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Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice

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Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice

*Jeffrey W. Stempel**©

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I. INTRODUCTION

During the past quarter-century, the growing judicial infatuation with summary judgment has been justly criticized.¹ Criticism began almost immediately after the Supreme Court's 1986 trilogy² and continued as a more expansive approach to summary judgment was applied by lower federal courts and increasingly by state courts influenced by federal developments.³ It spiked in the recent years as a near-unanimous Court

1. "Infatuation," although perhaps not a particularly scholarly or diplomatic word, captures well what happens when courts take an excessively positive view of particular persons, entities, procedures, institutions, theories, or outcomes such that courts are excessively driven to rule in their favor notwithstanding tension or even outright conflict with rules, norms, and history that supposedly guides courts. A classic example of this is the U.S. Supreme Court's excessively uncritical embrace of arbitration. See Jeffrey W. Stempel, *Tainted Love: Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. (forthcoming 2012) (showing how the Court's policy preference for arbitration prompts it to compel arbitration in situations where text, legislative history, and purpose of the Federal Arbitration Act argue to the contrary); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1383 (1996) (illustrating how the Court's unrealistically sanguine view of the efficacy of arbitration prompts it to overlook concerns regarding the quality of consent to such clauses).

2. See, e.g., Samuel Issacharoff & George Lowenstein, *Second Thoughts about Summary Judgment*, 100 YALE L.J. 73, 118 (1990) (showing that a move toward substantial evidence standard and greater judicial authority to grant summary judgment is likely to result in more errors than estimated by the Court); 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, 35-36 (1988) (showing that the 1986 trilogy reflects a shift to a doctrine more favorable to defendants not supported by a fair reading of Rule 56); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Value of Adjudication*, 49 OHIO ST. L.J. 95, 99 (1988) (noting that in the 1986 trilogy, the Court unwisely authorized expanded factfinding authority for judges). The trilogy refers to three summary judgment cases decided by the Court in 1986: *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). These cases all endorsed a broader and more frequent use of summary judgment and refined summary judgment doctrine in ways facilitating its greater use. See STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE AND CONTEXT 476-99 (3d ed. 2008) (discussing the background of the summary judgment motion and the refinement of doctrine brought about by the trilogy); Steven Alan Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 184 (1987) (discussing how the 1986 trilogy reflected significant doctrinal change making summary judgment more available); see also JOSEPH GLANNON ET AL., CIVIL PROCEDURE: A COURSEBOOK 988-1013 (2011) (presenting the trilogy as controlling law with almost no historical background).

3. See, e.g., Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 541-45 (2010) (noting and criticizing expanded summary judgment, particularly its impact on civil rights and job discrimination cases that are disfavored by some judges); Elizabeth Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 707-11 (2007) [hereinafter Schneider, *Dangers*] (discussing the trend towards summary judgment and the consequences of this trend); Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S.C. L. REV. 791, 820 (2002) (noting and criticizing the increased use of summary judgment to

issued perhaps its most problematic summary decision in *Scott v. Harris*⁴ and rewrote the rules of pleading in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*⁵ in a manner that arguably turned Rule 12(b)(6) motions into bad applications of summary judgment.⁶

dispose of sexual harassment suits); 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, 1048 (2003) (noting and criticizing the increased use of summary judgment and other pretrial disposition devices as an unwise contraction to the number of trials and public rights to trial and jury access); see also Brooke D. Coleman, *The Celotex Initial Burden Standard and An Opportunity to "Revivify" Rule 56*, 32 S. ILL. U. L.J. 295, 306–08 (2007) (suggesting that the initial burden required of summary judgment movants be clarified); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 144 (2007) [hereinafter Thomas, *Why Summary Judgment is Unconstitutional*] (suggesting summary judgment unconstitutionally violates the right to trial by jury). But see Edward Brunet, *Summary Judgment is Constitutional*, 93 IOWA L. REV. 1625, 1627 (2008) (discussing how summary judgment does not violate the Seventh Amendment). Others have argued that the summary judgment device should be abolished on prudential trial efficiency grounds. See John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 545 (2007) (suggesting that the aggressive invocation of summary judgment leads to greater adjudicative error, higher litigation costs, and waste of judicial resources); D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 890 (2006) (discussing how summary judgment is not necessarily faster or cheaper than trial in many instances). But see Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L.J. 689, 692, 694 (2012) [hereinafter Brunet, *The Efficiency of Summary Judgment*] (discussing how summary judgment promotes overall judicial efficiency in an acceptably fair way by focusing attention on facts prior to trial and creating a "settlement premium" for colorable claims that survive summary judgment); Linda S. Mullenix, *The Twenty-Fifth Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI. L.J. 561, 583–84 (2012) (suggesting a minimal impact of the trilogy on frequency and outcome of summary judgment motions); Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 133–35 (2006) (arguing that the *Celotex* regime is not unfair to disfavored litigants).

4. 550 U.S. 372 (2007).

5. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–54 (2009) (relying on "judicial experience and common sense," a 5–4 Court majority concluded that allegations of the Attorney General's knowledge and approval of illegal detention were insufficiently "plausible" under *Twombly*); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (dismissing an antitrust complaint after finding direct allegations of conspiracy inadequate to make the claim sufficiently "plausible"). Scholars have generally been highly critical of these decisions. See, e.g., Steven B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 403–08 (2011) (criticizing *Twombly* & *Iqbal*); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 40–41 (2010) (arguing that the effective imposition of heightened pleading standards in *Twombly* and *Iqbal* are inconsistent with the text and intent of the Federal Rules of Civil Procedure); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 200 (2010) (criticizing *Twombly* and *Iqbal* as unwisely contracting access to adjudication); A. Benjamin Spencer, *Plausible Pleading*, 49 B.C. L. REV. 431, 444 (2008) (examining and criticizing *Twombly*, offering thoughts on what pleading allegations may be deemed sufficiently plausible to withstand dismissal motions); Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 774 (2009) (finding pretrial disposition by courts inconsistent with the jury trial right and value of illuminating disputes through discovery and trial); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under*

In the wake of the trilogy, there has also been renewed interest in studying summary judgment in operation.⁷ Although the empirical efforts in this area have been helpful, we still know comparatively little about summary judgment in daily operation. Regardless of the shortcomings of available data or professional differences as to its meaning, this Article posits that we know enough to make an assessment of whether modern use of summary judgment is too aggressive.

The academy has attacked aggressive summary judgment use and the *Twombly/Iqbal*⁸ plausibility standard for assessing pleadings as

Iqbal and Twombly, 14 LEWIS & CLARK L. REV. 15, 17 (2010) (discussing how the empowerment of trial courts to dismiss claims trial judges view as “implausible” under *Twombly* and *Iqbal* effectively converts Rule 12(b)(6) motions to summary judgment motions); *see also id.* at 16–17 n.2–3 (listing critical scholarly commentary and articles supportive of *Twombly* and *Iqbal*).

6. *See* Thomas, *The New Summary Judgment Motion*, *supra* note 5, at 18 (discussing the similarities and differences of 12(b)(6) and summary judgment motions); Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1867–68 (2008) (explaining that because Rule 12(b)(6) motions are in effect summary judgment motions after *Twombly*, dismissal motions arguably violate the jury trial right as does judicial fact-finding in the context of summary judgment); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 169 (2010) (forcing plaintiffs to prove plausibility to the satisfaction of judges is an unfair burden, particularly for civil rights litigants who may face skeptical judges tending to defer to governments or employers). *But see* Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J. L. & POL’Y 61, 61–62 (2007) (viewing *Twombly* as a de facto summary judgment case and approving aggressive use of Rule 12(b)(6) in such cases where the evidence was largely in the public domain and could, in the author’s view, be assessed by the Court to determine whether an antitrust claim was sufficiently meritorious to go forward); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1340–41 (2010) (providing a less critical reading of *Twombly* and *Iqbal* and suggesting it will not have the negative impact posited by critics).

7. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethelhem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 591 (2004) (reviewing empirical data and concluding that there is reasonable basis to determine that summary judgment increased significantly during the 1960–2000 time period); Linda S. Mullenix, *supra* note 3, at 561 n.2 (collecting Federal Judicial Center studies on the matter); *see also, e.g.*, JOE S. CECIL & GEORGE CORT, FED. JUDICIAL CTR., REPORT ON SUMMARY JUDGMENT PRACTICE ACROSS DISTRICTS WITH VARIATIONS IN LOCAL RULES 9 (2008) (highlighting the trial courts’ grant of summary judgment in a substantial number of cases); JOE CECIL & GEORGE CORT, FED. JUDICIAL CTR., ESTIMATE OF SUMMARY JUDGMENT ACTIVITY IN FISCAL YEAR 2006 (Apr. 2007 as revised June 2007) (noting frequency of summary judgment motions and grants); Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 881–82 (2007) (finding substantial use of summary judgment during the time period since the Court’s 1986 trilogy); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1914–15 (1998) (noting dominance of disposition by summary judgment was contrasted with resolution of dispute via trial).

8. Because the *Twombly* and *Iqbal* cases were decided within a short time of one another and work together to heighten pleading requirements, the two cases are also often referred to in legal literature as “*Twiqbal*.”

permitting too much decision-making based upon an individual judge's gut reaction to a complaint.⁹ Particularly compelling have been analyses strongly suggesting that more aggressive summary judgment use has demonstrated gender bias and hostility toward civil rights suits, job discrimination claims, and other types of social action litigation.¹⁰ Overlooked to date has been a central non-ideological contention of this Article: summary judgment is simply not being performed very accurately according to the law's self-professed rules governing use of the motion and certainly is not being applied with enough accuracy to warrant expanded use.

Grants of summary judgment are reversed at too high a rate to have been properly granted. The very premise of summary judgment is that there are *no* genuine disputes of material fact, that *no* reasonable jury could find for the nonmovant, and that the law is so clear that there is *no* valid reason to postpone entry of judgment. By these standards, the grant of summary judgment (partial or whole) by a federal district judge

9. See Stempel, *supra* note 2, at 162–70 (criticizing the summary judgment trilogy for usurping the jury role, illegitimately changing procedural rules without sufficient study and use of amendment process, and introducing additional waste and bias in adjudication). *Twigbal* has been at least as criticized as the trilogy, perhaps more in view of both the large volume of negative commentary in the short time since these decisions and Congress's serious (but unsuccessful) efforts to legislatively overrule the pleading decisions, something that did not take place in the aftermath of the trilogy. See Notice Pleading Restoration Act of 2010, S. 4054, 111th Cong. (2d Sess. 2010); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (1st Sess. 2009); 156 Cong. Rec. S11, 37–38 (daily ed. Dec. 22, 2010) (statement of Sen. Arlen Specter (Pa.)) (criticizing *Twigbal*); Burbank & Subrin, *Litigation and Democracy*, *supra* note 5, at 399–408 (viewing *Twombly* and *Iqbal* as lawless, disastrous decisions); Stephen N. Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. (forthcoming 2012) (regarding *Iqbal* as among the worst Supreme Court decisions ever but raising similar, if less severe, criticisms of *Twombly*).

10. See Therese M. Beiner, *Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?*, 37 B.C. L. REV. 643, 650 (1996) (noting the degree to which male-dominated workplaces may place subtle discriminatory pressures of conformity on women workers—a type of discrimination that may not be adequately appreciated by male judges granting summary judgment); Therese M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 119 (1999) (showing that because hostile environment cases depend on the factfinder's assessment of context and circumstantial evidence, grants of summary judgment in such cases erroneously usurp the power of the jury); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 252 (1993) (discussing frequent court errors of crediting a discrimination defendant's explanation of adverse employment decisions rather than allowing a trial and jury determination of truth between conflicting plaintiff and defendant narratives); Schneider, *Changing Shape*, *supra* note 3 (showing how more frequent summary judgment grants tend to disadvantage discrimination plaintiffs, with judges increasingly usurping the jury role of drawing inferences from facts of record); Schneider, *Dangers of Summary Judgment*, *supra* note 3 (discussing the trend of granting summary judgment with more frequency and its troubling consequences).

(at least on no-genuine-dispute-of-fact grounds) should be affirmed nearly 100% of the time.¹¹ Instead, we find that grants of summary judgment are reversed between 20% and 40% of the time, depending on the appellate court, type of case, and time period.¹² Reversal rates this high indicate that summary judgment has failed on its own terms. Because of its imperfect application, summary judgment is almost certainly not the timesaving efficiency device posited by Justice Rehnquist in *Celotex Corp. v. Catrett*.¹³ More likely is that the aggressive use of summary judgment costs society more than would a procedural code with no summary judgment mechanism.¹⁴

Critics claiming race, gender, and class bias in summary judgment received a substantial shot in the arm with the publication of the blockbuster article *Whose Eyes Are You Going to Believe?* Scott v.

11. Expecting this kind of accuracy in trial court summary judgment determinations would seem especially appropriate in light of the trial court's discretion to deny even a well-presented motion if the judge is of the view that further adjudication will better illuminate the issues of the case. See Steven S. Gensler, Discretion to Deny Summary Judgment: Can Judges Just Say No? 7 (Mar. 8, 2012) (unpublished manuscript) (on file with the Loyola University Chicago Law Journal) [hereinafter Gensler, Discretion to Deny Summary Judgment] (concluding that the answer is "yes"); see also Steven S. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. 1139, 1160 (2010) [hereinafter Gensler, *Must, Should, Shall*] (making a similar point). More defensible are trial-appellate differences over grants of summary judgment where the facts are essentially stipulated but where the appellate court simply construes applicable law differently than the trial court. Reasonable lawyers may have divergent resolutions of legal questions. See *infra* text accompanying notes 110–21 (expounding on the distinction between no-dispute-of-fact summary judgment motions and divergence-over-applicable-law summary judgment motions).

12. See *infra* text accompanying notes 96–109 (discussing the less than perfect affirmance rate of summary judgment decisions and the accompanying inference that trial judges use too much discretion when deciding these motions); see also FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 48 (2007) (showing how grants of summary judgment were affirmed approximately three-fourths of the time during the 1950s and 1960s, a rate falling to two-thirds during the 1970s, 1980s, and 1990s); Stanton Wheeler et al., *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970*, 21 LAW & SOC'Y REV. 403, 406 (1987) (finding an overall affirmance rate of roughly 60% for most cases, including reviews of pretrial disposition). See generally ASHLYN K. KUERSTEN & DONALD R. SONGER, DECISIONS ON THE U.S. COURTS OF APPEALS 62–63 (2001) (finding similar rates of affirmance overall); DONALD R. SONGER, REGINALD S. SHEEHAN & SUSAN B. HAIRE, CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 105 (2001) (by examining the rates of reversal between 1925 and 1988, finding that the rate only varied between 26% and 31% throughout the sixty-four years).

13. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 317, 327 (1986) (extolling the virtues of summary judgment in terms so glowing as to suggest it is a panacea for modern litigation problems); Stempel, *supra* note 2, at 106 (finding the opinion's praise of summary judgment virtues naively inflated).

14. See Bronsteen, *supra* note 3 (finding summary judgment frequently wasteful and inefficient); Rave, *supra* note 3, at 890 (explaining that summary judgment increases the costs borne by litigants); Stempel, *supra* note 2, at 170–72 (criticizing the Court's cost-benefit analysis in changing Rule 56 and arguing that it did not take into consideration many associated disadvantages such as increased litigation expenses and waste of the judiciary's time).

Harris and the Perils of Cognitive Illiberalism.¹⁵ The article was prompted by the Court's decision in *Scott v. Harris*,¹⁶ which involved a civil rights suit alleging excessive use of force by police pursuing a fleeing suspect in a high speed car chase. The chase had been videotaped by pursuing police. Reviewing the taped chase, the Court by an 8–1 vote decreed that the only reasonable assessment of the situation was that fleeing speeder Harris was a sufficient danger to the public such that policeman Scott's ramming of the fleeing vehicle to get it off the road (a maneuver resulting in serious injuries to Harris) was justified and precluded a civil rights claim sounding in excessive use of force.¹⁷

The authors of *Whose Eyes*, Professors Kahan, Hoffman, and Braman, showed the videotaped automobile chase at issue in *Scott v. Harris* to a large sample of viewers. Even though the Court (as discussed at greater length below) had been nearly unanimous in holding that no reasonable jury could find unconstitutional use of force by the police in halting the chase by bumping the fleeing suspect off the road, the Kahan et al. sample of prospective jurors differed widely in their perceptions of the chase scene. Although a majority agreed with the Court, a substantial minority disagreed. Further, those disagreeing were disproportionately from minority groups.¹⁸

Even prior to publication of the Kahan et al. study, scholars had been critical of *Scott v. Harris* as violating the traditional norms of summary judgment—even under the pro-summary judgment ethos of the trilogy—in that it involved the Justices making an assessment of facts in the manner of a jury.¹⁹ In dissent, Justice Stevens gently mocked the

15. See 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, 879 (2009) (showing how a group of laypersons viewing the videotape described as clear by the Supreme Court exhibited a range of interpretations, suggesting that the Court erred in thinking the videotape could be interpreted in only one way).

16. 550 U.S. 372 (2007).

17. *Id.* at 385–86.

18. See Kahan et al., *supra* note 15, at 864–80 (presenting the results of their study); *infra* text accompanying notes 68–69 (describing the study in more detail).

19. See, e.g., 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, 436–48 (2008) (criticizing Justice Scalia’s reliance on the *Matsushita* case in *Scott v. Harris*); David Kessler, Comment, *Justices in the Jury Box: Video Evidence and Summary Judgment in Scott v. Harris*, 31 HARV. J.L. & PUB. POL’Y 423, 427–35 (2008) (cautioning against judges usurping the power of the jury when deciding summary judgment motions based on video evidence that causes the judges to become overconfident in their decisions); Martin A. Schwartz, *Analysis of Videotape Evidence in Police Misconduct Cases*, 25 TOURO L. REV. 857, 860–63 (2009) (criticizing *Scott v. Harris*); Howard M. Wasserman, *Orwell’s Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 607–10 (2009) (criticizing the growing trend of judges

majority as “my colleagues on the jury” in response to the majority’s willingness to so quickly take over the fact-finding function and to draw inferences traditionally left to the jury.²⁰ The Kahan et al. study was a particularly strong blow to *Scott v. Harris* and its defenders, both because it empirically demonstrated that prospective jurors could disagree in a way that the majority refused to acknowledge and because the divergence of the venire was correlated with demographic and cultural differences as well as ideological differences.²¹

Building on Professor Kahan’s earlier scholarship and coinage of the term,²² the authors of the experiment and article referred to the *Scott v. Harris* majority’s inability to accept the possibility of different perceptions as “Cognitive Illiberalism,” which they characterized as “failure to recognize the connection between perceptions of societal risk and contested visions of the ideal society.”²³ The term has already become part of the legal lexicon, at least among scholars.²⁴ Clearly, it captures an important anxiety not only about the degree of perception divergence within society but also about the work of judges, whose performance can seem often wrong but never in doubt. Of particular concern is the prospect that false judicial certainty is culturally bound and that judges are particularly bad at envisioning the possibility of a different assessment by persons with different backgrounds and beliefs.²⁵

deciding summary judgment based on their “brute sense impressions” of video evidence); see also Thomas, *The Fallacy of Dispositive Procedure*, *supra* note 5, at 762–77 (criticizing the *Scott v. Harris* analysis and outcome as well as the trilogy on these grounds; citing to the Kahan et al. study); Amelia G. Yowell, Note, *Race to Judgment? An Empirical Study of Scott v. Harris and Summary Judgment*, 85 NOTRE DAME L. REV. 1759, 1777 (2010) (suggesting that *Scott v. Harris* has not greatly altered summary judgment practice but noting that where courts cite *Scott v. Harris* they are more likely to grant summary judgment).

20. *Scott*, 550 U.S. at 389, 392 (Stevens, J., dissenting).

21. See Kahan et al., *supra* note 15, at 864–80 (describing results of the study); Thomas, *The Fallacy of Dispositive Procedure*, *supra* note 5, at 762–65 (referring to the Kahan et al. study as strong evidence that the *Scott v. Harris* decision was incorrect).

22. Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 125 (2007); see also Dan M. Kahan, *The Economics—Conventional, Behavioral, and Political—of “Subsequent Remedial Measures” Evidence*, 110 COLUM. L. REV. 1616, 1651 (2010) (illustrating the discrepancy between cognitive bias that results from watching a film and the judicial system’s requirement that the film as evidence be given dispositive significance); Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 24 (2011) (deploying the cognitive illiberalism concept and related field of cultural cognition in assessing legal policy).

23. See Kahan et al., *supra* note 15, at 838 (from the abstract of the article) (emphasis omitted).

24. See *infra* text accompanying notes 72–94 (describing the cognitive illiberalism concept and cultural cognition movement in greater detail).

25. See Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—*

“Cognitive Illiberalism,” as used in this Article, refers also to concepts such as false certainty bias and false consensus bias.²⁶ Although the cognitive illiberalism label and concept are important, it may rest too heavily on race, gender, and ethnic differences²⁷ or may be problematic because of years of imprecise political rhetoric.²⁸ Consequently, this Article will take some license and use the term cognitive illiberalism more broadly than its originators to mean more than just blindness to the differing views of those in different demographic groups. Although the term has become so widespread and wonderfully evocative that its use is unavoidable, it does not, as strictly defined by its originators, capture the problem of divergent perception throughout society and the consequent imperative to use greater caution in granting summary judgment.

The concept of cognitive illiberalism should include not only blindness to the differing views of those who are “different” but also blindness to the degree to which similarly situated persons belonging to the same demographics can reasonably disagree about what a video shows: whether a manager was prejudiced in firing a worker, whether a driver was negligent, whether a speaker knew his statements were untrue, etc. Perhaps better nomenclature might be apt, but because of the prominence of the term and the connotative meaning it conveys, it is used, however loosely, throughout this Article.

and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities, 30 REV. LITIG. 733, 740–53 (collecting sources that note the degree to which judges, like all persons, wear figurative perceptual blinders).

26. See, e.g., Lawrence Solan et al., *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1269 (2008) (discussing how, in response to an experiment, individual readers of contract language are quite certain that they know what the language means and that others agree with them even though readers as a whole may actually assign substantially different meanings to the same language).

27. I realize of course that Professors Kahan, Hoffman, and Braman might respond that by stripping out or de-emphasizing the cultural demographics of the cognitive illiberalism concept I am missing the point. I prefer to think of my assessment as attempting to expand the concept and to make clear that the types of differences noted in their study also are apparent within seemingly homogenous demographic groups. See *infra* text accompanying note 142 (discussing the degree to which even in groups largely supportive of the *Scott v. Harris* ruling, there were significant numbers disagreeing with the majority of their demographic group).

28. The word “liberal” and its variants in the United States has come to largely connote left-leaning progressive political views while “liberalism” as the term is used by Professor Kahan means the more traditional use of liberal as open, tolerant, non-doctrinaire and willing to consider a variety of information and perspectives (e.g., the liberal arts in education). See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 670 (10th ed. 1996) (presenting various definitions of “liberal” along these lines as well as the common connotation of progressive or left-leaning political views).

People, including judges, are not only too often blind to the possibility of disagreement by those who are different but also blind to the likelihood that even many similar persons will see things differently.²⁹ Consequently, judges should be reluctant to grant summary judgment unless there is essentially *no* serious prospect that others will disagree as to whether the facts are at issue and what the facts show. In the absence of such certainty, denial of summary judgment serves both logistical efficiency and adjudication accuracy.³⁰ In the absence of this higher level of certainty, grants of summary judgment as a whole waste legal resources, delay dispute resolution, and create the prospect of the injustices frequently noted by the critics of summary judgment.

This Article begins with a review of *Scott v. Harris* and the problems reflected by the Court's excessive focus on a portion of the evidence and cocksure confidence that there was only one reasonable view of the record.³¹ It continues with a telling anecdote about first-year law students' reaction to the video that precludes any effective defense of the Supreme Court's grant of summary judgment. First-year law students—a group much more homogenous than the viewers of the videotape in the Kahan et al. study—diverged substantially regarding the conclusions that could be drawn from the videotape,³² a reaction that should have been impossible had the *Scott v. Harris* majority been correct.

29. See *infra* text accompanying notes 93–94, 135–38 (noting the degree of divergence in perception even within relatively homogenous groups).

30. As discussed below, I am constrained to dispute Professor Brunet's optimistic view that summary judgment makes litigation more efficient. See Edward Brunet, *The Efficiency of Summary Judgment*, *supra* note 3, at 699 (discussing how summary judgment motions serve a valuable signaling process that aids settlement). Greater judicial embrace of Professor Gensler's argument that trial judges possess ample discretion to deny summary judgment would, at least at the margin, help alleviate the criticisms made of post-trilogy summary judgment. See Gensler, *Discretion to Deny Summary Judgment*, *supra* note 11, at 44 (noting that judges may refuse to grant summary judgment for prudential reasons even if the movant has technically met the criteria for grant of motion); Gensler, *Must, Should, Shall*, *supra* note 11, at 1160 (explaining how the amendment of Rule 56 will give judges discretion to deny summary judgment even if the moving party has met all the requirements of the rule). Similarly, the safeguards noted by Professor Brunet, if more vigorously deployed, would improve summary judgment practice. See Edward Brunet, *Six Summary Judgment Safeguards*, 43 AKRON L. REV. 1165, 1177 (2010). This Article argues for a more fundamental shift in attitude as well, one that will prompt judges to be cautious in concluding that their perceptions represent the only "reasonable" assessment of the record and contending inferences proffered by parties.

31. See *infra* text accompanying notes 36–69 (discussing in detail the facts of *Scott v. Harris*).

32. See *infra* text accompanying notes 70–71 (explaining how the group split into three diverging views).

This Article then expounds upon the concept of cognitive illiberalism and argues that the problem is much bigger than “mere” difference in perception of risk, discordant visions of the good society, cultural bias, or cultural boundedness and extends to perceptions of all sorts, not solely those involving risk.³³ It next examines the fate of summary judgment grants on appeal, highlighting the degree to which summary judgment, despite being designed for use in “slam dunk” situations, is improperly granted in an inordinate portion of cases—at least when the basis for summary judgment was the supposed absence of a genuine dispute of material fact.

This Article then discusses possible solutions to the problem of overuse of summary judgment and concludes that the most effective response is a large dose of judicial humility or consciousness-raising. Among the overlooked virtues of the trial process is the potential for its controlled presentation, adversarial testing, and forced deliberation to mitigate cultural illiberalism and its perceptual cousins.³⁴ Some greater restraint in granting summary judgment would more often allow these benefits of trial as well as avoiding the economic waste created by problematic grants of summary judgment.

The problems of application of post-trilogy summary judgment suggest one concrete act of judicial humility that would greatly improve practice: return to the pre-trilogy view that summary judgment should be denied even if the non-movant’s supporting evidence is “thin” or scintilla-like, a standard likely to minimize judicial weighing of contested evidence. This more forgiving attitude toward what constitutes a genuine clash of proof could also be faithfully applied to the range of permissible inferences drawn from the evidence.³⁵

II. *SCOTT V. HARRIS*: THE CULMINATION OF THE TRILOGY’S WRONG TURN ON SUMMARY JUDGMENT

As noted above, in *Scott v. Harris*, the U.S. Supreme Court rejected the assessment of three lower court judges and compelled summary judgment by determining that their interpretation of a single piece of evidence was *the only* reasonable assessment of the evidence.³⁶ The

33. See *infra* text accompanying notes 72–94 (discussing Professor Kahan’s contribution to cognitive illiberalism and other cognitive constraints that affect perceptions of evidence).

34. See *infra* text accompanying notes 95–175 (addressing the deficiencies that cognitive illiberalism causes when judges rule on motions for summary judgment).

35. See *infra* text accompanying notes 175–210 (discussing the inefficiencies the trilogy created and suggesting a return to the pre-trilogy summary judgment standard in which summary judgment was similar to directed verdicts).

36. *Scott v. Harris*, 550 U.S. 372, 379–80 (2007).

genesis of the case was a speeding motorist, Victor Harris, who refused to stop when Atlanta area police attempted to pull him over a little before 11:00 p.m. on March 29, 2001. Harris took off and the police began a high-speed chase, exceeding 85 m.p.h. at times.³⁷ Harris had no criminal record and the vehicle contained no contraband. His foolish decision to flee resulted because “he was scared, wanted to get home, and was hoping to avoid an impound fee for his car.”³⁸

Coweta County Sheriff’s Deputy Timothy Scott joined the chase,³⁹ colliding with the Harris vehicle in a shopping center parking lot Harris had entered before escaping again on to the open road.⁴⁰ Harris had been clocked going 73 m.p.h. in a 55 m.p.h. zone⁴¹ but had not been observed driving while impaired or committing any other crime.⁴² All of this was unknown to Scott, who decided that the situation justified action to halt Harris’s attempted escape.⁴³ After six minutes and nine miles of chasing, Harris finally was forced to a halt when Scott struck Harris’s rear bumper, knowingly putting Harris at a significant risk of serious injury or death, and ultimately causing Harris to suffer a broken neck, resulting in him becoming a quadriplegic.⁴⁴

37. The basic facts of the car chase and collision are recounted in *Scott*, 550 U.S. at 374–76, as well as in the trial and appellate court opinions, which differed markedly from the Court’s discussion of the facts and application of summary judgment. See *Harris v. Coweta Cnty.*, No. CIV 3:01CV148 WBH, 2003 WL 25419527 (N.D. Ga. Sept. 25, 2003), *aff’d*, 433 F.3d 807 (11th Cir. 2005).

38. See *Coweta Cnty.*, 2003 WL 25419527, at *1. The Supreme Court opinion makes no mention of Harris’s asserted reason for flight and generally tends to omit or abbreviate parts of the record favoring the plaintiff’s case. The lower court opinions and the Stevens dissent present a version of the facts much more favorable to Harris.

39. *Scott*, 550 U.S. at 375; *Coweta Cnty.*, 433 F.3d at 810 (affirming the Northern District of Georgia trial court’s ruling denying summary judgment to Scott but reversing the trial court’s denial of summary judgment to the Coweta County Sheriff). Both the Eleventh Circuit and district court opinions give more detail about the parking lot collision, which may have involved Harris ramming Scott’s car. Although this seems a possible motivation for Scott to have been excessively aggressive in his pursuit of Harris’s vehicle, this is not fully developed by the lower courts and is largely ignored by the Supreme Court.

40. *Scott*, 550 U.S. at 375; *Coweta Cnty.*, 433 F.3d at 810; *Coweta Cnty.*, 2003 WL 25419527, at *1–*2.

41. *Scott*, 550 U.S. at 374; *Coweta Cnty.*, 433 F.3d at 810; *Coweta Cnty.*, 2003 WL 25419527, at *1.

42. *Scott*, 550 U.S. at 375; *Coweta Cnty.*, 433 F.3d at 810; *Coweta Cnty.*, 2003 WL 25419527, at *1–*2.

43. *Scott*, 550 U.S. at 375; *Coweta Cnty.*, 433 F.3d at 810; *Coweta Cnty.*, 2003 WL 25419527, at *1–*2. In contradiction to the reported opinions, Scott has stated that he did know Harris was wanted for speeding and not a more serious crime. See *infra* note 61 (noting that the Court did not even take into consideration Scott’s lack of knowledge). If this is correct, Scott’s decision to bump Harris’s vehicle is harder to justify.

44. Kahan et al., *supra* note 15, at 843–44.

Harris brought a 42 U.S.C. § 1983 action against Scott, the Sheriff's Department, and the County, alleging violation of his civil rights through excessive use of force by the police. The defendants moved for summary judgment, which was denied by the trial court.⁴⁵ On appeal, an Eleventh Circuit panel unanimously affirmed denial of summary judgment as to Scott but overturned the district court's refusal to give summary judgment to the Sheriff on the ground that the undisputed facts failed to establish a defective Department policy regarding high speed chases, a prerequisite for the Sheriff Department's liability because the Sheriff was not personally involved in the chase and § 1983 does not permit liability for constitutional torts on the basis of respondeat superior.⁴⁶

The Supreme Court granted certiorari on the question of whether Scott was entitled to qualified immunity, which would be available to a police officer who did not violate "clearly established" law at the time of the interception incident.⁴⁷ Also subject to review was whether Scott had used deadly force in violation of the test set forth in *Tennessee v. Garner*.⁴⁸ In *Garner*, the Court found police to violate the victim's constitutional rights by shooting unless there was probable cause to believe that the suspect posed a sufficiently serious threat of death or serious physical injury to the officer or to the public.⁴⁹ The Eleventh Circuit's opinion had largely applied the *Garner* standard to high speed chase situations.⁵⁰ The Supreme Court, although not doing much to clarify the legal standard applicable to such cases,⁵¹ resolved *Scott v. Harris* by commanding entry of summary judgment in favor of Scott

45. *Coweta Cnty.*, 2003 WL 25419527.

46. *Coweta Cnty.*, 433 F.3d at 816–20.

47. This has been the law of official immunity since *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), as re-emphasized and refined in *Mitchell v. Forsyth*, 472 U.S. 511 (1985) and further developed in cases such as *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001) and *Hope v. Pelzer*, 536 U.S. 730 (2002). See MARK R. BROWN & KIT KINPORTS, CONSTITUTIONAL LITIGATION UNDER SECTION 1983 109–12 (2d ed. 2008) (showing how liability for government officials for civil rights violations only occurs when the defendant's conduct clearly violated established law); 2 SHELDON H. NAHMOOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 §§ 8:1–8:13 (4th ed. 2010) (highlighting that government officials are liable for civil rights violations only where the defendant's conduct violated clearly established law).

48. 471 U.S. 1, 11 (1985).

49. See *id.* at 3 (Garner was "reasonably sure" and "figured" that the suspected felon was unarmed); see also Kahan et al., *supra* note 15, at 843–48 (providing a more extensive summary of *Scott v. Harris*).

50. See *Coweta Cnty.*, 433 F.3d at 813–14 ("An automobile has been held to constitute a deadly weapon."); accord, *Coweta Cnty.*, 2003 WL 25419527, at *6–*7.

51. Because the Court was so certain as to the facts, it decided the case as if *Tennessee v. Garner* applied in the car chase context but did not make a definitive legal pronouncement in this regard. See *Scott v. Harris*, 550 U.S. 372, 376–77 (2007).

and against Harris by concluding that there was no legitimate factual issue as to the reasonableness of the deputy's car bump maneuver because the speeding Harris vehicle unquestionably posed a substantial threat of death or serious injury to the public.⁵² Justice Stevens dissented.⁵³

The Court focused primarily on videotapes of the chase made by cameras mounted on the pursuing police cars that switched lead pursuit positions at times. Writing for the Court, Justice Scalia described the videotape as presenting the Harris vehicle "racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast."⁵⁴ Seeing the fleeing car "swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulder to avoid being hit" as well as "run multiple red lights" while often traveling in the wrong lane and being pursued by police cars was enough for the majority to deem Harris a danger to the public, justifying Scott's disabling (to both the car and Harris) maneuver.⁵⁵

In dissent,⁵⁶ Justice Stevens described the majority as engaging in a *de novo* review of the type that was "buttressed by uninformed speculation about the possible consequences of discontinuing the chase." According to Justice Stevens, the tape "actually confirms, rather than contradicts" the lower courts' appraisal of the factual questions at issue. More important, it surely does not provide a principled basis for depriving the respondent of his right to have a jury evaluate the question" of deadly force.⁵⁷ Particularly powerful is Justice Stevens's observation that although the videotape might lead the

52. *Id.* at 384–86.

53. *Id.* at 389 (Stevens, J., dissenting). Justices Breyer and Ginsburg wrote separate concurrences but did not question the accuracy of Justice Scalia's characterization of the videotape. *See id.* at 387 (Breyer, J., concurring); *Id.* at 386 (Ginsburg, J., concurring).

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

55. *Id.*

56. Justice Ginsburg concurred, noting the fact-specific inquiry required to decide cases concerning alleged excessive force, but did not appear to question the majority's ironclad assessment that Scott's decision to run Harris off the road was reasonable under the circumstances, as a matter of law. *See id.* at 386 (Ginsburg, J., concurring). Justice Breyer also concurred, also noting the fact-based nature of the inquiry, suggesting that this might make it more efficient for trial courts to decide questions of official immunity first to avoid the necessity of determining disputed facts. *See id.* at 387 (Breyer, J. dissenting). But Justice Breyer also appeared not to question the majority's analysis of the video. *Id.* at 387–88; *see also id.* at 387 (Ginsburg, J., concurring) (describing the Breyer concurrence as "agree[ing]" that the videotape "demonstrates that the officer's conduct did not transgress *Fourth Amendment* limitations" (citations omitted) (emphasis added)).

57. *Id.* at 390 (Stevens, J., dissenting) (citations and footnote omitted).

majority to view the chase as reasonable, inferring reasonableness from evidence is for the jury.

In contrast to the majority opinion, the Stevens dissent marshals the facts of record to make a strong case that running Harris off the road, however stupid his decision to flee, was both unreasonable and unnecessary. The dissent points out facts soft-pedaled or ignored by the majority: that the police had the Harris license plate number and knew where he lived; that by the time of the fateful collision, Harris's vehicle was on the open road and posed less threat than it may have a few minutes earlier; that the police could have used "stop sticks" to puncture and gradually deflate the tires of Harris's car since they knew where he was going and essentially could have had him cornered and unable to escape, so long as the police displayed patience.⁵⁸

Persuasively, Justice Stevens noted that "[w]hether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury" and that the majority had "usurped the jury's fact-finding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable."⁵⁹ Demonstrating that one need not necessarily look across cultural divides to find divergent perception, the dissent observed 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."⁶⁰

As good as it is, even the Stevens dissent tends to overlook facts favorable to plaintiff Harris. As previously noted, Scott supposedly had no information about the infraction that led to the chase or whether Harris was a dangerous felon, facts that might have informed his judgment about whether to run Harris off the road.⁶¹ Neither did the

58. *Id.* at 390–97.

59. *Id.* at 395.

60. *Id.* at 396.

61. *Id.* at 375 (majority opinion). The Supreme Court majority reviewed the facts but failed to note that Scott had no information about the genesis of the chase nor knew whether Harris was a dangerous criminal or simply an adolescent acting foolishly. *Id.*; see also *Harris v. Coweta Cnty.*, 433 F.3d 807, 811 (11th Cir. 2005) (noting that Scott lacked this background, that the dispatcher did not know "how the pursuit originated, the speeds of the vehicles, the numbers of motorists or pedestrians on the roadways, or how dangerously Harris was driving," and that the dispatcher "also did not request further details about the pursuit prior to authorizing the PIT"); *Coweta Cnty.*, 2003 WL 25419527, at *2 (showing a series of interviews with individuals describing why they fled from law enforcement authorities). But in a videotaped interview available on the internet, Scott states that he was aware that the immediate cause of Harris's flight was speeding. See *Why I Ran* (Crime & Investigation Network broadcast Oct. 12, 2008), available at <http://www.hulu.com/watch/225429/why-i-ran-christievictor> (last visited Mar. 23, 2012); see also Brian L. Frye, *A Reasonable Man*, VIMEO (Apr. 3, 2011), <http://vimeo.com/21897714> (short film

police dispatcher who gave Scott permission to “take out” Harris,⁶² a wording choice that a reasonable jury might have found consistent with excessive use of force. Further, Scott failed to execute the precision maneuver he had been authorized to undertake, one that was designed to make a fleeing car spin to a stop without leaving the road or flipping over.⁶³ Scott had never even been trained in this maneuver.⁶⁴ All of the jurists reviewing the matter seem to have overlooked that a reasonable jury could see Scott’s conduct as an angry overreaction to being hit by Harris’s vehicle, another fact consistent with excessive use of force.⁶⁵

Quite amazingly, not one of the thirteen judges and Justices who reviewed the case noted that Harris was African American while Scott was white. Surely, a reasonable jury could take this into account in deciding whether the force used by Scott, perhaps motivated by racial animus as well as anger over the damage to his vehicle, upset at what appeared to be scofflaw behavior, and agitated because of the adrenaline rush of the chase was excessive under the circumstances.⁶⁶ The prospect that police in a state in the Deep South might be unduly aggressive when dealing with a black motorist in flight certainly cannot be dismissed and may help, along with other contextual factors, explain

that pairs the chase scene with soundtrack of the Supreme Court oral argument).

62. *Scott*, 550 U.S. at 375 (“Having radioed his supervisor for permission, Scott was told to ‘[g]o ahead and take [Harris] out.’”).

63. *Id.* (“Scott decided to attempt to terminate the episode by employing a ‘Precision Intervention Technique (‘PIT’) maneuver, which causes the fleeing vehicle to spin to a stop.”); see also *Coweta Cnty.*, 433 F.3d at 810 (noting that Scott radioed a general request for “permission to PIT [Harris]” and describing a PIT maneuver as “a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point on the vehicle, which throws the car into a spin and brings it to a stop”); *Coweta Cnty.*, 2003 WL 25419527, at *2 n.3 (“Scott wanted to use the maneuver to end the chase as soon as possible because he felt that Harris was acting in a reckless and extremely dangerous manner. At the time the request was made, there were no motorists or pedestrians in the area, which was due, in part, to the Peachtree City officers’ decision to blockade intersections.”).

64. *Scott*, 550 U.S. at 375 (discussing Scott’s decision to use PIT maneuver and dispatcher authorization but failing to note that Scott was not trained in PIT); *Coweta Cnty.*, 433 F.3d at 810–11 (noting that Scott requested to use and was given permission for PIT maneuver although “Scott had not been trained in executing this maneuver” and that “[Scott] and other Coweta officers did not undergo a training on PITs until after the incident”); *Coweta Cnty.*, 2003 WL 25419527, at *3 (highlighting that Scott and other officers were not trained in PIT).

65. According to the dissent, “‘stop sticks’ are a device which can be placed across the roadway and used to flatten a vehicle’s tires slowly to safely terminate a pursuit.” *Scott*, 550 U.S. at 397 n.9 (Stevens, J., dissenting).

66. The audio portion of the chase video includes Scott volunteering to be the officer who brings Harris’s vehicle to a stop because Scott’s vehicle has already suffered physical damage from the parking lot collision. We know that Harris is black and Scott is white because they both appear (separately) in a most affecting video in which they give their respective accounts of the incident. See *Why I Ran*, *supra* note 61.

why Scott took action that seems (at least in retrospect) so excessive relative to the situation.

The Stevens dissent, unlike the majority opinion, respected the traditional “rule” of litigation that fact issues such as witness credibility and whether particular events took place are for the jury. But as demonstrated by the saga of *Scott v. Harris*, we know that at least five very accomplished jurists would have deemed it reasonable if a jury had found excessive use of force under the circumstances of the chase. Further, none of the Justices hearing the case appeared to recognize that watching a video is one thing, while having it introduced by and interpreted by those involved in the matter is another, an exercise that might lead to a different perception than simply viewing the video in the isolation of judicial chambers.⁶⁷

Thus, simply as a self-contained set of three judicial opinions, *Harris v. Coweta County* cum *Scott v. Harris* is highly problematic on its face. The Supreme Court’s majority decision started to look even worse in the wake of the Kahan et al. study. As previously noted, Professors Kahan, Hoffman, and Braman showed the *Scott v. Harris* car chase video to 1350 respondents, who in turn gave their opinions regarding the videotape.⁶⁸ Unlike the nearly unanimous Supreme Court, the respondents of the Kahan et al. study exhibited a wider variety of opinions, with younger persons, women and minorities all considerably less willing to find the police officer’s actions clearly justified. Many observers had just the opposite reaction, seeing the interception tactic of the police as clearly unjustified under the circumstances. The Kahan et al. study found that the respondents “all varied significantly in their perceptions of the risk that Harris posed, of the risk the police created by deciding to pursue him, and of the need to use deadly force against Harris in the interest of reducing public risk” and that these “patterns suggest the influence of value-motivated cognition.”⁶⁹

67. See *infra* text accompanying notes 185–243 (describing the benefits of the trial process for illuminating evidence such as the videotape).

68. See Kahan et al., *supra* note 15, at 838.

69. See Kahan et al., *supra* note 15, at 903–04 (citation omitted). As discussed further in this Article, I am noting the degree to which the cognitive illiberalism observed by Professors Kahan, Hoffman, and Braman undermines the case for aggressive use of summary judgment, just as does much research on heuristics and biases, cognitive traits in humans, and behavioral law and economics. A full discussion of the *Whose Eyes* analysis, particularly the authors’ suggestion of how the Court could and should have decided the case, is beyond the scope of this Article, save that I must note that I do not necessarily agree with their solution to the *Scott v. Harris* problem and may even oppose it to the extent that their suggested alternative grounds for decision would have the effect of similarly removing such cases from jury consideration.

The Kahan et al. study thus reveals a Court majority that quite clearly was wrong about the range of reasonable jury responses to the videotape (to say nothing of examination of the evidence generally). Reasonable people, quite a few of them in fact, did not find that the video clearly exonerated the police. By highlighting the divergence of perception and its correlation with demographic traits, the Kahan et al. study further undermined the already shaky majority opinion.

The *Scott v. Harris* majority's blinders as to the range of reasonable reactions to the videotape are revealed even when the tape is shown to an audience that logically should see the tape as would a court. During Spring Semester 2011, students in a civil procedure class at the William S. Boyd School of Law-UNLV watched the *Scott v. Harris* chase video. Afterward, they expressed their views on the Scalia and Stevens perceptions of the videotape.

This group was considerably more homogenous than the Kahan et al. sample. There were only two African-Americans in the class and fewer than ten with Hispanic surnames, although the class was evenly divided by gender. By definition all the students had graduated from college and had been successful enough according to traditional college standards to gain admission to law school. Nearly all were from middle class or upper-middle class backgrounds. Except for its comparative youth, it appeared the type of group that—at least according to the Kahan et al. results—was reasonably likely to back Justice Scalia rather than Justice Stevens on this one.⁷⁰ But instead of mirroring the Court, the class divided as follows: approximately a third supported the Scalia characterization while another third agreed with Justice Stevens and the remaining third thought the accurate assessment was somewhere in between.

Although a large number were proud to stand with Justice Scalia, the results are instructive. First, this type of classroom episode, which has probably occurred throughout the country over the past four years,⁷¹ supports the Kahan et al. study, even in a group of mostly white kids eager to become part of the establishment. If this group of largely privileged, economically secure Caucasians about to become lawyers cannot be near-unanimous in its agreement with the *Scott v. Harris*

70. This is a bit of an oversimplification of the Kahan et al. results, which suggest that attitudes toward controversies like that in *Scott v. Harris* vary primarily according to respondent attitudes toward hierarchy vs. egalitarianism and individualism vs. communitarianism and other aspects of risk assessment. But in the study's sample, respondent attitudes on these dimensions were often correlated with demographic factors such as race.

71. Other civil procedure professors have reported similar division among their students when assessing the *Scott v. Harris* chase video.

majority about police conduct, this strongly suggests the Court majority was in error in finding the facts not genuinely open to dispute and was perhaps in error on the merits of its characterization that the chase was a danger to the public.

Second, when the class was asked the follow-up question, “How many agree that summary judgment was appropriate?” almost no hands went up. Even the majority of those who saw the chase Justice Scalia’s way acknowledged that other reasonable persons might disagree. Within seconds, they saw a compelling sample of these reasonable people—their classmates—disagreeing in substantial proportion.

Third, this group of future lawyers seems to instinctively grasp the perils of cognitive illiberalism about which the Kahan et al. study authors warned and, like Justice Stevens, appears to readily recognize that when judges argue that a scene can be described in only one way, the judges are acting more like jurors and violating the long-standing rules of summary judgment civil procedure. When they saw (with their own eyes), they believed their own eyes but also realized that other eyes might see the matter differently.

III. COGNITIVE ILLIBERALISM AND ITS COUSINS

As noted above, Professors Kahan, Hoffman, and Braman define cognitive illiberalism as “failure to recognize the connection between perceptions of societal risk and contested visions of the ideal society.”⁷² The term is most associated with Professor Kahan, who appears to have coined it and certainly has been its most prominent intellectual entrepreneur. In his writings, he has argued that much of the division of society, including prominent culture wars over sexuality, guns, smoking, climate change and the like stems from the respective groups differing views of the facts, in large part because people perceive, filter, and distill facts to fit their pre-existing world views.⁷³

The cognitive illiberalism concept is part of a broader cultural cognition project in which Professors Kahan, Hoffman, and Braman are important figures along with Mary Douglas,⁷⁴ Paul Slovic,⁷⁵ and others

72. Kahan et al., *supra* note 15, at 838.

73. See Dan M. Kahan, *The Cognitively Illiberal State*, *supra* note 22, at 115–25 (arguing that certain divisions in society result from varying views of facts that comport with people’s pre-existing world views).

74. See, e.g., MARY DOUGLAS, *NATURAL SYMBOLS: EXPLORATIONS IN COSMOLOGY* 60 (1996) (discussing “group” and “grid” world views that shape human perceptions according to whether a person is more or less communitarian or individualistic in group outlook and more or less hierarchical or egalitarian in orientation).

75. See, e.g., PAUL SLOVIC, *THE PERCEPTION OF RISK* 152 (2000) (noting the degree to which

whose work deals with the degree to which variance in individual and group attitudes colors their views of the factual world. According to its own self-description, The Cultural Cognition Project at Yale Law School is “a group of scholars interested in studying how cultural values shape public risk perceptions and related policy beliefs.”⁷⁶ Cultural cognition “refers to the tendency of individuals to conform their beliefs about disputed matters of fact . . . to values that define their cultural identities.”⁷⁷ A major theme of the Project is that people form differing belief structures that stem from their diverse cultural perspectives and orientations. Particularly important is a person’s predisposition as individualistic or communitarian and hierarchal or egalitarian.⁷⁸

The cultural cognition movement and the concept of cognitive illiberalism are important developments in our understanding of human perception and reasoning. The concepts are a sub-part of a larger body of knowledge which shows that people—even very intelligent, well-trained professionals—are subject to a variety of cognitive failings and are far from perfectly accurate in their perceptions or rational in their analyses.⁷⁹ A large body of cognitive science, which also travels under the banner of behavioral law and economics,⁸⁰ shows that humans consistently make a wide variety of reasoning errors. Among these is a

variant cultural and cognitive traits of persons shape their perceptions of facts and risks).

76. See THE CULTURAL COGNITION PROJECT AT YALE LAW SCHOOL, www.culturalcognition.net (last visited Mar. 23, 2012).

77. *Id.*

78. Kahan et al., *supra* note 15, at 859–62; *accord*, DOUGLAS, *supra* note 74, at 54–68 (diagramming the group and grid world views and separating whether an individual is independent of other people’s pressures versus controlled by them); see also Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 150 (2006) (arguing that a correlation exists between beliefs of completely different public policy issues, meaning that a person’s beliefs on one topic can be predicted based upon his or her understanding and opinion of a totally separate topic).

79. See DANIEL KAHNEMAN, PAUL SLOVIC & AMOS TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 18–19 (1982) (explaining that experiments with human subjects show people to regularly make data processing and reasoning errors in decision-making); Daniel Kahneman & Amos Tversky, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1224 (1974) (finding that rational thought was impeded by people’s unconscious, and reflexive thinking had a tendency to make cognitive shortcuts). The work of Tversky and Kahneman was particularly important in the development of cognitive science research and has been frequently invoked in analysis of legal policy as well as spawning a large volume of related literature about the degree to which human reasoning is prey to factors other than pure rationality.

80. See, e.g., BEHAVIORAL LAW AND ECONOMICS 1–5 (Cass R. Sunstein ed., 2000) (finding that the study of behavior law and economics is essentially the study of human decision-making). See generally RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS 6–11 (2008) (claiming that human decision-making is flawed and that enacted policies are often dictated by the way people process and make decisions).

tendency to see the world in a preferred way and to fail to realize that others could see the world in quite a different way, as addressed in the cultural cognition and cognitive illiberalism literature.

But beyond these sorts of reasoning errors, there are basic cognitive constraints that bedevil all humans whatever their cultural leanings. Among these traits are undue adherence to socially constructed preferences,⁸¹ extremeness aversion,⁸² hindsight bias,⁸³ optimism bias,⁸⁴ status quo bias,⁸⁵ bounded rationality,⁸⁶ the availability heuristic,⁸⁷ the anchoring heuristic,⁸⁸ and loss aversion.⁸⁹

81. See BEHAVIORAL LAW & ECONOMICS, *supra* note 80, at 1 (claiming that “[h]uman references and values are constructed rather than elicited by social situation” and “[a]lternative descriptions of the same choice problems lead to systematically different preferences”) (footnotes omitted) (quoting Amos Tversky, *Rational Theory and Constructive Choice*, in THE RATIONAL FOUNDATIONS OF ECONOMIC BEHAVIOR 186 (Kenneth Arrow et al. eds., 1996)). See generally THALER & SUNSTEIN, *supra* note 80 (discovering that people’s preferences, outlook, and opinions can be molded by the framing and wording of choices).

82. See BEHAVIORAL LAW & ECONOMICS, *supra* note 80, at 3 (“People are averse to extremes. Whether an option is extreme depends on the stated alternatives As between given alternatives, most people seek a compromise.”). See generally THALER & SUNSTEIN, *supra* note 80, at 217 (finding that people have a general preference for maintaining the status quo).

83. See BEHAVIORAL LAW & ECONOMICS, *supra* note 80, at 4 (“A great deal of evidence suggests that people often think, in hindsight, that things that happened were inevitable, or nearly so. The resulting ‘hindsight bias’ can much distort legal judgment.”).

84. See *id.* (labeling the trait “Optimistic Bias” and noting that “[e]ven factually informed people tend to think that risks are less likely to materialize for themselves than for others”). See generally THALER & SUNSTEIN, *supra* note 80, at 25–26 (finding that people tend to expect good outcomes, even in the face of evidence to the contrary).

85. See BEHAVIORAL LAW & ECONOMICS, *supra* note 80, at 4 (“People tend to like the status quo, and they demand a great deal to justify departures from it . . . [and] evaluate situations largely in accordance with their relation to a certain reference point.”). See generally THALER & SUNSTEIN, *supra* note 80, at 23–24 (explaining how people use anchor points in decision-making).

86. See Russell Korobkin, *Libertarian Welfarism*, 97 CAL. L. REV. 1651, 1656 (2009) (“People often rely on intuitions driven by attention to highly salient information rather than careful, reflective analysis, emotions rather than reason, and other heuristics that lead to ‘boundedly rational’ rather than fully rational decisions.”); see also Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1204–06 (2003) (stating that people are not fully rational and logical but are influenced by their own preconceptions as well as the context and design of situations). See generally THALER & SUNSTEIN, *supra* note 80, at 17–39 (noting the importance of “choice architecture” to human decision-making).

87. See BEHAVIORAL LAW & ECONOMICS, *supra* note 80, at 5 (“People tend to think that risks are more serious when an incident is readily called to mind or ‘available.’ If pervasive, the availability heuristic will produce systematic errors.”). See generally THALER & SUNSTEIN, *supra* note 80, at 24–26 (explaining that the likelihood of a person believing that a negative outcome scenario is more likely to occur increases when an example is very closely related in circumstances and time as well as how well known it is by that person).

88. See BEHAVIORAL LAW & ECONOMICS, *supra* note 80, at 5 (“Often people make probability judgments on the basis of an initial value or ‘anchor,’ for which they make insufficient adjustments. The initial value may have an arbitrary or irrational source. When this

Related to optimism bias and perhaps to status quo bias is a general tendency of persons to think they are better (at everything) than is really the case. This type of self-serving bias of course affects us all. But because judges hold enormous power and can often wield that power individually without the moderating influence of others (at least until appeal), this trait is a particular cause for concern. Consider the following passage from an article co-authored by prominent federal district court Judge Shira A. Scheindlin: “For all their virtues, juries cannot contribute much to the effort to define sexual harassment better – by granting summary judgment in proper cases and carefully reviewing jury findings, however, judges can.”⁹⁰ However, the broader cross-section of the jury and the benefits of the trial process are useful counterweights to a judge’s potentially idiosyncratic or erroneous view of the facts.⁹¹

In addition,

[o]ne of the psychological mechanisms that accounts for cultural cognition is Naïve Realism, which refers to a psychological tendency to attribute the perceptions of those who disagree with us to the distorting impact of their political predispositions (the Realism part) without being sensitive to how our own predispositions might affect our own perceptions (the Naïve part).⁹²

These cognitive and cultural traits make dispassionate rational analysis more difficult even in judges who have not a shred of what is normally described as unconscious racial, gender, or ethnic bias. An important contribution of the cognitive illiberalism and cultural cognition project is to emphasize that differing perceptions are not entirely the result of immutable race or gender differences (for example, the study found reduced perceptible difference in reaction to the video according to the sex of the respondent and the findings were not

is so, the probability assessment may go badly wrong.”).

89. See *id.* (“People are especially averse to losses. They are more displeased with losses than they are pleased with equivalent gains—roughly speaking, twice as displeased.”). See generally THALER & SUNSTEIN, *supra* note 80, at 33–34 (finding risk aversion and loss aversion common for most people).

90. See Shira A. Scheindlin & John Elofson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL’Y REV. 813, 852 (1999) (displaying confidence that judges, through their sophisticated legal training, will more frequently reach sound results in sexual harassment cases than lay persons).

91. See *infra* text accompanying notes 185–243 (describing the benefits of the trial process for uncovering evidence).

92. See Dan M. Kahan, “Ideology in” or “Cultural Cognition of” Judging: What Difference Does It Make?, 92 MARQ. L. REV. 413, 420 (2009) (citing Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: “Naïve Realism” in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 405 (1995)).

statistically significant).⁹³ Nor are divergences among judges and other humans purely the product of ideology or favoritism. As Professor Kahan has observed, ideology and values may have a subconscious influence on judges but they may not be the motive for their decisions.⁹⁴ Even if not intentional, result-oriented, or corrupt, basic orientations about society and its ordering can powerfully determine how disputed facts are assessed and the inferences drawn from the same piece of evidence.

The ensuing policy question presented is the proper response of the judicial system to this “new” information. At least in the slice of the legal system dealing with summary judgment, courts should become much more hesitant to grant summary judgment—at least in cases where the decision turns on whether there exists a genuine factual dispute.

IV. SUMMARY JUDGMENT’S TRACK RECORD: NOTHING TO BRAG ABOUT

As discussed above, one would expect the affirmance rate in fact-based summary judgment cases to approach 100% because, by definition, a court rendering summary judgment has determined either that the facts are uncontested (and, as discussed below, that the dispute between the parties is only one of law) or that no reasonable factfinder could agree to the nonmovant’s contentions. To the extent the actual affirmance rate is significantly lower, this suggests that trial judges are being too aggressive in addressing summary judgment motions.

Even if “law-based” summary judgment motions comprise a substantial portion of the cases on appeal, perhaps even a majority, a significant reversal rate suggests problems and probably plenty of cognitive illiberalism. Similarly, a significant reversal rate regarding law-based summary judgment is problematic as well in that it may indicate problems with the analytic abilities of trial courts, excessive case loads precluding adequate time for research and reflection, inadequate law clerk selection or support, or other factors in lieu of cognitive illiberalism. It might even indicate actual bias, prejudice, or lack of impartiality that is more overt than cognitive error regarding narrowness of focus or excessive confidence in one’s own abilities.

93. See Kahan et al., *supra* note 15, at 868–69 (discussing some gender differences in response to the *Scott v. Harris* chase video but noting that they were not statistically significant).

94. Kahan, *supra* note 92, at 413. But see Kahan et al., *supra* note 15, at 415 (noting that values could provide partisan motivation for decisions).

In addition, of course, using reversal rates as a means of assessing the correctness of trial court summary judgment practice may itself be misleading. Perhaps the trial courts had it right and the appeals courts had it wrong in reversing a “law-only” summary judgment. The trial court may have had a sounder view than the appellate court (or two of three members of an appellate panel). But for better or worse, the rule of a legal system is that the final decision of the highest court hearing the matter is the “correct” decision for purposes of assessing the quality of lower court decisions. Regardless of finality and hierarchy, reversal reflects disagreement among the bench, a bench composed of reasonable people. But summary judgment is not supposed to be granted unless reasonable people could not disagree. Consequently, reversal, even if resulting in incorrect decisions, strongly suggests the case was not apt for summary judgment.⁹⁵

With these caveats, an examination of the fate of summary judgment on appeal appears to strengthen the case of its critics more than its supporters. As a general rule, trial court decisions appear to be affirmed roughly 60% of the time.⁹⁶ One would expect summary judgment to have an even better track record on appeal because by definition the motion is to be granted only when there is *no* genuine dispute of material fact, *no* need for credibility determinations, *and* the law clearly directs a particular result. Even under the post-trilogy regime that permits judges to make too many resolutions of contested facts or favor the judge’s inferences over those a jury might render, one would still expect a better than average affirmance rate if the judge is correct in concluding that his or her view of the evidence is by far the most reasonable. Unless the judge is taking the trilogy even farther than its already judge-empowering boundaries, one would expect something approaching a 100% affirmance rate, particularly since the judge has

95. Even without considering the fate of summary judgment on appeal, the pattern of summary judgment practice at the trial level raises some cause for concern. For example, it appears that defendants obtain summary judgment at nearly twice the rate of plaintiffs (roughly 50% for defendants and roughly 30% for plaintiffs). See Edward Brunet, Presentation of *Summary Judgment Efficiency* at the Seattle University School of Law 25th Anniversary Summary Judgment Trilogy Colloquium (Sept. 16, 2011). Although this is perhaps justified because a plaintiff bears the burden of proof at trial, it does not explain why summary judgment occurs in civil rights cases at a 70% rate while succeeding in tort or antitrust cases at roughly a 50% rate. *Id.*

96. See KUERSTEN & SONGER, *supra* note 12, at 62–65 (noting a general affirmance rate of roughly 60%); Stanton Wheeler et al., *Do the “Haves” Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970*, 21 L. & SOC’Y REV. 403, 415 (1987) (finding that although rates do vary among jurisdictions, affirmance rates still are not even close to approaching 100%).

discretion to withhold summary judgment if not firmly convinced it is the right course of action for the case.⁹⁷

Instead, we find that summary judgment on appeal fares no better than the bulk of cases reviewed and falls far short of the near-perfect track record it logically would have on appeal if being properly administered at trial. For example, one study found that summary judgment opinions in one federal circuit were affirmed at a 70% rate.⁹⁸ Although this is not a horrendous track record, neither is it anything about which summary judgment proponents should crow. Recall that even more problematic trial court decisions tend to be affirmed 60% or more of the time and that summary judgment affirmance theoretically should approach 100%. In addition, the appellate court in question (the Seventh Circuit), generally known as a conservative court, has some judges who have publicly disparaged the bona fides of many job discrimination claims. If this is the best summary judgment can do in this sort of hospitable environment, it would nonetheless appear that trial courts are too aggressive in granting the motion.

The same is true regarding summary judgment appeals overall. One study found a general affirmance rate of 61% for grants of summary judgment,⁹⁹ roughly the same rate of success on appeal as other dispositive acts by the trial court (dismissal generally had the same affirmance rate of 61%),¹⁰⁰ while the affirmance rate for Rule 50 motions was 55%.¹⁰¹ Trial judgments were affirmed at the slightly higher rate of 68%.¹⁰² Notwithstanding the claims of defenders of the trilogy regarding the wonders of summary judgment, entry of the motion is overturned nearly half the time and fares no better on appeal than other trial court orders notwithstanding that the substantive

97. See Gensler, Discretion to Deny Summary Judgment, *supra* note 11, at 47 (outlining the amount of discretion judges have regarding summary judgment); see also Gensler, *Must, Should, Shall*, *supra* note 11, at 1142 (examining judicial discretion and judges' ability to withhold summary judgment).

98. See Paul W. Mollica, *Employment Discrimination Cases in the Seventh Circuit*, 1 EMP. RIGHTS. & EMP. POL'Y J. 63, 75–78 (1997) [hereinafter Mollica, *Employment Discrimination Cases*] (showing an increased trend in courts granting summary judgment in the Seventh Circuit); accord, Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141 (2000) [hereinafter Mollica, *Federal Summary Judgment at High Tide*] (examining statistical trends in summary judgment).

99. See CROSS, *supra* note 12, at 51 (finding that summary judgment grants were affirmed at a 61.1% rate). Where the plaintiff (who bears the burden of proof) obtained summary judgment, the reversal rate is slightly higher. *Id.* at 52.

100. *Id.* at 51 (61.1% affirmance rate).

101. *Id.* (55.1% affirmance rate for J.N.O.V. motions).

102. *Id.* (68.0% affirmance rate).

standard for summary judgment suggests it should be relatively immune to being overturned on appeal.

This rough success rate of 60% and perhaps 70% appears to hold across jurisdictions and types of cases, without the significantly greater success (much less the near perfect success) one would expect for summary judgment.¹⁰³ But in some subcategories of cases, affirmance rates can approach 90%.¹⁰⁴ Consequently, one might expect something more than just the “average” affirmance rate for summary judgment and to further expect that where summary judgments are reversed, they will at least be “law only” decisions as contrasted with trial court grants based on the supposed absence of fact disputes, only to have an appellate panel find disputed facts. Yet the system reflects such decisions,¹⁰⁵ which strongly suggests that trial courts have simply been too willing to impose an individual judge’s view in cases where there might be a range of reasonable jury responses.

A leading treatise construing one study described a “19 percent reversal rate for . . . summary judgment and a comparable 15 percent reversal rate for all civil appeals.”¹⁰⁶ Similarly, the treatise notes that “[d]ata collected by Judge [William] Schwarzer [a strong proponent of summary judgment], for example, shows that the reversal rate for

103. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 105 (2009) (“While win rates in the trial court vary from high to low across case categories, affirmance rates in the appellate court are elevated for all kinds of cases.”); Kevin M. Clermont et al., *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL’Y J. 562–63 (2003) (finding that plaintiffs in such cases do worse than plaintiffs generally, but significant number of trial court dismissals or grants of summary judgment are dismissed); Mollica, *Federal Summary Judgment at High Tide*, *supra* note 98, at 180 (noting that despite the popularity of the motion and frequency of summary judgment grants at trial, the affirmance rate is roughly the same as with other cases).

104. See Stephen J. Choi et al., *What Do Federal District Judges Want? An Analysis of Publications, Citations and Reversals*, 28 J. L. ECON & ORG. (forthcoming 2012) (manuscript at 7), available at <http://jleo.oxfordjournals.org/content/early/2011/08/25/jleo.ewr014.full.pdf+html>.

105. See, e.g., Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. TEX. L. REV. 431, 445–49, 471 (2002) (finding on average more than 30% of summary judgment grants reversed and reversal rates ranging from 20% to 45%, with more than half the reversals due to appellate courts finding “the existence of some evidence raising fact issues”). From 2001–02, reversal rates regarding jury verdicts and bench trials were 25% and 22%, respectively in Texas courts of appeals. *Id.*; see also Lynne Liberato & Kent Rutter, *Evaluating Appeals By the Numbers*, 66 TEX. B.J. 768, 770 (2003) (noting a 33% reversal rate for summary judgment cases). Although Texas state courts are obviously not part of the federal judicial system where the trilogy is controlling law, Texas summary judgment practice is similar, and the trilogy has been cited with favor by Texas courts. *Id.*

106. EDWARD J. BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE §11:1, at 451 (3d ed. 2006) (citing Joseph Cecil, *Trends in Summary Judgment Practice: A Summary of Findings*, 1 FJC DIRECTIONS 11, 15 (1991)).

summary judgment motions did not vary substantially from the overall rate of reversal for all civil cases”¹⁰⁷ and that “Judge Schwarzer correctly concluded that this data should correct any misperception of appellate inclination to overturn summary judgment dispositions.”¹⁰⁸

Unless summary judgment has a much better record on appeal than the average matter, perhaps something approaching a perfect record, trial courts are by definition violating the “rules” of the summary judgment “game” by taking too many liberties regarding fact finding as well as erring on the law when such errors are unnecessary in light of the bench’s discretion to deny summary judgment.¹⁰⁹

V. DISTINGUISHING BETWEEN FACT-DISPUTE AND LAW-ONLY SUMMARY JUDGMENT MOTIONS

As discussed above, cognitive illiberalism and its cousins (e.g., false certainty bias, false consensus bias,¹¹⁰ optimism bias, status quo bias, loss aversion) refer to both intrinsic failure in human reasoning and people’s failure to appreciate that others can see things differently.¹¹¹ When a judge fails to see that his or her construction of the facts may well not be shared by many others, the judge is being cognitively illiberal as well as falling prey to a variety of cognitive errors. In short, the judge erroneously thinks that his or her factual assessment is the only reasonable factual assessment.

However, as previously discussed, this type of cocksure judging is inappropriate. It violates the alleged rules of the civil procedure “game” and invades the province of the jury. Although Professor Suja Thomas

107. *Id.* §11:1, at 450 (citing William Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 467 (1984)). Note that Judge Schwarzer’s study took place prior to the trilogy, suggesting that even under a regime more protective on nonmovant opportunity to reach trial, appellate courts were finding, with some frequency, that judges erred in finding no issue of fact or in improperly deciding issues of fact as well as making mistaken assessments of the law.

108. *See id.* §11:2, at 450–51 (citing the data that Judge Schwarzer collected in support of the notion that summary judgment rulings, specifically reversals, do not vary substantially from other areas of appellate review); *accord*, Wald, *supra* note 7, at 1939 (“[S]ummary judgment fares quite well on appeal, at least in the D.C. Circuit.”).

109. *See* BRUNET & REDISH, *supra* note 106, §11:2, at 462 (discussing the amount of deference appellate courts should give to a trial court’s grant of summary judgment).

110. False consensus or false certainty bias is what occurs when people think that their view of a matter is more widely shared by the populace at large than is the case. *See* Solan et al., *supra* note 26, at 1268.

111. With apologies to Professors Kahan, Hoffman, and Braman for taking license with their more nuanced, culturally centered use of the term and its focus on differing visions of societal risk and the ideal society. *See supra* text accompanying notes 72–94 (discussing cognitive illiberalism and related theories).

makes too sweeping a claim in contending that any grant of summary judgment violates the Seventh Amendment,¹¹² she is correct that decisions like *Scott v. Harris* and *Ricci v. City of New Haven* are not only wrong but arguably unconstitutional applications of judicial power because they involve the Court adjudicating genuinely contested material issues of fact.¹¹³

For the reasons set forth below, judicial arrogation of the fact-finding function is also inefficiently bad court management. When judges resolve factual disputes that should have been left to the jury and are reversed in significant percentage, this inevitably leads to waste, added expense, and delay as well as unfair treatment.¹¹⁴ Although the analytic processes involved in this dance of dueling summary judgment may illuminate issues and streamline some aspects of the eventual trial, it clearly imposes an additional layer of legal activity and expense on cases that might just as easily have been tried with less fanfare, either reaching final adjudication or a settlement.¹¹⁵

In addition, there is a significant distributional question posed by the reversal rates of grants of summary judgment. By definition, these summary judgment grants are erroneous. But they can only be proved erroneous by claimants who have the resources to fund an appeal. In relatively small stakes cases or where claimants are of modest means, they may be forced to simply “lump” a bad summary judgment decision because of the expense of appeal. Knowing that the bench may favor their positions in such cases or that plaintiffs’ counsel perceive a

112. See Thomas, *Why Summary Judgment is Unconstitutional*, *supra* note 3, at 158–60 (arguing that summary judgment conflicts with the Seventh Amendment’s guarantee of right to trial by jury).

113. See *supra* text accompanying notes 41–83 (describing and assessing *Scott v. Harris*).

114. For example, the nonmovant who should have been able to have a trial in Year Three after a dispute does not obtain trial (whatever the result) until Year Five or perhaps even Year Fifteen after a dispute. Although it is not the norm, some cases can become marathons in large part because trial courts are overeager to grant summary judgment and are reversed and remanded repeatedly, resulting in trial resolution (or settlement) years later than would have been the case in the absence of summary judgment. See, e.g., Jeffrey W. Stempel, *Refocusing Away From Rules Reform and Devoting More Attention to the Deciders*, 87 DENV. U. L. REV. 335, 355–56 (2010) (describing instance of civil rights case based on a 1994 incident where two grants of summary judgment were reversed, leading to settlement fifteen years after the incident rather than the three to five years after the incident that would likely have been the case in the absence of summary judgment).

115. Notwithstanding its insights, Professor Brunet’s article in this Symposium does not fully explain why the same differentiation between strong and weak claims could not just as easily be reached at lower cost through the negotiation by reasonably talented and experienced counsel, early neutral evaluation, or mediation. See Brunet, *The Efficiency of Summary Judgment*, *supra* note 3, 694–95. Even court annexed arbitration, which entails a streamlined version of trial, might be cheaper than the baroque motion practice that often accompanies summary judgment.

disadvantage, defense counsel usually make summary judgment motions in such cases and refrain from early settlement offers.¹¹⁶

Judicial error regarding application of the law is of course different than judicial error in resolving contested facts. The former, even if unsuccessful on appeal, seems inherent in the nature of judging while the latter looks like improper removal of the case from the jury. Whether right or wrong, the system generally needs its judges to rule on legal questions.¹¹⁷ Failure to do so arguably violates the Code of Judicial Conduct.¹¹⁸ To refuse to do so even when the parties have stipulated to agreed facts seems particularly inappropriate, at least at first blush. In the past two terms alone, the Supreme Court has reversed a number of summary judgment grants not because the trial court resolved disputed facts but because the Court simply disagreed with the trial court's legal conclusions.¹¹⁹

116. Although anecdotal, the views related to me by plaintiffs' counsel in Nevada appear consistent with broader research in the area. See, e.g., Schneider, *Dangers*, *supra* note 3; Beiner, *supra* note 3; McGinley, *supra* note 10; see also Stempel, *supra* note 114, at 355–57 (citing instances where judges granted summary judgment despite facing records highly suggestive of discrimination).

117. See Mollica, *Employment Discrimination Cases*, *supra* note 98, at 78 (arguing that statutory construction cases, for example, “turn far less on the facts of the case (which are often not materially contested) than on whether the statute covers the practice at all” and that “[s]uch essentially legal determinations often warrant summary judgment because the court, rather than the fact-finder, determines the scope of the statute”). But see Rebecca Silver, Note, *Standard of Review in FOIA Appeals and the Misuse of Summary Judgment*, 73 U. CHI. L. REV. 731, 757 (2006) (finding that courts reviewing FOIA matters have slouched toward improper factual determination by judges due to adoption of a standard of review that unduly permits interjection of judicial fact assessment).

118. See AM. BAR ASSOC., MODEL CODE OF JUDICIAL CONDUCT R. 2.7, at 21 (2011) (requiring judges to sit on cases and discharge duties unless disqualified).

119. See, e.g., *Ortiz v. Jordan*, 131 S. Ct. 884, 893 (2011) (holding unanimously that denial of summary judgment on qualified immunity grounds may not be appealed after a trial finding officials liable unless they preserved sufficiency of the evidence issues through Rule 50 motion); see also *Mayo Found. for Med. Educ. & Res. v. United States*, 131 S. Ct. 704, 715 (2011) (reversing the Eighth Circuit's grant of summary judgment, and unanimously holding a Treasury Department Rule to be valid and reasonable construction of a statute requiring medical residents to be subject to FICA Social Security tax); *Christian Legal Soc. Chap., Univ. Cal., Hastings v. Martinez*, 130 S. Ct. 2971, 2978 (2010) (holding in a 5–4 decision that even though facts are uncontested, when a student organization that denies membership in violation of the school's “all-comers” provision summary judgment is not proper because there is an issue as to whether the school used the membership policy as pretext for denying official school recognition); *Jerman v. Carlisle, McNellie, Rini, Kramer & Aulrich LPA*, 130 S. Ct. 1605, 1611–12 (2010) (overturning the Sixth Circuit's grant of summary judgment under the Fair Debt Collection Practices Act and holding that 15 U.S.C. §1692k(c) did not provide for mistake-of-law defense to mortgage debtor in default despite the Sixth Circuit's holding that it did). Law-only summary judgment decisions of course occur at the state level as well. See, e.g., *De Smet Ins. Co. v. Pourier*, 802 N.W.2d 447, 447–48 (S.D. 2011) (granting summary judgment in favor of insurer because its exclusion from coverage of accidents involving vehicle owned-but-not-insured by policyholder was valid and not precluded by public policy).

A certain amount of this is of course inevitable. But perhaps the frequency of such reversals suggests that even these “nonfactual” summary judgment decisions should be viewed with more caution. Trial judges have discretion to grant summary judgment notwithstanding the seemingly mandatory command of Rule 56.¹²⁰ Perhaps that discretion should be more frequently exercised to refrain from granting summary judgment as to legal issues, even when the parties are stipulating to the facts. Further adjudication may develop these seemingly arid facts more fully in ways that illuminate the legal question. Additional delay may produce additional precedent to guide the trial court. Or denial or deferral of summary judgment may prompt settlement, obviating the need for the legal decision altogether. Although failure to obtain summary judgment arguably increases the settlement value of a claim, even a claim that would ultimately be adjudicated to lack merit, this might be a price worth paying (particularly if it is sufficiently spread through insurance or other means) when compared to the cost of increased litigation that results when courts decide legal questions on summary judgment only to be reversed.

Even when the ultimate decision is one granting summary judgment, disagreement between judges and courts suggests error and failure to follow the language of Rule 56 and the ostensible rules of the road regarding summary judgment. *Scott v. Harris* is such a case. Although the result at the Supreme Court level was an overwhelming 8-1 victory for the forces of summary judgment, the total vote of all judges viewing the case was eight in favor of granting summary judgment with five opposed.¹²¹ In a case where judgment was to be entered without trial only if there was no genuine dispute of material fact, more than a third of the jurists viewing the case thought there was such a dispute. Summary judgment is not a plebiscite. It should be available only when there is unanimity (at least among reasonable people).

120. See Gensler, *Must, Should, Shall*, *supra* note 11, at 1140 (arguing that the use of “should” instead of “shall” in Rule 56 indicates that judges have discretion in granting summary judgment); see also *Kennedy v. Silas Mason*, 334 U.S. 249, 256 (1948) (holding that trial courts have discretion to withhold summary judgment even when the movant has made a prima facie case for grant of motion); ROGER S. HAYDOCK, DAVID F. HERR & JEFFREY W. STEMPEL, *FUNDAMENTALS OF PRETRIAL LITIGATION* §12.3.11, at 533–36 (8th ed. 2011) (arguing that withholding summary judgment may aid in the development and appreciation of even largely undisputed facts and lead to different adjudication outcomes).

121. Justices Scalia, Roberts, Kennedy, Souter, Thomas, Ginsburg, Breyer, and Alito were all for summary judgment and five jurists were against (Justice Stevens, Eleventh Circuit Judges Barkett, Cox and Birch, and Northern District of Georgia Judge Hunt).

VI. RECOGNIZING COGNITIVE ILLIBERALISM AS A CALL FOR GREATER
JUDICIAL HUMILITY AND RECOGNIZING THE ABILITY OF TRIAL TO
COUNTERACT PROBLEMS POSED BY COGNITIVE ILLIBERALISM

Although lay jurors of course will exhibit many of the same traits that make judges imperfect, the jury by definition involves a combination of individuals that logically mutes the extremes produced by cognitive error, cognitive illiberalism, conscious or unconscious bias, or different reasoning styles. Further, jurors combine differing life experiences. In addition, the trial judge supervising a case will make evidentiary rulings and give instructions designed to reduce jury errors. If this combination and cross-fertilization fails to sufficiently suppress human divergence, myopia, or misjudgment, a trial judge stands by to grant judgment as a matter of law or a new trial as necessary.

The judge will be policing (and potentially upending) jury verdicts through the use of post-trial Rule 50 motions and motions for a new trial, but the judge's assessment will be informed by the events of trial and an opportunity for first-hand observation rather than just review over the documentary exhibits included in a motion for summary judgment.¹²² This colloquy between judge and jury is likely to produce more accurate determinations and is preferable to summary judgment unless the proponents of more aggressive summary judgment can carry the burden of demonstrating substantial cost and time savings.

Recent litigation events in the news provide a good example of what appears to be apt judge-jury interaction that eschews summary judgment but provides useful professional constraint upon lay assessment. The software giant Oracle sued Swedish software company SAP, contending that a SAP subdivision improperly expropriated Oracle's intellectual property. SAP conceded the bulk of the allegations but took the position that the improper appropriation had little benefit to SAP and relatively modest (by commercial standards) cost to Oracle, essentially conceding to damages in the \$20 million range. The case proceeded to trial, with a California jury (Oracle is based in Northern California) awarding much higher damages of \$1.3 billion. SAP moved for a new trial, contending that the verdict was against the weight of the evidence. The trial court agreed and granted a conditional new trial unless Oracle agreed to remittitur of \$272 million.¹²³

122. See Stempel, *supra* note 2, at 162–72 (discussing the relationship between judge and jury following the Supreme Court's trilogy of summary judgment opinions).

123. See *Judge Tosses \$1.3 Billion Verdict Against SAP in 'Web Scraping' Case*, 2011 WL 4056143 (WJCOMPI) (Sept. 14, 2011) (describing the litigation and remittitur); Jordan Robertson, *Oracle SAP Lawsuit Verdict Overturned: Judge Rules Against \$1.3 Billion Penalty*,

This is exactly the type of judge-jury interaction and judicial control that should be celebrated. The court did not prejudge jury issues through summary judgment and allowed a full development of facts at trial. But when the jury rendered a seemingly excessive verdict that could not be objectively justified, the court required a new trial unless the verdict winner was willing to accept a reduced award that was nonetheless far higher than the damages conceded by the defendant. Where remittitur is accepted, it by definition ends the case, which would appear to be efficient. Where remitter is rejected, the parties are not deprived of eventual jury consideration, and the judge is not acting as a jury of one in setting an amount, which would occur if the court decided damages on a summary judgment motion.

Judicial policing of the jury at trial or after verdict does not, of course, eliminate the interjection of judicial bias (overt or unconscious) or preclude judicial decision-making that reflects cognitive illiberalism, cultural cognition, or heuristic error. But it logically reduces these problems because it permits the judge to be better educated by the events at trial, the expression of views beyond those of the judge's cultural circle, or both.

If there is to be any judicial dethroning of the jury at all, it logically comes at or after trial rather than during the pretrial vacuum of summary judgment. Cognitive illiberalism and its cousins are not ejected from the proceedings, but their influence is reduced. Unless forgoing the earlier application of a single trial judge's view of the record is wasteful, summary judgment should be used more sparingly.

When coupled with the division of the bench itself regarding the contents of the video (in which eight Justices squared off against five jurists who disagreed), the results of the Kahan et al. experiment cast serious doubt on not only the result in *Scott v. Harris* but also on the wisdom and even the integrity of the Supreme Court majority, which clearly seems to be flaunting the long-standing procedural rules surrounding summary judgment and civil litigation generally (i.e., that resolution of disputes of fact, including the inferences drawn from a given fact situation, are for the jury rather than the court). Coupled with the Court's similar and relatively recent displays of excessive judicial certainty in *Bell Atlantic Corp. v. Twombly*¹²⁴ and *Ashcroft v.*

HUFFINGTON POST (Sept. 1, 2011, 7:13 PM), http://www.huffingtonpost.com/2011/09/01/oracle-sap-lawsuit-verdict-overturned_n_945512.html (discussing Oracle-SAP litigation).

124. 550 U.S. 544, 570 (2007) (holding that the plaintiff had not alleged sufficient facts to turn the allegations from conceivable to plausible).

*Iqbal*¹²⁵—which also received harsh scholarly criticism¹²⁶—the distaste generated by the oddly cocksure *Scott v. Harris* opinion brings to light once again the undue affinity for summary judgment held by a judicial body that has had precious little trial court experience.¹²⁷

Trial court experience should not be a litmus test for the Court any more than professorial experience should be disqualifying.¹²⁸ But the Justices in the modern era have had a disturbingly narrow set of life experiences for purposes of assessing the judge-jury relationship. Although one not need to be a mechanic to drive a car, it still seems logical that Justices (or appellate judges) should have more familiarity with juries in operation prior to determining the ranges of reasonable responses a jury may give when viewing evidence, a key implicit element of the summary judgment calculation. To the extent the bench is more removed from real juries and real trials, the more restraint is cautioned in granting summary judgment.

But even if reviewing appellate judges and Justices are highly steeped in jury experience, a respect for the cognitive errors of humanity, its express and implicit biases, its differing perspectives and experiences, and the tendency toward cognitive illiberalism augurs in favor of caution regarding summary judgment. The Kahan et al. study of *Scott v. Harris* in particular reflects the degree to which the bench can widely miss the mark regarding the range of assessments normal human beings might have regarding contested facts.¹²⁹

125. 129 S. Ct. 1377, 1392 (2009).

126. See *supra* text accompanying note 5 (noting scholarly criticism of *Twombly* and *Iqbal*).

127. The *Scott v. Harris* Court (which had not yet added current Justices Sonia Sotomayor, a former trial judge, and Elena Kagan) contained only one member who had ever served as a trial judge, Justice David Souter, who served on the New Hampshire Superior Court from 1978–83. Justice Souter also appears to have had some trial experience at his previous firm, Orr & Reno, where he “practiced a wide variety of law ranging from corporate law to general litigation.” *David H. Souter*, THE OYEZ PROJECT, http://www.oyez.org/justices/david_h_souter (last visited Mar. 23, 2011). Souter was also an assistant attorney general in New Hampshire and involved in criminal prosecution for three years. *Id.*

128. The Court went through a long period after the 1962 departure of former Harvard Law Professor Felix Frankfurter in which it contained no members who had been full-time academics. But the latter part of the century became a relative cornucopia of scholarly membership with the appointments of former Virginia and Chicago Law Professor Scalia in 1986 (but only after his opinions as a member of the D.C. Circuit had been scrutinized), former Rutgers-Newark and Columbia Professor Ruth Bader Ginsburg in 1993 (also after D.C. Circuit apprenticeship), former Harvard Professor Stephen Breyer in 1994 (after First Circuit apprenticeship), and former Chicago/Harvard Professor and Harvard Law Dean Elena Kagan in 2010. Justices Stevens (1975 appointment) and Kennedy (1987 appointment) had significant adjunct professorial experience.

129. See Kahan et al., *supra* note 15, at 845–60 (discussing the differing views the Justices had regarding *Scott*).

Although the Kahan et al. study focused on differences linked to the demographic and ideological traits of the respondents, the degree to which respondents in the same cultural cohort differed is perhaps even more striking and buttresses the call for restraint in summary judgment and increased judicial humility that goes beyond cultural differences. Even persons with essentially the same demographic profile may differ significantly in their assessments. A cookie cutter jury of card-carrying white collar Republicans from suburbia will not be uniform in their assessment of many cases. Consequently, a single judge, even one with sterling white collar Republican suburban credentials, should be highly reluctant to intrude into this area of jury authority and highly reluctant to conclude that contested evidence points in only one direction regarding liability, culpability, or damages.

The Kahan et al. study itself emphasizes this aspect of human perception and cognition. The authors introduce us to several prototypes that illustrate different types of prospective jurors who vary substantially regarding attitudes toward authority, risk, and responsibility.¹³⁰ One prototypical juror, Ron, is a self-made millionaire who identifies himself as a conservative Republican who wants limited government interference with markets.¹³¹ In addition, the authors created archetypes Bernie, a white male liberal Democrat,¹³² Linda, a liberal black woman,¹³³ and Pat, who is something of a poster child for a swing voter.¹³⁴

130. See *id.* at 862 (citing two recognizable cultural styles to represent the influences, “*aleph*” and “*bet*,” with the *Alephs* holding conspicuous “hierarchical and individualistic cultural worldviews” and leanings toward political conservatism, most likely to be affluent white males, and the *Bets* holding disproportionate “egalitarian and communitarian views,” most likely to be more Democratic and liberal, as well as disproportionately African American and female).

131. See *id.* at 849–50 (“[Ron is] a white male who lives in Arizona, overcame his modest upbringing to become a self-made millionaire businessperson. He deeply resents government interference with markets but is otherwise highly respectful of authority, which he believes should be clearly delineated in all spheres of life. Politically, he identifies himself as a conservative Republican.”).

132. See *id.* at 850 (“Bernie, another white male [in addition to and contradistinction to Ron], is a university professor who make a modest salary and lives in Burlington, Vermont. He will go along with the left wing of the Democratic Party, but thinks of himself as a ‘social democrat.’ He advocates highly egalitarian conditions in the home, in the workplace, and in society at large, and strongly support government social welfare programs and regulations of every stripe.”).

133. See *id.* (“Linda is an African American woman employed as a social worker in Philadelphia, Pennsylvania. She is a staunch Democrat and unembarrassed to be characterized as a ‘liberal.’”).

134. See *id.* (“Pat is the average American in every single respect: Pat earns the average income, has the average level of education, is average in ideology, is average in party identification, holds average cultural values, and is average even in race and gender.”).

So what happens when these archetypes view the *Scott v. Harris* videotape? As one might remember from this Article's earlier summary of the Kahan et al. study, there were significant differences in perception of the car chase correlated with the race, ethnicity, age, gender, political affiliation, and cultural worldview of the viewers.¹³⁵ Summarizing broadly, the authors concluded that "African Americans took a significantly more pro-plaintiff stance" as did "Democrats relative to Republicans, liberals relative to conservatives, and Egalitarians relative to Hierarchs" while women were also "generally more pro-plaintiff" as were lower-income subjects. But "less educated subjects were overall more pro-defendant than were more educated subjects" as were married subjects. In addition, "[o]lder subjects were more inclined than younger ones to view the chase as not worth the risk."¹³⁶

Importantly, even among the Rons of the world, there was divergence of opinion on such matters, just as not all Bernies, Lindas, or Pats were in agreement about what the evidence "showed."

[A]pproximately three-quarters (76%, $\pm 2\%$) of the persons who share his [Ron's] defining characteristics disagree—about two-thirds (66%, $\pm 3\%$) either moderately or strongly—with the proposition that the chase "wasn't worth the danger to the public." Bernie and Linda, in contrast, generally agree with that same statement: 59% ($\pm 3\%$) of the persons who share Linda's characteristics either strongly or moderately agree the chase wasn't worth the risk, and another considerable slice (18%, $\pm 4\%$) "slightly agree"; 73% ($\pm 3\%$) of the persons who share Bernie's characteristics agree (about half moderately or strongly) that the chase wasn't worth it. Pat leans toward Ron but is equivocal: 55% ($\pm 2\%$) of the members of the general population (according to the simulation) reject the claim that the chase wasn't worth the risk to the public, but the median citizen is only "slightly inclined" toward the position.

. . . Much like the majority in *Scott*, Americans on average (represented by Pat) are strongly disposed to see Harris as a lethal menace: over 85% believe (more than 70% either moderately or strongly) that he posed a risk to the public, and about 80% believe (over 60% either moderately or strongly) that he posed a deadly risk to the police. People who see the world the way Ron does hold the beliefs even more decidedly.¹³⁷

135. See *id.* at 858–70 (noting that viewers from different demographics had differing reactions to *Scott v. Harris* video).

136. *Id.* at 867.

137. *Id.* at 873–75; see also *id.* at 875–79 (providing a further summary of the data).

Impressive associations to be sure. But even strong majoritarian agreement is not the same as unanimity or consensus. Even when dealing with only conservative white men, such as the archetype Ron, one out of four persons saw the chase video differently than did the *Scott v. Harris* majority, while the “average” Pats of society were close to evenly divided in many ways. Similarly, substantial segments of “liberal” juror types were still inclined to resolve disputed facts favorably to law enforcement.¹³⁸

By definition, then, reasonable people—even reasonable people in demographics with strong majorities on one side of the issue—disagreed over the material facts of *Scott v. Harris* and their ultimate resolution. The Supreme Court’s failure to appreciate this divergence within the venire (even homogenous subsections of the venire) truncated the adjudication process and prevented full and proper airing of the dispute.

America is a land that worships winners.¹³⁹ For example, political commentators regularly characterize elections where the winner obtains 55% or more of the vote (and certainly more than 60% of the vote) as runaway or landslide victories.¹⁴⁰ But such thinking badly overlooks the degree to which there is significant division of opinion and a strong counter-perception of situations and outcomes.

Applied to politics, this may reflect only sloppy description and linguistic slouching (soon, perhaps, even those obtaining 51% of the

138. See *id.* at 868–69 (summarizing data); *id.* at 873–79 (providing extensive verbal summary of data after further analysis); see also, e.g., *id.* at 879 (finding that more than 80% of Rons believe the police acted reasonably, which still leaves nearly one-fifth of the conservative white male group against the police and the Supreme Court majority on the ultimate issue). Similar significant minorities of the other archetype groups differed from the majority of their peers.

139. And they need to be current winners. As the photographer Weegee famously put it, “You’re as good as your last picture. One day you’re a hero, the next day you’re a bum.” See Jan Morris, *New York’s Golden Age*, N.Y. MAG., Oct. 6, 1986, at 48, 56.

140. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 623 (2002) (defining “landslide” when the winner received 60% or more of the vote); Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA. L. REV. 253, 254 (2006) (defining “landslide” as a margin of victory of 20% or more); Bradley A. Smith, *Vanity of the Vanities: National Popular Vote and the Electoral College*, 7 ELECT. L.J. 196, 202–03 (2008) (noting that 296 stories referred to Reagan’s 1980 victory with 50.1% of the vote as a “landslide”). Even where the term is relatively appropriate, it unfairly overlooks the significance of the minority perspective. For example, Democrat Lyndon Johnson defeated Republican Barry Goldwater in the 1964 presidential election by a 61% to 39% vote. See CONG. Q., GUIDE TO U.S. ELECTIONS 461 (3rd ed. 1994). But this means that Goldwater’s strong conservative views enjoyed the support of more than a third of the electorate totaling millions. This is hardly an insignificant expression of opinion that should be ignored. Similarly, Republican Ronald Reagan in 1984 defeated Democrat Walter Mondale by a similar ratio: 59% to 41%. See CONG. Q., GUIDE TO U.S. ELECTIONS 466 (3rd ed. 1994) (describing the results of the 1984 Presidential election).

vote will be seen as “landslide” winners). By contrast, summary judgment is uncomfortably like having a political commentator decide that the likely winner of the election is so obvious that no election is required. Even where the pundit is someone well-regarded across the political spectrum, this would be cause for concern. The analogy is of course imperfect but serves to illustrate the wisdom of actually allowing the contest (election or trial) to proceed in order to eliminate legitimacy concerns no matter how clear the eventual winner may seem.¹⁴¹

More important is the role that minority perspectives play in adjudication. Although electoral supporters of an underdog have a theoretical chance of persuading others to join their cause or to abandon the opponent, there is no requirement that these competing perspectives be placed in a crucible of deliberation. Indeed, this is part of the problem of cognitive illiberalism. Members of particular cultural groups appear simply not to be very open to hearing and considering the perspectives of other social groups. Judges (and certainly eight of nine Justices in *Scott v. Harris*) displayed this same insularity.

But jury deliberation is different. The majority and minority perspectives are thrown together in the courtroom, exposed to the same evidence, given the same jury instructions, and forced to deliberate until the jury reaches a unanimous or overwhelming majority vote.¹⁴² Through the process of deliberation (reviewing and assessing the evidence, sharing different views, attempting reconciliation, clashing and perhaps compromising or yielding), the jury arrives at a decision that may be quite different than what would have taken place if the jurors had simply voted their preferences.

As a result, it is at least theoretically possible that a single sufficiently tenacious juror will turn around a group if the dissident juror’s analysis

141. The election cannot be cancelled because it is at the core of a working definition of democracy. By contrast, the rules of civil litigation permit appropriate grants of summary judgment. My point is simply that courts need to be more accurate and certain before granting summary judgment and that excessive grants move legal error closer to something we would all regard as abominable: the substitution of a single person’s assessment in lieu of a promised election.

142. Even where jury determinations are by majority vote rather than unanimous agreement, a supermajority usually required a 10-2 or 11-1 vote for twelve-person juries or a 5-1 vote for six-person juries. Recall that even among the Ron jurors highly likely to support the police in *Scott v. Harris*, the rate of support for the plaintiff was between twenty and thirty percent depending on the question asked in the study. In other words, the minority of Rons in a jury composed completely of Rons may be sufficient to prevent a verdict in support of the police under either a unanimity or a supermajority standard. If the subgroup of white conservative males willing to see things Harris’s way is not swayed by the peer pressure of the jury majority, it is able to prevent a determination favorable to the police and in a criminal analog to *Scott v. Harris* could prevent a criminal conviction.

and arguments are sufficiently persuasive to the group. Certainly, we all want to believe it is possible for even a sole righteous (and correct) juror to turn the tide. The play *Twelve Angry Men* was a hit on Broadway and on the screen for exactly that reason.¹⁴³ Actual socio-psychological research supports this notion that when persons are forced to have substantive discussions on the merits, the assessments and decisions of the group as a whole can change.¹⁴⁴

At the risk of sounding excessively rosy about the chances that jury deliberation will move people too far from their overall preferences and pre-conceived notions, it is important to note that jury deliberations are different than faculty meetings, board meetings, town meetings, and the like (including the legislative process, despite its necessity and arguable advantages over the forgoing groups), where attendees are usually homogeneous and easily subjected to outside influences. These differences promote rational decision-making, strengthen the role of dissidents and similarly strengthen the case for restrictive use of summary judgment that might otherwise smother the potential benefits of these deliberations in too many cases.

In the organizational or political context in which we normally see deliberation, it can result in sound decision-making even without the safeguards of the jury. But the jury operating correctly within the judicial system appears to hold the prospect for improving deliberative outcomes—or at least dampening the effects of bias, prejudice, cognitive heuristic error, and cognitive illiberalism.

First, the jury venire is randomly drawn.¹⁴⁵ Following the law of averages, most jury pools are diverse relative to other decision-making

143. See *TWELVE ANGRY MEN* (United Artists 1957). The movie is based on a 1954 teleplay by Reginald Rose. The movie and play involve a jury deliberating in a murder prosecution with the jury initially heavily slanted in favor of conviction and wishing to reach a verdict quickly. A lone juror (Henry Fonda in the American movie version; a more recent Russian version also exists) stands up to those rushing to judgment by quietly and firmly raising questions and eventually the jury realizes that not guilty is the apt verdict. Although overly romanticized, the play captures the ability of the jury process to adequately air minority perspectives that normally are overlooked or too quickly dismissed in social activities and politics.

144. See generally Glyn Elwyn & Talya Miron-Shatz, *Deliberation Before Determination: The Definition and Evaluation of Good Decision Making*, 13 *HEALTH EXPECTATIONS* 139 (2009) (discussing proper deliberation and how it generally improves assessment and decision-making). See also Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 *HARV. L. REV.* 1511, 1541–62 (1992) (arguing that deliberative aspects of expert administrative law regulation leads to better outcomes and justifies bureaucracy notwithstanding objections that it is anti-democratic); Cass Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 74–75 (1985) (arguing for civic republican deliberation as a partial antidote to raw interest group competition in politics and government).

145. See, e.g., 28 U.S.C. § 1861 (2006) (stating in the “Declaration of Policy” that jurors are selected at random from a “fair cross section of the community in the district or division wherein

groups such as those listed above.¹⁴⁶ Even if through some quirk of the draw or the highly homogenous composition of the community, a jury composed entirely of Rons is likely to have a wide enough distribution of Rons to include the one-fifth of this white male conservative archetypical group willing to see things from the plaintiff's perspective.

Second, the actual jury is shaped by attorneys and judges to reduce the prospect of bias, prejudice, distraction, inattentiveness, or inability. Prospective jurors may be challenged for cause.¹⁴⁷ Each side is provided with a minimum number (usually three) of peremptory challenges to prevent the seating of prospective jurors about whom counsel simply has doubts.¹⁴⁸ Although judges¹⁴⁹ and members of

the court convenes" and that all citizens shall have the opportunity and obligation to serve as jurors); *see also* 28 U.S.C. § 1862 (2006) ("No person shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status"); 28 U.S.C. § 1865 (2006) (noting that only a limited list of factors—e.g., illiteracy, inability to speak English, lack of citizenship, mental or physical infirmity, or criminal record—precludes service as a juror).

146. The jury selection process is much improved from fifty years ago when the lists from which the venire was drawn tended to over represent the white and comparatively well-off. Today, courts use a variety of sources for assembling the venire resulting in a considerably more representative jury pool than in times past. Despite the imperfections of the jury pool, the relevant (and relative) question is how the jury compares to other deliberative or decision-making bodies. Compared to judges, legislatures, faculties, corporate boards, and the like, the jury looks like a wonder of random distribution. For example, the federal bench is significantly whiter and more male than the nation as a whole. RUSSELL WHEELER, *THE CHANGING FACE OF THE FEDERAL JUDICIARY I* (2009), *available at* http://www.brookings.edu/~media/Files/rc/papers/2009/08_federal_judiciary_wheeler/08_federal_judiciary_wheeler.pdf.

147. *See, e.g.*, 28 U.S.C. § 1870 (2006); COLO. R. CRIM. P. 24; LA. CODE CIV. PROC. ANN. art. 1765 (establishing the right to challenge prospective jurors for cause in federal and selected state courts). *See generally* SUBRIN ET AL., *supra* note 2, at 452–53 (noting availability of for cause challenges); R. Brent Cooper & Diana L. Faust, *Procedural and Judicial Limitations on Voir Dire—Constitutional Implications and Preservation of Error in Civil Cases*, 40 ST. MARY'S L.J. 751, 753–54 (2009) (explaining the importance of voir dire and the implications of a jury with preconceived attitudes about issues in civil litigation); Thomas J. Hurney, Jr. & Randal H. Sellers, *Picking Juries: Questionnaires and Beyond*, 75 DEF. COUNS. J. 370, 372–76 (2008) (discussing potential juror dismissal based on jury questionnaire answers).

148. *See, e.g.*, U.S. DIST. CT. RULES D. MAINE, R. 47; U.S. DIST. CT. RULES D. OR., CIV LR 47-3; N.J. STAT. ANN. § 2B:23-13 (West 2012). *See generally* EDWARD J. DEVITT ET AL., 1 FED. JURY PRAC. & INSTR. § 3.03 at 66–70 (3rd ed. 1987) (discussing peremptory challenges in federal court); *Id.* § 3.014, at 47–58 (discussing federal rules for examining prospective jurors); 3 22B IND. PRAC., CIVIL TRIAL RULE HANDBOOK § 47:4 (citing three peremptory challenges possible for each side in civil trials in Indiana, which may be used only on regular jurors, not alternates); SUBRIN ET AL., *supra* note 2, at 457–63 (describing peremptory challenges).

149. *See* 28 U.S.C. § 455 (2006) (providing for disqualification of federal judges due to particular financial or familial interests in a matter or where there exists a reasonable question as to the judge's impartiality); MODEL CODE OF JUDICIAL CONDUCT, *supra* note 118, at 25–27 (discussing general rules for judges to disqualify themselves that have largely been adopted by states).

other deliberative bodies¹⁵⁰ may be restricted from participation in cases of outright conflict or demonstrated concern regarding impartiality, there is generally less protection in this regard outside the jury context.¹⁵¹

Third, at the outset of the case the judge orders jurors not to discuss the case informally until they begin their deliberations.¹⁵² This admonition removes or at least reduces the scourge of most meetings: pre-meeting lobbying by the parties most interested in the outcome. Although some amount of pre-meeting or pre-vote lobbying may be a necessary evil in order to avoid marathon meetings, it carries costs. The lobbyist's recounted anecdote or statistic given in the hallway to a member of the legislature is not displayed for all to see and cannot be challenged (at least not directly or in timely fashion) by skeptics or opponents. One board member's lunch with two others prior to the meeting of the full board may contain similar problematic communications that are never adequately aired and vetted before the full body. Although individual jurors of course begin to make assessments as they hear the evidence and argument,¹⁵³ at least there is

150. See, e.g., OFFICE OF CONG. ETHICS, U.S. HOUSE OF REPRESENTATIVES, CODE OF CONDUCT 4–6 (2011), available at http://oce.house.gov/pdf/OCE_Code_of_Conduct.pdf (describing congressional ethics rules that do not require legislators to be complete strangers to affected parties, which is the case for jurors); Rebecca L. Anderson, *The Rules in the Owners' Box: Lobbying Regulations in State Legislatures*, 40 URB. LAW. 375, 376–77 (2008) (discussing congressional ethics rules).

151. A significant number of states (but not yet a clear majority) provide a litigant with the opportunity to exercise a peremptory challenge to the judge initially assigned to a case. See Charles Gardner Geyh, *Why Judicial Disqualification Matters, Again*, 30 REV. LITIG. 671, 718 (2011) (urging greater availability of peremptory challenges of judges); Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 526–27 (2007) (urging peremptory challenges of judges as key component in preventing favoritism and improving public confidence in courts); Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 789–93 (2011) (discussing the use and benefits of peremptory challenges of judges). Such automatic recusal of judges based on litigant or lawyer concern is not available in federal courts, although a litigant with sufficient evidence of actual bias (rather than mere concern over impartiality) may obtain recusal through the affidavit of prejudice process of 28 U.S.C. § 144, which has been so narrowly interpreted by the courts that it is seldom used. 28 U.S.C. § 144 (setting the procedure for a party to establish the bias or prejudice of a judge). Under the more widely involved 28 U.S.C. § 455, particularly the general “doubts about impartiality” provision of § 455(a), the trial judge makes the initial assessment as to his or her impartiality, and a decision not to recuse is generally not reviewable until conclusion of the matter. 28 U.S.C. § 455 (setting the procedure for a judge to recuse himself in cases where impartiality may be questioned).

152. See 775B AM. JUR. 2D TRIAL § 1382, 167–68 (describing general bars on juror discussion of case prior to deliberation).

153. Some litigation literature suggests that jurors largely make up their minds after the

an effort to prevent those assessments from hardening until the entire jury can discuss the case.

Fourth, jurors are required to base their decisions on the controlled record in the case. Jurors may not conduct independent research and are instructed to avoid external sources of information.¹⁵⁴ Their knowledge of a dispute is (at least in theory) not distorted by newspaper articles, websites, conversation, etc. from sources that may be incorrect or biased. To be sure, these attempted controls may at times be honored more in the breach than in the observance,¹⁵⁵ but at least there are these attempted controls. By contrast, most other decision-making bodies are

opening statements section of the trial. See James W. McElhaney, *Taking Sides: What Happens in the Opening Statement*, 78 A.B.A. J. 80, 80 (1992); Kenneth J. Melilli, *Succeeding in the Opening Statement*, 29 AM. J. TRIAL ADVOC. 525, 525–26 (2006) (citing a study that indicates that eighty percent of jurors claim to make up their mind after opening statements). But at least these jurors are prevented from voting until they have heard much more and are required to expose their assessments to those of other jurors who may disagree.

154. See NANCY GERTNER & JUDITH H. MIZNER, *THE LAW OF JURIES* §§ 7–11 to 7–15 (1st ed. 1997) (jurors limited to case record in assessing dispute); Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 323 (2005) (discussing actions that constitute jury misconduct); Robert P. MacKenzie III & C. Clayton Bromberg Jr., *Jury Misconduct What Happens Behind Closed Doors*, 62 ALA. L. REV. 623, 623–25 (2011) (discussing the types of “outside influences” that can lead to jury misconduct); Amanda McGee, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 302 (2010) (discussing how the use of modern technology leads to easier jury misconduct). For example, jury verdicts have been set aside where jurors made unsupervised visits to accident or crime scenes or where a juror conducted research or experimentation and then attempted to use this to persuade other jurors to see the case in a similar way. See, e.g., *Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2d Cir. 1994) (setting aside the verdict because of juror’s independent activity outside case record); *Gibson v. Clanon*, 633 F.2d 851, 853–55 (9th Cir. 1980) (overturning a jury decision because one juror looked up and shared information outside the record).

155. Unless sequestered and supervised, jurors will have access to media accounts related to a trial. Being human, many will undoubtedly be tempted to read media accounts. But because of the admonition, even jurors who “cheat” are at least aware that use of external information is wrong and will likely be better able to resist its influence and give greater credence to what occurs at trial. Of course, even if jurors take very seriously the admonition not to read about the case while the matter is in trial, jurors are throughout life exposed to external stimuli that, while not directly on point, may have an impact on juror attitudes that in turn influences assessments made at trial. For example, the insurance industry has, since at least the 1950s, been conducting a public relations campaign designed to make the citizenry more resistive to plaintiffs’ tort claims. See Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Idea: Defining Public Policy Preferences*, 1998 WIS. L. REV. 71, 77 n.21, 89–90 (noting insurance industry advertisement in national magazine arguing that substantial jury awards result in increased insurance premiums for the public at large); see also STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 12–15 (1995) (discussing the advertisements produced by insurance companies to combat higher punitive damages). Depending on one’s point of view, this is democracy in action or a regrettable distortion of the facts and an attempt to bias the venire.

as a practical matter permitted to make important decisions based upon clearly self-interested, tainted, or unreliable inputs.

Although judges are expected to conduct themselves in a manner that avoids undue influence from suspect sources, there are few actual or realistic controls on the bench. The system assumes that the legal training, mental discipline, and experience of judges prevents them from being unduly influenced by externally received information, but the assumption is probably incorrect and in need of serious reexamination. For example, recent years have seen what appears to be lobbying or even attempted brainwashing of judges, or at least questionable judicial interaction with interest groups.¹⁵⁶

Fifth, the jurors receive a supervised presentation of the facts. Trial proceeds in an organized fashion in which the jurors are forced to hear both sides of the dispute without external distraction. A juror may think he or she has heard enough and wants to decide the case (and go home or back to work) after one side's opening or the first direct examination. But the juror is required to hear out both sides and to sit (as attentively as possible) through presentation of evidence and closing arguments.

During this process, rules of procedure, protocol, and evidence control the manner in which the evidence is presented. They are designed to foster fair presentation. Unlike discussions on the street, at the local café, or on cable news networks, there are rules of the game that if properly applied prevent lopsided presentation (due to bullying, shouting, histrionics, intimidation, use of red herrings, etc.) but, at the same time, permit assertions to be tested and assessed. On at least two junctures in every trial (after the close of the plaintiff's case and the close of the evidence), the court may intervene through a partial or complete judgment as a matter of law to narrow the scope of

156. See STEPHEN GILLERS, REGULATION OF LAWYERS 653–55 (6th ed. 2002) (discussing growth of “judicial seminars” during the past thirty years in which “corporations that frequently litigate in federal courts began contributing to nonprofit organizations, including law schools, to fund the expenses of federal judges (and sometimes a guest) to attend ‘seminars’ often at posh resorts at optimal times of the year [where golf] was a particular pastime along with the seminars” and speakers “would often advocate perspectives on the law that were favorable to the corporate sponsors”); see also *In re Aguinda*, 241 F.3d 194, 198 (2d Cir. 2001) (refusing to disqualify trial judge from pollution case for attending seminar sponsored by the Foundation for Research on Economics and the Environment (“FREE”) (the acronym name gives one a flavor of the content) but sounding “several cautionary notes” about judicial attendance at such events); CMTY. RIGHTS COUNSEL, NOTHING FOR FREE: HOW PRIVATE JUDICIAL SEMINARS ARE UNDERMINING ENVIRONMENTAL PROTECTIONS 5–7 (2000), available at <http://tripsforjudges.org/crc.pdf> (noting that company-sponsored risk, environmental, or law/economics programs contained curricula tending to advocate development, argue that economic growth was highly vulnerable to regulation, suggest that particular regulations were excessive, and that development caused less environmental damage than environmentalists contended).

consideration or spare the jury deliberation over a case where the outcome has become preordained.

After the evidence is in and before counsel's summation, the jury is not left to its own devices but is given legal guidance by the court, both as to the substantive law and the permissible conduct of jury deliberation. If jurors have questions, they may ask the judge and receive further clarifying instructions. Although jury instructions could of course be improved, they are largely regarded as less legalistic, clearer, and more helpful than in the past. However imperfect, jury instructions stack up pretty well on clarity and information grounds as compared to other pronouncements of the law.¹⁵⁷ Then follows the deliberation, which is also governed by rules (e.g., restricting outside contact) and supervised by the court.¹⁵⁸

Sixth, the evidence in the case is presented in a larger context through the adversary advocacy of attorneys where no single piece of evidence is enshrined or viewed in isolation. To apply a now famous aphorism, lawyers are not "potted plants" that sit idly at trial.¹⁵⁹ Within the rules of the game (e.g., no argument during the opening statement, pretrial

157. Jury instructions often do a very good job of distilling the rich complexities of law into an understandable summary accessible to the laity. They often are officially approved and, thus, enjoy the support of the mainstream of the profession. Even in systems such as the federal courts where there are no officially endorsed jury instructions, the Devitt & Blackmar treatise has largely assumed that role. See DEVITT ET AL., *supra* note 148, at 21–99. In addition, problematic jury instructions tend to be tested on appeal, with the resulting appellate opinion providing clarification and improvement for use by trial courts in the future.

158. The courts take seriously the admonitions about proper jury behavior and resistance to outside influences. For example, during the trial of a case that eventually reached the U.S. Supreme Court, a juror was excused for what could be described as a reasonably innocuous and short conversation about the trial with a non-juror. See JEFFREY W. STEMPEL, *LITIGATION ROAD: THE STORY OF CAMPBELL V. STATE FARM* 364–66 (2008) (noting that the trial judge appeared to reach this decision because of wanting to err on the side of caution and fairness and harboring concerns that the observed conversation might have been the metaphorical tip of the iceberg); see also *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (reviewing and vacating the trial court's large punitive damages award but on grounds unrelated to juror behavior or supervision).

159. The phrase famously came up during Attorney Brendan Sullivan's representation of Col. Oliver North during the 1987 Iran-Contra Hearings. Sen. Daniel K. Inouye (D-HI) was questioning Col. North before a congressional committee when Sullivan objected, to which Sen. Inouye replied that the witness could object if he so desired. Sullivan responded in mock horror by noting that he was not a "potted plant" and that, as an attorney, his job was to object when necessary to protect the witness. See KIM EISLER, *MASTERS OF THE GAME: INSIDE THE WORLD'S MOST POWERFUL LAW FIRM* 141 (2010) (describing attorney Sullivan's representation of Colonel North); LAWRENCE E. WALSH, *FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP* 133 (1997) (depicting Sullivan's behavior and the dynamic of the proceeding); see also Jeffrey W. Stempel, *Tending Potted Plants: The Professional Identity Vacuum in Garcetti v. Ceballos*, 12 NEV. L.J. (forthcoming 2012) (criticizing the Court's decision as insufficiently appreciative of the professional responsibilities of lawyers).

evidence rulings limiting the interjection of prejudicial material), attorneys present facts and arguments in a way designed to illuminate the case for the jury. To be sure, they are doing it in a self-interested way. But in addition to being required to behave ethically (e.g., no fabrications, no innuendos on cross-examination without some basis for asking the questions), lawyers face adversarial lawyers who will challenge their presentations and give their own counter-narratives.

Despite these rules and the role of the lawyer, trials are in no way Nirvana on earth, and the profession is often faced with problems of lawyers getting away with improper behavior (e.g., stage whispers, interjection of improper material, appeals to passion or prejudice). At least in theory, however, courts should be controlling such behavior.¹⁶⁰ Similarly, some attorneys are better trial lawyers than others and will be more persuasive even if their case is not. But if these problems with trials are considered so great that we must have a more aggressive application of summary judgment, it would appear that the entire rationale for the adversary system is in jeopardy. The system is premised on the assumption that self-interested parties and counsel are motivated to present their claims in the best light possible in a manner—if properly supervised by a neutral judge—that results in optimal illumination of the dispute for the jury (or a bench trial).¹⁶¹ This assumption is so established in the United States as to seem irrevocable and strongly suggests that the adversarial motivations of

160. In practice, courts actually appear to be discharging this policing function with some care. See *Liocce v. Cohen*, 174 P.3d 970, 974–86 (Nev. 2008) (reviewing four cases and finding improper arguments and appeals to material outside the record that required the court to vacate jury verdicts obtained in part of defense counsel’s strident arguments that personal injury plaintiffs were in essence being wimps, failing to take personal responsibility for their mistakes, and would increase costs to others should they prevail). Of course, the fact that the *Liocce* court had to review these cases and issue an extensive opinion setting ground rules for trial counsel perhaps reflects that trial judges were failing to properly discharge their supervisory responsibilities. But a case such as this suggests even more that the system as a whole takes the playing-by-the-rules mantra seriously and attempts to prevent abusive attorney conduct.

161. See Simon H. Rifkind, *The Lawyer’s Role and Responsibility in Modern Society*, 30 THE RECORD OF THE ASSOCIATION OF THE BAR CITY OF NEW YORK 535–37 (1975) (quoting a highly regarded former federal trial judge as describing the adversary process as “a form of organized and institutionalized confrontation” but one that has worked well despite concerns. “Experience tells me that the adversary system has been good for liberty, good for peaceful progress and good enough to have the public accept that system’s capacity to resolve controversies and, generally, to acquiesce in the results.”); see also GILLERS, *supra* note 156, at 393–513 (describing the adversary system and examining the ethical issues it presents); MONROE FREEDMAN, *LAWYERS ETHICS IN AN ADVERSARY SYSTEM* 9–26 (1975) (setting forth a strong concept of adversary system where the lawyers represent clients zealously rather than attempting to serve public interest as well).

counsel regarding presentation of the evidence make trial a substantial improvement over the sterility of a purely paper record.

One of the misleading aspects of the *Scott v. Harris* video and potentially misleading aspects of the Kahan et al. study is that the tape was largely viewed in isolation and was not subject to the evidence testing one finds in the heat of trial. To be sure, a video of an event is normally good evidence. But it is hardly definitive or foolproof. At trial, the videotape or any other piece of media evidence would not simply be shown to jurors but would be first vetted and perhaps edited by the court as a result of motions by counsel. The video would be introduced by a live witness laying a foundation for what was to be viewed and providing some background and context about the creation of the video. Opposing counsel and the court would ensure that proper foundation was laid, that the context and creation of the film was examined, and that the potential limitations of the video and its ability to mislead were presented to the jury.

Further, as shown in the case itself, even an important piece of evidence usually cannot tell a conclusive story. The *Scott v. Harris* video, for example, was a combination of two videos recorded by the two pursuing police cars. The study video was comprised of portions of each police car's recording, but it omitted certain portions of each video—mainly the footage shot by whichever car was trailing.¹⁶²

Although the study authors note that “[b]ecause only the footage shot from inside the lead vehicle permits observation of Harris, the study video nevertheless contained *all* portions of *both* tapes that bear on the factual disagreements between the *Scott* majority and dissent,”¹⁶³ the description and disclaimer, as well as a little common sense, underscore the degree that it is dangerous for factfinders to rely upon only one piece of evidence. The video (actually two videos) may be powerful evidence (and reaction to it differing greatly according to demographic and cultural groups is important), but it is not the entire record. It is but a slice of the record (however large a slice), and although the video is direct evidence rather than circumstantial evidence, it is not evidence that speaks for itself, at least not comprehensively. To be properly understood, even evidence as important as this needs explanation, context, and the sharpening of the advocates' debate as mediated by the court's evidentiary rulings.

162. Kahan et al., *supra* note 15, at 856 (footnote omitted). This was done to reduce the length of the study video so as to prevent study subjects from dropping out. *Id.*

163. *Id.*

Live trials provide this sort of richer, more comprehensive picture of “what really happened” on the fateful night of the *Scott v. Harris* chase. Jurors—and the presiding trial judge—immersed in these live trials almost inevitably will better understand the video and the case in general than they would on the basis of a summary judgment motion and record alone. As a result, the ability of even demographically and culturally distinct jurors to deliberate about what happened increases and adds value to the fact assessment process. To the extent that the jury’s deliberation results in arguable error, the judge—better-educated than he was before trial—is now in a good position to grant apt motions and issue orders regarding verdict reduction, a new trial, or even judgment as a matter of law should this be necessary.

Surely, this is an adjudicative improvement over summary judgment in any case with serious factual clash. And, as amply demonstrated by the Kahan et al. study and academic commentary critical of *Scott v. Harris*, there was a pretty serious factual clash in *Scott v. Harris*. Add to this the anecdotal but important datum of reaction to a mere slice of the proof by the Boyd Law Civil Procedure/ADR II class of Spring Semester 2011 (and apparently law students in civil procedure classes throughout the nation). A group composed largely of Rons and Pats, with a few Bernies and Lindas in the mix, was divided over the “true” meaning of the video, and the video was arguably but a tip of the iceberg of the entire record.

Supporters of the Supreme Court majority in *Scott v. Harris* might counter that the record contained information in addition to the two videos. Yet, this remains a far cry from the richer record that would result at trial. Further, no matter how much one respects the work ethic of the Court, one can harbor serious doubts about the Court’s ability to closely scrutinize the information in each case reviewed in light of the Court’s massive docket, especially when, like moths to a flame, the Justices were drawn primarily to the videotape. It should be noted that this is a Court that has delegated much of the scrutiny of petitions for certiorari to its law clerks through the vehicle of the “cert pool” rather than devoting the resources of individual chambers, much less the time and energy of an individual Justice him or herself.¹⁶⁴ Realistically, the Court’s review of the record will have gaps, oversights, and errors.

By contrast, jurors and trial judges are essentially forced to engage closely with the entire record. In *Scott v. Harris*, it probably would

164. See David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 953 (2007) (noting the degree to which much certiorari petition screening has been delegated to law clerks).

have been quite illuminating to hear Harris, Scott, and others describe the events of that evening as information supplemental to the video. In addition, Harris's counsel would have undoubtedly argued, and perhaps also presented expert testimony in support, that a camera strapped to the nose of a police cruiser does not necessarily tell the entire story of an event. Different perspectives, even if communicated orally rather than by dueling videotapes, can not only create factual clashes, but also provide factfinders with important additional information for resolving those clashes.

As any casual sports fan can attest, the perspective and vantage point of a picture is important. Football looks different depending on whether the camera is in the end zone, at ground level, in the backfield, on the sideline, in the quarterback's helmet, or aloft in the Goodyear Blimp. The National Football League officially acknowledges the importance of viewing perspective and vantage point by providing for review of officiating calls upon challenge, with the review involving collaborative viewing by the officials of the play in question from several camera angles.¹⁶⁵ At the risk of asking a perhaps unfair rhetorical question, one might read *Scott v. Harris* and wonder: Why does the Supreme Court not take the divergence of camera perspective as seriously as a sports league? Although sports fans may figuratively live and die with their team's fortunes, Harris was making a claim that would, to a large extent, determine for all time whether he received adequate compensation for his injuries and the type of life he would lead as a quadriplegic.¹⁶⁶

As the Kahan et al. study dramatically demonstrates, there can be great divergence in the venire as to whether a video is clear. This Article's additional attempted contributions to the insights of this study

165. See Chris Chase, *The NFL's New Replay Review Rules Are Becoming a Debacle*, YAHOO! SPORTS (Sept. 19, 2011, 10:54 AM), http://sports.yahoo.com/nfl/blog/shutdown_corner/post/The-NFL-s-new-replay-review-rules-are-becoming-a?urn=nfl-wp7408 (pointing out that instant replay reduces the possibility of making incorrect rulings); Tony Long, *March 11, 1986: NFL Adopts Instant Replay*, WIRED (Mar. 11, 2009), http://www.wired.com/science/discoveries/news/2009/03/dayintech_0311 (describing the National Football League's adoption of videotape review of controversial plays and officiating calls).

166. Although Harris would presumably have had access to government assistance programs and may also have had other insurance or the ability to make additional non-frivolous liability claims, government programs are not generally viewed as munificent programs. Without the additional compensation or assistance provided by a favorable settlement or verdict against Scott (whose liability would likely be covered by the county or the county's liability insurance) or other law enforcement officials or agencies, Harris likely has far less money to obtain the type of medical and rehabilitative care needed to live a reasonably comfortable, productive, and long life. At the risk of being trite, his claim (regardless of its merit) was more important than any football game.

are to suggest that: (1) there is enough divergence even among those with similar cultural settings to preclude summary judgment and defer to the trial process, and (2) the posited efficiency gains asserted by summary judgment proponents are nonexistent or inadequate in view of this public division and the track record of summary judgment on appeal.

Seventh, jurors are forced to sit down and hash out their views of the dispute. Unanimity and supermajority rules are designed to prevent truncation of discussion based on an immediate plebiscite of the group. Even if the jury is overwhelmingly in favor of conviction or inclined to find no liability, there is usually at least a single dissident who must be heard.¹⁶⁷ As a result, the jury is forced to sift through the evidence, discuss it, address different perspectives, and examine the case in more detail. Reflexive votes and snap judgments are discouraged.

As a practical matter, a juror whose assessment runs counter to the majority tide (think of a Linda in a jury composed of Rons and Pats), will be under at least some implicit pressure to yield to the majority and let the jurors return to their lives. As Hans Zeisel¹⁶⁸ and Michael Saks¹⁶⁹ powerfully demonstrated some thirty years ago, the Supreme Court probably made a serious mistake when it held that juries of as small as six were sufficiently large to comply with the Due Process Clause.¹⁷⁰ A person in the minority on an issue is much more likely to hold out and require discussion in the face of supermajority opposition

167. Even when the jury is unanimous, the norm is that jurors discuss their preferences and ask whether they are sufficiently certain to render a verdict on the basis of the initial straw vote or whether further discussion is required. In some systems, the jurors are required to deliberate for a reasonable time and are prohibited or discouraged from having an initial vote.

168. See Hans Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 710–21 (1974) (criticizing the Supreme Court's decisions permitting reduced jury size and non-unanimous verdicts in the face of constitutional challenges; marshalling psychological and social science literature suggesting that the presence of even a single ally makes a substantial difference in an individual's willingness to oppose the majority; demonstrating that as a matter of probability, a larger jury is more likely to produce one or two jurors differing from the majority assessment of a case).

169. See Michael Saks, *Ignorance of Science is No Excuse*, 10 TRIAL 18, 18 (1974) (showing that in opinions approving smaller civil juries and non-unanimous juries, the Court betrayed a misunderstanding of probability theory, and that the Court was particularly off-base in concluding that the move from six jurors to five jurors posed constitutional challenges, while the move from twelve-person juries to six-person juries did not).

170. See *Ballew v. Georgia*, 435 U.S. 223, 245 (1978) (holding that five-member civil juries were inconsistent with due process); *Colgrove v. Battin*, 413 U.S. 149, 164 (1973) (finding that six-person civil juries do not violate the Constitution); *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972) (upholding a non-unanimous jury verdict against constitutional challenge); *Williams v. Florida*, 399 U.S. 78, 102–103 (1970) (upholding the conviction by a six-member jury).

if this dissenter has even a single ally.¹⁷¹ Where the jury is larger, it likely contains a more diverse composition, making it more likely that there will be not one but two or more jurors who may be contrarian enough to force meaningful review of the evidence and discussion rather than permitting a relative rush to judgment after receiving jury instructions.¹⁷² Consequently, some serious consideration should be given to mandating a return to twelve-person civil juries as well as cooling some of the feverish rush to summary judgment that has also occurred in the past three decades.¹⁷³

But even in juries of six (the constitutional minimum) or eight (the norm in civil cases), there still are some reasonably good odds that at least one juror (our hypothetical Linda) initially will have a different view of the evidence that will in turn require some significant amount of deliberation and may allow other jurors to see that they have been too quick in their conclusions. But in many cases, a single dissenter will probably eventually be worn down enough to concede. Linda, trapped in a roomful of Rons, will probably not be able to turn the group around, at least most of the time. But the Rons or Pats of the jury will still be required to give serious consideration to Linda's views (or those of a Bernie) before rendering a verdict. This is a more reflective means of decision-making and more respectful of litigants and society than a pretrial decision by a single trial judge.¹⁷⁴

171. See Zeisel, *supra* note 168, at 711–20 (noting the importance of at least one ally to a person's ability to resist group pressure).

172. See *id.* at 720 (describing how the ally phenomenon makes two dissident jurors much more likely to hold out against the majority and that twelve-person juries provide greater opportunity for dissidents and allies to be on a jury); Saks, *supra* note 169, at 19 (illustrating that twelve-person juries provide significantly more likelihood of alternative orientations and viewpoints than six-person juries).

173. At the conference that produced this Issue's collection of articles, I was pleasantly surprised to find out that Judge Lee Rosenthal (S.D. Tex.) routinely uses twelve-person juries in her cases. I thought juries of this size were no longer in use at all. But even if they are more common than I realize, Judge Rosenthal's approach is a good one that should become standard policy in courts.

174. In theory—and probably in practice—the trial judge is not so isolated. The law clerks (two per chamber in federal court, usually one per chamber in most state courts) may provide a different perspective. Although they have no vote in the process, their views are likely to be at least considered by the trial judge. Similarly, trial judges in the privacy of chambers may use secretaries or court deputies as sounding boards. Student externs may also provide some additional perspective on the facts of a case. However, there is a tendency for judges to hire law clerks with views similar to their own. Where the judge has a permanent clerk, this tendency may be exacerbated.

VII. THE WISDOM OF PLAYING BY THE RULES OF PLURALIST PROCEDURE

In a sense, the summary judgment jurisprudence from the last third of the twentieth century to the present has been judicial activism in derogation of what were supposed to be the agreed rules of the game. Summary judgment, which began as a means of streamlining collection actions where the debt was clear and unchallenged,¹⁷⁵ was never intended to permit judges to substitute their credibility determinations, factfinding, and factual assessment for those of juries.¹⁷⁶ This norm was well established at the time of the enactment of the Federal Civil Rules in 1938 and remained firmly in place until at least the 1970s.¹⁷⁷ Although there is evidence that trial courts were engaging in more aggressive application of summary judgment prior to the 1986 trilogy,¹⁷⁸ summary judgment doctrine did not change until the Supreme Court issued its now-famous opinions.¹⁷⁹

175. Summary judgment was initially designed as a tool for plaintiff creditors to obtain a judgment upon which they could begin to pursue payment without the delay of trial in cases where the liability of the debtor and the amount were uncontested. Charles Clark & Robert Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 423 (1929).

176. See Stempel, *supra* note 2, at 133–38 (reviewing scholarly literature, transcripts of original advisory committee meetings, and other records of the committee suggesting that summary judgments were not apt where there was any dispute of witness credibility or conflicting evidence as to the happening of events).

177. See *id.* at 166–74 (reviewing case law reflecting a strong judicial hesitance to grant summary judgment if there was any question as to the existence of facts or the inferences to be drawn from uncontested facts).

178. See *supra* note 7 and accompanying text (explaining the frequency of summary judgment grants prior to the 1986 trilogy).

179. See, e.g., Marcy J. Levine, Comment, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court*, 37 EMORY L.J. 171, 177–78 (1988) (portraying the trilogy as a drastic break from prior summary judgment practice). But see *supra* note 7 (finding an upturn in summary judgment motions and grants during the decade prior to the trilogy). What is of course interesting about the studies suggesting a silent trial court move toward more aggressive summary judgment prior to the trilogy is the degree to which trial courts had moved toward (or in my view, slouched toward) more aggressive summary judgment even without the benefit of a favorable Supreme Court precedent. Until the trilogy, Supreme Court precedent remained seemingly resistant to summary judgment. See Stempel, *supra* note 2, at 144–56 (discussing summary judgment case law and secondary authority generally providing that such motions should be denied if there was even what the judge regarded as comparatively little factual support for the nonmovant). For example, *Poller v. CBS*, 368 U.S. 464 (1962), a case so resistant to summary judgment that it was criticized by many, continued to be widely cited as controlling law. But see, e.g., Martin Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707, 721 (1984) (urging that in defamation cases, First Amendment concerns animating the doctrine protective of the media reflected in cases like *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) urged stronger use of summary judgment because of the high burden placed on defamation cases involving public officials or public figures); David Sonenschein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U. L. REV. 774, 785–86 (1983) (urging that summary judgment be used more like directed verdict/judgment as a matter of law and that the nonmovant

Prior to 1986, the basic rules of summary judgment, even if honored in the breach by some trial courts, were well-established. Summary judgment was not to be granted so long as the nonmovant had any legally relevant evidence on its side, evidence that a jury could rely upon to render a verdict for the nonmovant. In assessing a summary judgment motion, the trial court was not to consider the credibility of witnesses or documents and was not to engage in factfinding regarding disputed matters, including the range of permissible inferences that could be drawn from agreed facts or circumstances.¹⁸⁰

The issue of whether facts are sufficiently genuinely disputed to make summary judgment inappropriate may involve a question of “fact existence”—whether certain tangible claims (e.g., was the light red or green at the time of the collision) are correct—and “fact inference”—what range of reasonable conclusions can be drawn from the same tangible evidence lying in plain sight for jury consideration.¹⁸¹ The latter category of fact disputes is just as much a genuine dispute of fact as the question of whether pavement was dry, a door was locked, or a light was on.

Although criticized by some as an insufficiently used and ineffective set of rules, there was nothing to suggest that the summary judgment doctrine prior to the trilogy was sufficiently “broken” as to need repair. Prior to the trilogy, despite an uptick in summary judgment grants during the 1970s, the Rule 56 doctrine nonetheless required judges to deny the motion if there was any non-fabricated claim that favorable facts supported the nonmovant or that non-psychotic juries might make factual inferences in a manner favorable to the nonmovant, even if the judge saw the fact inferences sought by the movant as more likely to be embraced by the jury.

In other words, prior to the trilogy, it was nearly inconceivable that a court would grant summary judgment to a defendant on the basis of a videotape like that in *Scott v. Harris*. The video was simply too open to interpretation, as well as not being the only item of evidence in the matter. Under the pre-trilogy regime, even if a judge thought the video reflected a dangerous driver who needed to be stopped, summary

be required to produce substantial evidence in its favor rather than merely any evidence or even significant evidence).

180. See ROGER S. HAYDOCK, DAVID F. HERR & JEFFREY W. STEMPEL, FUNDAMENTALS OF PRETRIAL LITIGATION § 12.4 (1985) (setting forth pre-1986 summary judgment doctrine); JAMES WM. MOORE ET AL., 11 MOORE’S FEDERAL PRACTICE § 56.02 (2d ed. 1985) (explaining when summary judgment is appropriate).

181. See Stempel, *supra* note 2, at 162–70 (elaborating on the difference between fact existence and fact inference).

judgment would be denied, and the matter of factual inference would be left for the jury. The ensuing two decades of work regarding cognitive science, cultural cognition, and cultural illiberalism have affirmed the wisdom of this approach. Reasonable people looking at the same events can reach different conclusions,¹⁸² making it unwise and inappropriate (as well as in derogation of the jury function) for a judge to impose his or her preferred approach.

The Court's 1986 decisions took a significant doctrinal turn and delivered an even more substantial connotative message that trial courts should be willing to grant summary judgment more often in a wider variety of cases. The trilogy gave judges figurative permission and unduly wide discretion to dismiss competing views of the evidence. Unless the judge found the evidence, either asserted direct evidence or requested inferences from the record, sufficiently compelling, "substantial," or "plausible," the judge was now empowered to grant summary judgment in situations where summary judgment was impossible (at least if the doctrine was applied properly) prior to the trilogy.

Although *Celotex Corp. v. Catrett* can, notwithstanding the flaws about which Justice Brennan complained in dissent, be regarded as an opinion merely clarifying practice, eliminating the tendency of some courts to insist on affidavits in the record, and implicitly placing an undue burden on movants, my view is that it also improperly replaced what had been an "any evidence" standard for finding adequate discharge of the nonmovant's burden in resisting summary judgment to a "substantial evidence" standard that permitted more judicial fact-weighting.¹⁸³ *Matsushita v. Zenith* and *Anderson v. Liberty Lobby* were jurisprudential disasters in that they squarely placed the Court (and by implication all lower federal courts) in the fact-finding business in derogation of both the jury and the trial process because *Matsushita* dismissed the plaintiff's proffered evidence while embracing the defendant's submissions on economic theory,¹⁸⁴ while *Liberty Lobby*

182. See Dan M. Kahan et al., "They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction, 64 STAN. L. REV. (forthcoming 2012) (viewers of a tape of protest differed in their likelihood of finding that speech crossed the line into unprotected conduct depending on what the viewers were told about the people and activity on the tape).

183. See Stempel, *supra* note 2, at 154–169 (explaining the different positions of summary judgment the Court has adopted over time and the subsequent confusion among lower courts in trying to interpret those positions).

184. See *id.* at 108–114 (re-examining the Court's errors in the *Matsushita* decision and its possible rationale).

allowed judges to further weigh facts by considering whether there was a heightened burden of proof at trial.¹⁸⁵

In the twenty-five years since the trilogy, the courts, following the lead of the Supreme Court, have steadily pushed the envelope in favor of more aggressive summary judgment.¹⁸⁶ Certainly, the Court, emboldened by the trilogy of its own making, has supported express or de facto summary judgment in highly problematic ways. *Scott v. Harris* is perhaps the best and most troubling example—one that would be inconceivable without the trilogy and the “permission” it granted judges to slouch toward factfinding. In conjunction with this over-eager imposition of summary judgment is the Court’s willingness to convert Rule 12 motions to dismiss into summary judgment motions as took place in *Twigbal*.¹⁸⁷

This change in the rules and shift in judicial attitudes had been brewing since the 1970s,¹⁸⁸ with the 1983 Amendment to Rules 11 and 16¹⁸⁹ and the 1986 trilogy serving as something of an official send-off

185. See *id.* at 114–29 (analyzing *Liberty Lobby* and how the Court departed from its traditional approach to summary judgment cases).

186. See *supra* notes 2–10 and accompanying text (discussing academic criticism of increased summary judgment); see also *Wood v. Safeway*, 121 P.3d 1026, 1030–31 (Nev. 2005) (adopting the trilogy at the state court level).

187. See *supra* notes 5–6 and accompanying text (noting the degree to which the *Twigbal* decisions shifted the balance of power between plaintiffs and defendants and substantial scholarly criticism of *Twigbal*); see also Burbank & Subrin, *supra* note 5, at 403–08 (criticizing *Twigbal*).

188. In addition to the creeping advancement of more aggressive summary judgment chronicled by the Federal Judicial Center and in other studies, see *supra* note 7 and accompanying text, the 1970s ushered in concern, much of it led by then-Chief Justice Warren E. Burger, about perceived excessive litigation and the need to scrutinize claims more closely and restrict access to the courts. See Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 312–317 (1996) (describing the “Pound Conference” organized by Chief Justice Burger, which operated under an assumption of excessive litigation and a need for increased promotion of ADR and other responses as something of a kickoff for a new era of more restrictive attitudes toward civil litigation). The Conference was officially titled the *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, and its proceedings were published at 70 F.R.D. 79 (1976). See also Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 541 (1985) (suggesting that preference for and availability of adjudication was receding throughout the 1970s and early 1980s); Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 701, 716 (1993) (commenting on the effect of the Pound Conference on summary judgment procedures); Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1156–59 (1993) (describing the 1976 Pound Conference as the start of the conservative, pro-defendant, pro-business counter-revolution and declining access to courts, which was arranged by Chief Justice Burger).

189. The 1983 Amendment to Rule 11 moved from a subjective to an objective standard for assessing counsel’s compliance with its edict that a lawyer’s signature on a pleading, motion, or other paper constituted a certification that it was adequately supported in fact or law, made

for the new era. *Scott v. Harris* and subsequent problematic cases such as *Twigbal* arguably are but imperialistic extensions of this fateful change of direction.

But whatever the genealogy of this new judge-made civil litigation, it has proven problematic. It appears to be an inefficient, anti-democratic exercise in result-oriented judicial activism.¹⁹⁰ But it also appears unstoppable. Although subsequent Supreme Courts may differ from the Roberts Court in doctrine and ideology, judges may be unwilling to cede back to juries and litigants the power they formerly enjoyed under the 1938 rules, even as interpreted by the Rehnquist Court. Once power is acquired, it is seldom given back easily. Absent a major change in the Court's membership and attitudes, the wrongs of recent cases are unlikely to be righted, particularly in regard to summary judgment in view of the 8-1 *Scott v. Harris* opinion and the subsequent retirement of lone dissenter Justice Stevens.¹⁹¹

A more prudent course of judicial conduct would include greater reluctance to grant summary judgment, a course of action that not only avoids the waste of reversed grants of summary judgment, but also consistently provides for the benefits of the trial process and lay juror scrutiny of claims. In particular, the controlled process of trial and the forced deliberation of lay jurors could provide a powerful antidote to not only overt biases and prejudices but also to the more subtle warping of perception and rational thought that stems from cognitive illiberalism and its cousins. This would certainly be an improvement over the narrowness of the judicial exercise of self-serving bias when viewing contested evidence.¹⁹²

sanctions for violation mandatory, and generally set a tone more conducive to the finding of violation and imposition of sanctions. See SANCTIONS: RULE 11 & OTHER POWERS 1-8 (Melissa L. Nelken ed., 3d ed. 1992) ("Many laud Rule 11 for having accomplished its primary goal of making lawyers 'stop and think' . . . others question whether the price paid . . . has been too high in terms of the Rule's chilling effect on novel or unpopular claims."); GEORGENE M. VAIRO, RULE 11 SANCTIONS, at xxxi (Richard G. Johnson ed., 3d ed. 2004) ("The rule has always had a salutary purpose: to curb abuses and cut down on waste in the system" but "many have objected to the rule's . . . potential for stifling the evolution of law."); see also *id.* at 5-10 (tracing the history of Rule 11). The 1983 Amendment to Rule 16 made pretrial conferences and case management by judges more important and was perceived as part of an overall trend toward more "managerial judging" by the bench and more aggressive judicial case management, which has been criticized for excessively empowering judges' pretrial impressions in derogation of the trial process and jury deliberation. See, e.g., Resnik, *supra* note 188, at 530-40 (noting the decline of the role of the judge from adjudicator to case-manager).

190. See Burbank & Subrin, *supra* note 5, at 406 (noting the democratic aspects of trial and the degree to which civil litigation doctrine discouraging trial has anti-democratic implications).

191. See *supra* notes 36-71 (describing the *Scott v. Harris* decision and lone dissent of Justice Stevens).

192. See *supra* notes 122-74 (reviewing the fact-sharpening benefits of trial and the tendency

Achieving this more prudent course is another matter. One important feedback loop in the system of Madisonian civil procedure is amendment of the Civil Rules, both in response to perceived changes in American litigation and as a corrective for problematic Supreme Court decisions or judicial tendencies.

In years past, the Advisory Committee on the Civil Rules has been willing to enter the fray to craft corrective amendments. Noticing a line of cases, primarily in the Third Circuit, that prevented summary judgment merely because the nonmovant alleged disputed facts (rather than making a proper showing in the record through affidavits or other material), the Committee revised Rule 56 to correct the problem.¹⁹³ When the 1983 Amendment to Rule 11 created unanticipated problems, the Advisory Committee responded with the 1993 Amendment that appears largely to have corrected the problem. Included in the 1993 Amendment was a “legislative overruling” of the Court’s ruling in *Pavelic & LeFlore v. Marvel Entertainment*,¹⁹⁴ which had refused to impose vicarious liability on a Rule 11-offending law firm and instead had let the firm associate who signed the pleading take the fall.¹⁹⁵ When the Court issued *Schiavone v. Fortune, Inc.*,¹⁹⁶ which unduly limited the relation back of amendments changing parties, the Committee responded with a revised Rule 15.¹⁹⁷

of jury deliberation to counteract narrow cognitive perspective through required receipt of different perspectives on the evidence).

193. FED. R. CIV. P. 56 advisory committee’s notes (1963) (amended 1987); *see also* Stempel, *supra* note 2, at 132–34 (describing the history of former Rule 56(e)).

194. *See Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 126–27 (1989) (holding that only attorneys actually signing a pleading are liable if the pleading violates Rule 11 even if others in the law firm participated).

195. In *Pavelic & LeFlore*, the Court took a narrow textual construction of Rule 11 that, under the 1983 version, spoke only of a single attorney signing pleadings and reasoned that it was more consistent with the language of the Rule to impose sanctions only on the signer of an offending pleading, motion, or other paper rather than the attorney’s law firm, even if as a practical matter the law firm was requiring the attorney to sign (perhaps even as a sacrificial lamb for controversial contentions) and was clearly supporting the attorney’s assertion of the claims.

196. *Schiavone v. Fortune, Inc.*, 477 U.S. 21, 30 (1986), *superseded by statute*, FED. R. CIV. P. 15 (1991 Amendment), *as recognized in* *Keller v. U.S.*, No. 10-3545, 2011 WL 5008422 (7th Cir. Oct. 20, 2011) (ruling that the amended complaint changing the name of the defendant did not relate back to the date of the original complaint even though it appeared that the real target defendant was, as a practical matter, aware of the claim at the time it was first brought); *see also* Harold S. Lewis, Jr., *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507, 1507–09 (1987) (criticizing *Schiavone*, the amendment, and the relation-back doctrine).

197. *See* FED. R. CIV. P. 15 advisory committee’s notes (1991) (illustrating that the 1991 changes to Rule 15(c) were designed to facilitate relation back and overrule this aspect of *Schiavone*).

Today's steroidal summary judgment, most embarrassingly reflected in *Scott v. Harris*,¹⁹⁸ demands Committee response, as does the metamorphosis of Rule 12(b)(6) motions into stealth summary judgment motions via *Twigbal*. To date, the Committee response—at least to *Twigbal*—is that it is studying the problem, in particular lower court application of *Twigbal*, to determine whether trial courts have applied *Twigbal* so expansively as to warrant Committee intervention.¹⁹⁹

Cynics might see this as the Committee (like the profession generally) hoping that trial judges are smart enough to largely ignore *Twigbal* in garden variety cases and use it only sparingly for clearly disfavored cases such as massive antitrust claims (*Twombly*) or suits against the Attorney General regarding controversial public policy matters (*Iqbal*).²⁰⁰ The Committee should address *Twigbal* on its own terms as defective jurisprudence clearly in violation of the letter and intent of Rule 12 as Court error, for which there is no need for empirical study. The Court in *Twigbal* twice exceeded its power by rewriting the Rules. It should be called to account by the Committee, even to the point of forcing what may be a losing showdown between the Committee (and Judicial Conference) and the Court itself, which must promulgate the Committee's product for the change to become effective under the Rules Enabling Act.

198. See *supra* notes 52–71 and accompanying text (describing the problematic imposition of summary judgment reversed on appeal); see also Jeffrey W. Stempel, *Refocusing Away From Rules Reform and Devoting More Attention to the Deciders*, 87 DENV. U. L. REV. 335, 355–57 (2010) (describing highly suspicious grants of summary judgment by trial courts that were readily reversed on appeal and contributed to a multi-year saga of a case).

199. See JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* (2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publications/motioniqbal.pdf> (noting the impact of the *Iqbal* decision on trial court rulings regarding motions to dismiss); Andrea Kuperman, Review of Case Law Applying *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, Memorandum to Civil Rules Committee and Standing Rules Committee (March 29, 2011), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_March_2011.pdf (describing ongoing work).

200. As a practical matter, this is how some commentators construe *Twigbal*, as cases that changed the rules of the game for disfavored, suspect, or controversial claims, but not necessarily for run-of-the-mill claims. See HAYDOCK ET AL., *supra* note 120, § 3.3.2. Of course, even if this narrower reading of the practical impact of *Twigbal* is correct, individual judges are nonetheless empowered to impose their personal preferences where the type of dispute prompts them to impose their personal preferences.

VIII. BACK TO THE FUTURE: RETURNING SUMMARY JUDGMENT TO ITS PRE-TRILOGY ROOTS

Corrective action is justified. But what corrective action? Clearly, judges are hard to constrain when they think they know the answer to contested litigation facts. Judges in pursuit of their preferred result are even willing to engage in over-the-top rhetoric that is almost embarrassing.²⁰¹

Prior to this modern era of steroidal summary judgment, the established practice essentially refused summary judgment so long as the nonmovant proffered at least some evidence to support its case. Summary judgment in the pre-trilogy era was akin to a directed verdict prior to the Supreme Court's decision in *Galloway v. United States*,²⁰² in which the Court clearly established that a well-made Rule 50 motion could be defeated only by "substantial" evidence rather than a mere "scintilla" of evidence.²⁰³

There was a logic and symmetry to this world of litigation. Prior to trial, a claimant could keep the claim alive even with what many might see as weak evidence, but then later have the opportunity to develop facts at trial. But if during or after trial it became clear that the claimant's evidence was very thin (a scintilla) and insufficiently substantial, a trial judge, by then steeped in the evidence with a feel for the case, could grant a directed verdict, or alternatively could submit the matter to the jury but police seemingly bizarre or unfair results through a post-trial Rule 50 or Rule 59 motion.²⁰⁴

201. In *Scott v. Harris*, for example, Justice Scalia described the chase scene as harrowing and the scariest he had seen since *THE FRENCH CONNECTION* (Twentieth Century Fox 1971). Transcript of Oral Argument at 28, *Scott v. Harris*, 550 U.S. 372 (2007) (No. 05-1531), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-1631.pdf. Although the chase videotape of course raises concerns, it is hardly the type of "rock-em, sock-em, smash-em-up" footage one sees in most Hollywood chase scenes.

202. 319 U.S. 372 (1943).

203. See *id.* at 374–78 (pointing out that the claimant nonmovant must demonstrate substantial evidence supporting his or her position to defeat a directed verdict motion). In 1991, Federal Rule of Civil Procedure 50 was amended to substitute the term "judgment as a matter of law" for the term "directed verdict." See FED. R. CIV. P. 50 advisory committee's note (1991) (providing background on use of the motion and rationale for the nomenclature change, in particular noting that under former nomenclature, judges never directed juries as to the verdict they should reach but merely entered judgment without submitting the matter to a jury). Prior to the trilogy, summary judgment was subject to a scintilla rule, although the term was not widely used in summary judgment opinions. Rather, courts routinely stated that a nonmovant could defeat summary judgment by setting forth any specific facts creating a dispute of material fact. See, e.g., Stempel, *supra* note 2, at 162–70 (illustrating that a judge could grant summary judgment if a party produced little or no material evidence to support its claims).

204. See Stempel, *supra* note 2, at 170–72 (describing the ability and flexibility of the trial process for policing problematic jury verdicts without preventing jury consideration altogether, as

This forgiving standard for nonmovants was not often described as a scintilla rule, but it was in essence the regime that prevailed. If a nonmovant proffered evidence to support its position, even evidence the judge regarded as weak, the judge was required to deny summary judgment. This attitude was sometimes described—and criticized—as a “slightest doubt” standard under which courts were to deny summary judgment if there was even the “slightest doubt” as to the facts.²⁰⁵ But this is an unfair characterization. Where there is at least some evidence favoring the party opposing summary judgment and the motion is denied as it would have been prior to the trilogy, this is not because the court has slight doubt but rather because there is an actual dispute of material fact, a dispute that requires resolution at trial. Further, the slightest doubt standard would, even as described by its critics, be an improvement over the trilogy and its ability to produce abominations like *Scott v. Harris*.

The downside of a scintilla approach to summary judgment is some additional amount of trial time or settlement payments for very weak claims. But the downside of the more aggressive regime of the trilogy-*Twigbal-Scott v. Harris* is judge-driven elimination of claims that might well succeed before a jury and resulting in injustices as well as Seventh Amendment violations. (If there are contested questions of fact existence or fact inference, the Thomas critique of summary judgment is correct.) Add to this the inefficiency of erroneous grants of summary judgment reversed on appeal (even under the current regime) and the additional costs and attrition created by the need for these appeals and the net case for the trilogy and *Scott v. Harris* summary judgment is mixed at best.

To the extent there is empirical doubt about whether too many weak or meritless claims survived prior to the trilogy or whether too many good claims were unfairly struck down or made unduly expensive to prosecute because of the trilogy, erring on the side of caution, a full airing of the issues at trial, and support for the civil jury seems the wiser course. A quarter century of psychological and sociological learning since the trilogy has underscored the error of the Court’s 1986 turn toward a more imperial, oracle-like judiciary.

One virtue of the de facto scintilla rule that dominated pre-1986 summary judgment was that it minimized the trial court’s weighing and

it takes place when summary judgment is granted).

205. See *id.* at 140–54 (noting the existence of the “slightest doubt” standard, or at least its rhetoric, prior to the 1986 trilogy); see also HAYDOCK ET AL., *supra* note 180, §12.4.7 (describing summary judgment and suggesting that the “slightest doubt” standard is excessively cautious).

assessment of the evidence, which acted as a restraint on the judge's ability to substitute his or her personal preferences for jury deliberation. A judge might be skeptical of a claimant's evidence but would nonetheless, in most cases, need to concede that there was at least something there, a concession that allowed for greater factual development.

But when the trilogy moved toward the "substantial evidence" standard and permitted consideration of the burden of persuasion (*Liberty Lobby*) and judicial elevation of scholarly theory above submitted factual assertions (*Matsushita*), this greater empowerment of trial judges made them more likely to look at a claimant/nonmovant's factual assertions and deem them too weak to defeat summary judgment. The judge was now deciding fact disputes prior to trial, a power that grew with accretion from the trilogy to *Scott v. Harris*. What was unimaginable prior to the trilogy—eight Justices watching a video and deciding the case on the basis of the video over a colleague's dissent and the differing perceptions of four lower court judges—became reality, because for a quarter-century the bench had gotten used to weighing and determining facts in a way closed to the bench prior to the trilogy.

If the summary judgment standard returned to the scintilla rule, either by express amendment or judicial consensus that more humility and pluralism were required, trial judges would logically be more reluctant to grant summary judgment, which in turn would produce more trials and more jury deliberation, as well as more defensible settlements.

Again, the cognitive learning of the past two decades is helpful to the analysis. As discussed above, "people make probability judgments on the basis of an initial value" or an anchor.²⁰⁶ This can lead to error because people also often "make insufficient adjustments" to the initial anchoring value, which may have an "arbitrary or irrational source" leading to a "high level of arbitrariness."²⁰⁷

But anchoring can also be a force for good. Consider the legal system's use of the "beyond a reasonable doubt" standard for criminal matters. This anchors the factfinder to a view that a defendant should be convicted and punished only if the factfinder is very, very sure of guilt.²⁰⁸ Although it appears that people "slouch" away from this

206. See BEHAVIORAL LAW AND ECONOMICS, *supra* note 80, at 5 (describing the anchoring phenomenon and the potential for an ill-set anchor to distort resulting thought).

207. *Id.* (providing examples of jury judgments about damage awards that are likely to be based on an anchor, which can produce a high level of arbitrariness).

208. See Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1311 (1977) (noting that in a survey of trial judges who

anchor and may convict only when they are pretty sure of guilt, the strong beyond-a-reasonable-doubt anchor at least minimizes the chances of conviction when a judge or jury merely finds that most of the evidence points toward guilt.

In similar fashion, a scintilla rule approach to summary judgment can anchor judges. By setting a standard opposed to summary judgment if there is any evidence favoring the nonmovant or any possibility that a reasonable jury could assess a piece of evidence (such as the *Scott v. Harris* video) in a manner favorable to the nonmovant, the judge becomes less likely to grant summary judgment merely because he or she is more favorably disposed toward the movant's evidence. Under a scintilla rule standard, the judge is forced to refrain from terminating the case so long as there is some dispute. As long as the dispute is genuine in the sense of not being fabricated or not in defiance of ironclad laws of nature (e.g., an assertion that a witness was unable to see a morning shooting because he was blinded by the sun rising in the West), summary judgment is denied. In some cases, of course, judges will be unable to resist subconsciously imposing their preferred construction of the contested facts, but the anchor of the scintilla rule will exert some significant force against this tendency while the trilogy, instead, at least fails to constrain this tendency and probably encourages it at the margin.

By suggesting a return to pre-trilogy summary judgment doctrine, this Article does not also suggest that movement back to scintilla rule thinking will magically make perfect justice universal. First, the ability of rules to shape behavior is powerful but limited. Anchoring exerts a pull on the psyche but not an absolute hold. Drivers speed in spite of speed limit signs and occasional speed traps and tickets. Impatience, oversight, or a driver's view that he or she has a better feel for the correct maximum speed will often triumph over the posted limits even if well-backed by the sanctions of law. Similarly, judges, particularly after twenty-five years of the trilogy and the Supreme Court's own behavior in *Scott v. Harris*, will often be unable to restrain themselves from entering judgment where they think an outcome is certain in spite of some evidence to the contrary. Although certainly not a cure-all, moving the bar for decisions from a substantial evidence-as-measured-

were asked to convert the concept of beyond-a-reasonable-doubt to a percentage, responses largely ranged from 80% to 100%, with some below 80%). Obviously, and troublingly, judges who peg the reasonable doubt test as only slightly stronger than the preponderance of the evidence standard have strayed too far from the correct concept of the beyond a reasonable doubt standard by requiring something approaching absolute certainty as a prerequisite to a criminal conviction.

by-the-ultimate-burden-of-persuasion-at-trial standard to the scintilla rule is likely to help.

In addition, there will of course be instances where cases go to trial and receive jury consideration even though the evidence is very weak. But these cases have always existed, and exist even today in spite of steroidal summary judgment. The proper judicial response to an unreasonable jury verdict will continue to be, as was intended by the 1938 Rules and the historical norms of civil litigation, a grant of a new trial (e.g., where verdicts are excessive or tainted by improper procedure) or judgment as a matter of law. For post-verdict Rule 50 motions, the court will apply a substantial evidence standard rather than the new/old scintilla standard.

While this degree of judicial fact assessment is problematic in the summary judgment context, it is a necessary evil for controlling unrepresentative jury verdicts. Although the judge's policing of the verdict also calls into question cognitive illiberalism concerns, at least after trial the judge is exercising this supervisory power on the basis of far more information, a better feel for the case, and the chance to have the judge's own cultural biases rectified through the judge's viewing of the evidence and assessment of a group of lay jurors.

IX. CONCLUSION

Although it is a truism that no litigation system achieves perfect justice or optimal efficiency, the move toward more aggressive use of summary judgment risks too many sacrifices of justice with little efficiency gain, or perhaps even net efficiency loss. Restoring pre-trilogy judicial humility, by rule change if necessary, to permit trial and jury deliberation in more cases can help to combat the innate cognitive illiberalism and error that afflicts judges making overly aggressive use of summary judgment. Although *Scott v. Harris* is a rare case where judicial error was "caught on tape," it likely represents the tip of a growing iceberg that the legal system needs to better navigate.

