that Harris had been on a four-lane road when he had been initially clocked speeding and that the cars had likely pulled over because of the sirens, not to avoid being hit by Harris.<sup>152</sup> Fifth, the Court concluded that the motorist ran red lights<sup>153</sup> when Justice Stevens stated it was not clear that he ran any lights.<sup>154</sup> Sixth, the court of appeals and Justice Stevens emphasized the late time of day of the chase and the fewer risks due to the center being closed.<sup>155</sup> Seventh, both lower courts stated that the officer did not have permission to bump the car but only to do what was called a precision intervention technique (PIT) maneuver.<sup>156</sup> While the Supreme Court acknowledged this, it considered this fact irrelevant.<sup>157</sup> Eighth, the lower courts recognized,<sup>158</sup> but the Supreme Court did not,<sup>159</sup> that police must be trained to perform the PIT maneuver and that despite asking for permission to execute it, the officer had not been trained to do the PIT maneuver. Ninth, in ignoring the fact that Scott was potentially aggressive toward Harris in the parking lot and that he may have been upset that their cars had collided, the Supreme Court failed to evaluate fully Scott's actions to bump Harris's car to stop the chase. Instead it stated that Scott acted only for the public safety.<sup>160</sup>

In all of the examples, courts do not consider or they discount facts that a jury could use to find for the nonmoving party. This type of nonconsideration or dissection of the facts undermines the justice system. Judges state that there is no factual dispute and describe what witnesses mean by their

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147. *Harris*, 433 F.3d at 810; *Harris*, 2003 WL 25419527, at \*1.

148. *Scott*, 550 U.S. at 375.

149. *Harris*, 433 F.3d at 815; *Harris*, 2003 WL 25419527, at \*5.

150. *Scott*, 550 U.S. at 384 ("We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability.").

151. *Harris*, 2003 WL 25419527, at \*5.

152. *Scott*, 550 U.S. at 390 (Stevens, J., dissenting) ("Omitted from the Court's description of the initial speeding violation is the fact that respondent was on a four-lane portion of Highway 34 when the officer clocked his speed at [seventy-three] miles per hour and initiated the chase.").

153. *Id.* at 379 (majority opinion).

154. *Id.* at 391–92 (Stevens, J., dissenting).

155. *Id.* at 392–93; *Harris v. Coweta County*, 433 F.3d 807, 815–16, 819 n.14 (11th Cir. 2005), *rev'd sub nom. Scott*, 550 U.S. 372.

156. *Harris*, 433 F.3d at 810–11, 816–17; *Harris*, 2003 WL 25419527, at \*2, \*7.

157. *Scott*, 550 U.S. at 375 & n.1 (majority opinion).

158. *Harris*, 433 F.3d at 810–11, 816–17; *Harris*, 2003 WL 25419527, at \*7.

159. *Scott*, 550 U.S. at 375.

160. *Id.* at 383–85 (holding that it was reasonable for the police officer to take the action that he did based on the danger to the safety of others the driver posed).

statements when it is not possible for judges to know what those people meant.

The Constitution promises that juries shall decide cases in which damages are alleged.<sup>161</sup> The Constitution also promises that people shall be free of unreasonable searches and seizures.<sup>162</sup> The Civil Rights Act of 1964 promises that people shall not be treated differently because of a number of characteristics.<sup>163</sup> Despite these rights and promises, judges parse the facts in many civil rights cases and determine the results instead of juries.<sup>164</sup>

### III. THE CONSENSUS REQUIREMENT

Thus far, I have defined the “summary judgment problem” as the multiple layers of legal and logical problems surrounding summary judgment. First, judges can use the procedure in an unconstitutional manner where they order summary judgment when disputed issues of fact exist. Second, judges cannot implement the impossible reasonable jury standard underlying summary judgment. Finally, judges massage facts in decisions on summary judgment.

Will this summary judgment problem be reformed? The Court continues to address constitutional problems affecting the jury in criminal cases recognizing the important historical role of the jury. However, as previously described, in the near future, the Supreme Court is unlikely to decide that summary judgment is unconstitutional generally or more specifically in a factually intensive case. Also, it is unlikely that the standard underlying summary judgment will be changed any time soon. Finally, although judges should emphasize to one another when facts are ignored or otherwise massaged, this practice has gone on for some time and no promise of change is apparent. At the same time that the problem persists, summary judgment precludes juries from determining facts in many factually intensive cases.

Various suggestions have been made for the reform of summary judgment. For example, Mark W. Bennett, a federal judge, has proposed the elimination of summary judgment for five to ten years to assess the benefits and detriments of its usage in circumstances where the parties do not consent to its use.<sup>165</sup> Alternatively, he argues for other changes. Courts could award attorneys’ fees to the nonmoving party when it wins the motion for summary judgment.<sup>166</sup> Because summary judgment motions are arguably “cost free,”<sup>167</sup> this shift would reduce significantly the roll-of-the-dice, no-loss

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161. U.S. CONST. amend. VII.

162. *Id.* amend. IV.

163. *See* 42 U.S.C. § 2000a (2012).

164. The same issues regarding the reasonable jury standard, constitutionality, and the massaging of facts can occur upon a motion to dismiss or judgment as a matter of law. Because of space limitations, they are not addressed here.

165. Mark W. Bennett, *From the “No Spittin’, No Cussin’, and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendants’ Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 710 (2012).

166. *Id.* at 714–15.

167. Kent Sinclair & Patrick Hanes, *Summary Judgment: A Proposal for Procedural Reform in the Core Motion Context*, 36 WM. & MARY L. REV. 1633, 1664 (1995).

nature of summary judgment motions.<sup>168</sup> Judge Bennett also advocates that summary judgment should not occur in low-dollar-amount and simple cases because these cases will be resolved faster upon a trial than summary judgment.<sup>169</sup> These noteworthy ideas have little support in the current legal regime where summary judgment motions are favored.

Jonathan Remy Nash has argued that appellate courts should review denials of motions for summary judgment just for abuse of discretion instead of performing de novo reviews where the decision turns in part at least on a question of fact.<sup>170</sup> This approach would be one way to help remedy the summary judgment problem. However, this solution does not take into account that when an appellate court rules that the trial court abused its discretion in denying summary judgment, at least one judge already thought a reasonable jury could have found for the party that lost. Additionally, this reform addresses only the trial court's denial of summary judgment, not when the court actually orders summary judgment.

Dan Kahan, David Hoffman, and Donald Braman proposed another reform for summary judgment.<sup>171</sup> They recognized that the judge who makes the summary judgment decision may have different characteristics from some jurors, and they showed that such differences may provoke a myriad of opinions about the case's facts.<sup>172</sup> Accordingly, the authors argued that a judge should "think hard" before ordering summary judgment if she believes that she is privileging her view over a member of a distinct group that she thinks may have a different opinion.<sup>173</sup> While a laudable idea, it does not recognize a fundamental problem about the reasonable jury standard underlying summary judgment: judges cannot actually determine what others, including those with different experiences from themselves, would think about a case. Moreover, the authors' reform idea does not account for the value of deliberations. Let us assume a judge could determine what others would think. A judge would not know how each individual would affect the group deliberation and then, how each individual on the jury would vote.<sup>174</sup>

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168. See Bennett, *supra* note 165, at 714–15.

169. *Id.* at 715.

170. Jonathan Remy Nash, *Unearthing Summary Judgment's Concealed Standard of Review*, 50 U.C. DAVIS L. REV. 87, 121–23 (2016).

171. See generally Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

172. *Id.* at 883.

173. *Id.* at 898–99.

174. See Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 776–77 (2007) (concluding that at the very least judges should consider carefully the law and evidence on summary judgment, think of other views, and favor trial). Other articles have been written proposing reform for the use of summary judgment. See, e.g., Samuel Issacharoff & George Luewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 114–18 (1990); 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, 1016–1041 (2003) (arguing for judicial restraint and additional instruction from the Supreme Court); Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1356 (2005) (stating among other possible reforms that the

Because of the issues just stated, these noble ideas to reform summary judgment, among others, do not remedy the summary judgment problem. In the past, in other contexts, I have proposed the consensus requirement to reform summary judgment.<sup>175</sup> As described here, the proposal has benefits but also can be critiqued. Under this requirement, summary judgment cannot be ordered unless all judges agree that it should be ordered.<sup>176</sup> So, if the trial court judge denies summary judgment, that order cannot be appealed, and the case goes to trial.<sup>177</sup> Alternatively, if the trial court orders summary judgment but a judge on the appellate court finds against summary judgment, then a jury decides the case.<sup>178</sup>

If it is not possible to determine what a reasonable jury could find and instead a judge decides what he thinks of the evidence, it is rational to permit the case to go to a jury trial where one judge thinks there is sufficient evidence of the claim. Presumably the judge is reasonable and some or all members of the jury could share his views. In an unusual case, if the judge is unreasonable in a case because of some bias or impediment, the parties always can try to disqualify the judge from the case prior to the decision. Moreover, if the case goes to a jury, the jury could find against the plaintiff.

Finally, the consensus requirement is a rational reform given that the Constitution does not require a jury to be reasonable. Instead, juries are selected to apply the law to the facts and even to decide against what the law is. Moreover, the Constitution does not assume that every jury will make the same conclusion. So, the reasonable jury standard has been an unwarranted—arguably unconstitutional—construct of the judiciary.

The founders' choice of the jury, not the judiciary, to decide was a careful one. The choice is now supported by studies. For example, psychological studies show that more eyes are often better than one.<sup>179</sup> In inattention blindness studies, people often see a fact once it is pointed out to them.<sup>180</sup> So, a juror may be able to convince people to see what happened when none of the jurors would have seen this fact on their own.

Arguments against the consensus requirement include that this requirement will result in more denials of summary judgment and thus, more trials, where insufficient resources exist for more trials.<sup>181</sup> However, if summary judgment is ordered less often, cases will not necessarily go to trial. They may settle instead. Also, even if there is a significant increase in jury

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Advisory Committee could give some needed additional textual or other guidance to the courts).

175. See THOMAS, *THE MISSING AMERICAN JURY*, *supra* note 23, at 237; Thomas, *What Happened to the American Jury?*, *supra* note 23, at 29–30.

176. See THOMAS, *THE MISSING AMERICAN JURY*, *supra* note 23, at 237; Thomas, *What Happened to the American Jury?*, *supra* note 23, at 29–30.

177. Thomas, *What Happened to the American Jury?*, *supra* note 23, at 29–30.

178. *Id.*

179. See generally Simons & Chabris, *supra* note 87.

180. See *id.*

181. See Thomas, *supra* note 20, at 177–79; see also John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 527 (2007) (rebutting the assumption that summary judgment saves money).

trials, the Constitution grants a right to a jury trial,<sup>182</sup> and sufficient resources should be devoted to this right.

Another contention against requiring consensus for summary judgment includes the notion that the judges who rule against summary judgment could be wrong. Although conceivable that a judge who decides against summary judgment could be wrong, it is difficult to prove this possibility given the inexactness of the standard. Moreover, if the judge is simply giving his own opinion of the evidence, there is no reason to believe that an otherwise competent judge is wrong in his determination of the sufficiency of the evidence. Instead, again, the inexactness of determining summary judgment and the possibility of a factual issue are highlighted. Additionally, if the case goes to trial after denial of summary judgment by a judge, the jury can check the judge's determination. Moreover, if the jury decides to favor the nonmoving party, like the trial judge originally did, the trial judge can still order judgment as a matter of law, checking his original decision. However, by extending the consensus requirement to judgment as a matter of law, one appellate court judge could successfully challenge that decision.

Because in many circumstances the decisions of judges are reviewed, the consensus requirement could be criticized because of the lack of review. Once a judge decided against summary judgment at the trial or appellate level, this decision would not be reviewed.<sup>183</sup> Again, if a jury subsequently decides the case, it can check the judge's decision, and the judge can check himself on a motion for judgment as a matter of law.<sup>184</sup> But one could argue that appeal is necessary; a group of judges should check the trial judge's decision against summary judgment. But appeals occur so that a panel can determine whether the district or appellate court judge or judges made a legal error. Here, the question of the sufficiency of the evidence, though labeled a question of law, is really a factual question, not a legal one, that judges never were able to determine in the past, except to order a new jury trial after a jury trial.<sup>185</sup>

Finally, because reasonableness inquiries occur in many areas of the law, one could argue that the reasonable jury standard is no more troublesome. The decision of the majority of the judges simply rules. Without specifically assessing those contexts, here in deciding a summary judgment motion, a judge attempts to determine whether a factual issue exists. Where disagreement exists on this inexact question, the rational result is for a jury to decide the case.

#### CONCLUSION

Courts employ summary judgment to dispose of cases that supposedly have no genuine dispute of material fact where the moving party is entitled

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182. U.S. CONST. amend. VII.

183. Thomas, *What Happened to the American Jury?*, *supra* note 23, at 29–30.

184. *Id.*

185. Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 698 (2004).

to judgment as a matter of law. As described in previous articles, there is a constitutional problem with summary judgment in factually intensive cases, and the reasonable jury standard underlying summary judgment is impossible to implement. This Article has described the third problem of judges' "massaging of the facts." These three issues constitute the summary judgment problem making reform of summary judgment necessary. A rational reform further developed here is the consensus requirement—precluding summary judgment (or judgment as a matter of law) where one judge thinks summary judgment should not be ordered because in these circumstances, a factual issue is apparent.