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Playing by The Rules (Or Not): How the Court's Misuse of Rule 59 Threatens to Undermine Qualified Immunity and the Civil Jury Trial

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Note

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KIMBERLY BOSSE

The civil jury trial is uniquely American. Though many countries utilize a jury system for conducting criminal trials, the trial by jury in civil matters is something seen almost exclusively in the United States, and has been a cornerstone of the American judicial system since the Colonial Era. However, many scholars have lamented what they refer to as the “vanishing jury trial,” due to increased use of alternative dispute resolution and settlements to resolve cases without a trial or jury. Now, in addition to pre-trial dispute resolution, a new trend has emerged which threatens to further undermine the American civil jury system as well as the doctrine of qualified immunity.

*The Seventh Amendment to the Constitution provides a right to a civil jury trial by one's peers to every American citizen. Yet, in the District of Connecticut, it has twice occurred that a Rule 59 Motion for a New Trial has been used in an apparent attempt to override a jury verdict in favor of police officer defendants, despite a lack of legal precedent supporting the move. These two cases are *Bryant v. Meriden Police Department* and *Huaman ex rel. J.M. v. Tinsley*.*

Of these two cases, the Huaman parties have subsequently settled—replacing the jury's no-liability judgment with an over \$300,000 payment to plaintiffs—and the Bryant parties have given oral arguments in front of the Second Circuit. If the Second Circuit were to affirm Bryant, and the manner in which Rule 59 was utilized is given precedential effect, there may be severe repercussions. First, qualified immunity would be weakened due to the removal of the reasonableness inquiry from the hands of the jury. Additionally, the civil jury trial itself would only be rendered further obsolete, as the verdicts that juries hand down would become significantly more vulnerable to being taken away by a judge who disagrees with the result. Either of these outcomes would undeniably alter the U.S. legal landscape, and neither would be an alteration for the better.

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Playing by The Rules (Or Not): How the Court’s Misuse of Rule 59 Threatens to Undermine Qualified Immunity and the Civil Jury Trial

KIMBERLY BOSSE *

INTRODUCTION

The civil jury trial is in trouble. For years, the trend of encouraging settlement, opting for alternative dispute resolution (“ADR”), and granting pre-trial dispositive motions has quickened in pace, resulting in a drastic decline in the percentage of cases that not only reach the trial stage, but that also are resolved by a jury verdict.¹ The notion of determining liability through a jury of one’s peers is one of the oldest and foremost foundational precepts upon which the American legal system was constructed,² and it now faces serious threat of effective eradication.

This trend—“the vanishing jury trial” as it has been called³—has been thoroughly studied and discussed, and has served as the subject of reputable symposia dedicated to understanding the causes and effects of such a growing phenomenon.⁴ Legal scholars have posited a number of possible contributing effects, three of which appear to be the most prominently

* University of Connecticut School of Law, J.D. Candidate 2019; Hofstra University, B.A. 2016. I would like to thank attorneys Jim Tallberg, Scott Karsten, Pat Allen, Dennis Durao, and Andrew Glass for awakening my interest in such a pivotal area of the law and for allowing me to dig my hands into the cases that serve as the focus of this Note. Without their guidance and constant support, this paper would not exist. I would also like to thank my Notes & Comments editor Jessica Colin-Greene, as well as the tireless members of the *Connecticut Law Review* for their assistance and thoughtful suggestions throughout the publication process.

¹ See Marc Galanter & Angela M. Frozena, *A Grin Without a Cat: The Continuing Decline & Displacement of Trials in American Courts*, 143 *DAEDALUS J. AM. ACAD. ARTS & SCI.* 115, 116 (2014) (citing data on the decline in percentage of cases tried in front of juries which dropped from 5.49 percent of all cases in 1962, to 2.33 percent in 1985, and to a mere 0.73 percent in 2012).

² See Hon. William G. Young, *Who’s to Blame? A View From the Bench*, Address at the New York University School of Law Civil Jury Project Conference: State of the Civil Jury Trial (Sept. 11, 2015) [hereinafter Young, *A View From the Bench*] (“The greatest contribution of American jurisprudence in the history of the world is our judicial independence and our American jury trial system.”); see also Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 *SUFFOLK L. REV.* 67, 69 (2006) (describing the American jury as being “as American as rock ‘n’ roll”).

³ Hon. Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mazingo? A Trial Judge’s Lament Over the Demise of the Civil Jury Trial*, 4 *FED. CTS. L. REV.* 99, 101 (2010).

⁴ The Civil Jury Project operates out of New York University School of Law. It conducts research and hosts conferences to discuss the causes and effects of the disappearing civil jury trial. CIVIL JURY PROJECT, <http://civiljuryproject.law.nyu.edu/> [<https://perma.cc/45UW-BYQQ>] (last visited Feb. 12, 2018).

suggested avenues of causation.⁵ Judicial encouragement of pre-trial resolution, increases in use of ADR, and dispositive pre-trial motions have all significantly slashed the frequency of cases being tried, generally. Among the many critics of this trend, Judge William Young of the District of Massachusetts has been vocal about the Seventh Amendment implications this trend carries with it.⁶ The Seventh Amendment to the U.S. Constitution provides that:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.⁷

Cases that are resolved through ADR, settlement, or dispositive motions, deprive parties of truly having their “day in court,” which, as many bright-eyed law students quickly learn, is a right inherited to every citizen who finds himself in a legal bind.⁸

Although it is true that these three avenues of causation have contributed to the decline in civil jury trial prevalence, a fourth avenue is emerging which is unique from the other three. This fourth avenue, a post-trial Rule 59 motion for a new trial, may begin to change the way scholars evaluate the disappearing nature of civil jury trials. Until now, the predominant hypothesis on the issue has been that the pre-trial resolution and disposal of cases *ex ante* has brought cases to a halt *before* a jury could be called upon, therefore eliminating the jury’s presence in daily court practice.⁹ Rule 59, however, is beginning to reveal itself as a tool for judges to eviscerate and make an *ex post facto* end-run around the Seventh Amendment right to a civil jury *after* a jury has rendered its decision.

⁵ See Anderson, *supra* note 3, at 105, 108 (listing factors contributing to the decline of the jury trial including: (1) the Administrative Office of U.S. Courts’ emphasis on docket management; (2) increasing resolution through ADR; and (3) legal costs); see also Galanter & Frozema, *supra* note 1, at 125 (“[Judges’] role as gatekeepers is enlarged, especially (in the federal courts, at least) by the elaboration of summary judgment (which now accounts for far more terminations than trials.)”); Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1423 (2002) (lamenting that trials are often viewed as a failed effort at dispute resolution, and calling on the system to keep trials alive, despite the benefits that settlements offer).

⁶ See Hon. William G Young, Speech at Judicial Luncheon at The Florida Bar’s Annual Convention in Orlando (June 28, 2007) (“How is it possible [that the American jury system is dying], with our Constitution and every one of the 50 state constitutions guaranteeing the right to a trial by jury? . . . The jury—direct democracy—is the most vital expression of local government—state or federal—that exists.”).

⁷ U.S. CONST. amend. VII.

⁸ See Galanter & Frozema, *supra* note 1, at 115 (“Common expressions such as having one’s ‘day in court,’ . . . reflect [the] cultural presence [that courts carry in American life].”).

⁹ See Anderson, *supra* note 3, at 109 (discussing legal tools that work to resolve cases before they reach the trial stage).

Granting a new trial after a jury verdict significantly increases the incentive to settle by giving leverage to the party who made the motion. Cases that do end in settlement ultimately avoid a jury verdict. In cases where the parties still refuse to settle, however, the new trial carries a burden of extra expenses; instead of footing the bill for one full trial, parties must instead pay for two. In civil rights cases, this also means the potential for a prevailing plaintiff to receive attorney's fees as a part of their recovery.¹⁰ Most critically, though, defendants sued under 42 U.S.C. § 1983 may find themselves unreasonably and inappropriately exposed to liability and a second lawsuit even after a jury has determined that their actions did not constitute a violation of the Constitution. Since the purpose of the qualified immunity affirmative defense to § 1983 claims is ultimately to provide protection from both liability and lawsuit to government officials when their actions were reasonable, Rule 59 threatens to weaken the defense by keeping the reasonableness inquiry out of the hands of the jury.¹¹ The new trend—though in its early stages—of using Rule 59 motions for a new trial to circumvent a jury verdict with which a judge—based on factors ranging from incorrect legal analysis to self-serving aspirations—simply just *disagrees*, is a potentially dangerous pattern that, if let to continue, could set a severe and irreparable precedent that significantly diminishes the importance of the American civil jury beyond the point to which it has already fallen.

This Note will discuss the evolution of the American judicial system towards becoming more of a managerial body than one that actually encourages bringing cases to trial. In particular, this Note will focus on two recently tried cases within the United States District Court for the District of Connecticut, and how their unprecedented results may have a serious impact on the operation of the federal judicial system, and more specifically on the ability for defendants to utilize the qualified immunity safeguard. Part I will discuss the history of the civil jury trial and the importance of the Seventh Amendment within the context of United States constitutional history. Part II will discuss the Rule 59 standard, as well as explain the significance of the qualified immunity doctrine, before proceeding to introduce the cases—*Bryant v. Meriden Police Department*¹² (“*Bryant*”) and *Huaman ex rel. J.M.*

¹⁰ See 42 U.S.C. § 1988 (2012) (“In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . .”).

¹¹ See *Pearson v. Callahan*, 555 U.S. 223, 231–32 (2009) (citations omitted) (“Because qualified immunity is an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial. Indeed, we have made clear that the driving force behind creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials [will] be resolved prior to discovery. Accordingly, we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.”).

¹² *Bryant v. Meriden Police Dep't*, No. 3:13-cv-449(SRU), 2017 WL 1217090 (D. Conn. Mar. 31, 2017), *appeal filed*, 2d Cir. Apr. 17, 2017.

v. *Tinsley*¹³ (“*Huaman*” or “*Huaman v. Tinsley*”). These two cases were tried to a jury verdict in the District of Connecticut in 2017 and both illustrate the pattern of using Rule 59 as a runaround with regards to the Seventh Amendment. Part III will look into possible incentives for both judges’ decisions to grant the post-trial Rule 59 motions, and will explore possible repercussions for allowing the trend to continue as-is. It will then conclude with a suggested solution to the particular problem pertaining to the qualified immunity catch-22 that is created in both of the scenarios illustrated by *Bryant* and *Huaman*.

I. HISTORY OF JURY TRIALS AND IMPORTANCE OF THE SEVENTH AMENDMENT

The American civil jury trial is a phenomenon that is unmatched anywhere else in the world.¹⁴ Although a number of countries use juries to decide criminal trials, civil jury trials are almost nonexistent outside of the United States.¹⁵ There are conflicting opinions on whether the right to a jury in a civil trial under the Seventh Amendment is as inherent and guaranteed as the parallel right to a jury of one’s peers in a criminal proceeding under the Sixth Amendment.¹⁶ For example, Edith Henderson posits that from the time of the drafting of the Constitution, there was argument over whether to explicitly provide for civil juries in the original document.¹⁷ Ultimately, Henderson describes how trial by jury in civil cases was left out of the final document; she seems to propose the idea that the only reason the Seventh Amendment was included at all was to assuage the fears of Anti-Federalists, who were worried civil juries would cease to exist altogether.¹⁸ Henderson chalks the intentional omission of a guaranteed right to a civil jury up to laziness of the drafters, implying that they simply did not care enough and just “wanted to go home.”¹⁹

¹³ *Huaman ex rel. J.M., v. Tinsley*, No. 3:13-cv-484(MPS), 2017 WL 4365155 (D. Conn. Sept. 28, 2017).

¹⁴ See Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in *WORLD JURY SYSTEMS* 1, 3 (Neil Vidmar ed., 2000) (“[W]ith the exception of the United States and parts of Canada, the jury has been largely abandoned for civil cases. . .”).

¹⁵ *Id.*

¹⁶ See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 293 (1966) (noting that during the Federal Convention of 1787, “broad general outlines” of what Article III would look like required a jury trial in criminal cases, but made no mention of civil cases). *Contra* Stephan Landsman, *The Civil Jury in America*, in *WORLD JURY SYSTEMS* 381, 381 (Neil Vidmar ed., 2000) (“Americans have relied on juries of ordinary citizens to resolve their civil disputes since the beginning of the colonial period.”).

¹⁷ See Henderson, *supra* note 16, at 293 (“On August 27 and 28 the convention as a whole discussed the judiciary articles, without, however, touching on juries in civil cases.”).

¹⁸ See *id.* at 294 (“It is not surprising that this omission of a right which was universally considered important—and indeed any bill of rights at all—alarmed the Anti-Federalists.”).

¹⁹ *Id.*

One of the justifications for the original omission of this right to a civil jury stemmed from the wide range of civil jury practices among the many states.²⁰ From the Federalist perspective, it made more sense to allow the states to determine situations in which civil juries would be most effective, rather than to have the federal government try to account for the variations in an overbroad protection.²¹ The Anti-Federalists were not persuaded, however, as illustrated by arguments based around the propositions of well-known figures like Patrick Henry, as well as those published in papers written in support of various constitutional provisions.²² At the Virginia Convention, delegates echoed some of Henry's propositions for amendments that advocated for the protection of the civil jury, calling the jury "one of the greatest securities to the rights of the people," and arguing that it should "remain sacred and inviolable."²³ Ultimately, protection for the civil jury trial came in the form of the Seventh Amendment to the Constitution, which has remained a cornerstone of the American legal system to this day.²⁴

Judge William Young of the District of Massachusetts, an ardent supporter of the American civil jury trial, is well-written on this topic and has spoken at prominent conventions advocating for its preservation.²⁵ At a symposium held by New York University School of Law's Civil Jury Project, Judge Young gave a speech in which he mentioned that ninety percent of the jury trials in the world are held in America.²⁶ He recounted how in the thirty years during which he has been a judge, the perception of trials has declined from them being a common, useful legal proceeding to something described as being similar to telephone landlines, "useful in some circumstances, but not the principal means of dispute resolution."²⁷ The drop in the percentage of jury trials nationwide is staggering,²⁸ and to anyone who learns about the American legal system by watching syndicated TV dramas, it may be difficult to understand. After all, the impression of the way in which the American judicial branch functions is rooted mainly in the notion of judge, jury, and trial. Granted, it may be

²⁰ See *id.* ("The explanation given by the Federalists [was] that because of the great diversity of state civil practice no single formula could satisfy everyone. . . .").

²¹ *Id.*

²² *Id.* at 296–99.

²³ *Id.* at n.17 with accompanying text.

²⁴ See Landsman, *supra* note 16, at 386 (describing how the right to a civil jury, though left out of the original Constitution document, was incorporated into it as its Seventh Amendment).

²⁵ See Young, *supra* notes 2, 6 (providing an overview of Judge Young's comments).

²⁶ Young, A View From the Bench, *supra* note 2.

²⁷ *Id.*

²⁸ While in the 1930s—prior to the implementation of the Federal Rules of Civil Procedure—approximately 20 percent of all cases were resolved in a trial setting. Currently less than 2 percent of all federal civil filings are resolved by a jury trial. John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 *YALE L. J.* 522, 524 (2012).

hard to create an invigorating TV drama that revolves around a judge who resolves every issue through in-chambers mediation, or around lawyers who exclusively negotiate and draft settlement agreements. Trials are exciting, captivating, and for many aspiring law students and lawyers, the reason they went to law school.²⁹ Given the reality of the percentage of cases that make it to trial now, with judges acting more as case managers than adjudicators,³⁰ it is hard not to question whether the story we have all been told about the law is anything other than a misconception, or more, a deception.

II. THE TREND, QUALIFIED IMMUNITY, AND THE CASES

A. *The Trend – Rule 50 vs. 59*

While much of the appeal of a common law system of jurisprudence stems from its balance between predictable outcomes based on precedent, and flexibility to make change through the development of law outside the legislature, one of the more rigid aspects of the American judicial system is seen in the rules that govern the processes by which these rulings, verdicts, and precedents come about. The Federal Rules of Civil Procedure (“FRCP”) lay out, in explicit terms, the proper form and governing conduct to which attorneys *and judges* are expected to adhere.³¹ FRCP Rule 50, for example, provides the standard for making a motion for a judgment as a matter of law.³² The Rule states that a party may make a “motion for a judgment as a matter of law . . . at any time before a case is submitted to the jury” for deliberation, at which point the judge may either grant the motion, or reserve ruling on the motion until after judgment has entered.³³ If the judge reserves ruling, or does not grant the Rule 50(a) motion initially, the party may renew its motion after trial no later than twenty-eight days after judgment enters.³⁴ Therefore, if you have not properly pleaded under Rule 50(a) at the appropriate time, you will *not* be allowed to make a successful motion under Rule 50(b), regardless of whether all parties consent, or if the presiding

²⁹ See Anderson, *supra* note 3, at 100 (stating that after 23 years on the bench he still gets nervous when the jury returns with a verdict).

³⁰ See Langbein, *supra* note 28, at 571 (citations omitted) (“Judges have welcomed the case management role, which has enhanced judicial authority both in promoting settlement and in pre-trial (nontrial) adjudication.”).

³¹ FED. R. CIV. P. 1. See also Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH. L. REV. 323, 326 (1991) (“The new rules—which persist today through numerous subsequent amendments—established a uniform federal procedure . . .”).

³² FED. R. CIV. P. 50.

³³ FED. R. CIV. P. 50(a).

³⁴ FED. R. CIV. P. 50(b).

judge feels it would be appropriate; the Rule does not allow for exception unless it would prevent a “manifest injustice.”³⁵

B. Rule 59 Standard

Rule 59 is listed as the proper procedure through which parties may make motions for a new trial following the entry of judgment.³⁶ Although they do not produce the same result, Rule 50 and Rule 59 motions may both be used to combat adverse judgments post-trial. But while Rule 50 motions must be made according to the subsection (a) and (b) standards, Rule 59 motions have no prerequisites under the FRCP.³⁷ Therefore, Rule 50 and Rule 59 motions are often brought together, with the latter being brought in the alternative.

Following a jury trial, a judge may grant a new trial, “for any reason for which a new trial has heretofore been granted in an action at law in federal court.”³⁸ Case law has interpreted this standard to allow judges to grant new trials when, after weighing the evidence and its credibility, it deems the verdict to be “a seriously erroneous result or . . . a miscarriage of justice.”³⁹ However, judges must still give great deference to the jury verdict.⁴⁰ Therefore, situations where a judge *disagrees* with the verdict based on factual conclusions drawn from the evidence do not warrant the grant of a new trial.⁴¹

³⁵ *Broadnax v. City of New Haven*, 415 F.3d 265, 268 (2d Cir. 2005) (quoting *Cruz v. Local Union No. 3 of the Int’l Bhd. of Elec. Workers*, 34 F.3d 1148, 1155 (2d Cir. 1994)). *See also* *Bracey v. Bd. of Educ. of Bridgeport*, 368 F.3d 108, 117 (2d Cir. 2004) (“[The failure to move for a directed verdict during trial] may not be waived by the parties or excused by the district court.”). But parties who *appropriately* move for judgment as a matter of law under Rule 50 may also move, in the alternative, for a new trial. FED. R. CIV. P. 50(b), (e).

³⁶ FED. R. CIV. P. 59(a)(1)(A).

³⁷ *See id.* (emphasis added) (“The court may, on motion, grant a new trial on all or some of the issues . . . after a jury trial, *for any reason for which a new trial has heretofore been granted* in an action at law in federal court . . .”).

³⁸ *Id.*

³⁹ *Nimely v. City of New York*, 414 F.3d 381, 392 (2d Cir. 2005). *See also* *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 133 (2d Cir. 1998) (permitting the grant of a new trial when jury verdicts are against the weight of the evidence).

⁴⁰ *See DLC Mgmt. Corp.*, 163 F.3d at 134 (stating that the court “should rarely disturb a jury’s evaluation of a witness’s credibility”).

⁴¹ This notion dates back to the eighteenth century in common law England. *See* *Henderson*, *supra* note 16, at 311 (quoting *Mellin v. Taylor*, 3 Bing. N.C. 109, 132 Eng. Rep. 351 (C.P.)) (citing Chief Justice Tindal’s reasoning that “[t]he Court ought to exercise, not merely a cautious, but a strict and sure judgment, before they send the case to a second jury . . . the setting aside [of the verdict] is the exception, and ought to be an exception of rare and almost singular recurrence . . .”); *see also id.* at 312 (quoting *Swain v. Hall*, 3 Wilson 45 (1770)) (pointing to Chief Justice Wilmot’s refusal to grant a new trial on the grounds that, “[I]f there hath been a contrariety of evidence on both sides, the Court hath never granted new trials . . . and although I am still of opinion, that the weight of evidence *was with the plaintiff*, yet I disclaim any power to controul the verdict of the jury, who are the legal constitutional judges of fact”).

C. *Qualified Immunity & The Cases*

Recently, two District of Connecticut cases—both with remarkably similar procedural histories—have been handled in almost identical and yet unprecedented fashion. *Bryant v. Meriden Police Department*,⁴² a case involving a claim of excessive force over the use of a Taser device in a holding cell, and *Huaman v. Tinsley*,⁴³ dealing with claims of excessive force as a result of putting hands on and physically moving a non-compliant truant child, serve as two examples of a budding trend in the District of Connecticut. Both cases feature federal judges granting plaintiff-made Rule 59 motions following jury verdicts for the defendants.⁴⁴ In both situations, Rule 59 motions were made as “in the alternative” motions attached onto improperly pleaded Rule 50(b) motions. In both situations, because they could not grant the improperly pleaded Rule 50(b) motions,⁴⁵ the judges granted the alternative motions for new trials, each issuing lengthy opinions as to their reasoning.⁴⁶ Ultimately, however, both judges—for whatever their underlying reasons may have been, as will be discussed, *infra*—stretched to reach conclusions and applied incorrect legal analysis, effectively usurping the constitutionally-sanctioned power of the jury in granting both new trials.

1. *Qualified Immunity*

Before jumping into the factual circumstances of the two cases at issue, it is important to first lay some groundwork with regard to the doctrine of qualified immunity and how it is affected by this new procedural conundrum. Qualified immunity is an affirmative defense used to shield government officials from liability and/or lawsuits when any reasonable official could have thought the actions taken were lawful at the time they occurred.⁴⁷ This doctrine developed in order to ensure that government officials are shielded from burdensome litigation when the actions they took

⁴² *Bryant v. Meriden Police Dep’t*, No. 3:13-cv-449 (SRU), 2017 WL 1217090, at *1–2, 5 (D. Conn. Mar. 31, 2017), *appeal filed*, 2d Cir. Apr. 17, 2017.

⁴³ *Huaman ex rel. J.M., v. Tinsley*, No. 3:13-cv-484 (MPS), 2017 WL 4365155, at *1 (D. Conn. Sept. 28, 2017).

⁴⁴ *Bryant*, 2017 WL 1217090, at *15; *Huaman*, 2017 WL 4365155, at *18.

⁴⁵ *See Bryant*, 2017 WL 1217090, at *3 (“Bryant provides no reason why he should be excused from his failure to comply with Rule 50. Accordingly, his Rule 50 motion is denied.”); *Huaman*, 2017 WL 4365155, at *7 (emphasis omitted) (citation omitted) (“Huaman provides no reason why she should be excused from her failure to comply with Rule 50. Accordingly, her Rule 50 motion is denied.”).

⁴⁶ The version issued by the court in *Bryant* was thirty-two pages, while *Huaman* was thirty-six.

⁴⁷ *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (explaining that the “doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known’”).

were reasonable, in order to safeguard their ability to perform their job without hesitation or fear of suit.⁴⁸

Saucier v. Katz emphasized the two-prong analysis to be used in assessing whether qualified immunity should apply to a given situation.⁴⁹ The first prong of the analysis looks at whether a constitutional violation has occurred, while the second prong evaluates whether the constitutional right in question was *clearly established*.⁵⁰ To be clearly established, there does not necessarily need to be a specific “case on point” to make a government official aware that their conduct is squarely governed by existing law.⁵¹ However, not every similar factual scenario may be sufficient to put a government official on notice.⁵²

In making a *clearly established* determination, courts consider whether every reasonable official in that particular situation would have known his conduct to be unlawful—or in other words, whether any reasonable officer in that situation could *possibly* think his actions were legal.⁵³ There is no set order in which the prongs must be considered.⁵⁴ Within the second prong is

⁴⁸ See Nicholas T. Davis & Philip B. Davis, *Qualified Immunity and Excessive Force: A Greater or Lesser Role for Juries?*, 47 N.M. L. REV. 291, 293 (2017) (“Qualified immunity developed in the context of case law rising from 42 U.S.C. Section 1983, which permits citizens to hold state government officials accountable for their actions through civil suit[,] . . . exist[s] in tension with the Supreme Court’s belief that officers should not be punished for the reasonable belief that they are acting correctly under the law when the law itself is not clearly established.”).

⁴⁹ See *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (“A court required to rule upon the qualified immunity issue must consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? . . . If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties’ submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition . . .”).

⁵⁰ *Id.* What constitutes *clearly established* law has been the subject of an enormous amount of litigation. See Davis & Davis, *supra* note 48, at 298 (citing *Golodner v. Berliner*, 770 F.3d 196, 205 (2d Cir. 2014)) (“Few issues related to qualified immunity have caused more ink to be spilled than whether a particular right has been clearly established . . .”); see also *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (“[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.”).

⁵¹ See *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (“We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.”).

⁵² See *id.* at 742 (reiterating the principal that what is considered to be “clearly established law” should not be assessed at a high level of generality because the law must be clearly established with regards to the *particular conduct* at issue); see also *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (holding that in order for a law to be “clearly established” it must be “particularized” to the fact of the case at hand and not a broad generalization); *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (citing *Anderson*, 483 U.S. at 640) (“As this court explained decades ago, the clearly established law must be ‘particularized’ to the facts of the case.”).

⁵³ See *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”).

⁵⁴ See Davis & Davis, *supra* note 48, at 294 (“The Supreme Court has most recently held that which of the two prongs is addressed first in the qualified immunity analysis is at the discretion of the court in

another layer of analytical considerations, referred to as the *Graham* Factors, which come from the landmark case *Graham v. Connor*.⁵⁵ The *Graham* Factors consist of three inquiries that help determine whether the actions taken by a police officer that led to the lawsuit were objectively unreasonable and, therefore, whether a reasonable officer in that situation could have thought that their actions were lawful.⁵⁶ The *Graham* Factor analysis considers: (1) the “severity of the crime at issue,” (2) “whether the suspect poses an immediate threat to the safety of the officers or others,” and (3) “whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.”⁵⁷ These factors render the subjective intent of any officer irrelevant and only consider the objective reasonableness of the actions taken.⁵⁸

The intricate, multi-layered qualified immunity analysis exists to protect government officials, more often than not police officers, from being overburdened with frivolous lawsuits. Police officers find themselves in situations where they must make “split-second judgments”⁵⁹ on a daily basis—and it is this ability to make quick decisions which, in many cases, can mean the difference between life or death for a victim they may be trying to protect. Therefore, overcoming the affirmative defense of qualified immunity requires claimants to satisfy an understandably high bar.⁶⁰ Further, the Supreme Court recently issued a ruling emphasizing the need to uphold this high bar.⁶¹ In *White v. Pauly*, in a per curiam opinion, the Court chastised lower courts for continuously applying the qualified immunity standard incorrectly.⁶² *White v. Pauly* instructs lower courts to adhere to the standard,

the light of the circumstances at hand.” (citing *Pearson v. Callahan*, 555 U.S. 223, 234, 236 (2009) (reconsidering the “rigid order of battle” required in the *Saucier* analysis, and holding that “it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.”)).

⁵⁵ *Graham*, 490 U.S. 386 (1989).

⁵⁶ *See id.* at 397 (“[T]he ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”).

⁵⁷ *Id.* at 396. *Graham* explains that the reasonableness inquiry requires a balance between the “nature and quality of the intrusion” on the individual’s right to be free from a constitutional violation, and the governmental interest that led to the intrusion. *Id.* The court then lists the non-exhaustive factors, mentioned *supra*, as considerations in this analysis.

⁵⁸ *See id.* at 397 (“An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.”).

⁵⁹ *See Kentucky v. King*, 563 U.S. 452, 466 (2011) (citing *Graham*, 490 U.S. at 396–97) (“[T]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”).

⁶⁰ *See Davis & Davis, supra* note 48, at 294 (discussing the “heavy” burden placed on plaintiffs trying to defeat a defendant’s motion for summary judgment based on qualified immunity).

⁶¹ *White v. Pauly*, 137 S. Ct. 548, 553 (2017).

⁶² *Id.* at 551.

instead of defining what is “clearly established” at “a high level of generality.”⁶³ The opinion speaks to the importance of qualified immunity and how it should effectively protect “all but the plainly incompetent or those who knowingly violate the law”⁶⁴ which, alone, illustrates the high threshold a complainant must reach in order to overcome the protection afforded by qualified immunity. Keeping the importance and necessity of qualified immunity in mind—as defined by the Supreme Court—it should be concerning, then, that the trend that serves as the topic of this Note severely threatens the availability and viability of qualified immunity as an affirmative defense.

2. *Bryant v. Meriden Police Department*

The fallout of *Bryant v. Meriden Police Department* is the result of an altercation between Meriden police officers and a suspect, Derrick Bryant, whom they arrested after a buy-and-bust operation in a liquor store parking lot.⁶⁵ During the arrest, to which Bryant was actively resisting, officers witnessed the suspect attempt to place a bag of crack cocaine between his buttocks in order to prevent its confiscation.⁶⁶ The bag remained in place until he was in a holding cell at the Meriden Police Department about an hour later.⁶⁷ When officers attempted to conduct Bryant’s strip search, Bryant refused to comply and appeared to be reaching into his pants.⁶⁸ The officers were unaware if he had been keeping any weapons concealed on his person, so for their own safety, Officer John Slezak, who had his taser displayed as a warning, then tased Bryant one time in drive-stun mode.⁶⁹ At that point, Bryant relaxed his muscles and the officers were able to confiscate the crack without conducting an anal cavity search.⁷⁰ All of the proceedings were recorded on a soundless, poor quality closed-circuit television recording, on which the plaintiff—and ultimately the

⁶³ See *id.* at 552 (citations omitted) (“Today, it is again necessary to reiterate the longstanding principle that ‘clearly established law’ should not be defined ‘at a high level of generality.’ As this Court explained decades ago, the clearly established law must be ‘particularized’ to the facts of the case. Otherwise, ‘plaintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.’ The panel majority misunderstood the ‘clearly established’ analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment.”).

⁶⁴ See *id.* at 551 (citations omitted) (“In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. The Court has found this necessary both because qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial.”).

⁶⁵ Brief for Defendant-Appellant at 1, *Bryant v. Meriden Police Dep’t*, No. 3:13-cv-449(SRU) (D. Conn. Aug. 7, 2017).

⁶⁶ *Id.* at 6.

⁶⁷ *Id.* at 27.

⁶⁸ *Id.* at 6.

⁶⁹ *Id.* at 7.

⁷⁰ *Id.* at 6–7.

judge—relied heavily in making their case.⁷¹ Bryant sued nine officers and the Meriden Police Department for, *inter alia*, excessive force and unreasonable search.⁷²

At trial the remaining defendants were six Meriden police officers, including Officers K. Egan and John Slezak.⁷³ Qualified immunity was not raised prior to trial due to remaining material issues of fact regarding the reasonableness of the force used.⁷⁴ Defendants and plaintiff presented conflicting testimony during trial with regard to the number of tasings and the extent of the strip-search.⁷⁵ Having clearly credited the defendants' testimony, the jury returned a verdict in favor of the officers on all counts brought by plaintiff at trial.⁷⁶

On March 31, 2017, the court issued a thirty-three-page opinion granting plaintiff's post-verdict Rule 59 motion for a new trial on the count of excessive force against Officers K. Egan and John Slezak.⁷⁷ The court recounts the evidence submitted during trial, continuously repeating that the jury had the right to determine the credibility of every shred of evidence, with the exception of the evidence submitted in defense against the excessive force claim.⁷⁸ The court states that it "should avoid disturbing a jury's evaluation of a witness's credibility," yet goes on to disturb the jury's evaluation of the officers' testimonies regarding their fear for their safety in the holding cell, which defendants submitted as justification for the use of force.⁷⁹

⁷¹ See *id.* at 4–5 n.3 (“[T]he court relied heavily on the video,” and, “[t]hat erroneous conclusion was flatly contradicted by the defendant’s trial testimony. . . .”); see also *Bryant v. Meriden Police Dep’t*, No. 3:13-cv-449 (SRU), 2017 WL 1217090, at *11 (D. Conn. Mar. 31, 2017) (“The video confirms that Bryant posed no threat to the officers individually or collectively while handcuffed in the holding cell.”), *appeal filed*, 2d Cir. Apr. 17, 2017; *id.* at *12 (“The closed-circuit video shows no evidence that Bryant offered any degree of active resistance at any time. Though the officers testified that they feared he had something in his pants that he was trying to access, there is no evidence that they reasonably believed Bryant to be in possession of a weapon.”).

⁷² *Bryant*, 2017 WL 1217090, at *2.

⁷³ *Id.*

⁷⁴ It should be noted, however, that plaintiff never filed a motion for summary judgment, which the court at one point indicated could have been sustained and granted based on the closed-circuit video alone. See *id.* (“Bryant did not move for summary judgment, so I had no occasion to consider whether the officers’ use of force against Bryant was unreasonable as a matter of law.”).

⁷⁵ See *id.* at *3 (explaining the parties’ competing testimonies—Bryant claims he was tased more than once and that Officer Egan inserted his fingers into Bryant’s anal cavity, while the Officers assert (and the Taser report indicates) that Bryant was tased only once, and that they were able to recover the bag of crack without conducting a cavity search).

⁷⁶ Judgment, *Bryant v. Meriden Police Dep’t*, No. 3:13-cv-449(SRU) (D. Conn. May 9, 2016).

⁷⁷ *Bryant*, 2017 WL 1217090.

⁷⁸ *Id.* at *4–5.

⁷⁹ See *id.* at *5, *11 (glazing over the serious nature of Bryant’s offense by characterizing it as “simple possession of narcotics”). Bryant was charged with, *inter alia*, Possession of Narcotics with Intent to Sell within 1500 feet of a School, and Assault on a Police Officer. Brief for Defendant-Appellant, *supra* note 65, at 21 n.17.

The court also considers the defense of qualified immunity, which was raised in the defendant's opposition to plaintiff's Rule 59 motion.⁸⁰ The court unilaterally denied qualified immunity as a defense for Officers Egan and Slezak, despite the fact that: 1) the jury returned a verdict stating that no violation of the law had occurred during the altercation,⁸¹ and 2) the court had denied defendants' request to submit special interrogatories to the jury along with the verdict form to help make a qualified immunity determination in the event that plaintiff was successful in establishing a constitutional violation. Effectively, because defendants were successful in obtaining a jury verdict at trial, a qualified immunity analysis was never necessary. But once the court granted the new trial and defendants tried to raise qualified immunity, the court refused to award it because he disagreed with the *fact* that no violation had occurred, and personally believed it to have been unreasonable for the officers to have believed their actions were lawful.

The court erred in its decision that the jury's verdict on the taser claim was against the weight of the evidence and that the officers were not entitled to qualified immunity.⁸² First, the facts upon which the jury relied to make its credibility determinations were effectively ignored by the court. Instead, the court used what it regarded as "undisputed facts" to conduct its *Graham* analysis and determine that the taser use violated the plaintiff's Fourth Amendment rights as a matter of law.⁸³ The court's "clearly established law" analysis was flawed because it used pepper spray cases to assert that the law on taser use was clearly established.⁸⁴ It used a dissimilar case to attempt to make this argument because, at the time of the incident, no case on point existed to make it undeniable that the law was established with regard to Taser use.⁸⁵ Further, the court gave too much weight to the video evidence, which it claimed was almost dispositive of the issue at hand.⁸⁶

⁸⁰ *Bryant*, 2017 WL 1217090, at *14.

⁸¹ Qualified immunity is not necessary if no violation has occurred, and even if a violation has occurred, qualified immunity is not precluded.

⁸² Brief for Defendant-Appellant, *supra* note 65, at 11–12.

⁸³ *Bryant*, 2017 WL 1217090, at *5.

⁸⁴ *See Bryant*, 2017 WL 1217090, at *15 (emphasis added) (“[T]he clearest statement of the law in the Second Circuit regarding the use of force *akin to that of a Taser* was *Tracy v. Freshwater*, 623 F.3d at 98. In *Tracy*, the Second Circuit held that it was objectively unreasonable for an officer to use *pepper spray* ‘mere inches away from the face of a defendant already in handcuffs and offering no further active resistance.’”).

⁸⁵ *See* Brief for Defendant-Appellant, *supra* note 65, at 34 (pointing out the flaw in the court's assertion that it was clearly established at the time of the incident that the use of force at issue was unlawful, by noting that the court does not follow up its bold statement with a citation to a Second Circuit or Supreme Court citation, thereby negating any possibility that the law could have been clearly established).

⁸⁶ *See id.* at 15 n.12 (“The district court's heavy reliance on the grainy, muted, holding cell video is misplaced.”); *see also Bryant*, 2017 WL 1217090, at *11 (emphasis added) (“[T]he videotape shows *conclusively* that Bryant posed no immediate threat to the officers or others at the time of the tasing.”).

The Second Circuit Court of Appeals heard oral arguments for *Bryant* in February 2018.

3. *Huaman v. Tinsley*

Huaman v. Tinsley began with a “troubled” truant boy refusing to go to his court-ordered psychological evaluation.⁸⁷ Since neither his mother nor a caseworker from the Connecticut Department of Children and Families (“DCF”) could get the boy to get dressed and leave the house, Officer Woodrow Tinsley from the East Hartford Police Department (“EHPD”) was sent to the house to assist.⁸⁸ After speaking with the boy, who remained uncooperative, Officer Tinsley took the boy by the arm and helped him up off the couch.⁸⁹ The boy refused to get dressed, so Officer Tinsley told him they would have to go with him dressed as he was.⁹⁰ On their way to the door, the boy not only began resisting, but began fighting with Officer Tinsley, kicking and punching him and bracing himself against the frame of the door, refusing to leave.⁹¹

Although there is conflicting testimony over the force used by Officer Tinsley after the boy began to fight him,⁹² the issue at hand centered on whether the initial use of force—Officer Tinsley taking the boy by the arm—was *per se* excessive.⁹³ After a jury trial, defendant Officer Tinsley was found not liable on all counts.⁹⁴ However, in (almost) unprecedented fashion, the court granted plaintiff’s Rule 59 motion for a new trial on the counts of false arrest, false imprisonment, malicious prosecution, and excessive force against Officer Tinsley.⁹⁵ And, the court did so in a similar way to how the court in *Bryant* went about doing so, issuing its own lengthy

⁸⁷ *Huaman v. Tinsley*, No. 3:13-cv-484(MPS), 2017 WL 4365155, at *1 (D. Conn. Sept. 28, 2017).

⁸⁸ *Id.*

⁸⁹ *See id.* at *5 (referencing testimony given by Officer Tinsley, who testified that the boy “assisted” him when he pulled on his arm to get him off the couch, and that he “started walking with” the officer towards the door).

⁹⁰ *Id.* at *4.

⁹¹ *See id.* at *5 (“[O]nce we got closer to the door he started to change his action and attitude and started to resist, and then he pushed up against the door [with his] hands on the door frame to keep himself from going out.”).

⁹² The boy’s mother gave testimony that Officer Tinsley had dragged her son to the door and was punching him, but Officer Tinsley denied this, stating that he was only encouraging the boy towards the door by his arm. *Id.* at *6. Given the verdict in the defendant’s favor, the jury credited the Officer’s testimony. *Id.* at *11.

⁹³ *See id.* at *13 (citation omitted) (“There was no justification for Tinsley to have used the force that he did [on the way from the couch to the door]; under these circumstances, any amount of force was excessive.”).

⁹⁴ *Id.* at *2.

⁹⁵ *Id.* at *18. This Rule 59 motion, like in *Bryant*, was pleaded in the alternative, attached to an improperly pleaded Rule 50(b) motion.

opinion in which it primarily relied on out-of-Circuit precedent to justify its decision.⁹⁶

The court erred in its analysis and decision in *Huaman* on the grounds that it, again, conducted a flawed “clearly established” inquiry—failing to properly apply *White v. Pauly*—and therefore the court’s decision on qualified immunity was improper. The court also mischaracterizes the events—usurping fact-finding power from the jury—by coming to opposite conclusions on factual issues and, as in *Bryant*, downplaying the danger posed by the plaintiff.⁹⁷ Following the court’s grant of a new trial, the *Huaman* parties have subsequently settled.⁹⁸

III. INCENTIVES AND REPERCUSSIONS OF RULE 59 END-RUNS

A. *Why Is This Happening?*

With every new trend comes a host of reasons for the change. The same can be said for the District of Connecticut’s repurposing of Rule 59 in the manner described *supra*. When conducting an evaluation as to how the effects of a phenomenon will play out, it is important to first consider what caused the change to occur. The causal factors in this case can be broken down in to three distinct categories: 1) pressures of the legal system itself, 2) judicial biases, and 3) judicial ambitions.

1. *The Pressures of the Legal System*

The nature of the judicial system as it currently stands not only fails to incentivize bringing cases to trial, but discourages doing so. Whether by disposing of a case pre-trial, or adding incentives to settle during trial, the pressures placed on parties by the system today all reduce the number of cases resolved by a jury verdict.⁹⁹ The prevalence of ADR, for example, has

⁹⁶ The court relied heavily on *State v. Davis*, 261 Conn. 553 (2002), a Connecticut Supreme Court decision, instead of any binding Second Circuit precedent—likely because there was no binding Second Circuit precedent on this issue. *Huaman*, 2017 WL 4365155 at *16.

⁹⁷ See *id.* at *14 (referring to the way in which Tinsley brought the boy to the door as “dragging” him from the couch and “prying his hands from the doorframe,”—the same way the boy’s mother characterized the events in her testimony, which the jury clearly discredited). The court further mischaracterizes the events by describing Officer Tinsley as “merely fac[ing] a child who did not want to attend an appointment,” *id.* at *13, conveniently ignoring the fact that this “child” weighed 200 pounds and was truant and uncooperative, *id.* at *18 n.1.

⁹⁸ Jesse Leavenworth, *East Hartford Settles Federal Complaint Against Cop*, HARTFORD COURANT (Feb. 7, 2018), <http://www.courant.com/community/east-hartford/hc-news-east-hartford-suit-settlement-20180207-story.html> [<https://perma.cc/BPB8-JPMP>]. The *Huaman* settlement directly illustrates the point of this Note, which is that the tactic of using Rule 59 to remove properly awarded jury verdicts only intensifies the pressure to resolve cases outside the courtroom, without the assistance of a jury of one’s peers.

⁹⁹ See Langbein, *supra* note 28, at 571 (footnotes omitted) (“Although the central dynamic in the disappearance of trial has been the substitution of discovery-induced settlements and dismissals, other

increased due to legislative requirements requiring federal district courts to implement systems that promote its use.¹⁰⁰

Arbitration and mediation grease judicial wheels by simultaneously resolving cases and lightening judge dockets.¹⁰¹ By participating in an arbitration or mediation, parties agree to seek an end to their dispute without pleading their case in front of a jury or a judge.¹⁰² These mechanisms offer benefits of expediency and, in the case of arbitration, finality, without shelling out the extreme costs normally associated with a full trial.¹⁰³ It is, therefore, hard to argue against the implementation of these avenues of dispute resolution. However, they contribute in great part to the declining number of cases that reach the trial stage, due simply to their nature.

Arbitrations in particular are routinely the result of many consumer disputes with larger companies. Cell phone service providers, for example, are notorious for using mandatory arbitration provisions in their customer contracts.¹⁰⁴ Therefore, not only are parties often *opting* for arbitration, but in many situations, they have no choice.¹⁰⁵ Arbitration clauses serve the purpose of either deterring a lawsuit altogether, or keeping the lawsuit from clogging up already overburdened judicial dockets. With judges and other judicial actors, including the parties themselves, increasingly using ADR, it is inevitable that the decline of jury trials will only continue.

Accepting this as true, it seems nonsensical for the judges to grant the Rule 59 motions in *Bryant* and *Huaman*, as the new trials would undoubtedly lengthen the case life and delay the efficiency of the system. Instead of looking for the quickest path to the end of the case, the court intentionally extended the process, *twice*. If it is true that judges try to minimize their docket load as quickly as possible, then it would make sense for both judges in these situations to have let the jury verdicts stand. Their proactive actions went against the norm—they defied the standard. However, this should not be viewed as an attempt to save the jury trial or promote active litigation.

factors have also been at work Judges have welcomed the case management role, which has enhanced judicial authority both in promoting settlement and in pretrial (non-trial) adjudication.”).

¹⁰⁰ See *id.* at 561 (discussing the legislature’s mandate enacted in 1998 which, in its accompanying findings, touts the benefits of ADR which include, “greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements”).

¹⁰¹ *Id.*

¹⁰² See *id.* (footnote omitted) (“Alternative dispute resolution programs of various sorts, notably arbitration and mediation . . . operate apart from the civil courts.”).

¹⁰³ *Id.*

¹⁰⁴ See *AT&T Mobility v. Concepción*, 563 U.S. 333, 352 (2011) (upholding the conscionability of class arbitration waivers in consumer contracts); see also Sanford M. Jaffe & Linda Stamato, *Private Justice: Losing Our Day in Court*, 34 ALTERNATIVES 163, 163 (2016) (“[Mandatory arbitration] has grown exponentially in the past two decades as the U.S. Supreme Court opened the floodgates with decisions like *AT&T Mobility v. Concepcion* People don’t seem to know or care about mandatory arbitration until they find they have signed contracts that require them to use it when they have a dispute with their cellphone provider, bank, nursing home, [or other consumer service providers].”).

¹⁰⁵ Jaffe & Stamato, *supra* note 104, at 163.

Rather, the new trials may have been an attempt to push the parties to *settle*, ensuring financial recovery for the plaintiffs, while keeping juror opinions out of it.

Settlements, like ADR proceedings, usually remove cases from court dockets more quickly than litigation.¹⁰⁶ However, the settlement process can be lengthy and contentious if both parties refuse to make concessions to reach a workable agreement amicably. Further, during the time that the parties are attempting to settle, the case remains on the judge's docket and continues to progress towards trial in the event that the settlement falls through.¹⁰⁷ However, settlements are often utilized both to avoid trial expenses and to keep the encounter productive rather than hostile. The drawback to settlement, though, is that in many situations, parties who may not actually be responsible for the damage that occurred may be forced to settle due to an inability to completely guarantee a success at trial. The unpredictable nature of trials turns the decision over whether to settle or try the case into a gamble that, for defendants whose pockets are limited, may not be worth the risk.

The use of Rule 59 in the manner described is akin to pushing ADR or settlement in the sense that it doubles down on the pressure to settle by raising the stakes for both parties. So, while it does not attempt to cut the legal process short as most other ADR mechanisms do, it accomplishes the same goal and outcome of preventing a jury from having the final say. As seen in *Huaman*,¹⁰⁸ and as can be speculated for *Bryant*,¹⁰⁹ therefore, the new trial orders likely served or will serve as a driving force to reach a settlement because clients' bills will only continue to increase. Since these disputes involve civil rights claims under 42 U.S.C. § 1983, the possibility of attorney's fees also looms in the background.¹¹⁰ The pressure on the officers—and the towns and cities that indemnify them—to settle before incurring additional attorney's fees of their own, as well as the fees of victorious adversaries, can be enough to force their hand despite the fact that a jury has already cleared them of liability. Since the judges in *Bryant* and *Huaman* indicated that each verdict in the defendants' favor was a "miscarriage of justice,"¹¹¹ it is not likely that either judge would allow

¹⁰⁶ See Langbein, *supra* note 28, at 561 ("Settlement of a civil dispute has material advantages over adjudication. Settlement is usually cheaper and faster . . .").

¹⁰⁷ See *id.* (stating that settlements only benefit the public, "so long as adjudication is preserved as a viable alternative . . .").

¹⁰⁸ *Huaman ex rel. J.M. v. Tinsley*, No. 3:13-cv-484 (MPS), 2017 WL 4365155 (D. Conn. Sept. 28, 2017).

¹⁰⁹ *Bryant v. Meriden Police Dep't*, No. 3:13-cv-449 (SRU), 2017 WL 1217090 (D. Conn. Mar. 31, 2017), *appeal filed*, 2d Cir. Apr. 17, 2017.

¹¹⁰ See 42 U.S.C. § 1988 (2012) ("In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . .").

¹¹¹ *Bryant*, 2017 WL 1217090, at *1; *Huaman*, 2017 WL 4365155, at *7.

additional defense verdicts to stand. This risk was too high for the *Huaman* parties, leading to the \$315,425 settlement.¹¹² In a *Hartford Courant* article that discusses the settlement, Town Council Chairman Rich Kehoe explains that, “given the potential for a significant verdict against the town, the Council decided it was in the best interest of the taxpayers to settle.”¹¹³ Only time will tell if *Bryant* will eventually result in the same outcome.

2. *Lack of Objectivity*

The second factor playing a role in the improper use of Rule 59 may be a lack of objectivity on the part of the court. The job of a judge—and particularly a federal judge—is to be an impartial, neutral body that will judge the *case*, not the *parties*.¹¹⁴ Judge Richard Posner notes that lawyers who seek judgeships know that they will be tasked with the job of being a fair arbiter of the law.¹¹⁵ He also, however, acknowledges that humans are imperfect, and that no one can ignore every encounter or experience they have had in their lives.¹¹⁶ Nor can judges who have tried many cases in the same field ignore trends or patterns they have witnessed over the course of their tenure.¹¹⁷ Humans cannot “think in a vacuum.”¹¹⁸ It is possible that, faced with situations in *Bryant* and *Huaman* that appeared unfair and unjust, the judges used their ability to order a new trial to make up for plaintiffs’ failures to properly plead their motions for judgment as a matter of law.

In a time of heightened scrutiny against police brutality and police use of force,¹¹⁹ the judges may have been—whether consciously or

¹¹² Leavenworth, *supra* note 98. The language within the settlement agreement itself stipulates that Officer Tinsley is not being held liable for the damage caused and that the settlement should not be construed as to indicate any such liability. *Id.* Therefore, the only discernable difference in detriment to Officer Tinsley between the original jury verdict and the settlement agreement is the fact that he (or rather, the Town of East Hartford) now owes *Huaman* over \$300k.

¹¹³ *Id.*

¹¹⁴ See RICHARD A. POSNER, *HOW JUDGES THINK* 88 (Harvard Univ. Press 2008) (footnote omitted) (discussing Aristotle’s concept of “corrective justice” and defining it as “judging the case rather than the parties” in an effort to live up to the blindfolded image of Lady Justice that serves as the symbol of the American judicial system).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 69.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See Carl Bialik, *Police Officers Say Scrutiny of Police Killings Has Made Their Job Tougher*, FIFTHIRTYEIGHT (Jan. 11, 2017), <https://fivethirtyeight.com/features/police-officers-say-scrutiny-of-police-killings-has-made-their-job-tougher/> [<https://perma.cc/W3JD-S6RM>] (highlighting hesitation on the part of police to “stop and question suspicious people” due to the heightened tension and public scrutiny placed on them in the wake of numerous high-profile deaths of African Americans at the hands of police officers); see also Mark Berman & Cleve R. Wootson, Jr., *U.S. Police Chiefs Blast Trump for Endorsing ‘Police Brutality’*, WASH. POST (July 30, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/07/29/u-s-police-chiefs-blast-trump-for-endorsing-police-brutality/?utm_term=.5a7079947c26 [<https://perma.cc/8JPL-M28P>] (discussing backlash against President Trump for stating that

unconsciously—inclined to remedy wrongs that they felt deserved both acknowledgement and curing. Though the “force” at issue in each case is vastly different and incomparable in terms of the amount used and the gravity of the situation, both were considered unreasonable by the presiding judges.¹²⁰ When faced with a situation where a plaintiff was making a claim that a sworn officer of the law had abused his power and used excessive force, it is easy to see how a judge might struggle to find in favor of the officer, giving the “victim” nothing in return. However, as Posner posits in his discussion about reasons for apparent judicial bias, “[i]f an arresting offer says one thing and the person he arrested says the opposite, the judge’s decision as to which one to believe is likely to be influenced by the judge’s background.”¹²¹ It is no fault of a judge to be human. The fault lies in situations where a judge allows his background and experiences to justify overriding the consensus of a group of citizens gathered as a jury, and to say that his experiences are more instructive than the collective experiences of those chosen to serve.

3. *Judicial Ambitions*

The third possible cause of the unprecedented decisions emerging from the District of Connecticut could be judicial aspiration to a higher bench. These rulings may have been nothing more than attempts to bolster profiles for when appointments to the Second Circuit Court of Appeals are made. Though all federal judges have lifetime appointments, the judicial system keeps incentives in place to make sure judges do not become lazy.¹²² For example, the “six-months” list—more formally the Civil Justice Reform Act Report¹²³—uses a system of “name and shame”¹²⁴ to show the judicial community which judges have motions pending on their docket for longer than six months.¹²⁵ Though there are no punishments for ending up on the list, judges still feel pressure to stay off it for reputational purposes.¹²⁶ Much

police officers “rough[] up” people who get arrested because it appears to be an endorsement of police brutality).

¹²⁰ *Bryant v. Meriden Police Dep’t*, No. 3:13-cv-449(SRU), 2017 WL 1217090, at *14 (D. Conn. Mar. 31, 2017) (“[I]t was against the weight of the evidence for a jury to find that Slezak’s use of the taser was reasonable under the circumstances.”), *appeal filed*, 2d Cir. Apr. 17, 2017; *Huaman ex rel. J.M. v. Tinsley*, No. 3:13-cv-484(MPS), 2017 WL 4365155, at *13 (D. Conn. Sept. 28, 2017) (“[U]nder these circumstances, any amount of force was excessive.”).

¹²¹ POSNER, *supra* note 114, at 69.

¹²² *See id.* at 142 (discussing how reputational pressures and possibilities of being promoted serve as incentives to keep judges motivated to produce quality work).

¹²³ 28 U.S.C. § 476 (2012).

¹²⁴ *See Name and Shame*, CAMBRIDGE ENGLISH DICTIONARY (2018) (“[T]o publicly say that a person, group, or business has done something wrong[.]”).

¹²⁵ *See* POSNER, *supra* note 114, at 140–41 (“Many federal district judges are sensitive about the quarterly statistics . . . that show how many cases a judge has had under advisement for more than a specified length of time . . .”).

¹²⁶ *Id.* at 141.

of the power of a judge stems from his reputation and credibility, which he gains through his years of practice.¹²⁷

Though most judges are content laboring “in obscurity,”¹²⁸ it is inevitable that some will aim to gain celebrity.¹²⁹ The judges we quote and remember by name are those who drafted biting dissents, produced quotable interpretations of the law, and defied normative standards.¹³⁰ Judges who have their sights set on a higher seat may, therefore, try to make a name for themselves by being trendsetters. Critics of this sort of judicial activism base their arguments on the notion that unelected judges striking down publicly supported laws and policies thwart popular sovereignty,¹³¹ but David R. Dow compares so-called judicial activists to “prophet[s]” who simply saw something before any other had the chance, and made it known.¹³² *Bryant* and *Huaman* could possibly be these judges’ attempts to “prophesize” themselves, and would therefore explain their departures from the norm. At the time of the *Bryant* decision, no similar fact pattern had been considered by any district or circuit court in the United States, including Connecticut and the Second Circuit.¹³³ Therefore, the eventual resolution of *Bryant* will be instructive, particularly in the wake of the *Huaman* settlement.¹³⁴

B. *So What?*

Many aspects of our legal system have changed since its inception. Procedurally, the Federal Rules are revised periodically, bringing about slow but steady change.¹³⁵ Practically, uncodified standards of decorum shift as well.¹³⁶ With regards to the Rule 59 avenue opening for judges to circumvent improper pleadings and jury decisions, the fluid nature of the judiciary begs

¹²⁷ See *id.* at 140 (“People care about their reputation even when it is not a potential source of tangible rewards. Rank orderings and prizes have psychological effects distinct from any career effects of being singled out from one’s fellows.”).

¹²⁸ *Id.* at 61–62.

¹²⁹ *Id.*

¹³⁰ The late Justice Antonin Scalia, for example, is well known for his sharp dissenting opinions.

¹³¹ DAVID R. DOW, AMERICA’S PROPHETS: HOW JUDICIAL ACTIVISM MAKES AMERICA GREAT 81 (2009).

¹³² *Id.* at 10.

¹³³ *Bryant v. Meriden Police Dep’t*, No. 3:13-cv-449(SRU), 2017 WL 1217090 (D. Conn. Mar. 31, 2017) *appeal filed*, 2d Cir. Apr. 17, 2017. This is made clear by the court’s need to use a pepper spray case to try and show clearly established law.

¹³⁴ See Brief for Defendant-Appellant, *supra* note 65, at 20 (“[T]he lower court . . . simply jumped to the legal conclusion that ‘[t]he use of a taser constituted a significant degree of force’ as a matter of law. No Second Circuit precedent supports this blanket proposition . . .”)

¹³⁵ For example, the last amendment to the FRCP was made to Rule 4 in 2017. *Current Rules of Practice & Procedure*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/current-rules-practice-procedure> [https://perma.cc/W346-X3SY] (last visited Mar. 9, 2018).

¹³⁶ See Anderson, *supra* note 3, at 103 (describing the abrasive litigation style of attorney Spot Mozingo, and commenting that though he was a fabulous lawyer, his argument style and language “may not pass muster” in today’s courtroom, whereas it was normal behavior in the 1960s).

the question of, “so what?”—change is a part of the system, after all. Would it really be that terrible for this shift to gain a foothold? To some, the answer is likely no. As Stephan Landsman points out in his chapter of *World Jury Systems*, in most other countries that utilize juries, the judge in those systems has more power over his jury and more control over directing how that jury understands and weighs the evidence of the case, than that of the United States federal judge.¹³⁷ Why, then, should it matter if this new precedent is established, when United States judges would, even after its legitimization, still wield less power over juries than judges do globally? It is a hard question to answer at first pass. However, if this trend becomes commonplace and evolves from being just a trend to being a routine tactic used by plaintiffs and defendants alike, it could have serious repercussions.

1. *Encouraging Settlement*

Perhaps the most obvious result of this tactic being given precedential weight by a Second Circuit affirmation would be that the already-pressing encouragement to settle cases would increase exponentially. Lawyers already feel pressure to settle cases as quickly as possible, due in part to judges’ desires to clear their crowded dockets.¹³⁸ The pressure also comes from the risks inherent to presenting evidence to a jury for deliberation.¹³⁹ The essence of the U.S. jury is that it humanizes an otherwise “mechanistic” and procedural legal process of applying precedent to facts and determining an outcome.¹⁴⁰ It therefore provides attorneys with the opportunity to test their luck and skill by foregoing settlement and opting for a trial—if they can win the jury, they can win their case. Expanding the instances in which Rule 59 can be used to take a verdict away from a jury diminishes this opportunity, and would effectively make the risk of choosing trial over settlement too high to justify.

In instances that involve police officer defendants, specifically, the pressure will be even heavier. Since the two cases that have followed this procedural anomaly thus far have involved claims of excessive force against Connecticut town police officers,¹⁴¹ it is likely that if the trend is to continue, it will do so in narrowly-similar situations at first, before being expanded to less similar fact patterns. How, then, are officers supposed to defend themselves from minor and baseless claims when there is a new dagger

¹³⁷ Vidmar, *supra* note 14, at 41–42.

¹³⁸ See POSNER, *supra* note 114, at 141 (describing federal district judges’ sensitivity to pressures placed on them to maintain efficient dockets).

¹³⁹ Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375, 375 (2011).

¹⁴⁰ See Vidmar, *supra* note 14, at 1 (“Juries inject community values into the formal legal process, and thus they can bring a sense of equity and fairness against the cold and mechanistic application of legal rules.”).

¹⁴¹ The officers involved in the *Bryant* case worked for the City of Meriden, and the officer in *Huaman* worked for the Town of East Hartford.

hanging over their heads, waiting to fall and sever their chances at avoiding payments to a plaintiff who, per a jury's judgement, should not be entitled to any relief? When a judge has not only the audacity, but also the precedential authorization to flip a jury verdict based on either his own preconceptions of the parties involved, or his own desire to administer punishment where *he* sees it fit, it would be hard to imagine a defense team that would willingly risk not only enduring one trial, but who would do so knowing any verdict in their favor would likely be taken from the jury by the judge, *in the interest of justice*. Settlement, therefore, would become an almost automatic response in these situations, which down the road could result in a system abused by any arrestee to punish an officer who was only doing his or her job by taking the suspect into custody.

It is likely that qualified immunity would effectively be eradicated in cases of excessive force if settlement becomes the go-to resolution in these situations. Since qualified immunity can only be raised in the trial setting,¹⁴² parties forced into settlements due to the likelihood of a jury verdict override will be precluded from having the opportunity to utilize this defense. Would-be-victorious defendants will have no choice but to pay settlement money instead of being shielded from both damages and suit, purely because the system designed to protect police officers and allow them to do their job without hesitation has been overridden by a judicial power that can, and will, strip them of their shield. The *Huaman* settlement, resulting in the Town of East Hartford paying plaintiff over three hundred thousand dollars, shows that this threat is not just speculation—it is beginning to play out in actuality.

2. *Forum Shopping and Safety*

The use of Rule 59 to bypass a jury verdict in a § 1983 case has, thus far, only occurred in the District Court for the District of Connecticut.¹⁴³ It is not possible to say at this juncture whether this will begin to occur in other circuits. If it does not, and the Second Circuit becomes an outlier by either affirming or denying to hear *Bryant* on jurisdictional grounds, it will be interesting to see if the Supreme Court decides to resolve the split. With the Supreme Court only granting certiorari to around 100 of the 7,000 cases for which it receives petitions each year,¹⁴⁴ however, it is unlikely that this issue would be granted cert. Over the last few years, the Supreme Court has already issued rulings on cases that affect police officers and qualified

¹⁴² See 59 AM. JUR. 3D *Proof of Facts* § 291 (2000) (defining qualified immunity as an affirmative defense).

¹⁴³ *Bryant v. Meriden Police Dep't*, No. 3:13-cv-449(SRU), 2017 WL 1217090 (D. Conn. Mar. 31, 2017), *appeal filed*, 2d Cir. Apr. 17, 2017; *Huaman ex rel. J.M. v. Tinsley*, No. 3:13-cv-484(MPS), 2017 WL 4365155 (D. Conn. Sept. 28, 2017).

¹⁴⁴ *About the Supreme Court*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about> [<https://perma.cc/G2AJ-DPNF>].

immunity, making clear that they are fed up with circuit courts misapplying the doctrine.¹⁴⁵ The Supreme Court may decide not to address this particular issue simply because they have handled similar cases recently. If a circuit split develops, therefore, attempts to forum-shop could become more frequent in situations where the new procedure would be a game-changer. Plaintiffs who believe they could state enough of a claim to get a jury verdict flipped would attempt to file suit in districts—like the District of Connecticut—where this tactic has roots. This, in turn, will create an environment in which Connecticut town police officers will be hesitant to take *any* action, in order to avoid being pinned against a legal wall and forced to pay settlement money for something as small as an allegedly too-tight handcuffing.¹⁴⁶ Inconsistencies in the application of Rule 59 could therefore decrease the quality of police forces in districts where this circumvention tactic has been successful, which in the long term could affect the safety of that district’s citizenry.

3. *Elimination of Civil Jury Trials*

The least likely, yet arguably most damaging outcome of this trend gaining a foothold would be the elimination of the civil jury trial altogether. After all, if a judge is going to make a decision based on his own preconceptions and assessments anyway, why bother with the charade of a jury trial? We might as well do away with it altogether. It could never happen overnight, of course. The outrage that would ensue following a formal, public declaration eliminating the option for a jury trial would likely mirror that which occurred during the colonial era when the drafters of the Constitution voiced their opinions that jury trials, “although valuable . . . might not be essential, especially in civil cases.”¹⁴⁷ The Anti-Federalist threats to reject the Constitution entirely on the basis of its failure to guarantee a civil jury trial ultimately led to the Seventh Amendment.¹⁴⁸ As a result of television programs like *Law & Order*, lessons taught in U.S. History and Civics classes, and general notions about what it means to be an American, the public holds the idea of having a trial by jury near and dear to its heart.¹⁴⁹ Citizens who are not involved in the legal system, especially,

¹⁴⁵ See *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (citations omitted) (“Today, it is again necessary to reiterate the longstanding principle that clearly established law should not be defined at a high level of generality.”).

¹⁴⁶ See *Sharnick v. D’Archangelo*, 935 F. Supp. 2d 436, 442 (D. Conn. 2013) (involving a dispute over whether or not handcuffs were correctly placed on an arrestee, who argued that improper handcuffing technique resulted in injury to his wrist—despite numerous contradictions throughout his testimony).

¹⁴⁷ See *Landsman*, *supra* note 16, at 385 (referencing THE FEDERALIST NO. 83 (Alexander Hamilton)).

¹⁴⁸ *Id.* at 385–86.

¹⁴⁹ A survey conducted by the American Society of Trial Consultants, in collaboration with the NYU School of Law Civil Jury Project, determined that after asking a “large sample size of U.S. Citizens

would have no way of knowing how new procedures and tactics are shaping, and effectively negating, the use of juries to a point where they may as well not be there at all.¹⁵⁰ Therefore, a formal elimination of jury trials would appear to be a drastic transgression on American liberty to the unsophisticated consumer of modern day hype-media.

However, the elimination of the jury trial in more quiet fashion is not precluded. Parties may soon begin to opt for bench trials after figuring that if a judge is going to steal a verdict from the jury, they may as well skip the jury step and let the judge be the fact-finding body from the beginning. Parties may also simply give into the pressures placed on them and settle, as discussed above.¹⁵¹ The *de facto* elimination of jury trials by avoiding their use could render the deliberative body a thing of the past; a fossil, left to be admired by future historians who will wonder how and why juries were ever used in civil cases in the first place.

4. *Or Maybe, More Efficiency?*

It is possible that I am over-inflating the doom-and-gloom aspect of the changes that would result from the *Bryant* ruling being written into precedent. It is possible that *Bryant* and *Huaman* are isolated incidents. Maybe the court's intentions are genuine and this change would be for the better.¹⁵² Perhaps this could actually result in a more efficient process that focuses on shortening the length of a legal case from the filing of the complaint to the closing of the file. If the jury trial is effectively eliminated, we as a society would be foregoing the opportunity to have civil disputes settled by neutral citizens. However, juries often create inefficiencies in instances when they cannot come to a decision, when they act inappropriately,¹⁵³ or when they use their appearance of neutrality to administer biased relief.¹⁵⁴ The alleged biases and criticisms that can be

from various demographic backgrounds," two-thirds of the respondents believed that the right to a civil jury trial was "somewhat to very important," though, shockingly, over 75 percent of respondents were unaware that civil jury trials are declining in frequency. ASTC CONSULTANT ADVISORS, PUBLIC SURVEY I: PUBLIC OPINIONS OF CIVIL JURY TRIALS 8 (2017), <http://civiljuryproject.law.nyu.edu/wp-content/uploads/2017/01/ASTC-CJP-Public-Survey-I-Public-Opinions-of-Civil-Jury-Trials-December-2017.pdf> [https://perma.cc/76GA-58HE].

¹⁵⁰ *Id.* at 4–5.

¹⁵¹ See Part III.A.1, *supra* (discussing the pressures the legal system places on parties to resolve cases prior to trial, either through settlement or ADR).

¹⁵² After all, the nature of a judgeship often results in hardworking judges who are not just seeking the path of least resistance. Judges take their position knowing they will be overworked, and many work long past their retirement eligibility date. Posner posits this may be because they enjoy working hard and find their position to be one of nobility. See POSNER, *supra* note 114, at 61–62.

¹⁵³ For example, ignoring their instructions or making decisions based on emotion and not facts.

¹⁵⁴ Novels like *To Kill A Mockingbird* and *A Time to Kill* comment on the prevalence of racial bias among juries during both the Jim Crow Era and modern day America. Though the trials were executed under the guise of fairness, the verdicts were anything but fair.

attributed to judges can often just as easily be applicable to juries, particularly in areas where jury-pool diversity is lacking.

The elimination of juries may very well streamline a process that many citizens utilize to resolve problems that cannot be disposed of otherwise. This could help remedy a major criticism of the legal system as it stands, which is the exorbitant cost of bringing a case.¹⁵⁵ With no jury, there is no need to charge hourly for events like the voir dire process,¹⁵⁶ and parties who win at trial—much like the defendants in *Bryant* and *Huaman*—would not be faced with the potential burden of having to pay for not one, but *two* trials when a judge decides that the jury made the wrong decision. If the judge is the main fact finder from the beginning, this problem would be eliminated entirely, and serious time and money would be saved on both sides of the aisle.

5. *Proposals*

While the elimination of the jury trial altogether is one way to resolve the issue at hand, it is clearly an extreme one. Instead, the judicial system should consider revising some of the ways it utilizes the jury and allows it to participate in the process. For example, some districts have begun to allow their juries to take notes during trial to prevent them from having to recall complex explanations of both events and law from memory over the course of the trial.¹⁵⁷ Other districts have even allowed jury members to submit written questions to the judge to clarify things they may not understand.¹⁵⁸ These implementations could create a greater probability of jury understanding, particularly in complex cases such as those involving police force and qualified immunity issues.¹⁵⁹ Critics of jury participation say these systems may be abused as a way for biases to gain a foothold in the

¹⁵⁵ See Scott Brister, *The Decline in Jury Trials*, 47 S. TEX. L. REV. 191, 207 (“Hundreds of years ago, trial by jury was cheaper than hiring a professional corps of judges. But today some argue it has become a system that it is simply too expensive to use.”).

¹⁵⁶ *Voir dire* is the process by which attorneys select jurors for their trial. FED. R. CIV. P. 47. *Voir dire* processes can take days, which could significantly increase a client’s legal bill.

¹⁵⁷ See Landsman, *supra* note 16, at 396 (“A number of judges and scholars have attacked the idea [of juror passivity] and have suggested that jurors should be encouraged to participate more actively in the trial process. To this end, many courts have embraced juror note taking.”).

¹⁵⁸ In 2015, jurors were permitted to question witnesses in 25 percent of civil jury trials based on a study of 1,673 state and federal trial courts across the country. Paula Hannaford-Agor, *But Have We Made Any Progress? An Update on the Status of Jury Improvement Efforts in State and Federal Courts*, NAT’L CTR. FOR STATE COURTS (NCSC) CTR. FOR JURY STUDIES 3, 7 (2015), http://www.law.nyu.edu/sites/default/files/upload_documents/But-have-we-made.pdf [<https://perma.cc/V9YB-FNWR>].

¹⁵⁹ Shari Seidman Diamond, *How Jurors Deal with Expert Testimony and How Judges Can Help*, 16 J.L. & POL’Y 47, 64–65 (2007).

deliberations,¹⁶⁰ but the greater threat is arguably that of a jury that does not have a full grasp of the issue. When a judge thinks a jury has misunderstood or misanalysed, the judge may be more easily persuaded to grant a Rule 59 motion. But, if the jury is allowed to ask for clarification on its misunderstandings, the judge would have less leeway to claim the jury made a mistake.

Additionally, courts could require that in qualified immunity cases, each jury must answer special interrogatories with regards to the factual reasonableness determination of the qualified immunity analysis along with the verdict form, regardless of who their verdict favors. Doing so would eliminate any speculation as to what the jury must have considered in arriving at their verdict decision. This would eliminate the possibility of the qualified immunity procedural catch-22 seen in *Bryant* and *Huaman*, in which the judge—lacking a jury determination on reasonableness because the original verdicts favored the defendants—was able to inject his own view of reasonableness into his analysis.¹⁶¹ Mandating special interrogatories upfront would bolster the qualified immunity doctrine, and could help revitalize the legitimacy and importance of the jury trial.

CONCLUSION

A frustrating yet exciting aspect of the legal system is its unpredictability. The truth of the matter is that no one can accurately say what will become of the jury trial until it happens. Until then, one can only speculate as to the many paths this journey could take. The vanishing jury trial is far from a new phenomenon, but the way in which we think about it as a legal society is evolving. No longer is it fueled simply by a desire for efficiency and a push to use alternative forms of dispute resolution, but it now is being aided from the other end by judges who seek to extend the trial process by granting new trials in the face of verdicts with which they disagree. How can a jury trial system be eliminated by both streamlining and lengthening forces, simultaneously? The pushing and pulling of *all* actors contributes to the unpredictability that frustrates the efforts of parties who rely on predictable outcomes to plan the best strategy. This unpredictability will undermine the jury trial system to a point where its effective eradication is likely imminent.

As for establishing precedent, the future of civil jurisprudence may very well turn on the eventual resolution of *Bryant*. Ultimately, the Second Circuit could decide to reverse the decision of the District Court in light of

¹⁶⁰ See Landsman, *supra* note 16, at 396 (explaining the risk of allowing jurors to ask questions as “jurors [] com[ing] to see themselves as advocates or seek[ing] answer to improper or prejudicial questions.”)

¹⁶¹ See Brief for Defendant-Appellant, *supra* note 65, at 21–25 (pointing out repeated instances in which the court made improper factual conclusions while conducting its *Graham* factor analysis to determine the reasonability of the officers’ actions for the purposes of qualified immunity).

the improper considerations and assertions that were used to support the decisions on appeal. It could also decide to dismiss the pending appeal on jurisdictional grounds, since it is technically an interlocutory appeal and not one of a final judgment on the case's merits. However, if the Second Circuit affirms the decisions of the District Court, the legal community must watch closely to see if the prevalence of Rule 59 motions increases. The precipice on which we stand, waiting to see which way the wind blows, provides a vantage point from which we can witness the evolution of the U.S. legal system in real-time. We can only hope that this evolution is for the better.