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# Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism.

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ARTICLE

WHOSE EYES ARE YOU GOING TO BELIEVE? SCOTT V. HARRIS AND THE PERILS OF COGNITIVE ILLIBERALISM

*Dan M. Kahan, David A. Hoffman, and Donald Braman*

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## WHOSE EYES ARE YOU GOING TO BELIEVE? SCOTT V. HARRIS AND THE PERILS OF COGNITIVE ILLIBERALISM

Dan M. Kahan,<sup>\*</sup> David A. Hoffman,<sup>\*\*</sup> and Donald Braman<sup>\*\*\*</sup>

*This Article accepts the unusual invitation to “see for yourself” issued by the Supreme Court in Scott v. Harris, 127 S. Ct. 1769 (2007). Scott held that a police officer did not violate the Fourth Amendment when he deliberately rammed his car into that of a fleeing motorist who refused to pull over for speeding and instead sought to evade the police in a high-speed chase. The majority did not attempt to rebut the arguments of the single Justice who disagreed with its conclusion that “no reasonable juror” could find that the fleeing driver did not pose a deadly risk to the public. Instead, the Court uploaded to its website a video of the chase, filmed from inside the pursuing police cruisers, and invited members of the public to make up their own minds after viewing it. We showed the video to a diverse sample of 1350 Americans. Overall, a majority agreed with the Court’s resolution of the key issues, but within the sample there were sharp differences of opinion along cultural, ideological, and other lines. We attribute these divisions to the psychological disposition of individuals to resolve disputed facts in a manner supportive of their group identities. The Article also addresses the normative significance of these findings. The result in the case, we argue, might be defensible, but the Court’s reasoning was not. Its insistence that there was only one “reasonable” view of the facts itself reflected a form of bias — cognitive illiberalism — that consists in the failure to recognize the connection between perceptions of societal risk and contested visions of the ideal society. When courts fail to take steps to counteract that bias, they needlessly invest the law with culturally partisan overtones that detract from the law’s legitimacy.*

### INTRODUCTION

For Craig Jones, it had to be one of those sinking moments when a lawyer arguing a case before the Supreme Court realizes, with stomach-turning certitude, that all is lost. Not only were the Justices broadcasting in their questions at oral argument that they were disposed to rule against him. They were making clear that their inclinations rested on a foundation that simply does not admit of counter-argument: brute sense impressions.

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Jones was representing Victor Harris, a motorist who had been rendered a quadriplegic when police officer Timothy Scott deliberately rammed Harris's vehicle at the end of a high-speed chase, causing it to flip over an embankment and crash.<sup>1</sup> Jones's task was to defend the judgment of the Eleventh Circuit Court of Appeals, which had ruled that Scott was not entitled to summary judgment in Harris's suit for violation of his Fourth Amendment rights.<sup>2</sup> But within seconds of beginning to explain why there was a "genuine issue" of fact<sup>3</sup> on whether Harris's flight posed a danger to the public sufficient to justify use of deadly force against him, Jones was confronted with what Justice after Justice cited as dispositive evidence to the contrary: a videotape of the chase filmed from inside police cruisers.

"Mr. Jones," Justice Alito started, "I looked at the videotape on this. It seemed to me that [Harris] created a tremendous risk [to] drivers on that road."<sup>4</sup> "He created the scariest chase I ever saw since 'The French Connection,'" Justice Scalia immediately chimed in, provoking laughter throughout the courtroom.<sup>5</sup>

Probably even more dispiriting was the exchange that came next with Justice Breyer, whose vote Jones had likely been counting on for affirmance. "I was with you when I read . . . the opinion of the court below," Justice Breyer related.<sup>6</sup> "Then I look at that tape, and I have to say that when I looked at the tape, my reaction was somewhat similar to Justice Alito's."<sup>7</sup> As Jones attempted to offer a less damaging interpretation of the tape's contents, reinforced by an invocation of the jury's prerogatives as factfinder, Justice Breyer sharply retorted:

JUSTICE BREYER: . . . What am I supposed to assume? . . . I mean, I looked at the tape and that tape shows he is weaving on both sides of the lane, swerving around automobiles that are coming in the opposite direction with their lights on, goes through a red light where there are several cars that are right there, weaves around them, and there are cars coming the other way, weaves back, goes down the road.

. . . [A]m I supposed to pretend I haven't seen that? . . .

MR. JONES: Well, I didn't see that.

JUSTICE BREYER: You didn't see that?

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<sup>1</sup> See *Scott v. Harris*, 127 S. Ct. 1769, 1773 (2007).

<sup>2</sup> *Harris v. Coweta County*, 433 F.3d 807 (11th Cir. 2005), *rev'd sub nom. Scott*, 127 S. Ct. 1769.

<sup>3</sup> See FED. R. CIV. P. 56(c) (summary judgment appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law").

<sup>4</sup> Transcript of Oral Argument at 27, *Scott*, 127 S. Ct. 1769 (No. 05-1631).

<sup>5</sup> *Id.* at 28.

<sup>6</sup> *Id.* at 30-31.

<sup>7</sup> *Id.* at 31.

....

MR. JONES: But those are not the facts that were found by the court below in this —

JUSTICE BREYER: Well that's, that's what I wonder. If the court says that isn't what happened, and I see with my eyes that is what happened, what am I supposed to do?<sup>8</sup>

Later, during the rebuttal argument of opposing counsel (at which point a helpless Jones was reduced to watching mute), Justice Breyer continued, "I look at the tape and I end up with Chico Marx's old question with respect to the Court of Appeals: Who do you believe, me or your own eyes?"<sup>9</sup>

When the opinion was handed down some ten weeks later, a majority of Justices had indeed decided to "call it" as they "saw it." Acknowledging that although normally "courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion,'"<sup>10</sup> Justice Scalia, writing for an eight-Justice majority, stated, "[t]here is . . . an added wrinkle in this case: existence in the record of a videotape capturing the events in question."<sup>11</sup> "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment,"<sup>12</sup> Justice Scalia reasoned. "Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him."<sup>13</sup>

Somewhat inconveniently for the majority, however, one *Justice* who had watched the tape had in fact taken Harris's view. "[T]he tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue,"<sup>14</sup> Justice Stevens announced in dissent.

But having grounded its decision in its senses, the majority saw no need to resort to reasoned elaboration of its position to rebut Stevens's apprehension of facts "no reasonable juror" could have seen. Instead, creating the Court's first (and so far only) multimedia cyber-opinion, it supplied a URL for a digital rendering of the tape that had been up-

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<sup>8</sup> *Id.* at 44–45.

<sup>9</sup> *Id.* at 54.

<sup>10</sup> *Scott*, 127 S. Ct. at 1774 (alteration in original) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

<sup>11</sup> *Id.* at 1775.

<sup>12</sup> *Id.* at 1776.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1781 (Stevens, J., dissenting).

loaded to the Court's website. "We are happy," Scalia wrote, "to allow the videotape to speak for itself."<sup>15</sup>

Well, does the *Scott v. Harris*<sup>16</sup> tape speak for itself? If so, what does it say?

We decided to conduct an empirical study to answer these questions. We showed the video to a diverse sample of approximately 1350 Americans. We then asked them to tell us what *they* saw, and give us their views on the issues that the Court had identified as dispositive.

Our subjects didn't see things eye to eye. A fairly substantial majority did interpret the facts the way the Court did. But members of various subcommunities did not. African Americans, low-income workers, and residents of the Northeast, for example, tended to form more pro-plaintiff views of the facts than did the Court. So did individuals who characterized themselves as liberals and Democrats.

Individuals with these characteristics tend to share a cultural orientation that prizes egalitarianism and social solidarity. Various highly salient, "symbolic" political issues — from gun control to affirmative action, from the death penalty to environmental protection — feature conflict between persons who share this recognizable cultural profile and those who hold an opposing one that features hierarchical and individualistic values.<sup>17</sup> We found that persons who subscribed to the former style tended to perceive less danger in Harris's flight, to attribute more responsibility to the police for creating the risk for the public, and to find less justification in the use of deadly force to end the chase. Indeed, these individuals were much more likely to see the *police*, rather than Harris, as the source of the danger posed by the flight and to find the deliberate ramming of Harris's vehicle unnecessary to avert risk to the public.

Thus, the question posed by the data is not, as Justice Breyer asked, *whether* to believe one's eyes, but rather *whose* eyes the law should believe when identifiable groups of citizens form competing factual perceptions. That's a normative question, which this Article will also try to answer.

We will argue that the Court in *Scott* was wrong to privilege its own view. Although an admitted minority of American society, citizens disposed to see the facts differently from the *Scott* majority share a perspective founded on common experiences and values. By insisting that a case like *Scott* be decided summarily, the Court not only denied those citizens an opportunity, in the context of jury deliberations,

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<sup>15</sup> *Id.* at 1775 n.5 (majority opinion).

<sup>16</sup> 127 S. Ct. 1769.

<sup>17</sup> See generally JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (2d ed. 1986) (describing historical and contemporary disputes between cultural groups).

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to inform and possibly *change* the view of citizens endowed with a different perspective. It also needlessly bound the result in the case to a process of decisionmaking that deprived the decision of any prospect of legitimacy in the eyes of that subcommunity whose members saw the facts differently. Told that the law must be made in a fashion that rigorously excludes their understanding — which the opinion in *Scott* stigmatizes as being one only “unreasonable” people could hold — those who disagree with the outcome cannot divorce their assent to it from acceptance of their status as defeated outsiders. We won’t attempt to articulate a comprehensive theory of the function of the jury in promoting the democratic legitimacy of law. But we will argue that no normatively credible theory of this sort can be reconciled with the *Scott* Court’s inattention to the shared identity of citizens likely to form a different understanding of the risks depicted in the videotape.

This is not to say that we believe, necessarily, that there is *no* credible normative defense of the result in *Scott*. One might take the position, for example, that *Scott* and cases like it should be decided summarily not because the understanding of social reality associated with a particular cultural subcommunity is inherently “unreasonable,” but because allowing the law to credit it could result in inconsistent jury verdicts across jurisdictions or within jurisdictions over time. Alternatively, one might take the position that courts should not allow the law to credit a subcommunity’s view of the facts because doing so could result in bad practical consequences for law enforcement. Or one might argue that cases like *Scott* should be dismissed because the appropriateness of high-speed police chases should not be determined by courts, but by democratically accountable legislative bodies. We aren’t fully convinced by these arguments. But we are certain that *any* of these rationales would have been superior to the one the Court offered, because none would have incurred the cost to democratic legitimacy associated with labeling the perspective of persons who share a particular cultural identity “unreasonable” and hence unworthy of consideration in the adjudicatory process.

In addition to explaining how the Court got it wrong in *Scott*, we will also venture a diagnosis of *why* it did. The Court’s mistake, we’ll argue, reflects a type of decisionmaking hubris that has cognitive origins and that has deleterious consequences that extend far beyond the Court’s decision in *Scott*. Social psychology teaches us that our perceptions of fact are pervasively shaped by our commitments to shared but contested views of individual virtue and social justice. It also tells us that although our ability to perceive this type of value-motivated cognition in others is quite acute, our power to perceive it in ourselves

tends to be quite poor.<sup>18</sup> We thus simultaneously experience overconfidence in the unassailable correctness of the factual perceptions we hold in common with our confederates and unwarranted contempt for the perceptions associated with our opposites. When these dispositions become integrated into law — as we believe they did in *Scott* — they generate needless cultural and political conflict that enervates the law’s political legitimacy.<sup>19</sup> Judges, legislators, and ordinary citizens should therefore always be alert to the influence of this species of “cognitive illiberalism” and take the precautions necessary to minimize it.

This Article will present and elaborate on these various claims over the course of three Parts. Part I will look more closely at the issue and opinions in *Scott*, including the Court’s provocative invitation to readers to view the tape and decide for themselves whether the majority or dissent got it right. Part II will describe the theoretical underpinnings, the design, and the results of the empirical study we conducted in response to the Court’s invitation. Part III will then set forth our normative analysis of what the study results say about the correctness of the *Scott* decision, about the general impact of cognitive illiberalism in adjudication, and about the steps judges should take to try to counteract it.

## I. IT’S OBVIOUS!

We consider first the story of *Scott v. Harris*. It begins with a relatively familiar challenge — “catch me if you can” — on the roads of Georgia and ends with a very unusual one — “see for yourself” — in the pages of a Supreme Court opinion.

Just before 11:00 p.m. on March 29, 2001, on a two-lane highway in the Atlanta suburbs, the police detected Victor Harris speeding.<sup>20</sup> But when the officers attempted to make a traffic stop, Harris hit the gas pedal, fleeing at high speed.<sup>21</sup> Soon a car driven by Officer Timothy Scott joined the chase. Knowing little of the inciting situation, Scott had decided on his own initiative to help apprehend Harris.<sup>22</sup> Following a slow-speed interlude that included a side swiping in an empty shopping mall parking lot, the chase returned to the road, reaching speeds in excess of eighty-five miles per hour.<sup>23</sup> The pursuit

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<sup>18</sup> See Robert J. Robinson, Dacher Keltner, Andrew Ward & Lee Ross, *Actual Versus Assumed Differences in Construal: “Naive Realism” in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 414–16 (1995).

<sup>19</sup> See Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007).

<sup>20</sup> *Harris v. Coweta County*, 433 F.3d 807, 810 (11th Cir. 2005).

<sup>21</sup> *Scott*, 127 S. Ct. at 1772; *Harris*, 433 F.3d at 810.

<sup>22</sup> See *Harris*, 433 F.3d at 810.

<sup>23</sup> *Scott*, 127 S. Ct. at 1772–73; *Harris*, 433 F.3d at 810.



ended some six minutes and nine miles after it began, when Scott decided to strike Harris's rear bumper with his car, causing Harris, as intended, to spin out of control and crash.<sup>24</sup> Scott recognized that this maneuver involved a significant risk of serious injury or death to Harris,<sup>25</sup> who in fact suffered a broken neck that left him a quadriplegic.<sup>26</sup>

Harris filed a lawsuit under 42 U.S.C. § 1983 alleging that the use of admittedly deadly force to terminate the chase constituted an unreasonable seizure under the Fourth Amendment.<sup>27</sup> After the district court denied Scott's claim of qualified immunity,<sup>28</sup> Scott took an interlocutory appeal to the Eleventh Circuit Court of Appeals, which affirmed.<sup>29</sup> In addition to upholding the district court's ruling on immunity,<sup>30</sup> the court of appeals agreed that Scott was not entitled to summary judgment on the merits of Harris's Fourth Amendment claim:

None of the antecedent conditions for the use of deadly force existed in this case. Harris' infraction was speeding (73 mph in a 55 mph zone). There were no warrants out for his arrest for anything, much less for the requisite "crime involving the infliction or threatened infliction of serious physical harm." Indeed, neither Scott nor [a second officer] had any idea why Harris was being pursued. The use of deadly force is not "reasonable" in a high-speed chase based only on a speeding violation and traffic infractions where there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and Harris remained in control of his vehicle, and there is no question that there were alternatives for a later arrest.<sup>31</sup>

The court also specifically rejected Scott's argument that "Harris' driving must, as a matter of law, be considered sufficiently reckless to give Scott probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians".<sup>32</sup>

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<sup>24</sup> *Scott*, 127 S. Ct. at 1773; *Harris*, 433 F.3d at 810. Scott had been authorized by his dispatcher to use a so-called "Precision Intervention Technique" (PIT) maneuver, a collision technique that is designed to cause a pursued vehicle to spin out and stop, but not necessarily to crash. *See Harris*, 433 F.3d at 810-11. However, Scott (who was not trained in the PIT maneuver, *see id.*) decided that he was going too fast to execute the maneuver and that it was necessary to "ram[] his cruiser directly into Harris's vehicle." *Id.* at 811.

<sup>25</sup> *See Harris*, 433 F.3d at 814 n.8.

<sup>26</sup> *See id.* at 811; *Harris v. Coweta County*, No. 3:01CV148, 2003 WL 25419527, at \*2 (N.D. Ga. Sept. 25, 2003).

<sup>27</sup> *Scott*, 127 S. Ct. at 1773.

<sup>28</sup> *See Harris*, 2003 WL 25419527, at \*6.

<sup>29</sup> *See Harris*, 433 F.3d at 821. The court did, however, reverse in part, holding that a second defendant, the officer who authorized the less dangerous PIT maneuver, was entitled to summary judgment. *See id.* at 816-17.

<sup>30</sup> *See id.* at 821.

<sup>31</sup> *Id.* at 815 (citation omitted) (quoting *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985)).

<sup>32</sup> *Id.*

This is a disputed issue to be resolved by a jury. As noted by the district court judge, taking the facts from the non-movant's viewpoint, Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. . . . [B]y the time . . . Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.<sup>33</sup>

The Supreme Court granted certiorari. Framed by the questions presented for review and by the briefs, the case appeared to hinge on two issues. One was whether Scott was entitled to immunity from suit on the ground that any violation of Harris's Fourth Amendment rights was not based on law "clearly established" at the time of the chase.<sup>34</sup> The other was the relevance of *Tennessee v. Garner*,<sup>35</sup> which held that police could not use deadly force in the form of *shooting* a fleeing suspect "unless . . . the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."<sup>36</sup> The Eleventh Circuit had relied heavily upon *Garner*;<sup>37</sup> Scott argued for a less restrictive standard in the context of a high-speed police chase.<sup>38</sup>

But it was the chase videotape, an exhibit in support of the defendants' motion for summary judgment, that proved decisive. For the Court, the facts revealed in the video made it so indisputably clear that Scott was entitled to summary judgment that it found no need to resolve the immunity issue.<sup>39</sup> Justice Scalia wrote:

[W]e see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit.

<sup>33</sup> *Id.* at 815–16 (footnote omitted) (citations omitted).

<sup>34</sup> See Brief for Petitioner at 24, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631), 2006 WL 3693418 ("Scott's decision to use his push bumper to protect the lives of innocent persons from the risks created by Harris's dangerous driving did not violate 'clearly established' law. To find otherwise would reduce the requirement of 'fair and clear warning' that Scott's conduct violated the Fourth Amendment to no warning at all.")

<sup>35</sup> 471 U.S. 1.

<sup>36</sup> *Id.* at 3.

<sup>37</sup> See *Harris*, 433 F.3d at 816–17.

<sup>38</sup> See Brief for Petitioner, *supra* note 34, at 14 ("*Garner*'s framework should be reserved for cases in which the officer would know with certainty that his use of force will be deadly. Applying *Garner* to vehicle-contact cases such as this one would provide the police with very little guidance on when they can use direct contact to stop a fleeing vehicle.")

<sup>39</sup> The Court reasoned that "because the constitutional question with which we are presented is . . . easily decided," it was not necessary to "address the wisdom" of the disputed precedent, *Saucier v. Katz*, 533 U.S. 194 (2001), which generally requires the merits of a constitutional claim to be considered prior to any immunity claim. *Scott*, 127 S. Ct. at 1774 n.4. Although he agreed with the Court's assessment of the merits, Justice Breyer, in his concurring opinion, took issue with the Court's failure to consider Scott's immunity argument first. See *id.* at 1780–81 (Breyer, J., concurring).

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We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.<sup>40</sup>

Referring to the conventional rule that disputed facts should be construed in favor of the nonmoving party in evaluating a motion for summary judgment, Justice Scalia concluded that “[t]he Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.”<sup>41</sup>

The Court also found that the tape so manifestly demonstrated the “reasonableness” of the use of deadly force that there was no need to puzzle over how to adapt *Garner* to a car chase.<sup>42</sup> The Court evaluated the reasonableness of Scott’s actions by looking at several factors, starting first with the risks posed to the police, the public, and Harris by the chase:

Although there is no obvious way to quantify the risks on either side, it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase. It is equally clear that Scott’s actions posed a high likelihood of serious injury or death to respondent — though not the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head . . . .<sup>43</sup>

The Court then attempted to balance these factors by framing the issue as one of comparative fault:

So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person? We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent.<sup>44</sup>

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<sup>40</sup> *Scott*, 127 S. Ct. at 1775–76 (majority opinion) (footnotes omitted).

<sup>41</sup> *Id.* at 1776.

<sup>42</sup> *Id.* at 1778.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

The Court apparently viewed the conclusion of this “relative culpability” analysis as likewise so far beyond dispute that no contrary jury determination would be sustainable: “We have little difficulty in concluding it was reasonable for Scott to take the action that he did.”<sup>45</sup>

As noted, Justice Stevens, alone, dissented. Justice Stevens reported his own impression that “the tape actually confirms, rather than contradicts, the lower courts’ appraisal of the factual questions at issue.”<sup>46</sup> In what must have struck the majority as a strangely flattering rebuke, Justice Stevens, at eighty-seven the Court’s oldest Justice, attributed his colleagues’ contrary perceptions to their comparative youth: “Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways — when split-second judgments about the risk of passing a slow-poke in the face of oncoming traffic were routine — they might well have reacted to the videotape more dispassionately.”<sup>47</sup>

Just as strangely, if not as flatteringly, the Court majority did not counter Justice Stevens’s dissent with argument. As noted, the Court replied curtly, “[w]e are happy to allow the videotape to speak for itself.”<sup>48</sup> Answering Chico Marx’s question, Justice Breyer, in a concurring opinion, seconded the Court’s “see for yourself” rejoinder:

Because watching the video footage of the car chase made a difference to my own view of the case, I suggest that the interested reader take advantage of the link in the Court’s opinion and watch it. Having done so, I do not believe a reasonable jury could, in this instance, find that Officer Timothy Scott (who joined the chase late in the day and did not know the specific reason why the respondent was being pursued) acted in violation of the Constitution.<sup>49</sup>

Indeed, Justice Breyer and Justice Ginsburg, who also wrote separately, were arguably even more emphatic about the impact of the video. Whereas the majority opinion appeared to endorse a general rule that all uses of deadly force to end dangerous high-speed chases should be treated as constitutional,<sup>50</sup> these Justices stressed the need to review such pursuits case by case. “[T]he video,” Justice Breyer wrote, “makes clear the highly fact-dependent nature of this constitutional de-

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1781 (Stevens, J., dissenting).

<sup>47</sup> *Id.* at 1781 n.1.

<sup>48</sup> *Id.* at 1775 n.5 (majority opinion).

<sup>49</sup> *Id.* at 1780 (Breyer, J., concurring) (citation omitted).

<sup>50</sup> *See id.* at 1779 (majority opinion) (“[W]e lay down a . . . sensible rule: A police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”).

termination.”<sup>51</sup> Justice Ginsburg echoed this point in her separate concurrence:

I do not read today’s decision as articulating a mechanical, *per se* rule. The inquiry described by the Court is situation specific. Among relevant considerations: Were the lives and well-being of others (motorists, pedestrians, police officers) at risk? Was there a safer way, given the time, place, and circumstances, to stop the fleeing vehicle? “[A]dmirable” as “[an] attempt to craft an easy-to-apply legal test in the Fourth Amendment context [may be],” the Court explains, “in the end we must still slosh our way through the factbound morass of ‘reasonableness.’”<sup>52</sup>

For Justices Breyer and Ginsburg, then, the video mandated summary judgment not merely because it foreclosed reasonable disagreement about whether a dangerous chase had occurred, but also because, for them at least, it foreclosed reasonable disagreement on whether chasing Harris at all promoted public safety, whether Harris or the police were more culpable for the danger of the chase to the public, *and* ultimately whether the use of deadly force was justified in light of the risk that Harris posed.

## II. TAKING THE SCOTT CHALLENGE

For those familiar with the Court’s commitments both to reasoned justification and to safeguarding its exclusive power to interpret the Constitution, the invitation to members of the public at large to judge the correctness of the decision for themselves by simply *applying their senses* was a conclusion to the case every bit as spectacular as the metal-contorting crash that ended Harris’s flight from the police.<sup>53</sup> There is, however, an obvious problem with the Court’s invitation. In reporting that *he*, at least, saw something different, Justice Stevens was plainly advancing the claim that the tape doesn’t speak for itself — that *different* people, with different experiences, can *see different things* in it. No individual who watches the tape and comes away agreeing with the Court will be in a position to rebut Justice Stevens’s

<sup>51</sup> *Id.* at 1780 (Breyer, J., concurring).

<sup>52</sup> *Id.* at 1779 (Ginsburg, J., concurring) (alterations in original) (citations omitted) (quoting *id.* at 1777–78 (majority opinion)).

<sup>53</sup> Not surprisingly, this aspect of the Court’s decision has provoked debate in the legal academy. Compare Posting of Orin Kerr to The Volokh Conspiracy, <http://volokh.com/posts/1172720514.shtml> (Feb. 28, 2007, 22:23) (“The right answer is that Justice Breyer should believe his own eyes.”), with *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 222 (2007) (arguing that the Court’s analytical approach pushed it to make a bad ruling on an incomplete record), Jessica Silber, *Justices Taken in by Illusion of Film*, BALT. SUN, May 13, 2007, at 21A (“[A]ll film manifests a distinct point of view . . . . Films never speak for themselves . . . .”), and Posting of Dave Hoffman to Concurring Opinions, [http://www.concurringopinions.com/archives/2007/04/the\\_death\\_of\\_fa.html](http://www.concurringopinions.com/archives/2007/04/the_death_of_fa.html) (Apr. 30, 2007, 13:41) (“[E]ach Justice saw the risk of speeding through his or her own cultural prism.”). See generally Howard M. Wasserman, *Video Evidence and Summary Judgment: The Procedure of Scott v. Harris*, 91 JUDICATURE 108 (2008).

claim, because however clearly that person perceives things, the fact remains that she is able to see only what *she* sees and not what anyone else does. The testing method the Court proposes, in sum, is hopelessly solipsistic.

There is only one way we can think of to accept the *Scott* majority's proposal that its conclusion be tested by viewing the tape. It is to get a *large number* of people of diverse experiences and characteristics to watch it. If there are members of this group who do see things differently from the majority, one can then try to determine whether there is anything that seems to unite the former other than that they are simply "unreasonable."

That's what we decided to do. We conducted a study to see who sees what in the *Scott* tape and why. In this Part, we describe that study. We start essentially with the bottom line — a narrative account of what people of varying characteristics and backgrounds would likely *see* were they to watch the *Scott* tape. We then identify the social psychological theories that explain *why* one might expect certain defining characteristics to affect such individuals' perceptions of facts. Then we show how these theories informed the design and hypotheses of our study. Finally, we offer a more fine-grained reporting of the study results themselves, before summing up.

One point of clarification, however, must be stressed at the outset. Although our subjects were instructed to view the video from the perspective of a juror deciding the case, we do not understand the results of the study to indicate how a case like *Scott* would come out if it went to trial. Obviously, jurors in an actual case would be exposed to more evidence than just the video. They would also hear arguments from counsel. Most important of all, they would deliberate. They might conclude, on such a basis, to vote for a verdict contrary to their initial reaction to the tape, particularly if that reaction were equivocal. Our study is designed only to help evaluate the assertion that the tape "speak[s] for itself"<sup>54</sup> — and that what it says is so unequivocal that it leaves no room to "believe a reasonable jury could, in this instance, find that Officer Timothy Scott . . . acted in violation of the Constitution."<sup>55</sup>

#### A. *Four Members of the American Venire*

Imagine four Americans (Figure 1). Ron, 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

<sup>54</sup> *Scott*, 127 S. Ct. at 1775 n.5.

<sup>55</sup> *Id.* at 1780 (Breyer, J., concurring).

believes should be clearly delineated in all spheres of life. Politically, he identifies himself as a conservative Republican. Bernie, another white male, is a university professor who makes 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 supports government social welfare programs and regulations of every stripe. 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.” Finally, there is Pat. 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. If placed on a jury, apprised of the basic issues and law, and asked to watch the video in *Scott v. Harris*, what will these four individuals see on the tape, and how will the tape affect their views of how the case should come out prior to deliberating?

FIGURE 1. FOUR REPRESENTATIVE MEMBERS  
OF THE AMERICAN VENIRE



**Ron**



**Bernie**



**Linda**



**Pat**

Here is the answer. Ron will see exactly what the *Scott* majority saw: a very dangerous driver, whom the police correctly pursued from the outset and against whom they appropriately used deadly force. Pat will tend in the same direction, but with less certainty; in particular, Pat will be ambivalent about whether the risk to the public was worth the chase, but will conclude, fairly unequivocally, that terminating it with deadly force was warranted given the danger that Harris's flight posed.

Linda and Bernie, however, will feel quite differently. They will be fairly adamant that the police, after detecting that Harris was speeding, made a serious mistake in conducting a high-speed chase when he refused to pull over. They will tend to agree that the chase posed lethal risks to the public and the police, but in contrast to Ron and Pat, they will be somewhat equivocal in that judgment. They will not be equivocal about blame: they will perceive the police to be as culpable as Harris or even more culpable for the risk the chase created for the public. And they will be fairly strongly disposed to find that the police were *not* justified in using deadly force to terminate the chase in light of the danger Harris himself posed.

At least, those are the impressions they'll have before they start to exchange their views with one another and explain them in deliberations. In what follows, we identify the theoretical grounds from which to expect this initial array of perceptions and then turn to the details of the study that support this particular account of what individuals like these will likely "see" in the *Scott* tape.

### *B. Theoretical Background: Motivated Cognition of Legally Consequential Facts*

Why, to start, might we expect people with characteristics as diverse as Ron's, Linda's, Pat's, and Bernie's not to see "eye to eye" on the *Scott* video? There are a number of social psychological mechanisms that explain how the group identities and values associated with such characteristics influence cognition of facts. They form the theoretical basis for the design of our study and its hypotheses.

One of these mechanisms is the *culpable control model* of blame.<sup>56</sup> That theory starts with the premise — confirmed by a diverse body of research in psychology, anthropology, and linguistics<sup>57</sup> — that people are generally disposed to "blame" someone for an action only if they perceive that the putatively blameworthy agent made a *voluntary* choice to *act* in a manner that *caused* some *harm* or *injury*. Neverthe-

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<sup>56</sup> See generally Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOL. BULL. 556 (2000).

<sup>57</sup> See, e.g., *id.* at 556–57 (discussing previous research on blame).



less, experiments demonstrate that people's perceptions of the elements of this blaming template are highly sensitive to circumstances extrinsic to the template itself. In particular, people are much more disposed to *perceive* voluntariness, action, causation, and harm (as well as other conditions of blaming) when the putatively blameworthy agent is behaving in ways that defy social norms (perhaps by engaging in an interracial relationship or by using drugs), including norms contested across distinct subcommunities.<sup>58</sup> In effect, cognition of blame-relevant "facts" (volition, action, causation, harm) is *motivated* by the subconscious desire to form blame attributions that accord with moral evaluations of the agent's character or lifestyle.

A second theory is *identity-protective cognition*.<sup>59</sup> Individual well-being, material and emotional, is bound up with membership in various self-defining groups. Rejecting factual beliefs widespread within such a group can undermine individual well-being, either by threatening to estrange a person from his peers or by forcing that person to contemplate the social incompetence of those he identifies with. As a means of psychological self-defense, then, people tend to process information in a selective fashion that bolsters beliefs dominant within their self-defining groups.<sup>60</sup>

Finally, there is the *cultural cognition of risk*.<sup>61</sup> This theory posits that people tend to conform factual beliefs about risk to their cultural evaluations of putatively dangerous behavior. As a result of various cognitive mechanisms, people are motivated to believe that behavior they find noble is also socially beneficial (or at least benign) and behavior they find base is also socially harmful. For example, people who hold individualist values discount claims that commerce and industry harm the environment because they value markets and other forms of private ordering. People who hold egalitarian values, in contrast, readily credit claims of environmental risk, the widespread acceptance of which would justify restricting behavior — such as commerce and industry — that those people associate with inequalities in

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<sup>58</sup> See *id.* at 564; see also Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368 (1992).

<sup>59</sup> See generally Dan M. Kahan, Donald Braman, John Gastil, Paul Slovic & C.K. Mertz, *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465 (2007).

<sup>60</sup> See generally Joshua Aronson & Claude M. Steele, *When Beliefs Yield to Evidence: Reducing Biased Evaluation by Affirming the Self*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1151 (2000); Geoffrey L. Cohen, Roger Giner-Sorolla & Shelly Chaiken, *Selective Use of Heuristic and Systematic Processing Under Defense Motivation*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 84 (1997); Geoffrey L. Cohen, David K. Sherman, Anthony Bastardi, Lillian Hsu, Michelle McGoeys & Lee Ross, *Bridging the Partisan Divide: Self-Affirmation Reduces Ideological Closed-Mindedness and Inflexibility in Negotiation*, 93 J. PERSONALITY & SOC. PSYCHOL. 415 (2007).

<sup>61</sup> See generally Dan M. Kahan, Paul Slovic, Donald Braman & John Gastil, *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1083–87 (2006).

wealth. Alternatively, people who subscribe to hierarchical values impute risk to homosexuality, drug use, abortion, subversive speech, and other behaviors that defy the authority of traditional, stratified norms of behavior, whereas egalitarians and individualists reject these risk claims as specious.<sup>62</sup>

Combined, these theories furnish strong grounds to expect individuals of diverse identities and commitments — like Ron, Linda, Bernie, and Pat — to form different perceptions of the facts revealed by the *Scott* tape. The facts highlighted by Justice Scalia's analysis — how much care Harris was taking to avoid colliding with other vehicles,<sup>63</sup> how feasible it was for other drivers to pull to the side to avoid exposure to collision,<sup>64</sup> the relative harm of chasing Harris or breaking off the pursuit and letting him escape<sup>65</sup> — all relate to moral (and legal) attributions of blame. Perceptions of those facts, the culpable control model suggests, are likely to be motivated by extrinsic moral evaluations of the putatively blameworthy actors — Harris and the police.

Beliefs about the extent to which the police in general abuse their authority (particularly against minorities), and correspondingly the relative preponderance of licit and illicit reasons for attempting to avoid police encounters, vary across sociodemographic and political groups.<sup>66</sup> Identity-protective cognition thus suggests that people are likely to construe the facts depicted in the tape in a way that reinforces the beliefs that predominate among their peers.

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<sup>62</sup> See *id.* at 1086–87. This theory is amply supported by a growing body of empirical research. See, e.g., Karl Dake, *Orienting Dispositions in the Perception of Risk: An Analysis of Contemporary Worldviews and Cultural Biases*, 22 J. CROSS-CULTURAL PSYCHOL. 61 (1991); Hank C. Jenkins-Smith, *Modeling Stigma: An Empirical Analysis of Nuclear Images of Nevada*, in RISK, MEDIA, AND STIGMA: UNDERSTANDING PUBLIC CHALLENGES TO MODERN SCIENCE AND TECHNOLOGY 107 (James Flynn, Paul Slovic & Howard Kunreuther eds., 2001); Kahan, Braman, Gastil, Slovic & Mertz, *supra* note 59; Dan M. Kahan, Donald Braman, Paul Slovic, John Gastil & Geoffrey Cohen, *Cultural Cognition of the Risks and Benefits of Nanotechnology*, 4 NATURE NANOTECHNOLOGY (forthcoming Feb. 2009); Ellen Peters & Paul Slovic, *The Role of Affect and Worldviews As Orienting Dispositions in the Perception and Acceptance of Nuclear Power*, 26 J. APPLIED SOC. PSYCHOL. 1427, 1445 (1996); Dan M. Kahan, Donald Braman, Paul Slovic, John Gastil & Geoffrey L. Cohen, *The Second National Risk and Culture Study: Making Sense of — and Making Progress in — The American Culture War of Fact* (Yale Law Sch., Public Law Working Paper No. 154; George Washington Univ., Legal Studies Research Paper No. 370; George Washington Univ., Law School Public Law Research Paper No. 370, 2007) [hereinafter Kahan et al., *Risk and Culture Study*], available at <http://ssrn.com/abstract=1017189>.

<sup>63</sup> *Scott v. Harris*, 127 S. Ct. 1769, 1775–76 (2007).

<sup>64</sup> See *id.* at 1775.

<sup>65</sup> *Id.* at 1778–79.

<sup>66</sup> See DANIEL LEMPERT, BELIEF IN A JUST WORLD AND PERCEPTIONS OF FAIR TREATMENT BY POLICE (2007), available at <http://www.electionstudies.org/resources/papers/Pilot2006/neso12058.pdf> (reporting in Part I results of survey on perceived fairness of police toward criminal suspects). Cf. *Illinois v. Wardlow*, 528 U.S. 119, 132–34 (2000) (Stevens, J., concurring in part and dissenting in part) (noting community-specific reactions to avoidance of police).

Finally, the facts at issue relate to the risks posed by the parties to the chase. Consistent with the theory of cultural cognition, we can expect individuals to form risk perceptions that reflect the competing, culturally grounded affective responses a high-speed police chase is likely to evoke: from fear of those who defy lawful authority; to resentment of abuses of power by the police; to distrust of authority generally; to anger at apparent indifference to the well-being of innocent bystanders.<sup>67</sup>

### C. Study Design and Hypotheses

These understandings of the potential sources of motivated cognition suggest a relatively straightforward way to determine whether the *Scott* tape admits of competing interpretations. By showing the tape to a sufficiently large and diverse group of persons and soliciting their reactions to it, one can determine whether differences of belief on key issues vary across persons in patterns predicted by cultural cognition, identity-protective cognition, and the culpable control theory. As we explain in greater detail, this is how we proceeded.

1. *Sample.* — The study sample consisted of approximately 1350 individuals. The subjects were drawn randomly from a demographically diverse panel of some 40,000 online adult Americans assembled by Knowledge Networks for participation in scholarly public opinion analysis.<sup>68</sup> The sample was 51% male and 49% female; and 9% Hispanic, 6% African American, and 6% other minority. The mean age was 47, mean annual household income \$40,000 to \$49,000, and the mean education level was “some college.” The subjects participated in the study over a one-month period between late September 2007 and late October 2007.

2. *Stimulus.* — Subjects were exposed to a stimulus consisting of two parts. The first was a textual introduction. The introduction advised subjects that the point of the survey was to determine how they “would decide a real-life lawsuit if [they] were on the jury.” In addition to setting forth the nature of the suit — one brought by Harris al-

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<sup>67</sup> See generally Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741 (2008) (describing evidence of the role that affective states play in connecting risk perceptions to cultural values).

<sup>68</sup> Knowledge Networks is a leading firm in online opinion studies. Numerous studies have shown that the online samples and testing methods of Knowledge Networks yield results equivalent in reliability to conventional random-digit-dial surveys, and studies based on those samples and methods are routinely published in academic journals. See KNOWLEDGE NETWORKS, KNOWLEDGE NETWORKS BIBLIOGRAPHY: ARTICLES AND PRESENTATIONS BASED ON KN COLLECTED PANEL DATA, ANALYSIS, OR METHODOLOGY, available at <http://www.knowledgenetworks.com/ganp/docs/KN%20Bibliog%205-29-2007%20External.pdf>; J.M. Dennis, Methodological Information About Knowledge Networks for Reviewers, <http://www.knowledgenetworks.com/ganp/reviewer-info.html> (last visited Dec. 6, 2008).

leging that he had suffered injuries when Scott used “unreasonable force” to end a high-speed chase — the introduction set forth a list of facts on which “the parties agree.” The list consisted of facts not disputed by the parties when the case was before the Supreme Court:<sup>69</sup>

The police clocked Harris driving 73 miles per hour on a highway in a 55 mile-per-hour zone at around 11 pm.

The police decided to pursue Harris when Harris ignored the police car’s flashing lights and kept driving rather than pulling over.

The chase lasted around seven minutes and covered eight to nine miles.

The police determined from the license plate number that the vehicle had not been reported stolen.

Officer Scott joined the chase after it started. He did not know why the other officers had originally tried to stop Harris.

Scott knew that other police officers had blocked intersections leading to the highway but did not know if all of the intersections were blocked.

Officer Scott deliberately used his police cruiser’s front bumper to hit the rear of Harris’s car[,] hoping to cause Harris’s car to spin out and come to a stop.

Officer Scott knew there was a high risk that ramming the car in this manner could seriously injure or kill Harris.

Harris lost control, crashed, and suffered severe injuries, including permanent paralysis from the neck down.<sup>70</sup>

The second part of the stimulus consisted of the chase video. The video was identified as having been filmed from inside the pursuing police cruisers. It was also described as “key evidence” relating to facts on which the “[p]arties disagree.” Subjects were requested to “closely watch the video . . . just as [members of the jury in the case] would.”<sup>71</sup>

The video is approximately six minutes in length. It starts when the police activate their sirens and terminates with a scene of Harris’s flipped-over vehicle engulfed in thick smoke. The study video displayed an image comparable in size to the video uploaded to the Supreme Court website. Like the Supreme Court video, the study video also included sound, which consisted of radio communication between the pursuing cars and the police dispatcher. Shortly before Scott rams Harris’s vehicle, the dispatcher is heard issuing the instruction to “take him out.”

<sup>69</sup> *Scott*, 127 S. Ct. at 1772–73; Brief for Petitioner, *supra* note 34, at 2–5; Brief for Respondent at 12, *Scott*, 127 S. Ct. 1769 (No. 05-1631), 2007 WL 118977.

<sup>70</sup> The survey instrument is on file with the Harvard Law School Library.

<sup>71</sup> The study video can be accessed at <http://www.youtube.com/watch?v=DBY2y2YsmNo>.

The video shown to the subjects was actually a composite of two from the trial record, both of which were uploaded to the Supreme Court's website.<sup>72</sup> The two tapes were recorded by the two pursuing police cars, which, at around the midpoint of the chase, swap positions relative to the fleeing Harris. The study video consists of those portions of each tape recorded when the filming vehicle was the lead car in the chase and omits those portions of each recorded when the car filming was in the trailing position. It was necessary to combine the tapes in this fashion to keep the total running time of the study short enough to avert high dropout rates among study subjects. Because 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.

Like the tapes in the Supreme Court record, but unlike the file displayed on the Supreme Court website, the study tape was in color. As a result, it permitted subjects to observe the color of overhead traffic lights and also clearly to discern the tail lights (including the braking lights) of Harris's car and of vehicles passed during the pursuit. The black and white file displayed on the Supreme Court website, in addition to masking these pertinent details, contains myriad indistinct patches of bright or flashing light; in the color video, these flashes are revealed to be objects such as illuminated roadside street signs, lights in roadside structures, and the headlights of cars that are either pulled over, approaching the chase from an intersecting street, or traveling in the opposite direction. Beyond furnishing a more vivid (and potentially more chilling) depiction of the chase than the file uploaded to the Court's website, the study tape in this respect also more closely resembled the footage observed by the Justices themselves.

3. *Response Measures.* — On exactly which facts the Court understood the video to be dispositive in *Scott* is itself open to debate. Although Justice Scalia considered a range of issues — the degree of risk Harris's driving posed;<sup>73</sup> how to “weigh[] the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person”;<sup>74</sup> the “relative culpability” of Harris and the police for creating risk to the public<sup>75</sup> — his opinion could be read to indicate that the constitutionality of deadly force turns on only one fact: whether the police and the fleeing driver were involved in a “high-speed car chase that threatens the lives of in-

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<sup>72</sup> We were kindly supplied with the record versions of the tapes by Andrew Clarke, counsel for Harris.

<sup>73</sup> See *Scott*, 127 S. Ct. at 1775–76.

<sup>74</sup> *Id.* at 1778.

<sup>75</sup> *Id.*

nocent bystanders.”<sup>76</sup> Justices Breyer and Ginsburg, however, indicated that they did not understand the Court’s decision “as articulating a mechanical, *per se* rule.”<sup>77</sup> For them, the entire “inquiry described by the Court”<sup>78</sup> involved “highly fact-dependent” questions, the answers to which were “ma[de] clear” by a viewing of the video.<sup>79</sup> We decided to solicit our subjects’ reactions to the entire range of determinations that figured in the Court’s reasoning, both because the opinion was arguably ambiguous about which of them were matters of fact for the jury to decide and because the possibility that people might disagree about them after watching the video struck us as relevant to evaluating which of those facts *ought* to be ones for a jury in a case like *Scott*.

One of the key issues was the degree of risk that Harris’s driving posed. Justice Scalia used various formulations to characterize the degree of lethal danger that a jury would be required to find in a case like *Scott*.<sup>80</sup> “Great risk of death” struck us as the one most likely to be understood clearly and uniformly among the laypersons in our subject pool.<sup>81</sup> Accordingly, to assess our subjects’ perceptions of that risk, we asked them to indicate, on a six-point scale, their level of disagreement or agreement with these two statements:

During the pursuit, Harris drove in a manner that put members of the public at great risk of death.

During the pursuit, Harris drove in a manner that put the police at serious risk of death.

<sup>76</sup> *Id.* at 1779 (“[W]e lay down a more sensible rule: A police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.”).

<sup>77</sup> *Id.* (Ginsburg, J., concurring); *see also infra* p. 848.

<sup>78</sup> *Scott*, 127 S. Ct. at 1779 (Ginsburg, J., concurring).

<sup>79</sup> *Id.* at 1780 (Breyer, J., concurring).

<sup>80</sup> *See, e.g., id.* at 1775–76 (majority opinion) (“[T]he video . . . closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at *great risk* of serious injury.” (emphasis added)); *id.* at 1778 (“[I]t is clear from the videotape that respondent posed an *actual and imminent threat* to the lives of any pedestrians . . . , to other civilian motorists, and to the officers . . . .” (emphasis added)); *id.* at 1779 (“The car chase that respondent initiated in this case posed a *substantial and immediate risk* of serious physical injury to others; no reasonable jury could conclude otherwise.” (emphasis added)).

<sup>81</sup> Because the Court emphasized that the tape left no ground for reasonable disagreement on “the factual issue whether respondent was driving in such fashion as *to endanger human life*,” *id.* at 1776 (emphasis added), we interpret the Court’s references to the “risk of serious injury,” *id.* at 1772, 1776, and a “substantial and immediate risk of serious physical injury,” *id.* at 1779, as contemplating a degree of injury that would be life-threatening. To avoid the possibility that subjects would construe the term “physical injury” as extending to *non-life-threatening* harm, we chose not to use this phrase and instead to refer simply to “great risk of death,” which we judged would uniformly be understood to embrace the risk of life-threatening physical injury.

The majority opinion in *Scott* also evaluated the degree of risk the police created and its magnitude in relation to the risk posed by Harris. To assess our subjects' perceptions of that issue, we asked them to indicate their level of disagreement or agreement (again on a six-point scale) with this statement:

It just wasn't worth the danger to the public for the police to engage in a high-speed chase of Harris when he refused to pull over for speeding. Instead, they should have tried to find and arrest him later.

They were also asked to indicate their assessment of the "relative culpability"<sup>82</sup> of the police and Harris:

Please indicate how much you think the parties were at fault for the risk posed to the public by the chase: (1) the police were much more at fault than Harris; (2) the police were slightly more at fault than Harris; (3) the police and Harris were equally at fault; (4) Harris was slightly more at fault than the police; (5) Harris was much more at fault than the police.

Finally, we asked subjects to indicate their level of disagreement or agreement with a statement relating to the outcome of the case:

The danger that Harris's driving posed to the police and the public justified Officer Scott's decision to end the chase in a way that put Harris's own life in danger.

Responses to these five items, when combined, formed a highly reliable scale ( $\alpha = 0.81$ ).<sup>83</sup> To facilitate analysis, the scale was coded to reflect agreement with the *Scott* majority and labeled "Agree with Court."<sup>84</sup>

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<sup>82</sup> *Id.* at 1778.

<sup>83</sup> Cronbach's alpha ( $\alpha$ ) is a statistic for measuring the internal validity of attitudinal scales. In effect, it measures the degree of intercorrelation that exists among various items within a scale; a high score suggests that the items can be treated as a valid measure of a latent, or unmeasured, attitude or trait. Generally,  $\alpha \geq 0.70$  suggests scale validity. See generally Jose M. Cortina, *What Is Coefficient Alpha? An Examination of Theory and Applications*, 78 J. APPLIED PSYCHOL. 98 (1993). Because a high Cronbach's alpha confirms that responses to items of opposing valence (e.g., that "[d]uring the pursuit, Harris drove in a manner that put members of the public at great risk of death" versus "[i]t just wasn't worth the danger to the public for the police to engage in a high-speed chase of Harris when he refused to pull over for speeding") are indeed negatively correlated, it helps to dispel the concern that subjects' responses reflected acquiescence bias, the tendency "to 'agree' with a statement just to avoid seeming disagreeable," RUSSELL K. SCHUTT, INVESTIGATING THE SOCIAL WORLD 265 (6th ed. 2008).

<sup>84</sup> Because subjects responded after watching a car crash that they were told resulted in serious injury, one might reasonably wonder whether their responses were affected by "hindsight bias," which consists in overestimating the *ex ante* likelihood of an event based on *ex post* knowledge of its occurrence. See generally Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998). However, the *Scott* majority based its ruling not on its anxiety that jurors might overreact to the tape (an alternative basis for decision we discuss below, see *infra* p. 891), but on its professed confidence that jurors would rule for the defendant on the basis of the tape. The possibility of hindsight bias — whatever it might imply about what jurors in a case like *Scott* should be allowed to see — does not pose any difficulty for a study aimed at testing disputed claims about how jurors would react if allowed to view it. Moreover, because it is an influence to which all subjects are exposed, the possible impact of

4. *Individual Characteristics.* — (a) *Demographic Characteristics.* — We collected data relating to the individual characteristics of the subjects. These included conventional sociodemographic characteristics, such as gender, race, age, household income, education, community type (urban or nonurban) of residence, and region of residence.

(b) *Political Ideology and Party Affiliation.* — Subjects indicated their party affiliation — either Republican, Democrat, or neither. They also indicated their political ideology on a seven-point scale that ran from “extremely liberal” to extremely conservative (“conservatism”).

(c) *Cultural Worldviews.* — We also collected data on our subjects’ cultural orientations and worldviews. The orientations reflected a scheme developed by the late anthropologist Mary Douglas, who characterized worldviews, or preferences for how society should be organized, along two cross-cutting dimensions — “group” and “grid.”<sup>85</sup> A “high group” worldview generates a preference for a *communitarian* ordering in which the interests of the individual are subordinated to the needs of the collective, which is in turn responsible for securing the conditions of individual flourishing. A “low group” worldview, in contrast, coheres with a preference for an *individualist* ordering in which individuals are expected to secure the conditions of their own flourishing without interference or assistance from the collective. A “high grid” worldview corresponds to a preference for a relatively *hierarchical* ordering, in which entitlements, obligations, opportunities, and offices are all assigned on the basis of conspicuous and largely fixed attributes, such as gender, race, lineage, class, and the like. A “low grid” worldview, in contrast, generates a preference for an *egalitarian* ordering that emphatically rejects the proposition that such distinctions should figure in this way in societal conditions.<sup>86</sup>

The two dimensions of worldview contemplated by “group-grid” were measured (in pre-screening surveys conducted several weeks in advance of the study) with two scales, “Hierarchy-Egalitarianism” (or simply, “Hierarchy”) and “Individualism-Communitarianism” (“Individualism”), used in previous studies of the cultural cognition of risk.<sup>87</sup>

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hindsight bias also does not pose any obstacle to testing hypotheses about individual differences in perceptions based on cultural worldviews and other pertinent characteristics.

<sup>85</sup> See generally MARY DOUGLAS, *NATURAL SYMBOLS: EXPLORATIONS IN COSMOLOGY* (1996).

<sup>86</sup> See generally Steve Rayner, *Cultural Theory and Risk Analysis*, in *SOCIAL THEORIES OF RISK* 83 (Sheldon Krimsky & Dominic Golding eds., 1992).

<sup>87</sup> The scales consist of multiple “agree-disagree” items that express attitudes associated with one or another worldview (e.g., “[a] lot of problems in our society today come from the decline in the traditional family, where the man works and the woman stays home,” for hierarchy; “[w]e need to dramatically reduce inequalities between the rich and the poor, whites and people of color, and men and women,” for egalitarianism; “[t]oo many people today expect society to do things for



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As in previous studies, the scales were highly reliable measures of the latent disposition of subjects toward those respective sets of world-views (Individualism,  $\alpha = 0.86$ ; Hierarchy,  $\alpha = 0.85$ ). To facilitate comparisons of subjects identified by their worldviews, we assigned subjects to cultural groups. Based on the relationship of their scores to the median on each scale, we classified subjects as either "Hierarchs" or "Egalitarians" and as either "Individualists" or "Communitarians."

5. *Hypotheses.* — We formulated two major hypotheses. One was that even if a majority of subjects agreed with the interpretation of the Supreme Court majority in *Scott*, reactions to the study tape would display significant variation across persons of different characteristics. The second major hypothesis was that these characteristics would be suggestive of the impact of culpable control, identity-protective, and cultural cognition.

What these characteristics would be and how they would matter support a number of subhypotheses. Some of the relevant characteristics, we surmised, would be sociodemographic. We thus anticipated differences along dimensions such as age and community type (urban or nonurban). Such differences could be a consequence of the mundane contribution that experience in general makes to understanding events: witnessed events are, in effect, the equivalent of minor premises in a cognitive syllogism that generates conclusions only when combined with major premises drawn from experience. Justice Stevens clearly had this point in mind when he argued that older people who learned to pass slow-moving automobiles on poorly lit, windy, two-lane country roads are likely to see Harris's driving as creating less risk than those who grew up in an era of straight, brightly illuminated, four-lane highways. One might expect differences in various other experientially relevant characteristics — such as education — to have some effect too.

But other demographic characteristics, we expected, would also contribute to differences in perception through mechanisms of motivated cognition. Race and gender, for example, are variously depicted both as sources of group identity and as proxies for identities that consist in shared values.<sup>88</sup> African Americans, we predicted, would be inclined to view the facts in a manner different from the *Scott* majority because they are more likely to have had negative experiences with po-

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them that they should be doing for themselves," for individualism; and "[i]t's society's responsibility to make sure everyone's basic needs are met," for communitarianism). Kahan, Braman, Gastil, Slovic & Mertz, *supra* note 59, at 504–05.

<sup>88</sup> See, e.g., W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (Alfred A. Knopf, Inc. 1993) (1903) (offering classic statement of African American identity based on shared values); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1993) (developing theory of gender identities focused on contrasting values).

lice, to know other persons who have, and (as a result) to have friends and family members who believe the police are disposed to abuse their authority.<sup>89</sup> Perceiving the facts in the video in a manner that suggests the police response was out of proportion to the risk created by Harris is congenial to this evaluation, and thus predicted by both the culpable-control and identity-protective cognition theories.

We also predicted that gender would influence perceptions of the facts in the *Scott* tape. Women, we surmised, were likely to view the facts in a manner relatively more favorable to Harris than were men. The basis for this conjecture is that gender correlates with values — including cultural egalitarianism<sup>90</sup> and ideological liberalism<sup>91</sup> — that we have reason to think (as described below) would motivate cognition hostile to the behavior of the police in this case.

Other characteristics we expected to matter are explicitly connected to group commitments that figure in theories of motivated cognition. These include political ideology and political party affiliation. Understandings predominant among politically defined groups are among those to which individuals, for identity-protective reasons, tend to conform their own beliefs about policy-related and legally consequential facts.<sup>92</sup> Cultural worldviews also matter from the standpoint of motivated cognition. As noted, previous work suggests that cultural worldviews more powerfully explain differences of risk perception<sup>93</sup> and legally consequential facts<sup>94</sup> than do other characteristics. Gender, race, income, and region of residence are likely proxies for the affinities constituted by such values.<sup>95</sup> Moreover, they also furnish greater

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<sup>89</sup> See Sandra Lee Browning et al., *Race and Getting Hassled by the Police: A Research Note*, POLICE STUD.: INT'L REV. OF POLICE DEV., NO. 1, at 1, 1-11 (1994); Yolander G. Hurst, James Frank & Sandra Lee Browning, *The Attitudes of Juveniles Toward the Police: A Comparison of Black and White Youth*, 23 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 37, 44-50 (2000).

<sup>90</sup> See Melissa L. Finucane et al., *Gender, Race, and Perceived Risk: The 'White Male' Effect*, 2 HEALTH, RISK & SOC'Y 159, 166-67 (2000).

<sup>91</sup> See Richard A. Brody & Jennifer L. Lawless, *Political Ideology in the United States: Conservatism and Liberalism in the 1980s and 1990s*, in CONSERVATIVE PARTIES AND RIGHT-WING POLITICS IN NORTH AMERICA: REAPING THE BENEFITS OF AN IDEOLOGICAL VICTORY? 53 (Rainer-Olaf Schultze, Roland Sturm & Dagmar Eberle eds., 2003).

<sup>92</sup> See Geoffrey L. Cohen, *Party over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCHOL. 808 (2003).

<sup>93</sup> See generally Kahan, Braman, Gastil, Slovic & Mertz, *supra* note 59.

<sup>94</sup> See Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1, 54-56 (2008).

<sup>95</sup> See RICHARD E. NISBETT & DOV COHEN, CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH (1996) (using region as a proxy for shared values); Kahan, Braman, Gastil, Slovic & Mertz, *supra* note 59, at 471 (suggesting that race and gender correlate with shared values).

heuristic guidance than do political ideologies for persons who (like most Americans) have at best only modest interest in politics.<sup>96</sup>

To focus our hypotheses reflecting these influences, we predicted that reactions to the *Scott* tape would vary across subjects divided into two prominent and recognizable cultural styles, which we designated “*aleph*” and “*bet*.” *Alephs* hold conspicuously hierarchical and individualistic cultural worldviews and (on most questions, at least) highly conservative political leanings. Demographically, they are more likely to be affluent white males.<sup>97</sup> *Alephs* also are more likely to live in the South or far West, where hierarchical and individualistic values predominate.<sup>98</sup> *Bets*, in contrast, hold disproportionately egalitarian and communitarian views. Their politics are more liberal and Democratic. Relative to *alephs*, at least, *bets* will also be disproportionately female and African American. And they are more likely to live in the Northeast, where egalitarian and communitarian cultural worldviews are relatively predominant.<sup>99</sup>

We understand these groups to be recognizable contemporary examples of what Gusfield refers to as “status collectivities.”<sup>100</sup> “Unlike groups such as religious and ethnic communities[,] they have no church, no political unit, and no associational units which explicitly defend their interests,” but are nevertheless affiliated, in their own self-understandings and in the views of others, by largely convergent worldviews and by common commitments to salient political agendas.<sup>101</sup> “They possess subcultures” that play a conspicuous role in political conflict motivated by symbolic status competition.<sup>102</sup> The issues that pit our *aleph* and *bet* styles against each other range from affirmative action to gun control, from nuclear power to abortion, from the death penalty to gay rights.<sup>103</sup>

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<sup>96</sup> See Aaron Wildavsky, *Choosing Preferences By Constructing Institutions: A Cultural Theory of Preference Formation*, 81 AM. POL. SCI. REV. 3, 15–18 (1987); see also Kahan et al., *Risk and Culture Study*, *supra* note 62, at 14–15.

<sup>97</sup> Indeed, a discrete but sizable subset of white males who hold extremely hierarchical and individualistic values drive the so-called “white male effect,” which refers to the disposition of white men to attribute less risk to various putatively dangerous activities than do women and minorities. See generally Kahan, Braman, Gastil, Slovic & Mertz, *supra* note 59.

<sup>98</sup> See generally RAYMOND D. GASTIL, *CULTURAL REGIONS OF THE UNITED STATES* (1975) (providing basic cultural descriptions of geographic regions); NISBETT & COHEN, *supra* note 95 (contrasting the South with the North, West, and Midwest).

<sup>99</sup> See generally Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 439–42, 452–53, 462–67 (1999) (describing culturally grounded status conflict between these types on issues such as the death penalty, gun control, and hate crimes).

<sup>100</sup> GUSFIELD, *supra* note 17, at 21 (emphasis omitted).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See, e.g., *id.* at 140–41, 167–71; KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 158–91 (1984); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997) (gay rights and affirmative action); Kahan, *supra* note 99 (gun control and death penalty).

As the Court's analysis in *Scott* illustrates, someone called upon to evaluate a high-speed car chase must individuate and compare competing risks. Which course of action by the police creates greater risk for the public — pursuing a driver who refuses to stop or letting him (and others in his situation) go? What sorts of risk are worse — the continuous but indeterminately lethal ones to the public and the police associated with maintaining pursuit of a fleeing driver, or the sudden and more obviously lethal one to the driver associated with deliberately inducing his car to crash to a halt? *Aleph* and *bet* subjects, we surmised, would form competing perceptions and evaluations relating to these matters.

*Aleph* subjects, we hypothesized, would assess the risks in a manner consistent with that of the *Scott* majority. *Alephs* morally disapprove of challenges to lawful authority and defiance of dominant norms. These moral sensibilities make it congenial for them to believe, among other things, that illicit drug trafficking causes social harm and that excessive gun control renders law-abiding citizens vulnerable to predation.<sup>104</sup> The same cultural and political sensibilities would likely trigger negative emotions, including fear of and resentment toward Harris as a symbol of deviance and law-breaking. People who hold individualistic and hierarchic worldviews and associated political commitments also tend to approve of highly punitive responses to law-breaking, and as a result, to believe that such measures (including capital punishment) reduce the incidence of dangerous or harmful behavior.<sup>105</sup> This shared disposition, we surmised, would move subjects to approve of both the decision to pursue Harris at the outset and the decision to use deadly force to terminate the chase as risk-reducing on balance.

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Like any scheme that purports to treat “culture” as an explanatory variable — particularly one amenable to measurement — ours necessarily reflects a highly simplified account of how shared values, experiences, and patterns of living connect people. Indeed, in referring to *aleph* and *bet* as cultural *styles*, we mean to emphasize the relatively modest depth of the affinities that connect individuals who adhere to them. As is clearly implied in Gusfield's account of status collectivities, *aleph* and *bet* comprise subgroups whose members, by virtue of more intimate ties, obviously possess distinct “cultures” in an even deeper sense. We recognize, too, that there will be some issues that divide the subcommunities that tend to share either the *aleph* or *bet* styles. See, e.g., Kahan, Braman, Gastil, Slovic & Mertz, *supra* note 59, at 494–95 (discussing variation among white and African American egalitarians on issues involving sexual mores). Because the *aleph* and *bet* styles are salient and do figure in a familiar range of political conflicts, we see utility, both methodological and practical, in incorporating them into our analysis. But we most certainly do not mean, in adopting this scheme, to make the patently absurd claim that American society consists of just two “cultures” or “cultural types.”

<sup>104</sup> See Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 *YALE L. & POL'Y REV.* 149, 156–57 (2006) (describing theory of cultural cognition); see also Kahan, *supra* note 19, at 131–36.

<sup>105</sup> Cf. Kahan, *supra* note 19, at 122–23.

We hypothesized that *bet* subjects would form the opposite set of reactions. Their egalitarian worldviews and left-leaning political sensibilities can be expected to incline *bets* to condemn authority figures for abuses of power much more readily than they condemn putative deviants for defying authority.<sup>106</sup> Reinforced by their communitarian orientation, these same dispositions tend to make *bet* persons supportive of social welfare programs.<sup>107</sup> Adopting factual beliefs congenial to these dispositions, such individuals tend to think that capital punishment and other punitive measures are not effective deterrents, and that permitting individuals to arm themselves with guns for self-protection, rather than making society safer, increases the risk of crime and accidents.<sup>108</sup> In the same vein, we predicted that individuals who adhere to the *bet* style, when they viewed the *Scott* tape, would be angrier at the police, as symbols of overreaching authority figures indifferent to the danger their use of coercion posed to the well-being of bystanders, not to mention Harris. As a result, they would form the judgment that the decisions to chase Harris and to use deadly force to halt his flight did not reduce the net risk to society.

#### D. Results

We present the results of our study in two steps. First, we offer preliminary analyses of the reactions of our subjects, overall and across different groups, to the *Scott* tape. Second, we use statistical simulations to explore more systematically how individuals bearing combinations of characteristics that endow them with identities consistent with the *aleph* and *bet* cultural styles would view the facts the tape reveals.

1. *Preliminary Analyses: Main Effects and Group Differences.* — A preliminary examination of the data reveals two conclusions. The first is that a relatively large majority formed perceptions of the *Scott* tape consistent with that of the Supreme Court majority. The second is that there are nevertheless marked differences in perceptions across identifiable subgroups.<sup>109</sup>

As reflected in Figure 2 and Figure 3, overall perceptions of the key risk issues are highly consistent with those of the Court in *Scott*. Solid majorities agreed either “strongly” or “moderately” that Harris’s driv-

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<sup>106</sup> See sources cited *supra* note 66.

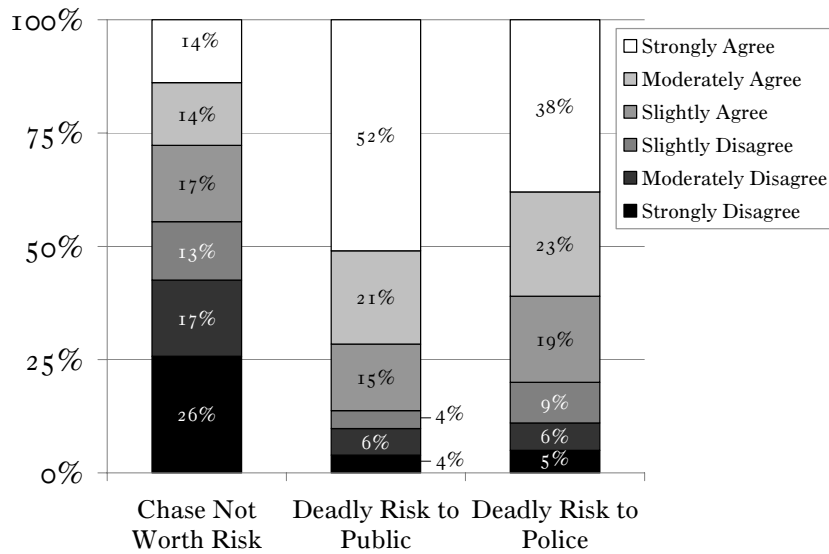
<sup>107</sup> See Kahan et al., *Risk and Culture Study*, *supra* note 62, at 15.

<sup>108</sup> See Kahan, *supra* note 19, at 134–36.

<sup>109</sup> To correct for underrepresentation of African Americans in the sample — and thus make the results more reflective of the likely views of the American public at large — the sample-wide summary statistics reported in Figure 2 through Figure 4 use population-weighted data. The group summary statistics reported in Table 1 use unweighted data, as do the multivariate regression analyses reflected in Table 2 and the statistical simulations presented *infra* section II.D.2.

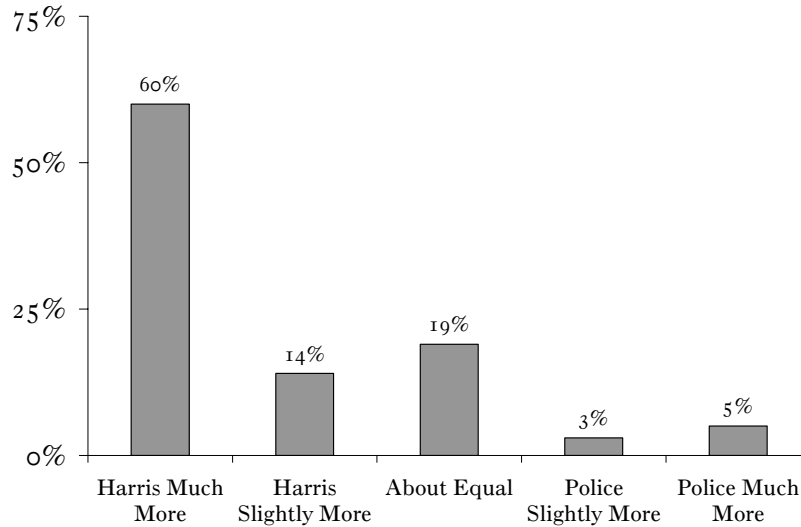
ing posed a deadly risk to the public, and additional subjects “slightly” agreed with those statements. The subjects were more equivocal about the decision of the police to pursue Harris; 45% agreed (28% either “strongly” or “moderately”) that the chase was not worth the risk it posed to the public, and another 13% only “slightly” agreed that the chase was worth the risk. Still, 74% of the subjects judged Harris to be either “much more” or “slightly more” at fault for the risk to the public.<sup>110</sup>

Figure 2. Overall Perceptions of Risk



<sup>110</sup> All percentages reported in the Figures and Tables and discussed in the text are rounded to the nearest percent.

FIGURE 3. OVERALL PERCEPTIONS OF FAULT



On the ultimate question (Figure 4), approximately 75% agreed and 26% disagreed that the use of deadly force was warranted. Reflecting some equivocation, however, nearly a quarter agreed or disagreed only slightly.

FIGURE 4. DEADLY FORCE WAS JUSTIFIED IN RESPONSE TO RISK HARRIS POSED

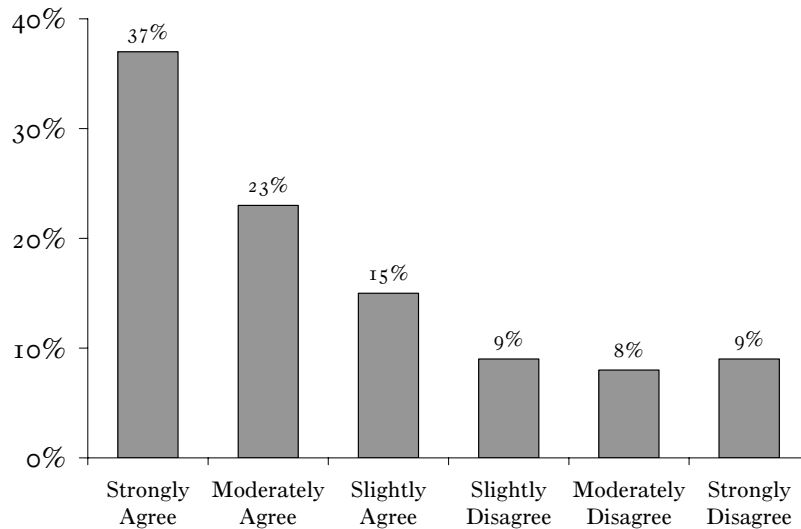


Table 1 illustrates the mass of individual variation tucked into the main effects illustrated in Figures 2 through 4. That table reports group means on the individual response items and on the composite "Agree with Court" scale, which reflects the average of the response to all of the items.<sup>111</sup> As predicted, African Americans took a significantly more pro-plaintiff stance across all items. So did Democrats relative to Republicans, liberals relative to conservatives, and Egalitarians relative to Hierarchs. Communitarians were significantly more pro-plaintiff than Individualists for every item except risk to the public. Women were also generally more pro-plaintiff, although statistically the difference between the sexes was only marginally significant ( $p = 0.07$  for "Agree with Court";  $p = 0.09$  for "Deadly Force Justified").

Table 1 also reveals some additional sources of variation. Lower-income subjects were consistently more pro-plaintiff than were higher income ones. Nevertheless, less educated subjects were overall more pro-defendant than were more educated subjects. So, unexpectedly, were married subjects.

Older subjects were more inclined than younger ones to view the chase as not worth the risk it imposed on the public and the use of deadly force as not justified by the risk Harris posed. However, contrary to Justice Stevens's hypothesis, elderly subjects did not perceive Harris's driving to be less risky to either the public or the police.

One might have surmised that urban dwellers would react differently from non-urban ones. But our results detected no such effect.

The impact of various individual characteristics relative to each other is reflected in the ordered logistic regression analyses reported in Table 2. A multivariate regression model shows how much variance in any explanatory or "independent" variable (here race, gender, cultural worldview, and so forth) affects a quantity of interest (in our case, subjects' answers to our response measures) when the impact of every other independent variable in the model is held constant.<sup>112</sup> The models in Table 2 demonstrate that being African American (as opposed to white) exerts the largest effect across the various response measures. How hierarchical or egalitarian subjects' worldviews are also exerts a relatively large (and statistically significant) independent effect across all measures except the perceived risk of Harris's driving to the public. Being from the Northeast likewise had a relatively large (and statistically significant) effect across all but two of the measures. Income had a significant but relatively small effect on three of the five measures as well.

<sup>111</sup> See *supra* p. 858.

<sup>112</sup> See JACOB COHEN ET AL., APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES 6-7 (3d ed. 2003).



TABLE I. MEAN RESPONSES

Scale	Agree with Court 1-6	Relative Culpability 1 (police) to 5 (Harris)	Chase Not Worth Risk ← 1 (strongly disagree) to 6 (strongly agree) →	Harris Posed Lethal Risk		Deadly Force Justified
				to Public	to Police	
Female	4.37	4.18	3.25	4.92	4.61	4.37
Male	4.48	4.28	3.09	5.04	4.64	4.52
Difference	0.11	0.10	0.16	0.12	0.03	0.15
Black	3.70	3.57	3.87	4.42	3.83	3.51
White	4.50	4.32	3.04	5.03	4.69	4.55
Difference	<b>0.80</b>	<b>0.75</b>	<b>0.83</b>	<b>0.61</b>	<b>0.86</b>	<b>1.04</b>
< \$35,000/yr	4.23	4.05	3.35	4.66	4.53	4.25
≥ \$50,000/yr	4.52	4.30	3.09	5.15	4.69	4.54
Difference	<b>0.29</b>	<b>0.25</b>	<b>0.26</b>	<b>0.49</b>	0.16	<b>0.29</b>
≤ HS degree	4.50	4.30	3.17	5.02	4.75	4.61
≥ BA degree	4.24	4.07	3.33	4.89	4.44	4.10
Difference	<b>0.26</b>	<b>0.23</b>	0.16	0.13	<b>0.31</b>	<b>0.51</b>
18-36 yrs old	4.44	4.19	2.96	4.89	4.57	4.50
> 53 yrs old	4.28	4.17	3.46	4.84	4.58	4.28
Difference	<b>0.16</b>	0.02	<b>0.50</b>	0.05	0.01	<b>0.22</b>
Unmarried	4.24	4.10	3.28	4.72	4.47	4.22
Married	4.58	4.34	3.08	5.20	4.77	4.64
Difference	<b>0.34</b>	<b>0.24</b>	<b>0.20</b>	<b>0.48</b>	<b>0.30</b>	<b>0.42</b>
Urban	4.44	4.23	3.02	4.92	4.61	4.48
Nonurban	4.41	4.23	3.20	4.99	4.63	4.44
Difference	0.03	0.00	0.18	0.07	0.02	0.04
Northeast	4.23	4.13	3.37	4.78	4.40	4.20
South or West	4.51	4.28	3.04	5.02	4.72	4.58
Difference	<b>0.28</b>	0.15	0.33	<b>0.24</b>	<b>0.32</b>	<b>0.38</b>
Democrats	4.16	4.00	3.55	4.85	4.44	4.07
Republicans	4.72	4.51	2.70	5.14	4.84	4.82
Difference	<b>0.56</b>	<b>0.51</b>	<b>0.85</b>	<b>0.29</b>	<b>0.40</b>	<b>0.75</b>
Liberals	4.13	4.01	3.45	4.74	4.35	4.01
Conservatives	4.67	4.44	2.87	5.15	4.85	4.80
Difference	<b>0.54</b>	<b>0.43</b>	<b>0.58</b>	<b>0.41</b>	<b>0.50</b>	<b>0.79</b>
Egalitarians	4.21	4.05	3.52	4.90	4.51	4.14
Hierarchs	4.62	4.40	2.84	5.05	4.74	4.73
Difference	<b>0.41</b>	<b>0.35</b>	<b>0.68</b>	<b>0.15</b>	<b>0.23</b>	<b>0.59</b>
Communitarians	4.28	4.09	3.38	4.94	4.52	4.23
Individualists	4.56	4.37	2.96	5.02	4.74	4.65
Difference	<b>0.28</b>	<b>0.28</b>	<b>0.42</b>	0.08	<b>0.22</b>	<b>0.42</b>

Bolded text indicates difference in means of paired groups significant at  $p \leq 0.05$ .

TABLE 2. ORDERED LOGISTIC REGRESSION MODELS  
FOR RESPONSE MEASURES

	Chase Not Worth Risk	Deadly Risk to Public	Deadly Risk to Police	Harris More at Fault	Force Justified
Female	0.03 (0.10)	-0.01 (0.11)	0.09 (0.10)	-0.08 (0.12)	-0.15 (0.10)
Black (v. White)	<b>0.46</b> (0.22)	<b>-0.45</b> (0.22)	<b>-0.60</b> (0.22)	<b>-0.92</b> (0.22)	<b>-0.66</b> (0.22)
Other Minority (v. White)	-0.03 (0.16)	0.09 (0.17)	0.06 (0.16)	-0.32 (0.17)	0.09 (0.16)
Age	<b>0.01</b> (0.00)	0.00 (0.00)	0.00 (0.00)	-0.01 (0.00)	0.068 (0.00)
Household Income	<b>-0.03</b> (0.01)	<b>0.06</b> (0.02)	0.02 (0.01)	<b>0.04</b> (0.02)	0.03 (0.01)
Education	0.03 (0.03)	-0.05 (0.03)	<b>-0.06</b> (0.03)	-0.02 (0.04)	<b>-0.08</b> (0.03)
South (v. West)	0.08 (0.13)	0.08 (0.14)	-0.10 (0.14)	-0.21 (0.16)	-0.02 (0.14)
Midwest (v. West)	0.27 (0.14)	0.06 (0.15)	-0.05 (0.15)	-0.20 (0.17)	-0.21 (0.15)
Northeast (v. West)	<b>0.30</b> (0.15)	-0.17 (0.16)	-0.25 (0.15)	<b>-0.48</b> (0.17)	<b>-0.33</b> (0.15)
Urban (v. Nonurban)	0.04 (0.14)	0.18 (0.15)	0.13 (0.14)	0.14 (0.16)	0.15 (0.14)
Married (v. Unmarried)	<b>-0.22</b> (0.11)	<b>0.32</b> (0.12)	0.16 (0.11)	<b>0.31</b> (0.13)	<b>0.27</b> (0.11)
Parent (v. No children)	-0.07 (0.12)	0.04 (0.13)	0.15 (0.12)	0.17 (0.14)	-0.01 (0.12)
Republican (v. Democrat)	<b>-0.31</b> (0.13)	-0.03 (0.14)	-0.04 (0.13)	0.29 (0.16)	-0.01 (0.13)
Independent (v. Democrat)	-0.03 (0.31)	0.00 (0.33)	0.01 (0.33)	0.15 (0.38)	-0.03 (0.33)
Conservative	0.03 (0.04)	0.09 (0.05)	0.05 (0.04)	0.08 (0.05)	0.05 (0.05)
Hierarchy	<b>-0.39</b> (0.08)	0.10 (0.08)	<b>0.16</b> (0.08)	<b>0.39</b> (0.09)	<b>0.46</b> (0.08)
Individualism	-0.08 (0.08)	0.04 (0.09)	0.08 (0.08)	0.07 (0.10)	0.07 (0.09)
$R^2$ (McKelvey/Zavoina)	0.09	0.06	0.04	0.14	0.11
log likelihood	-2296.53	-1731.62	-2049.71	-1393.15	-2060.64
Prob > Chi <sup>2</sup>	0.00	0.00	0.00	0.00	0.00

$N = 1,347$ . Dependent variables are responses to the indicated survey items. Coefficients are ordered log-odds (ordered logits). Bolded coefficients are significant at  $p \leq 0.05$ . Parentheticals indicate standard errors.

Some characteristics of interest had no significant effect in the regression models. These included gender ( $p = 0.15$ , for “Force Justified,” for example) and the relative individualistic or communitarian worldview of subjects ( $p = 0.45$ , for “Force Justified”), although those variables did have the expected signs. This finding, of course, does not necessarily mean that these characteristics in fact have no influence on perceptions of the *Scott* tape. They mean only that these characteristics do not have an influence considered apart from whatever effect they might be exerting *jointly* with other characteristics.<sup>113</sup>

This picture is largely consistent with our hypotheses. But it remains blurry. Differences in means show that characteristics like race, gender, income, party affiliation, ideology, region of residence, and cultural orientation all tend to matter. But in the real world, people’s identities are usually not formed with reference only to one or another of these characteristics but with reference to packages of them that cohere with and reinforce one another in meaningful ways. Far from eliminating this problem, multivariate regression analysis exaggerates it by partialing out the joint effects of these characteristics and showing us only what each independently contributes, thus obscuring the effects they will exert in tandem if they covary.<sup>114</sup> Our *aleph* and *bet* cultural styles form packages of related, and typically jointly occurring, characteristics and dispositions. Clarifying the picture of what individuals holding these recognizable combinations of these characteristics are seeing in the *Scott* tape, then, requires a more powerful form of statistical analysis.

2. *Clarifying the Data: Statistical Simulations.* — (a) *Overview.* — Clarify, a statistical application designed by Harvard political scientist Gary King, makes such analysis possible. In conventional regression analysis, the influence of some set of explanatory variables on a dependent variable is expressed in a mathematical equation, the elements of which (regression coefficients, standard errors,  $p$ -values, and so forth) are reported in a table (such as our Table 2).<sup>115</sup> Clarify is intended to generate data analyses that simultaneously extract more information from a multivariate regression and present it more intelligibly.<sup>116</sup> Using Clarify, an analyst specifies values for the independent variables that form a regression model. The application then generates a predicted value for the dependent variable through a statistical simulation that takes account of the model’s key parameters (including the standard errors for the regression coefficients). It then repeats that

<sup>113</sup> See *id.* at 79.

<sup>114</sup> See *id.* at 72, 78–79.

<sup>115</sup> See generally *id.*

<sup>116</sup> See Gary King, Michael Tomz & Jason Wittenberg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 347 (2000).

process. Then it repeats it again. Then it repeats it again and again and again — as many times as directed by the analyst (typically 1000 times, or enough to approximate the entire probability distribution for the dependent variable). The resulting array of values for the dependent variable can then be analyzed with techniques that are statistically equivalent to those used in survey sampling to determine an average predicted value, plus a precisely calculated margin of error.<sup>117</sup>

This form of analysis has various advantages over conventional regression analysis. Conventional regression outputs (such as those reflected in Table 2) report the impact and statistical significance of each predictor or independent variable while controlling for the impact of every other one.<sup>118</sup> As such, these outputs obscure the impact of theoretically relevant *combinations* of predictors (in our study, the various characteristics associated with the *aleph* and *bet* cultural styles). That impact can easily be modeled through Clarify simulations, which permit one to compare how competing sets of predictors jointly affect a quantity of interest (such as responses to our various risk-perception measures).<sup>119</sup> In addition, consistent with the growing movement in the social sciences to make statistical analysis more accessible,<sup>120</sup> the

<sup>117</sup> See *id.* at 349–51.

<sup>118</sup> The concept of statistical significance is used to characterize a degree of confidence, as reflected in a *p*-value, that a predictor or independent variable (e.g., length of imprisonment) exerts an effect on a quantity of interest or dependent variable (e.g., the crime rate). The *p*-value represents the probability that the difference between any observed effect and zero (or no effect) could have occurred by chance. Conventionally, an effect is considered statistically significant when  $p \leq .05$ , meaning that the likelihood that one might have observed the measured effect when the predictor in fact has no effect is less than 5%. See generally Jacob Cohen, *The Earth Is Round* ( $P < .05$ ), 49 AM. PSYCHOLOGIST 997 (1994). Accordingly, the “nonsignificant” 0.15 *p*-value for Female in “Force Justified” indicates that there is a 15% chance that the observed effect of being female (controlling for all other influences) in reducing support for a pro-defendant outcome occurred by chance.

<sup>119</sup> Independent-variable regression coefficients that are not statistically significant considered in isolation can still have a significant *joint* effect on the dependent variable when added together. To capture that effect, nonsignificant predictors can be included, and set to whatever value is desired by the analyst, in a Clarify simulation. See Michael Tomz, Jason Wittenberg & Gary King, *Clarify: Software for Interpreting and Presenting Statistical Results*, J. STAT. SOFTWARE, Jan. 2003, at 1, 19 (2003). “This is not problematic because the true quantities of interest are usually the predicted values, . . . not the coefficients themselves.” *Id.* The size of the standard error associated with any predictor (i.e., independent variable) included in the simulation will, of course, affect the precision of the predicted value of the quantity of interest (i.e., the dependent variable). But because “even coefficients that are not statistically significant can provide important information,” it is more sensible “to focus on the confidence intervals Clarify reports for each quantity it computes than the standard errors of coefficients.” *Id.*; see also ANDREW GELMAN & JENNIFER HILL, DATA ANALYSIS USING REGRESSION AND MULTILEVEL/HIERARCHICAL MODELS 42, 69 (2007) (rejecting the position that statistically nonsignificant independent variables should be excluded from predictive models and identifying circumstances in which their inclusion “make[s] sense,” *id.* at 42).

<sup>120</sup> See, e.g., Andrew Gelman, Cristian Pasarica & Rahul Dodhia, *Let’s Practice What We Preach: Turning Tables into Graphs*, 56 AM. STATISTICIAN 121 (2002). In the legal academy, Lee

results of Clarify simulations — predicted values for quantities of interest, subject to specified margins of error — can be graphically displayed in a manner that more clearly illustrates their real-world significance to real-world people than do regression coefficients, which lack intuitive meaning.<sup>121</sup>

This form of analysis furnishes a perfect fit for our purposes. We are interested in the perceptions of subcommunities of people holding combinations of characteristics associated with the cultural styles that we have designated *aleph* and *bet*. We can form reasonable statistical predictions of those perceptions by setting pertinent characteristics — gender, race, region of residence, political ideology, party affiliation, and cultural worldviews — to appropriate values in Clarify simulations.

(b) *Ron, Linda, Bernie, and Pat.* — We used Clarify to simulate the responses of our four hypothetical jurors, Ron, Linda, Bernie, and Pat. Ron was endowed with characteristics associated with the *aleph* cultural style. He is a white male. He is significantly more hierarchic and more individualistic (in the top quartile of the population for both characteristics) than the average American. He is a Republican and also extremely conservative. He is fairly well-educated (a professional degree), and his household income is relatively high (over \$175,000 per year). He is from Arizona, or some other “Far West” state. He is 46 years old (the population mean, excluding those under 18). Having no reason to believe that *alephs* differ from *bets* in their family status, we treated him as being as likely to be married and have children as the average American.<sup>122</sup>

We set Linda’s characteristics to those of a recognizable *bet*. She is an African-American female. She is a liberal Democrat. She lives in Pennsylvania, or another Northeastern state. She is significantly more egalitarian and more communitarian in her cultural outlooks than the

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Epstein and her coauthors have forcefully espoused the use of simulations and other forms of analysis that make the practical impact of multivariate regressions more accessible. See Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811 (2006); Lee Epstein, Andrew D. Martin & Christina L. Boyd, *On the Effective Communication of the Results of Empirical Studies, Part II*, 60 VAND. L. REV. 801 (2007).

<sup>121</sup> See King, Tomz & Wittenberg, *supra* note 116, at 347 (explaining that Monte Carlo statistical simulations used in Clarify “extract . . . currently overlooked information” that “(1) convey[s] numerically precise estimates of the quantities of greatest substantive interest, (2) include[s] reasonable assessments of uncertainty about those estimates, and (3) require[s] little specialized knowledge to understand”); *id.* at 360.

<sup>122</sup> As can be seen in Table 2, being married and having children tend to predict greater agreement with the Court majority. Simulations suggest that, all else being equal, being married with children, as opposed to unmarried and childless, predicts about a 5% ( $\pm$  1%) increase in the likelihood of agreement with the Court’s disposition on the “ultimate issue” — whether deadly force was justified in light of the risk that Harris posed.

population mean (in the top quartile for both). She has an associate's degree (or more precisely, some college education short of a bachelor's degree) and makes a modest salary (around \$25,000 per year) as an occupational therapist's assistant. We made no assumptions about her marital or family status.

Bernie also fits the profile for a *bet*. As a white male, his inclusion in the analysis helps to show how that particular cultural style is not confined to African Americans or women. Because white *bets* tend to be more egalitarian in their attitudes toward sexual mores than do African American ones,<sup>123</sup> we assigned Bernie a more egalitarian worldview (in the top decile of the population) than Linda. He is coded as a liberal Democrat. As one would expect of a university professor, he is extremely well educated (he holds a doctorate degree), but makes a more modest salary (that of the population mean). Like Linda, he lives in the Northeast. In other respects (including marital status and parenthood), his characteristics were set to the population mean.

Pat, of course, is an "average American." All of his/her values (including gender) have been set to the American population mean. Neither *aleph* nor *bet* (or perhaps a bit of both), he/she is included as a heuristic benchmark for assessing the views of the other representative members of our hypothetical venire.

Using Clarify, we simulated the responses of Ron, Bernie, Linda, and Pat to the statements used to assess subjects' perceptions of the *Scott* tape. The results appear in Figures 5 to 9 and Tables 3 to 7.<sup>124</sup> In the cases of Ron, Linda, and Bernie, the percentages can be interpreted as reflecting either the likelihood that a person with his or her characteristics would respond to an item in the indicated manner or the percentage of people with his or her characteristics who would respond that way. For Pat, the percentages can be understood to reflect either the likelihood that any person picked from the American population would respond as indicated or the percentage of persons in the general population who would so respond.

Figure 5 and Table 3 furnish a vivid image of the deep *dissensus* that exists over whether the police should have engaged in a high-speed chase to apprehend Scott in the first place. For Ron, this is a no-brainer: approximately three-quarters (76%,  $\pm 2\%$ ) of the persons

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<sup>123</sup> See Ted G. Jelen & Clyde Wilcox, *Causes and Consequences of Public Attitudes Toward Abortion: A Review and Research Agenda*, 56 POL. RES. Q. 489, 492 (2003) (finding that African Americans are more opposed to abortion than are whites); Gregory B. Lewis, *Black-White Differences in Attitudes Toward Homosexuality and Gay Rights*, 67 PUB. OPINION Q. 59, 63 (2003) (reviewing studies finding African Americans more opposed to homosexuality than whites controlling for other influences); see also Kahan, Braman, Gastil, Slovic & Mertz, *supra* note 59, at 494-95 (finding that egalitarianism influences abortion risk perceptions less powerfully among African Americans than among whites).

<sup>124</sup> The margins of error for all estimates reflect a 95% level of confidence.

who share his 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 that position.

FIGURE 5. CHASE NOT WORTH THE RISK

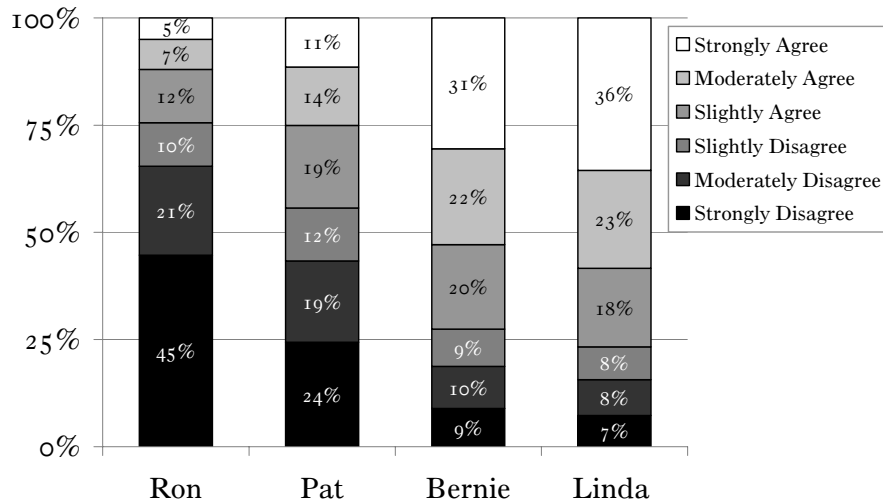


TABLE 3. CHASE NOT WORTH THE RISK

	Ron	Pat	Bernie	Linda
Strongly Agree	5% ( $\pm 2\%$ )	11% ( $\pm 2\%$ )	31% ( $\pm 9\%$ )	36% ( $\pm 12\%$ )
Moderately Agree	7% ( $\pm 3\%$ )	14% ( $\pm 2\%$ )	22% ( $\pm 4\%$ )	23% ( $\pm 3\%$ )
Slightly Agree	12% ( $\pm 3\%$ )	19% ( $\pm 2\%$ )	20% ( $\pm 3\%$ )	18% ( $\pm 4\%$ )
Slightly Disagree	10% ( $\pm 2\%$ )	12% ( $\pm 2\%$ )	9% ( $\pm 2\%$ )	8% ( $\pm 3\%$ )
Moderately Disagree	21% ( $\pm 3\%$ )	19% ( $\pm 2\%$ )	10% ( $\pm 3\%$ )	8% ( $\pm 4\%$ )
Strongly Disagree	45% ( $\pm 10\%$ )	24% ( $\pm 2\%$ )	9% ( $\pm 4\%$ )	7% ( $\pm 4\%$ )

Figure 6 and Figure 7, along with Table 4 and Table 5, address the risk that Harris's driving posed. 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 these beliefs even more decidedly.

Bernie and Linda believe Harris's driving posed deadly risks too, but their views are somewhat more equivocal. Fewer than one-half (44%,  $\pm$  4%) of the persons who share Linda's defining characteristics believe either moderately or strongly that Harris posed a lethal danger to the public, and another quarter (23%,  $\pm$  3%) of those persons agree only "slightly" with that proposition. Even fewer (37%,  $\pm$  5%) of the Lindas in American society hold a firm conviction ("moderately" or "strongly agree") that Harris posed a lethal danger to the police. Fewer than half of the persons with Bernie's characteristics (39%,  $\pm$  4%) would have a firm conviction ("moderately" or "strongly agree") that Harris put the police at deadly risk. There is a high likelihood (75%,  $\pm$  4%) that someone with his characteristics will agree that Harris's escapade posed a lethal threat to the public, although only about half (54%,  $\pm$  3%) would agree either "moderately" or "strongly."

FIGURE 6. HARRIS A LETHAL DANGER TO THE PUBLIC

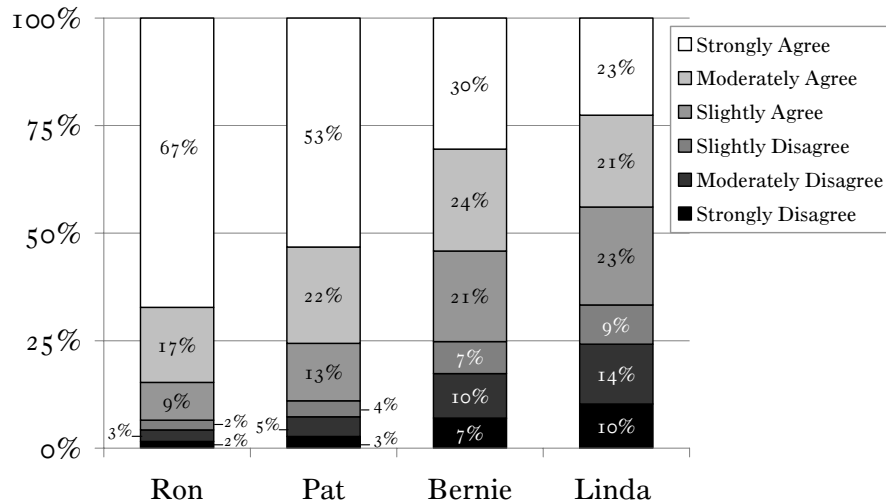




TABLE 4. HARRIS A LETHAL DANGER TO THE PUBLIC

	Ron	Pat	Bernie	Linda
Strongly Agree	67% ( ± 11%)	53% ( ± 3%)	30% ( ± 10%)	23% ( ± 10%)
Moderately Agree	17% ( ± 5%)	22% ( ± 2%)	24% ( ± 3%)	21% ( ± 4%)
Slightly Agree	9% ( ± 3%)	13% ( ± 2%)	21% ( ± 4%)	23% ( ± 3%)
Slightly Disagree	2% ( ± 1%)	4% ( ± 1%)	7% ( ± 3%)	9% ( ± 3%)
Moderately Disagree	3% ( ± 1%)	5% ( ± 1%)	10% ( ± 4%)	14% ( ± 5%)
Strongly Disagree	2% ( ± 1%)	3% ( ± 1%)	7% ( ± 4%)	10% ( ± 6%)

FIGURE 7. HARRIS A LETHAL DANGER TO POLICE

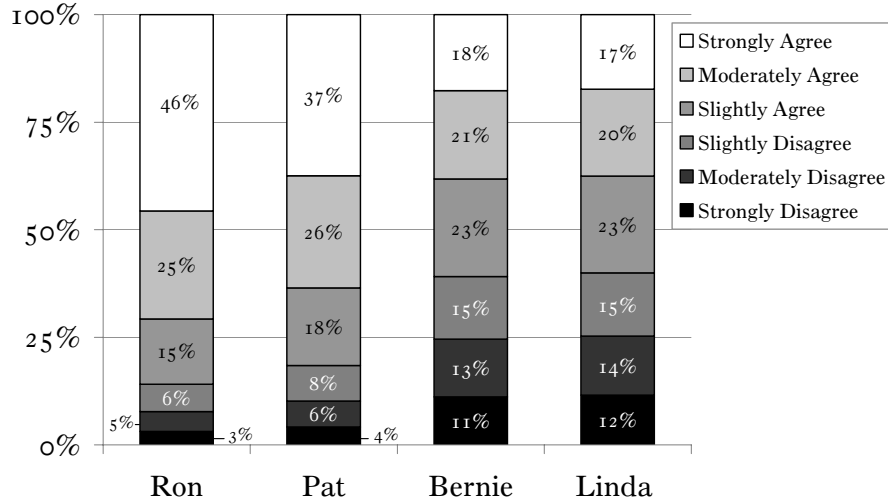


TABLE 5. HARRIS A LETHAL DANGER TO POLICE

	Ron	Pat	Bernie	Linda
Strongly Agree	46% ( ± 11%)	37% ( ± 3%)	18% ( ± 7%)	17% ( ± 7%)
Moderately Agree	25% ( ± 3%)	26% ( ± 2%)	21% ( ± 4%)	20% ( ± 5%)
Slightly Agree	15% ( ± 4%)	18% ( ± 2%)	23% ( ± 3%)	23% ( ± 3%)
Slightly Disagree	6% ( ± 2%)	8% ( ± 1%)	15% ( ± 3%)	15% ( ± 4%)
Moderately Disagree	5% ( ± 2%)	6% ( ± 1%)	13% ( ± 5%)	14% ( ± 5%)
Strongly Disagree	3% ( ± 1%)	4% ( ± 1%)	11% ( ± 5%)	12% ( ± 6%)

The simulations also furnish a clear picture of the divisions hidden within the societal consensus over the “relative culpability” of Harris and the police (Figure 8 and Table 6). The overwhelming majority of

the persons who hold Ron's defining attributes feel Harris was either "much more" (88%,  $\pm 6\%$ ) or "slightly more" (6%,  $\pm 2\%$ ) at fault. Pat, representing the average American, is almost as emphatic in his/her condemnation: there is a 79% ( $\pm 2\%$ ) chance, the simulation suggests, that a member of the general public will see Harris as more at fault, and only a 5% ( $\pm 1\%$ ) chance that he/she will regard the police as more culpable.

FIGURE 8. RELATIVE CULPABILITY

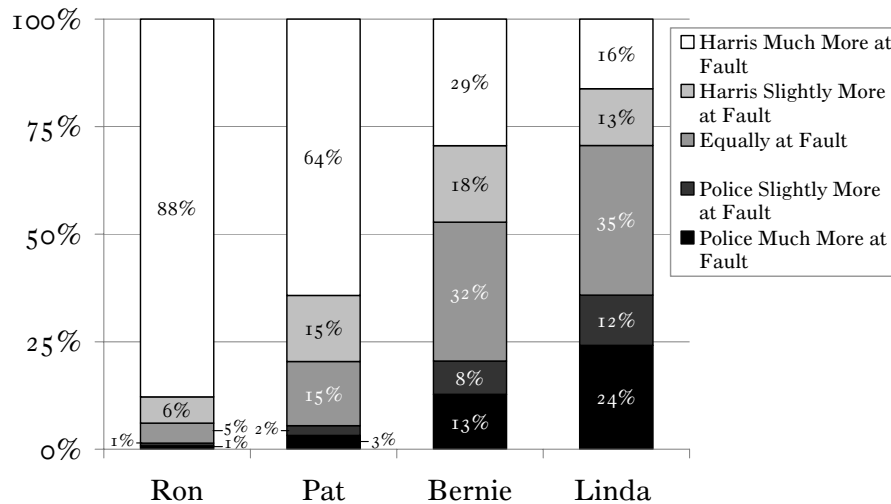


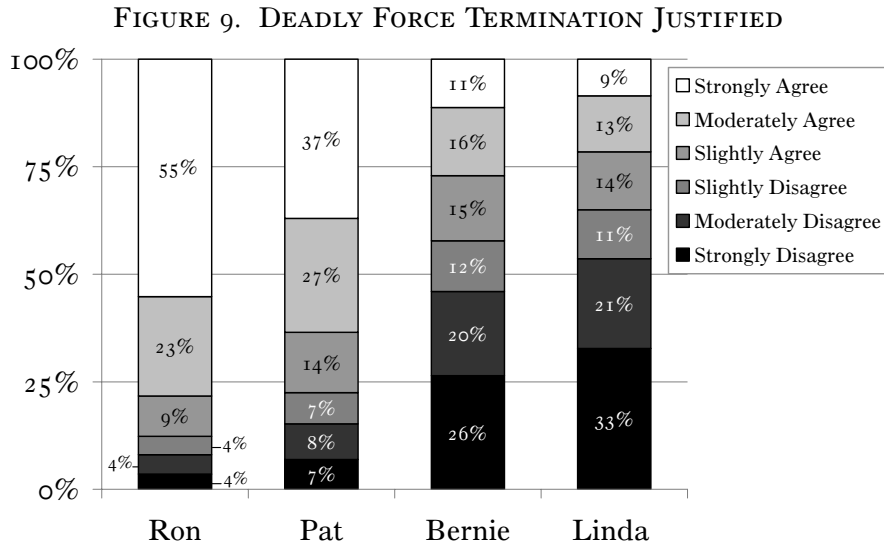
TABLE 6. RELATIVE CULPABILITY

	Ron	Pat	Bernie	Linda
Harris Much More at Fault	88% ( $\pm 6\%$ )	64% ( $\pm 3\%$ )	29% ( $\pm 11\%$ )	16% ( $\pm 8\%$ )
Harris Slightly More at Fault	6% ( $\pm 2\%$ )	15% ( $\pm 2\%$ )	18% ( $\pm 3\%$ )	13% ( $\pm 4\%$ )
Equally at Fault	5% ( $\pm 2\%$ )	15% ( $\pm 2\%$ )	32% ( $\pm 5\%$ )	35% ( $\pm 5\%$ )
Police Slightly More at Fault	1% ( $\pm < 1\%$ )	2% ( $\pm 1\%$ )	8% ( $\pm 4\%$ )	12% ( $\pm 4\%$ )
Police Much More at Fault	1% ( $\pm < 1\%$ )	3% ( $\pm 1\%$ )	13% ( $\pm 6\%$ )	24% ( $\pm 11\%$ )

Bernie and Linda, though, see matters differently. About one-half (53%,  $\pm 5\%$ ) of the people who share Bernie's defining characteristics will say either that the parties were equally at fault or the police more at fault. At most a third (29%,  $\pm 4\%$ ) of the persons who share Linda's characteristics will say that Harris was more at fault; a person who shares her characteristics is at least five times more likely (36%,  $\pm 4\%$ ) to say that the police were more at fault than is an average member of the general population (5%,  $\pm 1\%$ ).

Bernie and Linda also don't agree with the *Scott* majority on the ultimate issue (Figure 9 and Table 7). Over three-fifths (65%,  $\pm 2\%$ ) of

the persons who share Linda's characteristics disagree — about one-half either strongly or moderately — with the statement that “[t]he danger that Harris's driving posed to the police and the public justified Officer Scott's decision to end the chase in a way that put Harris's own life in danger.” Nearly three-fifths (58%,  $\pm$  2%) of the persons who hold Bernie's characteristics are also likely to believe that deadly force was unreasonable.



**TABLE 7. DEADLY FORCE TERMINATION JUSTIFIED**

	Ron	Pat	Bernie	Linda
Strongly Agree	55% ( $\pm$ 11%)	37% ( $\pm$ 3%)	11% ( $\pm$ 5%)	9% ( $\pm$ 4%)
Moderately Agree	23% ( $\pm$ 4%)	27% ( $\pm$ 2%)	16% ( $\pm$ 5%)	13% ( $\pm$ 5%)
Slightly Agree	9% ( $\pm$ 3%)	14% ( $\pm$ 2%)	15% ( $\pm$ 3%)	14% ( $\pm$ 3%)
Slightly Disagree	4% ( $\pm$ 2%)	7% ( $\pm$ 1%)	12% ( $\pm$ 2%)	11% ( $\pm$ 2%)
Moderately Disagree	4% ( $\pm$ 2%)	8% ( $\pm$ 1%)	20% ( $\pm$ 4%)	21% ( $\pm$ 4%)
Strongly Disagree	4% ( $\pm$ 1%)	7% ( $\pm$ 1%)	26% ( $\pm$ 9%)	33% ( $\pm$ 11%)

Pat does agree with the *Scott* majority, although not without a bit of equivocation. There is a 64% ( $\pm$  2%) chance that a person drawn randomly from the population would either moderately or strongly agree that the police were justified in using deadly force. There is, however, a 14% ( $\pm$  2%) chance that he/she would be only “slightly” inclined to agree, and over a 20% chance that he/she would conclude upon watching the tape that use of deadly force was unreasonable.

Ron again is emphatic. Over 80% of the individuals who share his characteristics would find the police acted reasonably.

*E. Summary and Discussion*

The results of our study strongly confirmed our hypotheses. With the exception of whether the police should have initiated a high-speed chase — a matter on which subjects sharply disagreed — reactions to the *Scott* tape reflect constrained dissensus. A very sizable majority of our diverse, nationally representative sample agreed with the *Scott* majority that Harris's driving exposed the public and the police to lethal risks, that Harris was more at fault than the police for putting the public in danger, and that deadly force ultimately was reasonable to terminate the chase. However, dissent from these perceptions and evaluations was not random; the minority of subjects who disagreed about the appropriateness of deadly force were connected by a core of identity-defining characteristics. Indeed, so too were members of a minority who formed a view of the facts most unequivocally in line with those of the *Scott* majority.

The relationship between these perceptions, on the one hand, and the relevant group identities, on the other, fits our hypothesis that reactions to the *Scott* tape would be shaped by various sources of value-motivated cognition. As we predicted, there were sharp differences of perception among persons bearing characteristics and commitments typical of two recognizable cultural styles. Individuals (particularly white males) who hold hierarchical and individualist cultural world-views, who are politically conservative, who are affluent, and who reside in the West were likely to form significantly more pro-defendant risk perceptions. Individuals who hold egalitarian and communitarian views, whose politics are liberal, who are well educated but likely less affluent, and whose ranks include disproportionately more African Americans and women, in contrast, were significantly more likely to form pro-plaintiff views and to reject the conclusion that the police acted reasonably in using deadly force to terminate the chase. The conspicuous competition between these recognizable cultural styles (or "status collectivities"<sup>125</sup>) on issues ranging from gun control to climate change, from abortion to the death penalty, attests to the power of the images reflected in the *Scott* tape to provoke perceptions protective of observers' identities.<sup>126</sup>

The results of the study also make clear that this form of identity-protective cognition operates unevenly across the types of risk percep-

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<sup>125</sup> GUSFIELD, *supra* note 17, at 21 (emphasis omitted).

<sup>126</sup> See *supra* p. 862 & note 103 (describing relationship between cultural styles and deeper forms of cultural affinity).

tions and evaluations that the Court's own analysis in *Scott* reflects. Persons subscribing to the *bet* cultural style disagreed with those subscribing to the *aleph* style about the risk posed by Harris's driving, but they even more strongly disagreed about the apportionment of fault between Harris and the police for creating that risk. The latter assessment, likely combined with a similar discrepancy between these groups on whether the chase was worth the risk to the public to begin with, is apparently what explains the disagreement over whether deadly force was justified. The stake that those adhering to these styles have in protecting their respective identities, then, impels them into disagreement most strongly on whether the behavior of the police was risk-reducing or risk-enhancing on net, likely because that "fact" has the closest connection to whether we should view those in authority with trust or suspicion.

As we have discussed, the Court's opinion admits of some ambiguity on exactly which issues the video was deemed dispositive.<sup>127</sup> Were a case like *Scott* to be submitted to a jury, of course, the jury would be called upon to decide (in the form of a general verdict) all the issues that the Court identified as decisive to its analysis. That is, in considering whether the use of deadly force to terminate the chase was reasonable, the jury would be required not only to gauge the degree of risk that the fleeing driver's behavior imposed on the public and the police, but also to assess the "relative culpability" of the fleeing driver and the pursuing police officer for creating that risk.<sup>128</sup>

As a result of the Court's decision in *Scott*, though, in *no* case will a jury be permitted to decide *any* of those issues. The Court's decision effectively determined that, regardless of whatever other evidence might be presented in the case and whatever might transpire in the course of jury deliberations, there could be no room for "reasonable" disagreement on *either* the magnitude of the risks involved in the case *or* the role of the police in reducing or exacerbating those risks.

Our analysis suggests that this conclusion cannot be based on the ground that in fact *no* identifiable group of people *would* disagree with the Court on these matters after watching the *Scott* tape. The Court's decision can be justified only if the members of that group — those

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<sup>127</sup> See *supra* pp. 856–57.

<sup>128</sup> See, e.g., COMM. ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS'N, ELEVENTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CIVIL CASES) 192–93 (2005) ("The third aspect of the Plaintiff's [§ 1983, Fourth Amendment] claim is that excessive force was used by the Defendants in effecting the Plaintiff's arrest. . . . Whether a specific use of force is excessive or unreasonable turns on factors such as the severity of the crime, whether the suspect poses an immediate violent threat to others, and whether the suspect is resisting or fleeing. You must decide whether the force used in making an arrest was excessive or unreasonable on the basis of that degree of force that a reasonable and prudent law enforcement officer would have applied in making the arrest under the same circumstances disclosed in this case.").

who do see something different from the Court majority — are necessarily “unreasonable.” We consider next whether such a conclusion can possibly be an appropriate one for the law to make.

### III. EVALUATING *SCOTT*

Just as the *Scott* tape doesn’t “speak for itself” in a way that generates a single, indisputably correct answer to the factual issues posed by the case, so our study results don’t “speak for themselves” in a way that generates a single and indisputably correct answer to whether *Scott* was correctly decided. Our results show that a substantial majority of the American public would likely see the key facts in the manner the Supreme Court majority did. One could argue that this finding supports the Court’s conclusion that summary judgment was warranted. We would not, because we think the shared values and other defining characteristics of the citizens who would see things differently make it inappropriate to dismiss their minority perspective as “unreasonable.” But we realize full well that this position demands a reasoned defense, which we endeavor to supply in this Part. We also identify alternative grounds on which the Court could have reached the same result in *Scott* without insisting that the videotape supported only one “reasonable” view of the facts.

That insistence, we argue, is the only thing that is manifestly wrong about the decision. The Court’s failure to recognize the culturally partial view of social reality that its conclusion embodies is symptomatic of a kind of cognitive bias that is endemic to legal and political decisionmaking and that needlessly magnifies cultural conflict over and discontent with the law.

#### A. *Dissensus, Deliberation, and Legitimacy*

Our study suggests that a fairly sizable majority of Americans would agree after viewing the *Scott* tape that Harris’s driving created lethal risks to the public that warranted the police using deadly force to terminate the chase. Such a finding is a necessary condition for concluding that the Court was correct to hold that the case should be decided summarily, but is it sufficient to justify that outcome?

To answer the question requires a theoretical understanding of the properties of consensus that justify dispensing with civil jury decisionmaking.<sup>129</sup> How large, how intense, and how uniform across

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<sup>129</sup> We mean to address this issue not just as it relates to summary judgment but also to judgment for directed verdict and judgment notwithstanding the verdict as well. Although variously worded under the Federal Rules, compare FED. R. CIV. P. 56(c) (standard for summary judgment), with FED. R. CIV. P. 50(a)(1) (standard for judgment as a matter of law), “the inquiry [for all these dispositions] is the same: whether the evidence presents a sufficient disagreement to require sub-

groups must such agreement be for a court to say there is no point in obliging the large majority that sees things one way to deliberate with an identifiable minority that sees them differently? We will offer a modest theoretical framework for answering that question — modest not necessarily because we have only a modest view of our own ability as theorists, but rather because we think nothing more than midlevel theorizing is needed to show that the necessary properties of consensus were lacking in *Scott*.<sup>130</sup>

Presumably, a judge in a case like *Scott* should not base her decision to decide summarily on whether she thinks deliberation would increase the likelihood of a *correct* verdict enough to justify the cost of a jury trial. The reason is that verdict accuracy at a reasonable cost is not the point of jury decisionmaking. If accuracy were the goal, it seems unlikely the law would use ordinary citizens to decide facts in a one-off fashion; it would almost certainly rely instead on professionals, whose expertise in “getting it right” would reflect both prior training and experience from repeated decisionmaking. Or in other words, the law would presumably use judges as factfinders.<sup>131</sup> This is not to say

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mission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986); *see also* 9B CHARLES WRIGHT & ARTHUR MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2532 (3d ed. 2008). Nothing in our discussion, however, bears on summary disposition under Federal Rule 12(b)(6) or its state-law equivalents, which require a case to be dismissed for “failure to state a claim,” a disposition that goes to the adequacy of a plaintiff’s *legal theory*, not the strength of the plaintiff’s factual evidence.

<sup>130</sup> Our theory is modest, too, in the sense that we do not take on the task of justifying the jury system. There is a rich literature on this subject, many contributions to which we draw on in the discussion that follows. The Court in *Scott*, of course, did not premise its decision on a radical repudiation of the jury and its conventional justifications. Nevertheless, we can easily imagine that the Court was motivated to overstate the conclusiveness of the video on the key facts in the case by an unstated resistance to jury trials generally. *See* Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1907–14 (1998) (linking evolving Supreme Court summary judgment standards to growing acceptance of limiting access to jury trials); *see also* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007) (noting and criticizing the same trend). But if so, the Court could have achieved the same result, without duplicity and without the cost to legitimacy we attribute to its reasoning, if it had based its decision on the grounds we discuss in section III.B.

<sup>131</sup> The case for professionalization of factfinding has a long pedigree and is well developed. *See, e.g.*, ERWIN GRISWOLD, 1962–1963 HARVARD LAW SCHOOL DEAN’S REPORT 5–6 (“Why should anyone think that 12 persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons?”), *quoted in* HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 5 (1966). *See generally* JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 318–31 (2003) (documenting the historical antagonism between truth-seeking and the growing centrality of the jury in an adversary system of adjudication). Although the comparison presents methodological challenges, the weight of the evidence seems to suggest that judges generally render more accurate verdicts than juries. *See, e.g.*, Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305 (2007) (surveying past studies and using innovative statistical methods to determine relative error rates of judges and juries based on rates of disagree-

that a theory of when jury decisionmaking is worth the bother should be indifferent to accuracy, but it is to say such a theory must also be sensitive to other properties that a jury is uniquely or specially fitted to add to a (reasonably) accurate verdict.

Those qualities are familiar and are reflected in standard accounts of the benefits of jury decisionmaking. One is the simple ordinariness of jurors' perspectives.<sup>132</sup> Facts "speak for themselves" only against the background of preexisting understandings of social reality that invest those facts with meaning. Those understandings come from experiences and social influences that vary across groups of persons in systematic ways. In particular, we can expect ordinary citizens to form different understandings of social reality from judges or other professional factfinders precisely because the process of legal and judicial professionalization involves experiences and social influences alien to the rest of society.<sup>133</sup> Maybe those special experiences and influences make the judges "smarter" and better equipped to give facts their proper meaning. But since the judgments of fact on which the law bases its commands are ones that govern the lives of ordinary citizens, the law would face a fairly obvious difficulty if its view of the "facts" didn't take ordinary citizens' understandings of reality into account.

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ment). Some dispute this conclusion. See, e.g., Robert J. MacCoun, *Epistemological Dilemmas in the Assessment of Legal Decisionmaking*, 23 LAW & HUM. BEHAV. 723, 726 (1999). However, the most common reply is to demur; the exclusive focus on accuracy fails to account for the myriad other political benefits associated with giving ordinary citizens a conspicuous and (arguably) meaningful voice in the administration of justice. See, e.g., VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 249 (1986) (arguing that the "political functions of the jury" deserve just as much consideration as its "fact-finding functions . . . in judging the jury's role in society"); Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 983 (2006) ("[T]he jury is not at its core a mechanism for seeking truth; it is a tool for injecting democracy into the judicial process . . ."); see also Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333 (1988) (presenting experimental evidence that ordinary citizens prefer the jury on grounds of fairness to other modes of adjudication that appear to surpass it in accuracy).

<sup>132</sup> See, e.g., JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 18 (Harvard Univ. Press 2000) (1994) ("[L]ocal knowledge . . . qualifies the juror[s] to understand the facts of the case and to pass judgment in ways that a stranger . . . could not. . . . [T]hey know the conscience of the community and can apply the law in ways that resonate with the community's moral values and common sense.").

<sup>133</sup> See, e.g., *Maher v. People*, 10 Mich. 212, 222 (1862) ("[J]urors, from the mode of their selection, coming from the various classes and occupations of society, and conversant with the practical affairs of life, are, in my opinion, much better qualified to judge of the sufficiency and tendency of a given provocation, and much more likely to fix, with some degree of accuracy, the standard of what constitutes the average of ordinary human nature, than the Judge whose habits and course of life give him much less experience of the workings of passion in the actual conflicts of life."); HANS & VIDMAR, *supra* note 131, at 248 ("[T]he overwhelming majority of judges are still white males who come from a privileged sector of our society. Often their views of the world reflect their backgrounds. Some rather rigidly adhere to a narrow perspective of justice and fairness that is not consistent with that of the general community.").



That difficulty would be of various forms, all of which relate, essentially, to *legitimacy*. “Legitimacy” in a descriptive sense refers to the political acceptability of law — its power to command voluntary compliance.<sup>134</sup> Citizens would be unlikely to assent to legal determinations that seem to reflect inaccurate judgments of fact — inaccurate because of their lack of correspondence to ordinary citizens’, as opposed to specialized professionals’, understandings of how the world works.<sup>135</sup>

“Legitimacy” in its normative sense refers to qualities that make the law morally *worthy* of assent.<sup>136</sup> Here too the jury plays a critical role. Broadly speaking, law has *democratic legitimacy* when the process of its formation is sufficiently connected to (determined by, solicitous of, respectful toward) the will of those who are governed by it that we can impute the law’s commands *to* them.<sup>137</sup> Jury factfinding is such a process: the understanding of the *facts* reflected in the law can be morally imputed to those governed by the law when the law uses a fact-finding process that is informed by their view of social reality.

Understandings of social reality vary, of course, not only between judges and citizens, but also across citizens of diverse experiences and social identities. The diversity of citizens magnifies the contribution that jury factfinding makes to legitimacy in all these various senses.

Just as citizens would be unlikely to assent to verdicts rendered by professionals (say, judges) whose understandings of social reality were alien to theirs, so diverse citizens would be unlikely to assent to verdicts rendered only by *other citizens* whose understandings of social reality were alien to theirs.<sup>138</sup> By affording a factfinding role to citizens from diverse subcommunities, whose understandings of reality re-

<sup>134</sup> This is the positive conception of legitimacy associated with the social sciences. See generally C.K. Ansell, *Legitimacy: Political*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 8704, 8704 (Neil J. Smelser & Paul B. Baltes eds., 2001).

<sup>135</sup> See HANS & VIDMAR, *supra* note 131, at 248–49 (arguing that the public will accept verdicts more readily when rendered by jury than by judge, particularly in a controversial matter); cf. Laurence H. Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1376 (1971) (modes of adjudication that “fail[] to penetrate or convince the untutored contemporary intuition threaten to make the legal system seem even more alien and inhuman than it already does to distressingly many”).

<sup>136</sup> See Ansell, *supra* note 134, at 8704 (describing the normative conception of “legitimacy” of concern to political philosophers).

<sup>137</sup> This is the unifying theme of a diverse collection of “social contract” theories of legitimacy. See generally IAN SHAPIRO, *THE MORAL FOUNDATIONS OF POLITICS* 109–15 (2003).

<sup>138</sup> See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (“The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.”); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1316–17 (2000) (stressing the role of representative juries in dissipating resistance to verdicts likely to be controversial among discrete subcommunities).

flect experiences and social influences peculiar to those subcommunities, the jury contributes to the law's legitimacy in the descriptive sense.<sup>139</sup> To take an obvious example, the Jim Crow exclusion of African Americans from juries<sup>140</sup> led to a cynical and dispirited view of legal institutions in minority communities. Having no voice in that mode of the law's production, those citizens naturally distrusted the rules that came from the jury.<sup>141</sup>

Likewise, by involving diverse citizens in factfinding, the jury contributes to the law's democratic legitimacy in the moral sense. The experience of interacting with others whose understandings of social reality differ from theirs — and thus learning that their own understandings, and hence their views of the facts, are partial — might cause jurors of diverse identities to converge on a common view of the facts, particularly where one side's initial view is less intensely held than the other's.<sup>142</sup> Such convergence would furnish assurance to the diverse citizens whom such jurors represent that the law embodies a view of the facts consistent with their shared experiences and defining commitments. This assurance would in turn make the expectation of generalized obedience morally compelling.

But probably even more important, jury deliberation can invest law with democratic legitimacy even when factual understandings born of diverse experiences and social influence persist. Necessarily in that circumstance, subcommunities whose views of the facts are rejected by the law will not be able to see the law as reflecting their understanding of reality in substance. Accordingly, they can be expected to see the law as *theirs* in the sense that morally warrants an expectation of assent only if the law arises from a *process* that shows due respect for their understanding of reality and hence for their identities.<sup>143</sup> Jury factfinding is a procedural strategy of that sort. It assures that those who win in a contest between competing understandings were obliged to *listen* — under circumstances geared toward maximizing the prospects of changes in, and convergences of, perspectives — to those who have *lost*. And in so doing, it enables the latter to assent

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<sup>139</sup> See, e.g., *Glasser v. United States*, 315 U.S. 60, 86 (1942) (“[T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a ‘body truly representative of the community,’ and not the organ of any special group or class.” (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940))).

<sup>140</sup> See ABRAMSON, *supra* note 132, at 108–12.

<sup>141</sup> See ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 946–47 (2002) (describing civil rights leaders' resistance to jury trial enforcement of the 1957 Civil Rights Act because of distrust of unrepresentative juries).

<sup>142</sup> See ABRAMSON, *supra* note 132, at 100–01.

<sup>143</sup> Cf. HANS & VIDMAR, *supra* note 131, at 51, 248–49 (explaining that subcommunities aggrieved by controversial verdicts are more likely to see verdicts as fair if the jury contains their members).

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without the experience of subjugation and domination that estranges them from the law.<sup>144</sup>

This account brings into sharper focus the features that factual consensus must have before it can justify dispensing with jury deliberation. Precisely because juries can lend legitimacy to law by assuring *minorities* that their perspective is being respected, it surely isn't enough that the facts in a particular case "speak for themselves" for a large majority. If the minority's view of the facts reflects the minority's view of social reality, summary adjudication will deny the minority a basis to accept, or for the majority to demand that it accept, the law's view of the facts as its own. Before summary adjudication can be justified, then, the consensus that attends a particular set of factual findings must be more than (or simply different from) "large." It must also be devoid of any partial understanding of social reality the endorsement of which by the law would alienate or stigmatize an identifiable subcommunity, whose perspective has been excluded from consideration. Or, in a word, it must be *mundane*.

Most — probably the overwhelming majority — of the cases that strike judges as presenting "no genuine issue as to any material fact"<sup>145</sup> will pass this test. Almost every time a judge declares no such issue to exist, whether in a complex commercial dispute or a routine slip-and-fall suit, she can be confident that *some* small fraction of potential jurors might well perceive the facts differently; statistical outliers are inevitable. But if these individuals are *mere* outliers — if they don't share experiences and an identity that endow them with a distinctive view of reality, if the factual perceptions in question don't arise from their defining group commitments — summary judgment will *not* convey the message of exclusion that delegitimizes the law in the eyes of identifiable subcommunities.

*Scott*, however, was not a case of that sort. Our data suggest that the minority who would see things differently from the Court after watching the tape are *not* idiosyncratic statistical outliers; they are members of groups who share a distinctive understanding of social reality that informs their view of the facts. Those facts, moreover, involve a type of police-citizen encounter fraught with competing connotations in our society: a civil liberties case. Perhaps the disclosure of the experiences and social influences on which the minority's understanding rests could change the majority's view of social reality, and hence its view of the facts.

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<sup>144</sup> See generally CHRISTOPHER J. ANDERSON, ANDRÉ BLAIS, SHAUN BOWLER, TODD DONOVAN & OLA LISTHAUG, *LOSERS' CONSENT: ELECTIONS AND DEMOCRATIC LEGITIMACY* (2005).

<sup>145</sup> FED. R. CIV. P. 56(c).

But even if we assume — as we think is likely — that such exposure would *not* change the perceptions of the “vast majority,” it still does not follow that the Court was right to order that *Scott* be decided summarily. For it is exactly when the law is certain to endorse a factual position that aligns it with one contested view of how the world works rather than another that the process of jury deliberation performs its greatest function in conserving democratic legitimacy in a diverse society. If the law has not only rejected their view of social reality, but has refused even to permit the articulation of it in the process of the law’s determination of the facts, those who disagree lack any resources for understanding the law as theirs. Indeed, if the law has adopted procedures designed rigorously to insulate judicial determinations from the minority’s view of reality because a court deems that view to be one no “reasonable” citizen could possibly hold, members of that minority cannot understand (or be expected to understand) assent as anything other than acquiescence in their status as defeated and subjugated outsiders.

*Scott* put identifiable subgroups of citizens in exactly that position. Even though constrained, the nature of the dissensus surrounding the facts revealed in the tape shows that Americans interpret those facts against the background of competing subcommunity understandings of social reality. Under these circumstances, ordering that the case be decided summarily based on the video was wrong precisely because doing so denied a dissenting group of citizens the respect they were owed, and hence denied the law the legitimacy it needs, when the law adopts a view of the facts that divides citizens on social, cultural, and political lines. In so doing, the *Scott* majority transformed an inevitably partial view of social reality reflected in law into a needlessly partisan one.

*B. How To Defend the Outcome in Scott: Reasons, Not Perceptions*

We have suggested that the Court in *Scott* was wrong to order summary judgment on the ground that it was entitled to “believe its own eyes” after watching the tape. Its decision to privilege its view of a set of facts on which even a minority of persons who share a set of defining commitments would disagree stigmatizes those citizens as outsiders and in so doing delegitimizes the law.

But nothing we have said in that regard implies, necessarily, that the *result* in *Scott* was incorrect. We can think of at least three plausible alternative grounds for the decision. We don’t know whether in the end any of them is persuasive (in part because we disagree among ourselves about the merits of at least one of them). But we do believe that they all avoid the sort of criticism we have developed of the Court’s reasoning — or lack thereof — in the case.

One such ground would have emphasized the unique approach that courts often take to factfinding in constitutional settings.<sup>146</sup> So-called “constitutional facts,” unlike those decided in cases presenting no constitutional issue, are often reviewed *de novo* in the Supreme Court.<sup>147</sup> One reason for independent factfinding is to assure adequate enforcement of constitutional guarantees toward which there is majority antagonism that could seep into jury factfinding.<sup>148</sup> Another is the importance of uniformity and predictability in constitutional rules.<sup>149</sup> This concern is particularly compelling where a court can perceive that enforcement of a constitutional norm will turn on a type of factual perception that a discrete subcommunity does not share, for in that case summary adjudication is necessary to avoid inconsistent verdicts across jurisdictions and within particular jurisdictions over time.<sup>150</sup>

These concerns have had a conspicuous influence in Fourth Amendment jurisprudence. The Supreme Court has warned against “standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review.”<sup>151</sup> To avoid that, Fourth Amendment doctrine is replete with rule-like *presumptions of reasonableness* for generically defined fact patterns (for example, the arrest and jailing of suspected misdemeanants without regard to their per-

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<sup>146</sup> See generally Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 247–54 (1985) (history of constitutional fact review).

<sup>147</sup> *Id.* at 261–62.

<sup>148</sup> See, e.g., *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 276–77 (1971) (justifying judicial scrutiny of jury findings in cases involving the First Amendment because the jury itself is “unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those ‘vehement, caustic, and sometimes unpleasantly sharp attacks’ which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail,” *id.* at 277 (citation omitted) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))).

<sup>149</sup> See, e.g., *Ornelas v. United States*, 517 U.S. 690, 697–98 (1996) (“[D]e novo review [of facts that bear on Fourth Amendment determinations] tends to unify precedent and will come closer to providing law enforcement officers with a defined ‘set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.’” (quoting *New York v. Belton*, 453 U.S. 454, 458 (1981))).

<sup>150</sup> These, in any case, are the conventional accounts of a certain type of aggressive judicial factfinding in constitutional cases. For an alternative account, see Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006). Goldberg argues that courts tend to disguise contestable normative judgments (sometimes ones that support repression of marginalized groups but also sometimes ones that resist such repression) as unassailable “facts” in order to minimize political resistance to their decisions. See *id.* at 1961; see also Alafair S. Burke, *Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043, 1048–51 (2005) (book review) (describing tension between empirical and normative strands of Fourth Amendment search jurisprudence); David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 544–45 (1991) (identifying normative commitments in factfinding).

<sup>151</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001).

ceived dangerousness;<sup>152</sup> “suspicionless” interviews of travelers at bus terminals;<sup>153</sup> the stopping of a vehicle where probable cause exists to believe a traffic violation has taken place, without regard to officers’ subjective motives for the stop<sup>154</sup>) that spare police the uncertainty that would attend minute, case-specific factual inquiries, whether in the context of pretrial motions to exclude evidence from criminal prosecutions or of civil actions for damages.<sup>155</sup>

The Court in *Scott* could easily have reversed on the basis of a presumption of reasonableness defended in this way. Indeed, its decision ended by announcing a “rule” — “[a] police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death”<sup>156</sup> — that going forward could well shield from judicial scrutiny any police chase of a fleeing motorist.<sup>157</sup>

To be sure, any decision on this basis could have been criticized. Every bit as often as the Court has insisted on the importance of “bright line” rules, it has also recognized the need for flexible standards that can accommodate the fact sensitivity of Fourth Amendment reasonableness determinations.<sup>158</sup> Because such standards *do* enlarge the role for juries in civil damages cases, this branch of the doctrine is said to accord with “[t]he genius of the framers’ [understanding] . . . that juries of ordinary Americans can sometimes decide which intrusions

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<sup>152</sup> See *id.* at 354.

<sup>153</sup> See *Florida v. Bostick*, 501 U.S. 429 (1991).

<sup>154</sup> See *Whren v. United States*, 517 U.S. 806 (1996).

<sup>155</sup> Cf. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 110–11 (2004) (describing *Atwater* as a constitutional decision rule).

<sup>156</sup> *Scott v. Harris*, 127 S. Ct. 1769, 1779 (2007).

<sup>157</sup> *But see id.* (Ginsburg, J., concurring) (“I do not read today’s decision as articulating a mechanical, *per se* rule. The inquiry described by the Court is situation specific.” (citations omitted)); *id.* at 1780 (Breyer, J., concurring) (“[T]he video makes clear the highly fact-dependent nature of this constitutional determination.”). See generally pp. 856–57 (describing the *Scott* opinion’s ambiguity on the rule to be applied in car chase cases and on the identity of the issues subject to determination by the factfinder).

<sup>158</sup> See Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court’s Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387, 1417 (2003) (“In addition to the Court’s construction of broad, shifting reasonableness propositions, it has also inconsistently characterized the Fourth Amendment as requiring bright-line rules or case-by-case adjudication.”); see also *Robbins v. California*, 453 U.S. 420, 443 (1981) (Rehnquist, J., dissenting) (attacking one Fourth Amendment “bright line” rule against warrantless search of container during lawful search of interior of car: “Our entire profession is trained to attack ‘bright lines’ the way hounds attack foxes. Acceptance by the courts of arguments that one thing is the ‘functional equivalent’ of the other, for example, soon breaks down what might have been a bright line into a blurry impressionistic pattern.”), *overruled by* *United States v. Ross*, 456 U.S. 798, 824 (1982) (adopting fact-sensitive standard for reviewing searches of containers in vehicles subject to search).

are so unreasonable” as to violate the Fourth Amendment.<sup>159</sup> The concern that jury factfinding might be corrupted by insufficient community support for the protections the Fourth Amendment guarantees is, at least sometimes, counteracted by the stake that ordinary citizens clearly have in “strik[ing] a sensible balance between liberty and order[.] If they unreasonably handcuff the cops, their community will suffer; and if they allow the cops to handcuff citizens unreasonably, they are likewise putting themselves at risk.”<sup>160</sup> Finally, the prospect that jury decisionmaking might result in nonuniform verdicts, far from being decried as a vice, might be thought by some to be a virtue that perfects democratic rule by giving a persistent dissenting group “temporally or spatially restricted power to express their views.”<sup>161</sup>

We take no position on the merits of judicial factfinding animated by concerns for uniform application of constitutional principles. We note only that *had* the Court decided *Scott* on this ground, as it easily could have, it would have avoided stigmatizing an identifiable subcommunity’s view of social reality as too “unreasonable” to be given consideration in the administration of justice. *No* group of citizens’ views of the facts having been treated as privileged by the law, the members of subcommunities that had the minority view would have had no reason to see the law as less legitimately binding on them than the members of the majority, who likewise are expected to assent to judicial determinations that reflect the special competence of courts as expositors of the Constitution.<sup>162</sup>

The same would have been true had the Court in *Scott* squarely based reversal on a second basis: the institutional advantage that courts have in determining the systemic consequences of particular legal rulings. If the law is trying to figure out whether one man “slapped [another] . . . on the elbow” or “merely touched him,”<sup>163</sup> “jurors, from the mode of their selection, coming from the various classes

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<sup>159</sup> Akhil Reed Amar, *An Unreasonable View of the 4th Amendment*, L.A. TIMES, Apr. 29, 2001, at M1.

<sup>160</sup> *Id.*

<sup>161</sup> Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1756 (2005).

<sup>162</sup> This is not to say that the minority — like the majority — will not be irritated by courts’ assertion of power. Even today, the (large) minority of the population who disagree with *Roe* and *Casey* protest its rule that courts, rather than criminal juries, weigh the social consequences and contested facts involved in the law of abortion. That protest, in turn, excites political action. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 399 (2007) (arguing that dissensus is “frequently expressed in legislation, which offers countless opportunities for judicial critics to interpose practical obstacles to the realization of constitutional norms advanced by a challenged decision”). Here we invoke only the conventional argument that when courts exercise their constitutional interpretive power in the manner conventionally assumed to be appropriate, their decisions are legitimate in the moral sense.

<sup>163</sup> *Duncan v. Louisiana*, 391 U.S. 145, 147 (1968).

and occupations of society, and conversant with the practical affairs of life” have an advantage in determining all manner of historical fact over judges, “whose habits and course of life give [them] much less experience of the workings of passion in the actual conflicts of life.”<sup>164</sup> But by the same token, precisely because of their distinctive “habits and course of life,” not to mention the special “mode of *their* selection,” judges are likely to gain certain insights into the workings of the practical affairs of legal institutions. Whereas most citizens, for example, have only fleeting contact with law enforcement, judges have recurring occasion to observe police officers and prosecutors at work. They are thus, arguably, much more cognizant than are individual jurors of how damages verdicts — even intermittent ones — might change law enforcement behavior. Indeed, far from taking these more abstract and largely unobserved costs into effect, juries might be riveted by the vivid consequences of policing gone bad in individual cases, and thus overestimate the likelihood of such misfortunes generally.<sup>165</sup> Even if one does not believe that these sorts of influences should disqualify ordinary citizens from central participation in the administration of justice generally, one might still conclude that they warrant constraining ordinary citizens’ role in deciding certain matters, which for that reason should be characterized as “matters of law” for courts to determine.<sup>166</sup>

Elements of such reasoning *do* appear in the Court’s opinion in *Scott*. Rejecting the claim that the police should have discontinued the chase as a less drastic alternative to deadly force, the Court stated, “[i]t is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights.”<sup>167</sup> Because such perverse incentives

<sup>164</sup> *Maier v. People*, 10 Mich. 212, 222 (1862).

<sup>165</sup> This feature of jury decisionmaking reflects the unique vulnerability of juries to distorting influences such as vividness, representativeness bias, hindsight bias, and the like. See, e.g., Dorothy K. Kagehiro, Ralph B. Taylor, William S. Laufer & Alan T. Harland, *Hindsight Bias and Third-Party Consentors to Warrantless Police Searches*, 15 LAW & HUM. BEHAV. 305 (1991) (analyzing effects of hindsight bias on lay perceptions of third-party consent to warrantless searches); Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC’Y REV. 123 (1981) (analyzing cognitive biases affecting lay juror interpretation of quantitative evidence); cf. Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 COLUM. HUM. RTS. L. REV. 659, 680–81 (2006) (arguing that issues on which Fourth Amendment excessive force claims turn should be allocated between judge and jury with such considerations in mind).

<sup>166</sup> Cf. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) (noting that in performing certain tasks structured to involve legal reasoning, judges appear to display relatively greater resistance to biases than lay persons).

<sup>167</sup> *Scott v. Harris*, 127 S. Ct. 1769, 1779 (2007).



could be generated by *any* jury verdict in favor of the plaintiff in a case involving a high-speed chase, the Court could have treated this reasoning as dispositive of the case as a matter of law wholly apart from whatever facts any “reasonable juror” might have seen in the tape.

Again, we are not necessarily arguing that this would have been a persuasive basis for reversing. Indeed, one could argue that judges are the ones who lack a realistic understanding of the costs and benefits of various policing techniques,<sup>168</sup> particularly in communities whose members have considerable experience with the coercive incidences of them.<sup>169</sup> Moreover, judges may be subject to capture by the authorities they are supposed to regulate, especially in state systems, where electoral endorsement by the police and the district attorney tend to be necessary in judicial elections. It is also a bit odd for members of the Supreme Court — who encounter the workings of criminal law enforcement from a remote, law-bookish perspective only — to think they have a better grasp of the consequences of Fourth Amendment rulings than do individual district court judges, whose dockets are likely to be dominated by criminal matters. Nevertheless, as a ground for decision firmly established in familiar understandings of the institutional competence of courts in general, had the Court relied entirely on the bad consequences of permitting *any* jury to award damages in a high-speed police chase, it would have avoided gratuitously insulting any class of citizens in particular.

Finally, the Court in *Scott* could have reversed on the ground that democratic political checks adequately assure the “reasonableness” of high-speed police chases. Like many other bodies of constitutional doctrine,<sup>170</sup> the Court’s Fourth Amendment jurisprudence is highly sensitive to the *generality* of coercive state behavior. In a case like *Tennessee v. Garner* — in which the police shot a criminal suspect who was fleeing them on foot — coercion is *concentrated* on a single individual whose well-being is likely to be a matter of indifference (at best)<sup>171</sup> to the general public. Popularly accountable officials thus

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<sup>168</sup> See Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 137 n.114 (1999) (suggesting that “availability” heuristic distorts judicial perception of likelihood of accuracy of police investigatory judgments because courts see “primarily . . . criminal cases in which police intuition proved accurate”).

<sup>169</sup> See generally Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998) (defending deference to inner-city communities’ balance of order and liberty struck by policing techniques that affect them).

<sup>170</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>171</sup> Although the Supreme Court famously avoided referring to this aspect of the case, the defendant in *Garner* was an African-American youth, and the challenge to the state common law authorization of the use of deadly force against nondeadly fleeing felons was based primarily on

have little incentive to police the police in this context to assure the toll police behavior exacts on individual liberty is compensated for by its contribution to public order — the test for “reasonableness” under the Fourth Amendment.<sup>172</sup> Accordingly, *courts* regulate the exercise of police power in this and like circumstances through strict enforcement of judicially defined reasonableness tests.

Many other types of law enforcement authority, however, *do* impose a burden on citizens generally, either directly or indirectly through their impact on parties whose interests citizens share. Examples include sobriety<sup>173</sup> and other types of vehicle checkpoints,<sup>174</sup> which burden ordinary citizens as drivers; random drug tests of high school students,<sup>175</sup> which burden ordinary citizens as parents; and warrantless “administrative” searches of businesses,<sup>176</sup> which burden ordinary citizens as consumers. Precisely because the coercive effects of such exercises of law enforcement authority are meaningfully visited on the citizenry at large, their approval by politically accountable actors furnishes compelling evidence that these policies strike a reasonable balance between liberty and order.<sup>177</sup> Judicially enforced rules are thus not necessary in these settings to test whether such exercises of power are “reasonable” under the Fourth Amendment.<sup>178</sup>

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the racially disparate impact of this law enforcement technique. See Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 339–40 (1998).

<sup>172</sup> See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (stating that “the standard of reasonableness” under the Fourth Amendment turns on a “balanc[ing]” of the affected “individual’s legitimate expectations of privacy and personal security” and the government’s interest in securing “public order”).

<sup>173</sup> See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

<sup>174</sup> See *Illinois v. Lidster*, 540 U.S. 419 (2004) (upholding checkpoints aimed at apprehending hit-and-run drivers).

<sup>175</sup> See *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002) (upholding drug testing program for students involved in extracurricular activities generally); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 650 (1995) (upholding drug testing program for high school athletes).

<sup>176</sup> See *New York v. Burger*, 482 U.S. 691 (1987).

<sup>177</sup> See *Kahan & Meares*, *supra* note 169, at 1173–74.

<sup>178</sup> See, e.g., *Lidster*, 540 U.S. at 421, 426 (explaining no “rule is needed” to assure roadside checkpoints are “reasonable, [and] hence, constitutional” because “practical considerations — namely, limited police resources and community hostility to related traffic tieups” — can be expected to constrain the unwarranted use of this technique); *Earls*, 536 U.S. at 841 (Breyer, J., concurring) (citing as evidence of reasonableness of drug-testing policy that a “democratic, participatory process” in which parents were involved “revealed little, if any, objection”); *Acton*, 515 U.S. at 665 (citing “unanimous approval” of parents at public meeting as evidence that drug testing does not unreasonably burden privacy of students).

This reasoning could well have been adopted in *Scott*.<sup>179</sup> When police decide to initiate a high-speed chase — and to persist in it until they manage to force the suspect to lose control of his vehicle and crash — they create *immense* risk for members of the public generally. Indeed, innocent bystanders *are* often injured when struck either by a fleeing motorist or police pursuers.<sup>180</sup> Accordingly, even if she is indifferent (or hostile) to the interests of the fleeing suspect, the ordinary citizen as driver or pedestrian clearly has a stake in the police *not* resorting to this potentially deadly seizure technique unless doing so generates commensurate benefits for public order. Because the ordinary citizen has such a stake, politically accountable officials have an incentive to police their own police to make sure they don't engage in high-speed chases without good reason. Indeed, hundreds of municipalities — responsive to the opinions of citizens like Bernie and Linda — have already adopted regulations that place severe restrictions on the use of high-speed chases and prohibit them from being used to apprehend drivers who resist being pulled over for minor traffic infractions.<sup>181</sup>

Once more, we are not necessarily arguing that the Court should have identified the adequacy of political checks as grounds for summarily deciding *Scott*. But had it done so, far from sending a message of exclusion to citizens like Bernie and Linda, it would have been conveying in the most emphatic terms available to a court that the decision was to be made through a process — the enactment of law by democratically accountable representatives — in which the voices of all must theoretically be heard.<sup>182</sup>

### C. Cognitive Illiberalism and Judicial Humility

We have come not to bury *Scott* but rather to identify the lessons that can be gleaned from it. We have argued that members of the Court majority were mistaken merely to “trust their own eyes” in viewing the *Scott* tape. But the upshot can't be that judges should *never* trust their own perceptions of the facts when determining whether to resolve cases summarily — instead sending every case, no matter how flimsy or outright specious the factual disputes are, to ju-

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<sup>179</sup> It was in fact a disposition urged on the Court by an amicus group consisting of various municipal and state governments and officials. See Brief of the National Ass'n of Counties et al. as Amici Curiae Supporting Petitioner at 9–17, *Scott v. Harris*, 127 S. Ct. 1769 (2007) (No. 05-1631), 2006 WL 3693465. This group was represented by one of the authors (Kahan) in his capacity as an instructor in the Yale Law School Supreme Court Clinic.

<sup>180</sup> See *id.* at 12 & n.9.

<sup>181</sup> See *id.* at 15.

<sup>182</sup> See generally JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999) [hereinafter WALDRON, *DIGNITY*] (developing theory of how legislation recognizes dignity of the minority at the same time it recognizes authority of the majority); JEREMY WALDRON, *LAW AND DISAGREEMENT* 108–13 (1999) (same).

ries. *Scott*, we've argued, presents certain special features that made it inappropriate for the Court to treat it as warranting summary decision even though the case would have presented a "genuine issue [of] material fact"<sup>183</sup> only for an admitted minority of citizens. The task, then, is to try to figure out what sorts of cues judges can look for when they are trying to distinguish the relatively few cases that possess these features from the vast run of cases, including ones that rely on video and like forms of demonstrative evidence, that are otherwise fit for summary adjudication. Performing this task, we suggest, requires identifying and taking effective steps to neutralize a set of interlocking social-psychological dynamics that are likely to distort judicial decisionmaking on factual issues that divide competing cultural and social groups.

The foundation of such distortion is *naïve realism*.<sup>184</sup> Social psychologists use this term to refer to an asymmetry in the ability of most people to identify the effects of value-motivated cognition. We are good at detecting when those who disagree with us about matters of fact are influenced by the congeniality of their beliefs to their defining group commitments.<sup>185</sup> That's the realism part. The naïve part is that we are correspondingly poor at identifying how the motivation to form beliefs congenial to our own group commitments operates in us.<sup>186</sup>

In the realm of legal and political life, this tendency has pernicious consequences. Many important policies turn on issues of disputed fact, or predictions based on fact: Does the death penalty deter murder? Does global warming exist, is it caused by humans, and does it pose significant economic and environmental threats? Does the minimum wage make working-class people better off or worse off? Will vaccinating school-age girls against HPV cause them to engage in promiscuous, unprotected sex and thus increase the incidence of teen pregnancy and HIV infection? Because they are not generally aware of their own disposition to form factual beliefs that cohere with their cultural commitments, legislators, policy analysts, and ordinary citizens manifest little uncertainty about their answers to these questions. But much worse, because they *can* see full well the influence that cultural predispositions have on those who *disagree* with them, participants in policy debates often adopt a dismissive and even contemptuous posture toward their opponents' beliefs. This attitude in turn provokes resentment on the part of their opponents, who, as a result of naïve realism, bridle at the suggestion that they are conforming their factual beliefs to their values yet see exactly that sort of process going on in

<sup>183</sup> FED. R. CIV. P. 56(c).

<sup>184</sup> See Robinson, Keltner, Ward & Ross, *supra* note 18, at 404–05.

<sup>185</sup> *Id.* at 405.

<sup>186</sup> *Id.*

the minds of their (annoyingly smug, it seems) antagonists. They naturally proclaim as much — initiating an escalating cycle of recrimination and distrust.<sup>187</sup>

The result is a state of *cognitive illiberalism*. The vast majority of citizens in our society do not desire to impose their values on others. They accept the basic liberal premise that law and policy should be confined to attainment of secular goods — security, health, prosperity — that are fully accessible to persons of all cultural outlooks.<sup>188</sup> But because the factual beliefs they form about the sorts of behavior that threaten those goods are (subconsciously) motivated by their cultural appraisals of those activities, such citizens naturally divide into opposing cultural factions on the policies the law should pursue to achieve their common welfare. Locked into a state of cyclical recrimination, moreover, members of these factions become perfectly (painfully) aware of this alignment between competing factual beliefs and opposing cultural identities. In such a climate, challenges to group-dominant beliefs become indistinguishable from indictments of the integrity and competence of the groups' members. Opposing groups find themselves engaged in relentless, symbolic status competition — *not* over whose partisan view of the good the law will endorse, but over whose culturally partisan view of the *facts* it will credit.<sup>189</sup>

We argue that the decision in *Scott* reflects and reinforces these dynamics. The Justices in the majority couldn't literally have perceived that *no one* could see the facts on the tape differently from how they saw them. The evidence that some citizens might was staring them, literally, in the face: Justice Stevens, who presumably indicated even in conference that he was *not* of the view that the case was fit for summary disposition. Even apart from Justice Stevens's interpretation of the tape, though, the case was replete with cues that a decision on the grounds the Court settled on would provoke at least some generalized societal dissent. It involved a coercive, near-deadly encounter between police and a citizen, always a potentially divisive matter in our society; numerous public interest groups had filed briefs in support of the respondent; coverage of the case in the media, too, suggested the decision would be controversial. Consistent with naïve realism, the Court might well have concluded, hardly without reason, that any dissatisfaction various social groups would have with reversal would reflect the motivating impact of these citizens' group commitments on their

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<sup>187</sup> See Kahan, *supra* note 19, at 130–42 (tracking this process in political debates concerning sodomy, drugs, guns, smoking, and nuclear energy and global warming).

<sup>188</sup> See generally MORRIS P. FIORINA WITH SAMUEL J. ABRAMS & JEREMY C. POPE, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (2006) (canvassing evidence that the vast majority of the public cares more about material welfare issues than symbolic moral ones).

<sup>189</sup> See generally Kahan, *supra* note 19.

perceptions of the facts as well as their interpretation of the relevant legal precedents. But what likely *did not* occur to the Justices in the majority was the degree to which their own perceptions (not to mention the perceptions of those who would agree with them upon watching the tape) would be just as bound up with cultural, ideological, and other commitments that disposed them to see the facts in a particular way.<sup>190</sup>

The basis on which the Court justified its decision exhibits the tendency of naïve realism toward culturally grounded recrimination and distrust. By declaring, in particular, that “no reasonable juror” could have formed beliefs contrary to the Court’s own, the Court inevitably called into question the integrity, intelligence, and competence of identifiable subcommunities whose members in fact held those dissenting beliefs. Those individuals, the Court should have foreseen, would in turn react with resentment and (not insupportable) suspicion that members of the Court majority (and any who agreed with them) were motivated by *their* values to declare *their* perceptions alone to be “reasonable.” As in other settings, then, in which the law picks sides in factual disputes that arise from culturally conflicting worldviews, the decision itself could well have been expected to deepen illiberal status competition.<sup>191</sup>

We believe this sort of outcome is avoidable. Judges can but needn’t inevitably compound the dynamics of cognitive illiberalism. Indeed, we believe they are uniquely equipped to help *counteract* those dynamics. The remedy is a form of judicial *humility*.

In a recent article, Professor Cass Sunstein argues that an appropriate posture of humility counsels courts to be sensitive to community outrage.<sup>192</sup> Judges, he notes, are boundedly rational, just like the rest of us, and as a result are prone to err both about the legal correctness of their decisions and about the practical consequences of them. One remedy, Sunstein argues, is a sensitivity to anticipated community out-

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<sup>190</sup> Cf. RICHARD A. POSNER, HOW JUDGES THINK 116 (2008) (observing that when judges are confronted with ambiguous facts that touch on charged issues they, like everyone else, “fall back on their intuitions” and display “[t]he kind of telescoped reasoning . . . called . . . ‘cultural cognition’”).

<sup>191</sup> See generally Goldberg, *supra* note 150 (arguing that judicial factfinding responds to and reinforces cultural conflict); Kahan & Braman, *supra* note 94 (making this point about factual determinations in controversial self-defense cases). It is precisely because this aspect of *Scott* generalizes that the decision furnishes a constructive target for criticism on this basis. Our point is not that *Scott*, considered by itself, deprives the law generally of legitimacy; obviously, the degree to which any particular display of cultural partisanship undermines civic identification with the law will be negligible. Our point is that the case displays a form of bias that is in fact pervasive in our legal and political system and that as a whole is responsible for illiberal conflict. See generally Kahan, *supra* note 19.

<sup>192</sup> See Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007).

rage conventionally thought to be antithetical to the judicial mind-set.<sup>193</sup> Humility — born of mindfulness of the limits of her own reasoning power — counsels the judge to treat the foreseeability of such outrage as a cue that maybe she is in fact wrong; it gives her, at a minimum, reason to rethink, and might, in some cases, furnish her a reason to decide a case in a manner contrary to her own inclinations.<sup>194</sup> Sunstein suggests that outrage normally serves as a corrective heuristic of this sort only when it is experienced by a large majority, unless the judge perceives that an outraged minority has some special expertise or might be specially situated to resist the decision in a way that has bad consequences for society overall.

But our argument shows how humility might enlarge the circumstances in which judges should attend to the potential for *minority* outrage. Judges, like the rest of us, lack full insight into how the mechanisms of value-motivated cognition shape their and others' perceptions of particular facts. But just like the rest of us, they are perfectly capable of understanding that these dynamics exist and can adversely affect the quality of their decisionmaking. One way to compensate for the partiality, and the incipient partisanship, of their own factual perceptions is to attend to cues that a cultural *subcommunity* will react with outrage should judges privilege their own factual perceptions. For in that situation, the anticipated reaction will furnish judges with evidence that committing the law to a particular fact risks creating the delegitimizing forms of cultural conflict that we have described.

More concretely, we recommend that a judge engage in a sort of mental double check when ruling on a motion that would result in summary adjudication. Again, almost any time a judge does conclude that there is no genuine dispute about some set of material facts, she will be able to anticipate that some small percentage of actual jurors would nevertheless dispute them. Before concluding, then, that no reasonable juror could find such facts, the judge should try to imagine *who* those potential jurors might be. If, as will usually be true, she cannot identify them, or can conjure only the random faces of imaginary statistical outliers, she should proceed to decide the case summarily. But if instead she *can* form a concrete picture of the dissenting jurors, and they are people who bear recognizable identity-defining characteristics — demographic, cultural, political, or otherwise — she should stop and think hard. Due humility obliges her to consider whether privileging her own view of the facts risks conveying a deni-

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<sup>193</sup> See *id.* at 164.

<sup>194</sup> See *id.* at 175–78.

grating and exclusionary message to members of such subcommunities. If it does, she should choose a different path.

There is nothing radical in our suggestion that a judge temper her decisionmaking with a prudential sensibility of this sort. On the contrary, that judges can and should exercise this form of discernment is the premise of Professor Alexander Bickel's celebrated defense of the "passive virtues," which counsels a rich array of avoidance techniques to steer the law clear of legitimacy-energizing gestures of partisanship.<sup>195</sup> All we are doing is calling attention to another legitimacy-depleting gesture — the endorsement of culturally partisan views of facts — that courts should use this sensibility to avoid.

But will judges inevitably succumb to the subconscious influence of their cultural predispositions even as they exercise the particular corrective we have urged to avoid cognitively illiberal judicial factfinding? Maybe.<sup>196</sup> Research is growing, however, on the power of the judicial role to impart habits of mind that counteract certain types of biases,<sup>197</sup> including ones that distort moral reasoning.<sup>198</sup> There is certainly no reason, then, to dismiss out of hand the possibility that the device we are recommending — that judges pause to consider whether what strikes them as an "obvious" matter of fact might in fact be viewed otherwise by a discrete and identifiable subcommunity<sup>199</sup> — is one that would function as an effective debiasing strategy for cognitive illiberalism. Indeed, the very gesture of attempting to do so in good faith would go a long way to counteracting the message of exclusion associated with a decision like *Scott*.<sup>200</sup>

Connecting our proposal to Bickel's prudential minimalism makes more concrete the limited scope of our caution about summary adjudication. Courts are *rarely* impelled to adopt the self-abnegating style

<sup>195</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–98 (Vail-Ballou Press 2d ed. 1986) (1962); see also Sunstein, *supra* note 192, at 168–75 (grounding his defense of "humility" in the theory of passive virtues).

<sup>196</sup> Cf. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 81–82 (2005) ("Reading Bickel's [*The Supreme Court, 1960 Term—Foreword: The Passive Virtues*], 75 HARV. L. REV. 40 (1961)], one realizes that he had definite ideas about where the public policy of the United States should be moving and that these ideas were his 'principles.'").

<sup>197</sup> See Guthrie, Rachlinski & Wistrich, *supra* note 166.

<sup>198</sup> See Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *A Thumb on the Scale: Investigating Implicit Bias on the Bench*, 84 NOTRE DAME L. REV. (forthcoming Mar. 2009).

<sup>199</sup> Cf. Linda Greenhouse, *Justices Indicate They May Uphold Voter ID Rules*, N.Y. TIMES, Jan. 10, 2008, at A1 (reporting Justice Roberts's skepticism toward the claim that obtaining official identification at the county seat as a prerequisite to voting is burdensome and reply of counsel that "[i]f you're indigent, [the 17-mile bus trip from urban Gary to the county seat is] a significant burden" (internal quotation marks omitted)).

<sup>200</sup> We are grateful to Judge Richard Posner for focusing our attention on this issue.



associated with the passive virtues. As we have emphasized, the Court certainly could have foreseen, because of the contentious symbolism of the case, that its view of the facts in *Scott* would be disputed by persons of a particular cultural outlook. We can certainly think of other kinds of cases too — ones involving gun control,<sup>201</sup> say, or environmental regulation<sup>202</sup> — that courts could readily anticipate would result in culturally polarized understandings of fact. But those cases are far and away the exception and not the rule in ordinary litigation. Consequently, the prudential brake we are urging on summary adjudication is one courts should rarely feel constrained to apply in cases that otherwise seem fit for such disposition.

It should also be clear that we are not advancing any sweeping indictment of judicial consideration of visual or other demonstrative evidence. It is not unprecedented for the Supreme Court to attach photographs, maps, pictures, and exhibits to its opinions as support and to refer readers to them.<sup>203</sup> In the aftermath, too, of *Scott*, judges might well feel emboldened to give more decisive weight to the factual inferences they themselves are inclined to draw from videos or photographs in deciding summary judgment motions.<sup>204</sup> There might well be compelling grounds for objecting to these and like practices,<sup>205</sup> but the particular criticism we are making of *Scott* doesn't go to the propriety of what might be called a "sensory jurisprudence" generally.

Our concern with the Court's reliance on the *Scott* tape is much more focused. At least within the terms of our argument, there is

<sup>201</sup> Cf. Dan M. Kahan, Donald Braman & John Gastil, *A Cultural Critique of Gun Litigation, in SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 105 (Timothy D. Lytton ed., 2005) (arguing that use of litigation to regulate guns exacerbates cultural conflict).

<sup>202</sup> Cf. David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 U. PA. L. REV. 1741, 1744 (2007) (describing resort to tort cases in response to global warming).

<sup>203</sup> See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 597 (1991) (Stevens, J., dissenting) ("[O]nly the most meticulous passenger is likely to become aware of the forum-selection provision [in the agreement printed on each cruise-vacation ticket]. I have . . . appended to this opinion a facsimile of the relevant text, using the type size that actually appears in the ticket itself. A careful reader will find the forum-selection clause in the 8th of the 25 numbered paragraphs."). See generally Hampton Dellinger, *Words are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704, 1707 (1997) (stating that "photographs, maps, and other attachments operate as communicative vehicles of economy, all offering the possibility of an impact more powerful than words").

<sup>204</sup> See, e.g., *Green v. N.J. State Police*, No. 06-4111, 2007 WL 2453580, at \*2 n.1 (3d Cir. Aug. 29, 2007) (using video evidence to establish facts but affirming denial of summary judgment); *Sharp v. Fisher*, No. 406CV020, 2007 WL 2177123 (S.D. Ga. Jul. 26, 2007) (granting summary judgment on the basis of the facts as depicted in a police video, and posting the video to the court's website).

<sup>205</sup> See Dellinger, *supra* note 203; Jessica Silbey, *Cross-Examining Film*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1202043](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1202043); Wasserman, *supra* note 53.

nothing problematic about a court deciding summarily based on its sensory impressions when the factual inference it is drawing isn't one that is likely to divide potential jurors along cultural lines (in a personal injury case, say, where the object the plaintiff is seen to be tripping on in a video is his own untied shoelace rather than a raised board in the floor of the defendant's store). In addition, where a factual inference *would* likely provoke cultural dissensus, our argument would counsel the judge not to draw it even if the basis for the inference is nothing other than her mere sensory impression.

What should a judge do in cases in which she does perceive that summary adjudication would create the sort of cultural divisions we are describing? As we have suggested, there are a number of possibilities.

One of them, of course, is to permit the case to be decided by the jury notwithstanding the judge's justifiable belief that a large majority of jurors would see the facts as she does. Even if doing so did not result in a verdict in line with the factual views of the minority groups' members, mandating that the case be decided in a manner that assures their perspective is given a respectful hearing makes it possible for them to assent to the outcome as one consistent with recognition of their status and competence.

Alternatively, the court can decide the case summarily on some announced basis that *doesn't* stigmatize the potentially aggrieved sub-community's view of reality as flawed. The Court could have done that in *Scott*, we pointed out, by emphasizing either the need for verdict uniformity in this area, the adverse policy consequences that would attend a verdict for the plaintiff, or the appropriateness of political rather than judicial regulation of high-speed police pursuits.

That is, appropriate humility does not forbid judges to select an *outcome* that is likely to be more congenial to one cultural style or another, but only to *justify* that outcome in terms that avoid cultural partisanship. Had *Scott* been decided on one of these alternative grounds, the outcome would likely not have been any less contentious in the eyes of persons who subscribe to what we have characterized as the *bet* cultural style. But it would have been less *demeaning* to them.

The law explicitly takes sides all the time on issues that pit conflicting cultural values against one another. In the ordinary tort case, for example, communitarians might object to using a cost-benefit calculus to determine the scope of the duty to use care.<sup>206</sup> In an action for breach of contract, individualists might believe that contracting parties should be bound to all promises, including those that courts routinely

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<sup>206</sup> See, e.g., Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1020-21 (1994) (describing and criticizing this position in academic commentary).

dismiss as “puffery.”<sup>207</sup> In antitrust cases, the dominant consumer-welfare philosophy will likely be much less congenial to egalitarians, who favor a more redistributive approach, and hierarchs, who might prefer a more corporatist one, than to individualists.<sup>208</sup>

But when judges enforce the law in a manner that forbids dissenting jurors to override the *values* reflected in such doctrines, they do so within a decisionmaking environment that (normally, at least) evinces *respect* for losers. The ability of defeated parties to identify with such decisions, notwithstanding their disagreement with them, is preserved, in part, through the law’s genesis, and continued amenability to revision, in democratic politics.<sup>209</sup> But just as important, the dignity of dissenters is protected by idioms of justification, including formalism, that disavow the law’s endorsement of a cultural orthodoxy. Indeed, the array of techniques associated with judicial minimalism is animated by a recognition on the part of the judiciary that promoting liberal pluralism in law requires judges to attend carefully to the *language* they use to justify their decisions.<sup>210</sup>

Far from promoting that end, proclaiming that there is only one “reasonable” view of the facts in a culturally contentious case needlessly burdens the law with partisanship, detracting from its legitimacy. That is the simple, but important, lesson of *Scott*.

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<sup>207</sup> See generally David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395 (2006) (describing multiple areas of law in which puffing claims are taken from juries).

<sup>208</sup> See generally Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985) (refuting neoclassical efficiency model of antitrust as insufficient in addressing strategic behavior); Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 920 (2003) (reviewing RICHARD A. POSNER, *ANTITRUST LAW* (2001)) (describing connection between ideological antitrust and competing antitrust theories).

<sup>209</sup> See WALDRON, *DIGNITY*, *supra* note 182.

<sup>210</sup> See David A. Strauss, *Legal Argument and the Overlapping Consensus 20–21* (July 12, 1998) (unpublished manuscript, on file with the Harvard Law School Library); see also CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 132 (1996). The contribution that idioms of justification make to liberal culture independent of the content of the policies being justified is well-developed in the study of democratic politics generally. See, e.g., AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 14–16 (1996) (defending idioms of justification that evidence “reciprocity” and seek to uncover common ground among persons of diverse values); STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 234 (1995) (defending democratic “gag rules” that constrain appeal to divisive issues of value in order to enable “citizens who differ greatly in outlook on life [to] work together to solve common problems”). How idioms of justification in *judicial* decisions should be structured to promote liberal accommodation warrants a commensurate degree of attention and empirical study. For an existing treatment that ought to serve as a model for such investigation, see MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 25–39 (1987), discussing the West German Supreme Court’s attention to the possibility of injecting plurality of social meanings into abortion law.

## CONCLUSION

To our knowledge, *Scott v. Harris* is the only case in which the Supreme Court has invoked brute sense impressions to justify its decision.<sup>211</sup> Its remarkable invitation to members of the public to download the *Scott* video and decide for themselves what to make of Justice Stevens's dissent reflects the premise that perceptions of "facts" don't stand in need (or even admit) of the sort of reasoned defense we expect when courts make potentially contentious normative judgments. Our goal in this Article was to motivate a critical appraisal of the Court's premise by determining empirically who would and wouldn't agree with the majority after viewing the tape.

Our empirical study found that when we "allow the videotape to speak for itself,"<sup>212</sup> what it says depends on to whom it is speaking. To be sure, a substantial majority of American society is inclined to see in Harris's flight from the police the sort of lethal threat to public safety that in turn warrants a potentially deadly response on the part of the police. But this view is not uniform across subcommunities. Whites and African Americans, high-wage earners and low-wage earners, Northeasterners and Southerners and Westerners, liberals and conservatives, Republicans and Democrats — 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.

These patterns suggest the influence of value-motivated cognition. Comprising several discrete mechanisms, value-motivated cognition refers to the tendency of people to resolve factual ambiguities in a manner that generates conclusions congenial to self-defining values.

This conclusion was compellingly borne out by the relationship of cultural outlooks to views of the tape in *Scott*. Individuals disposed to form extreme views of the facts in *Scott* tend to be united by adherence to one of two competing sets of preferences about how society should be organized — one that is egalitarian and communitarian, and another that is hierarchical and individualistic. We found that after viewing the *Scott* tape, individuals of the latter outlook formed views emphatically in line with those of the Court majority. Those of the former outlook, in contrast, were more likely to see the police, not Harris, as the source of the risk to the public and to conclude that use of deadly force was not a justifiable response given the risk that Harris posed. This division brings the conclusions of our study into line with

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<sup>211</sup> The closest analogue is probably Justice Stewart's famous and frequently mocked statement, "I know [obscenity] when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>212</sup> *Scott v. Harris*, 127 S. Ct. 1769, 1775 n.5 (2007).

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those on cultural cognition generally, which show that competing cultural outlooks of these varieties dispose people to disagree about the facts of all manner of putative dangers — from climate change to gun control to HPV vaccinations for school-age girls.<sup>213</sup>

What should be made of these findings? We have argued that they are the basis for strongly objecting to the Court's reasoning in *Scott*. Our legal system conspicuously holds forth jury decisionmaking as a means of making the law responsive to, and hence legitimately binding on, individuals of diverse backgrounds. The basis of the Court's decision in *Scott* cannot be reconciled with this understanding. It's true that a majority of Americans would indeed see the facts the way the Court did after watching the *Scott* tape. But the minority of persons in our society who would perceive the facts differently are not bare statistical outliers; they are a cohesive and recognizable subcommunity whose members share an identity based on common values and experiences. By asserting that the view of the facts these people came away with was one no "reasonable juror" could have formed, the *Scott* majority not only denied jurors of this identity a chance to persuade those of another identity to see things a different way. It also assured that the law established by the case would be seen by members of that subcommunity as deriving from a process calculated to exclude their voices from even being heard.

There were *multiple* avenues available to the Court for reversing in *Scott*, we have suggested. But the justification it chose was the one that maximized the experience of exclusion for a recognizable segment of the American citizenry, needlessly infusing the decision with culturally partisan overtones that detracted from the law's legitimacy.

We do not mean, however, to attribute bad faith to the Court. On the contrary, we have suggested that it's likely that the Court in *Scott* unwittingly fell prey to cognitive illiberalism — and dragged the rest of us along with it. Sincerely perceiving the facts to be unambiguous, the Court concluded, with considerable foundation, that only those in the grip of a partisan set of cultural commitments could see things otherwise. But in saying that, the Court necessarily made itself into a culturally partisan decisionmaker in the eyes of those who saw, with just as much foundation, that the Court's *own view* of the facts was culturally motivated. This is how honest disagreements of fact in our society mutate into recriminatory sources of cultural conflict among persons who in truth have no desire to enforce a moral orthodoxy through law.

The incompatibility of liberal principles with the use of law to impose a partisan vision of the good is well understood. Our legal and

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<sup>213</sup> See Kahan, *supra* note 19, at 123, 134–36, 139–42.

political practices are replete with devices that not only forbid full-blooded sectarianism of this type but also effectively stifle even latent forms of it in their incipiency, lest rhetorical misadventure impel citizens into illiberal conflict against their will. In political life, these include the norm of public reason, which requires legislators and ordinary citizens to justify policies on grounds accessible to persons of diverse moral and cultural persuasions instead of in terms that reflect a partisan conception of the good.<sup>214</sup> In the legal arena, they include devices like formalism and minimalism, which enable judges to defend outcomes and elaborate the law without resort to more contentious moral claims.<sup>215</sup>

What's not nearly so well understood, however, is the threat that competing understandings of *fact* pose to a liberal society. Indeed, forms of advocacy that feature seemingly neutral factual claims about how to promote societal welfare ("optimal deterrence," "cost-benefit analysis," "contingent valuation" and the like) are thought to be among the practices that dissipate illiberal conflict by avoiding reference to more contentious judgments of value.<sup>216</sup> It might seem natural to see judicial idioms that focus on "facts" as conflict-avoiding for the same reason.<sup>217</sup> But because we inevitably recur to our cultural values to evaluate empirical claims about what conditions threaten our welfare and what policies promote it, styles of argumentation that feature facts can polarize us every bit as much as one that deals with differences of value in a transparent way.<sup>218</sup>

We have proposed a form of judicial humility as one technique for ameliorating such conflict. But such a strategy, we concede, will on its own make only a modest contribution to this end. Much more attention to solving the problem of cognitive illiberalism is needed, in both the legal and the political domains.

Accepting the Court's peculiar invitation in *Scott* hasn't shown that every "reasonable" person would see the facts in that case the way the majority did. But it has, we think, helped make it possible for

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<sup>214</sup> See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 175, 217–18 (1993) (articulating a norm of "public reason" that prohibits political actors in most contexts from invoking "comprehensive" doctrines that "include[] conceptions of what is of value in human life, as well as ideals of personal virtue and character;" *id.* at 175, and instead requires them to "explain . . . how the principles and policies they advocate and vote for can be supported by" considerations, *id.* at 217, consistent with "a diversity of reasonable religious and philosophical doctrines," *id.* at 218).

<sup>215</sup> See generally SUNSTEIN, *supra* note 210; Strauss, *supra* note 210.

<sup>216</sup> See Martin Rein & Christopher Winship, *The Dangers of "Strong" Causal Reasoning in Social Policy*, *SOCIETY*, July–Aug. 1999, at 38, 39 (identifying the appeal of empirical modes of policy analysis in their provision of "objective procedures and criteria" that seem "decidedly divorced from statements about morality").

<sup>217</sup> See, e.g., Goldberg, *supra* note 150, at 1984 (imputing this approach to courts in constitutional law contexts).

<sup>218</sup> See Kahan, *supra* note 19, at 144.

every reasonable citizen to see something much more important: that just as critical to liberalism as developing strategies for dissipating cultural conflict over values is the development of strategies for dissipating cultural conflict over facts.