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

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This paper 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 attempted 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 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 1,350 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 paper 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 facts itself displayed a characteristic of 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.

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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 counterargument: brute sense impressions.

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 explode.¹ 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.² But within seconds of beginning to explain why there was a “genuine issue of fact”³ 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

¹ See *Scott v. Harris*, 127 S. Ct. 1769, 1772-73 (2007).

² *Harris v. Coweta County*, 433 F.3d 807 (11th Cir. 2005), *rev’d*, *Scott v. Harris*, 127 S. Ct. 1769, 1772-73 (2007).

³ See Fed. R. Civ. P. 56(c) (summary judgment appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law”)

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 of drivers on that road.”⁴ “He created the scariest chase I ever saw since ‘The French Connection,’” Justice Scalia immediately chimed in, provoking laughter throughout the courtroom.⁵

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,” Breyer related. “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.”⁶ 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, 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? . . .

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?⁷

Later, during the rebuttal argument of opposing counsel (at which point a helpless Jones was reduced to watching mute), 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?”⁸

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

⁴ Oral Arg. Tr. *Scott v. Harris*, No. 05-1631, at 27 (U.S. S. Ct. Feb. 26, 2007).

⁵ *Id.* at 28.

⁶ *Id.* at 31.

⁷ *Id.* at 44.

⁸ *Id.* at 54.

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,’” 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.”⁹ “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,”¹⁰ Scalia reasoned. “Respondent’s version of events is so utterly discredited by the record that no reasonable jury could have believed him.”¹¹

Somewhat inconveniently for the majority, though, one *Justice* who had watched the tape had in fact taken Harris’s view. “The tape actually confirms, rather than contradicts, the lower courts’ appraisal of the factual questions at issue,”¹² 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 uploaded to the Court’s website. “We are happy,” Scalia wrote, “to allow the videotape to speak for itself.”¹³

Well, does the *Scott v. Harris* 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 some 1,350 Americans. We then asked them to tell us what *they* saw, and give us their views on the issues 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 be bound together, moreover, by a shared 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 persons who hold an opposing one that features hierarchical and individu-

⁹ *Scott*, 127 S. Ct. at 1774-75 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655(1962)).

¹⁰ *Id.* at 1776.

¹¹ *Id.*

¹² *Scott*, 127 S. Ct. at 1781 (Stevens, J., dissenting).

¹³ *Scott*, 127 S. Ct. at 1775 n. 5.

alistic values.¹⁴ 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 it, and to find less justification in the use of deadly force to end it. 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 paper 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 shared 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, 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 this feature of the decision in *Scott*.

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 that case and ones 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 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 is one that should be decided not 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 inflicted the harm to democratic legitimacy associated with labeling the perspective of

¹⁴ See generally Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (2d ed. 1986) (describing historical and contemporary disputes between these cultural groups).

persons who share a particular cultural identity “unreasonable,” and hence unworthy even of consideration in the adjudicatory process.

In addition to explaining how the Court got it wrong in *Scott*, we’ll also venture a diagnosis of *why* it did. The form of the mistake, we’ll argue, is bound up with 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.¹⁵ 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 of 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.¹⁶ 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 paper 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 decision in *Scott*, about the general impact of cognitive illiberalism in adjudication, and steps judges should take to try to counteract it.

I. IT’S OBVIOUS!

We consider first the story of the *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?”—on the pages of U.S. Reports.

Just before 11:00 p.m. on March 29, 2001, on a four-lane highway in the Atlanta suburbs, the police detected 19-year-old Victor Harris speeding. But when the officers attempted to make a traffic stop, Harris hit the gas pedal, fleeing at high speed. 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.¹⁷ Following a slow-speed interlude that included a side-swiping in an empty shopping-mall parking lot, the chase re-

¹⁵ 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 (1995).

¹⁶ See Dan M. Kahan, *The Cognitively Illiberal State*, 60 Stan. L. Rev. 115 (2007).

¹⁷ See 127 S. Ct. at 1773.

turned to the road, reaching speeds of 90 miles per hour. The pursuit 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.¹⁸ Scott recognized that this maneuver involved a significant risk of causing serious injury or death to Harris, who in fact suffered a broken neck that left him a quadriplegic.¹⁹

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. After the district court denied Scott's claim of qualified immunity,²⁰ Scott took an interlocutory appeal to the Eleventh Circuit Court of Appeals, which affirmed.²¹ In addition to upholding the district court's ruling on immunity,²² 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.²³

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":

¹⁸ Scott had been authorized by his dispatcher to use a so-called PIT ("Precision Intervention Technique") maneuver, a collision technique that is designed to cause a pursued vehicle merely to spin out and stop, but not necessarily to crash. *See Harris v. Coweta County*, 433 F.3d 807, 810 (11th Cir. 2005). However, Scott (who was not trained in the PIT maneuver in any case, *see id.* at 810-11) decided that he was going too fast to execute the maneuver and that it was necessary to "ram[] his cruiser directly into Harris' vehicle." *Id.*

¹⁹ *See Harris*, 433 F.3d at 810-11, 814 n.8; *Harris v. Coweta County*, No. 3:01CV148, 2003 WL 25419527, at *1-*2 (N.D. Ga. Sept. 23, 2003).

²⁰ *See Harris*, 2003 WL 25419527, at *6-*7.

²¹ *See Harris v. Coweta County*, 433 F.3d 807 (11th Cir. 2005). The court did, however, reverse in part, holding that a second defendant, the officer at a station who authorized the less dangerous PIT maneuver, was entitled to summary judgment. *See id.* at 816-17

²² *See id.* at 821.

²³ *Id.* at 816 (quoting *Tennessee v. Garner*, 471 U.S. 1, 12 (1985) and *Vaughan v. Cox*, 343 F.3d 1323, 1330 (11th Cir.2003)).

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.²⁴

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.²⁵ The other was the relevance *Tennessee v. Garner*,²⁶ 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."²⁷ The Eleventh Circuit had relied decisively on *Garner*,²⁸ Scott argued for a less restrictive standard in the context of a high-speed police chase.²⁹

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 Harris was entitled to summary judgment that it found it unnecessary to address the immunity issue.³⁰ "We see respondent's vehicle," wrote Justice Scalia,

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

²⁴ *Id.* at 815-16 (internal citations and notes omitted).

²⁵ See Brief for Petitioner, *Scott v. Harris*, United States Supreme Court, No. 05-1631 at 24 ("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.").

²⁶ 471 U.S. 1 (1985).

²⁷ *Id.* at 3.

²⁸ See 433 F.2d at 816-17.

²⁹ See Brief for Petitioner, *Scott v. Harris*, United States Supreme Court, No. 05-1631 at 13-14 ("*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.>").

³⁰ The Court reasoned that because "the constitutional question with which we are presented is . . . easily decided," it was not necessary to "to address the wisdom" of a 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. *Id.* 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 *Scott v. Harris*, 127 S. Ct. 1769, 1780 (2007) (Breyer, J., concurring).

other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. 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.³¹

Referring to the lower court's application of the conventional rule that disputed facts should be construed in favor of the non-moving party in evaluating a motion for summary judgment, 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."³²

The Court also found 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. 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.

The Court then attempted to balance such 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

³¹ *Id.* at 1775-76 (internal citations omitted).

³² *Id.* at 1776.

warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent.³³

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.”³⁴

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.”³⁵ In what must have struck the majority as a strangely flattering rebuke, Stevens, at 87 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.”³⁶

Just as strangely, if not as flatteringly, the Court majority did not counter Stevens’s dissent with argument. As noted, the Court replied curtly, “[w]e are happy to allow the videotape to speak for itself.”³⁷ 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.³⁸

Indeed, Justice Breyer and Justice Ginsburg, who also wrote separately, were arguably even more emphatic about the impact of video. Whereas the majority opinion appeared to endorse a general rule that all lethally dangerous high-speed chases should be treated as constitutional,³⁹ these Justices stressed

³³ *Id.* at 1778 (citations omitted).

³⁴ *Id.*

³⁵ *Scott*, 127 S. Ct. at 1781 (Stevens, J., dissenting).

³⁶ *Id.* at 1782 n. 1.

³⁷ *Id.* at 1775 n.5.

³⁸ *Scott*, 127 S. Ct. at 1780 (Breyer, J., concurring).

³⁹ *See* 127 S. Ct. at 1779 (“[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.”)

the need to review such pursuits case by case. “The video,” Justice Breyer wrote, “makes clear the highly fact-dependent nature of this constitutional determination.”⁴⁰ 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.’”⁴¹

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 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.⁴² 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 claim, because however clearly that person perceives

⁴⁰ 127 S. Ct. at 1780.

⁴¹ *Scott*, 127 S. Ct. at 1779 (Ginsburg, J., concurring) (quoting 127 S. Ct. at 1778) (citations omitted).

⁴² Not surprisingly, this aspect of the Court’s decision has provoked debate in the legal academy. Compare Orin Kerr, *What Are the Facts in Scott v. Harris*, The Volokh Conspiracy, <http://volokh.com/posts/1172720514.shtml> <http://volokh.com/posts/1172720514.shtml> (“The right answer is that Justice Breyer should believe his own eyes.”) (February 28, 2007) *with* Case Comment, *Fourth amendment – Reasonableness of Forcible Seizure*, 121 Harv. L. Rev. 214, 222 (2007) (arguing that the Court’s analytical approach pushed it to make a bad ruling on an incomplete record); Tommy Crocker, *Do Texts Speak for Themselves*, Prawfsblawg, <http://prawfsblawg.blogs.com/prawfsblawg/2007/11/do-texts-speak-.html> (November 5, 2007) (criticizing Court’s lack of justification for its result and stating “I can imagine how much easier teaching would be if I could simply say to students, ‘I’m happy to allow Marbury to speak for itself.’”); and Dave Hoffman, *The Death of Factfinding and the Birth of Truth*, Concurring Opinions, http://www.concurringopinions.com/archives/2007/04/the_death_of_fa.html (April 30, 2007) (“each Justice saw the risk of speeding through his or her own cultural prism.”).

things, the fact remains 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's only one way we can think of to accept the *Scott* majority's proposal that its conclusion be tested by viewing the tape. It's 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 Court majority, one can then try to determine whether there is anything that seems to unite them 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'll 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'll then identify the social psychological theories that explain *why* one might expect certain defining characteristics to affect such individuals' perceptions of facts. Then we'll show how these theories informed the design and hypotheses of our study. Finally, we'll 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 as indicating 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 the video. They would also be exposed to 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 assess the assertion that "the tape speak[s] for itself"⁴³—and that what it says it 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."⁴⁴

A. Four Members of the American Venire

Imagine four Americans (Figure 1). Ron, a white male, who lives in Arizona, overcame his modest upbringings to become a self-made millionaire businessperson. He deeply resents government interference with markets but is otherwise highly respectful of authority, which he believes should be clearly delineated in all spheres of life. Politically, he identifies himself as a conservative Republican. Bernie, another white male, is a university professor who makes a modest salary and who lives in Burlington, Vermont. He will go along with the left-wing of the Democrat party, but thinks of himself as a "social democrat," who 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

⁴³ 127 S. Ct. at 1775 n.5.

⁴⁴ 127 S. Ct. at 1780 (Breyer, J., concurring).

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 they see on the tape and how will the tape affect their view of how the case should come out prior to starting to deliberate?

**Ron****Bernie****Linda****Pat**

Figure 1. Four Representative Members of the American Venire

Here’s the answer. Ron will see exactly what the *Scott* majority saw—a very dangerous driver, whom the police correctly pursued from the outset and appropriately used deadly force to stop. 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 Harris was speeding, made a serious mistake to conduct a high-speed chase when he refused to pull over. They’ll 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 won’t be equivocal about blame: they will perceive the police to be as or

more culpable than Harris for the risk the chase created for the public. And they'll be fairly strongly disposed to find that the police were *not* justified in using deadly force to terminate the chase in light of 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'll identify the theoretical grounds to expect this initial starting array of perceptions, and then turn to the nitty-gritty details of the study that supports this particular account of what individuals like this 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 group identities and values associated with such characteristics influence cognition of facts. They form theoretical basis for the design of our study and its hypotheses.

One of these is the *culpable control theory* of blaming.⁴⁵ That theory starts with the premise—confirmed by a diverse body of research in psychology, anthropology, and linguistics—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. Nevertheless, experiments show that perception of the elements of this blaming template is highly sensitive to circumstances 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 (perhaps engaging in an interracial relationship, or using drugs) that defy social norms, including ones that are contested across distinct subcommunities.⁴⁶ In effect, cognition of blame-relevant "facts" (volition, action, causation, harm) are *motivated* by the subconscious desire to form blame attributions that accord with moral evaluations of actors' characters or lifestyles.

A second theory is *identity-protective cognition*.⁴⁷ 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, indi-

⁴⁵ See generally Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 *Psych. Bull.* 556 (2000).

⁴⁶ See *id.* at 564; Mark D. Alicke, *Culpable Causation*, 63 *J. Per. & Soc. Psych.* 368 (1992).

⁴⁷ 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).

viduals tend to process information in a selective fashion that bolsters beliefs dominant within their self-defining groups.⁴⁸

Finally there is the *cultural cognition of risk*. This theory posits that individuals tend to conform factual beliefs about risk to their cultural evaluations of putatively dangerous behavior.⁴⁹ As a result of various cognitive mechanisms, people are motivated to believe that behavior they find honorable is also socially beneficial (or at least benign) and behavior they find base is also socially harmful. Because they value markets and other forms of private-ordering, for example, people who hold individualist values discount claims that commerce and industry harm the environment. People who hold egalitarian values, in contrast, readily credit claims of environmental risk, the widespread acceptance of which would justify restricting behavior—commerce and industry—that those people associate with inequalities in wealth. Persons who subscribe hierarchical values impute risk to homosexuality, drug use, abortions, subversive speech and other behaviors that defy the authority of traditional, stratified norms of behavior. Egalitarians and individualists reject these risk claims as specious.⁵⁰

Combined, these theories furnish strong grounds to expect individuals of diverse identities and commitments—like Ron, Linda, and Bernie—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, how feasible it was for other drivers to pull to the side to avoid exposure to collision, the relative harm of chasing Harris or breaking off the pursuit and letting him escape—relate to moral (and legal) attributions of blame. Perceptions of those facts, the “culpable control” theory suggests, are likely to be motivated by extrinsic moral evaluations of the putatively blameworthy actors—Harris and the police.

⁴⁸ See generally Geoffrey L. Cohen, David K. Sherman, Anthony Bastardi, Lillian Hsu & Michelle McGoey, *Bridging the Partisan Divide: Self-Affirmation Reduces Ideological Closed-Mindedness and Inflexibility in Negotiation*, *J. Personality & Soc. Psychol.* 415 (2007); G. L. Cohen, J. Aronson & C. M. Steele, *When Beliefs Yield to Evidence: Reducing Biased Evaluation by Affirming the Self*, 26 *Personality & Social Psychol. Bull.* 1151 (2000) [hereinafter “Cohen, et al., *Affirming the Self*”]; Roger Giner-Sorolla & Shelly Chaiken, *Selective Use of Heuristic and Systematic Processing Under Defense Motivation*, 23 *Personality & Soc. Psychol. Bull.* 84 (1997).

⁴⁹ See generally Dan M. Kahan, Paul Slovic, Donald Braman & John Gastil, *Fear of Democracy: A Cultural Critique of Sunstein on Risk*, 119 *Harv. L. Rev.* 1071, 1083-87 (2006).

⁵⁰ See Kahan, *supra* note 49, at 1086-87. This theory is amply supported by a growing body of empirical research. See, e.g., Kahan et al., *supra* note 47; 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); and 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* (Oct. 3, 2007), available at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=1017189.

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

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 wellbeing of innocent bystanders.⁵¹

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 1,350 individuals. Weighted to assure national representativeness, the subjects were drawn randomly from a demographically diverse panel of some 40,000 on-line survey respondents assembled by Knowledge Networks for participation in scholarly public opinion analysis.⁵² They 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

⁵¹ See generally Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, Penn. L. Rev. (forthcoming 2008) (describing evidence of the role that affective states play in connecting risk perceptions to cultural values).

⁵² Knowledge Networks is a leading firm in on-line opinion studies. Numerous studies have shown that the on-line 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 <http://www.knowledgenetworks.com/ganp/reviewer-info.html>; <http://www.knowledgenetworks.com/ganp/docs/KN%20Bibliog%205-29-2007%20External.pdf>.

brought by Harris alleging 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:

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.

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.”⁵³

The video was approximately 6.5 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 in 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.”

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. The two tapes were recorded by the two pursuing police cars, which at around

⁵³ The study video can be accessed at <http://www.youtube.com/watch?v=DBY2y2YsmN0>.

the mid-point 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 files 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;⁵⁴ 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”;⁵⁵ the “relative culpability” of Harris and the police for creating risk to the public⁵⁶—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 innocent bystanders.”⁵⁷ Justices Breyer and Ginsburg, however, indicated that they did not understand the Court's decision “as articulating a mechanical, *per se* rule.”⁵⁸ For them, the entire “inquiry described by the Court”⁵⁹ involved “highly fact-dependent”

⁵⁴ *See* 127 S. Ct. at 1775-76.

⁵⁵ *Id.* at 1778.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1779 (“we 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”).

⁵⁸ 127 S. Ct. at 1779 (Ginsburg, J., concurring); *see* text at notes 40-41.

⁵⁹ 127 S. Ct. at 1779 (Ginsburg, J., concurring).

questions, the answers to which were “ma[d]e clear”⁶⁰ by a viewing of the video. 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 the fleeing driver posed in a case like *Scott*.⁶¹ “Great risk” struck us as the one most likely to be understood clearly and uniformly among the laypersons in our subject pool. 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 to 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 great risk of death.

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”⁶² 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.

⁶⁰ 127 S. Ct. at 1780 (Breyer, J., concurring).

⁶¹ See, e.g., 127 S. Ct. at 1775-76 (“the 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 (“it is clear from the videotape that respondent posed an *actual and imminent threat* to the lives of any pedestrians . . . to other civilian motorists, and the other officers”) (emphasis added); *id.* at 1779 (“The car chase that respondent initiated in this case posed a *substantial and immediate risk* of physical injury to others; no reasonable jury could conclude otherwise”) (emphasis added).

⁶² *Id.*

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 ($\alpha = .81$).⁶³ To facilitate analysis, the scale was coded to reflect agreement with the *Scott* majority and labeled "Agree with Court."

4. Individual Characteristics

a. Demographic characteristics. We collected data relating to the individual characteristics of the subjects. These included conventional socio-demographic 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 7-point scale that ran from extremely liberal to extremely conservative.

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."⁶⁴ 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.⁶⁵

⁶³ Cronbach's alpha (α) 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, $\alpha \geq .70$ suggests scale validity. See generally Jose M. Cortina, *What Is Coefficient Alpha: An Examination of Theory and Applications*, 78 J. Applied Psychol. 98 (1993).

⁶⁴ See Mary Douglas, *Natural Symbols: Explorations in Cosmology* (1970).

⁶⁵ See generally Steve Rayner, *Cultural Theory and Risk Analysis*, in *Social Theories of Risk* 86 (S. Krimsky and D. Goldin ed., 1992).

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.⁶⁶ As in previous studies, the scales were highly reliable (Individualism, $\alpha = .86$; Hierarchy, $\alpha = .85$) measures of the latent disposition of subjects toward those respective sets of worldviews. 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 socio-demographic. We thus anticipated differences along dimensions such as age, income, education and region of residence. Such differences would 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 to have the same effect.

But other demographic characteristics, we expected, would also likely to 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.⁶⁷ African-Americans, we predicted, would be inclined to view the facts

⁶⁶ See Kahan *et al.*, *supra* note 47.

⁶⁷ See, e.g., W.E.B. DuBois, *The Souls of Black Folk* (1903) (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); Kahan *et al.*, *supra* note 47, at 471 (suggesting that race and gender correlate with shared values); Gary Kleck, *Crime, Culture Conflict and the Sources of Support for Gun Control*, 39 *Am. Behavioral Sci.* 387 (1996) (using gender and race as proxies for cultural values).

in a manner different from the *Scott* majority because they are more likely to have had negative experiences with police, 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. 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—political and cultural—that we have reason to think (as described below) would motivate cognition hostile to the behavior by the police in this case.⁶⁸

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- or legally consequential facts⁶⁹ Cultural worldviews also matter from the standpoint of motivated cognition. As noted, previous work suggests that cultural worldviews more powerfully explain differences of risk perception⁷⁰ and legally consequential facts⁷¹ than other characteristics. Gender, race, as well as region of residence, are likely proxies for the affinities constituted by such values.⁷² Moreover, they also supply greater orienting significance than do political ideologies for persons who (like most Americans) have at best only modest interest in politics.⁷³

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. Demographi-

⁶⁸ See Melissa Finucane, Paul Slovic, C.K. Mertz, James Flynn & Theresa A. Satterfield, *Gender, Race, and Perceived Risk: The “White Male” Effect*, 3 *Health, Risk, & Soc’y* 159 (2000).

⁶⁹ See Geoffrey L. Cohen, *Party over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 *J. Personality & Soc. Psychol.* 808 (2003); Geoffrey L. Cohen *et al.*, *supra* note 48.

⁷⁰ See generally Kahan *et al.*, *supra* note 47.

⁷¹ See Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, Yale Law School Public Law Working Paper No. 142 (Sept. 7, 2007), available at <http://ssrn.com/abstract=1012967>.

⁷² See Kahan *et al.*, *supra* note 49, at 1090 & n.59.

⁷³ See Aaron Wildavsky, *Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation*, 81 *Am. Pol. Sci. Rev.* 3 (1987); 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* (Oct. 3, 2007), available at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=1017189.

cally, they are more likely to be affluent white males.⁷⁴ *Alephs* also are more likely to live in the South or far West, where hierarchical and individualistic values predominate.⁷⁵ *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.⁷⁶

We understand these groups to be recognizable contemporary examples of what Gusfield refers to as “status collectivities.”⁷⁷ “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.⁷⁸ “They possess subcultures” that play a conspicuous role in political conflict motivated by symbolic status competition.⁷⁹ 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.⁸⁰

⁷⁴ 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 *et al.*, *supra* note 47.

⁷⁵ *See generally* Richard E. Nisbett & Dov Cohen, *Culture of Honor: The Psychology of Violence in the South* (1996); Raymond D. Gastil, *Cultural Regions of the United States* (1975).

⁷⁶ *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).

⁷⁷ Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* 21 (2d ed. 1986).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 140-41, 167-71; Kahan, *supra* note 76; J.M. Balkin, *The Constitution of Status*, 106 *Yale L.J.* 2313 (1997); Kristin Luker, *Abortion and the Politics of Motherhood* (1984). *Id.* at 140-41, 167-71; Kahan, *supra* note 76; J.M. Balkin, *The Constitution of Status*, 106 *Yale L.J.* 2313 (1997); Kristin Luker, *Abortion and the Politics of Motherhood* (1984). 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 *et al.*, *supra* note 47, 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 American society consists of just two “cultures” or “cultural types.”

As the Court's analysis in *Scott* illustrates, someone called upon to evaluate a high-speed car chase must individuate and compare competing risks. What 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 him 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 surmised, 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.⁸¹ The same cultural and political sensibilities, we surmised, 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 for law-breaking, and as a result to believe that such measures (including capital punishment) reduce the incidence of dangerous or harmful behavior.⁸² 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 net.

We hypothesized that *bet* subjects would form the opposite set of reactions. Their egalitarian worldviews and left-leaning political sensibilities generally incline *bets* to condemn authority figures for abuses of power much more readily than they condemn putative deviants for defying authority. Reinforced by their communitarian orientation, these same dispositions tend to make *bet* persons supportive of social welfare programs. 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.⁸³ 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.

⁸¹ See Kahan, *supra* note 16, at 131-36; Donald Braman, *Cultural Cognition of Public Policy*, 24 Yale J. L. & Pub. Pol'y 147, 156-57 (2006).

⁸² See *id.* at 157.

⁸³ See *id.*

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 reveal two conclusions. The first is that a relatively large majority of the tested subjects 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.

As reflected in Figure 2 and Figure 3, the study subjects overall took positions highly consistent with those of the Court in *Scott*. Solid majorities agreed either “strongly” or “moderately” that Harris’s driving 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 wasn’t 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. On the ultimate question, 75% of the subjects agreed that the use of deadly force was warranted.

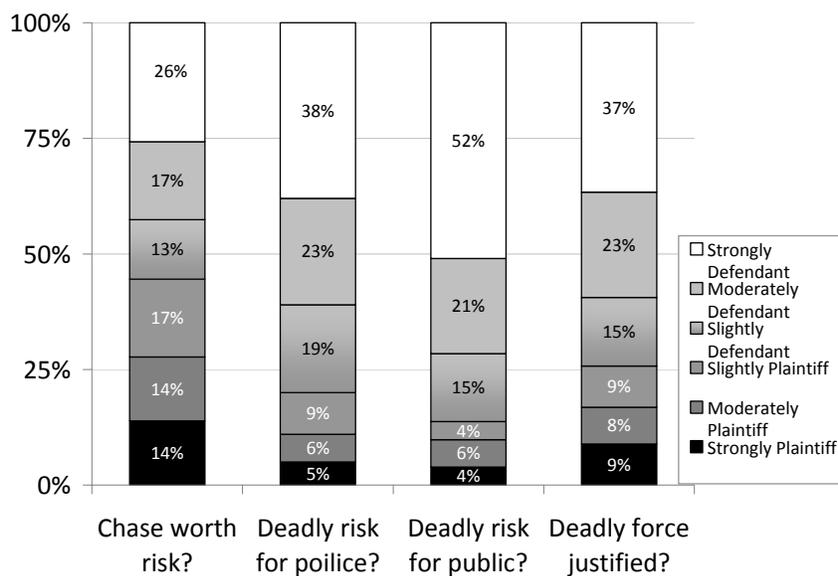


Figure 2. Overall Perceptions of Risk

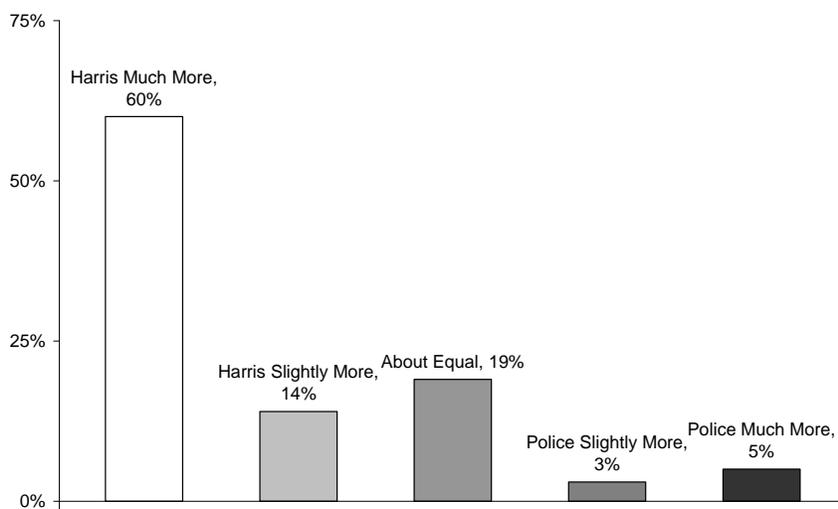


Figure 3. Overall Perceptions of Fault

Response Measures

Scale	Agree with Court	Relative Culpability	Chase Not Worth Risk	Harris Posed Lethal Risk... to Public	Lethal Risk... to Police	Deadly Force Justified
	1 - 6	1 (police) to 5 (Harris)	← 1 (strongly disagree) to 6 (strongly agree) →			
Overall	4.42	4.23	3.17	4.98	4.63	4.44
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	4.22	4.01	3.47	4.85	4.49	4.20
White	4.50	4.32	3.04	5.03	4.69	4.55
Difference	0.28	0.31	0.43	0.32	0.20	0.33
< \$35,000/yr	4.20	4.05	3.37	4.66	4.53	4.25
≥ \$50,000/yr	4.52	4.30	3.09	5.15	4.70	4.54
Difference	0.32	0.25	0.28	0.49	0.17	0.29
≤ 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	0.26	0.23	0.16	0.15	0.29	0.51
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	0.16	0.02	0.50	0.05	0.01	0.22
Unmarried	4.24	4.10	3.28	4.72	4.47	4.22
Married	4.57	4.34	3.08	5.20	4.77	4.64
Difference	0.33	0.24	0.20	0.48	0.30	0.40
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	0.18	0.15	0.33	0.24	0.32	0.38
Democrats	4.16	4.00	3.55	4.85	4.44	4.07
Republicans	4.71	4.51	2.70	5.14	4.84	4.82
Difference	0.56	0.51	0.85	0.29	0.40	0.75
Liberals	4.13	4.01	3.45	4.74	4.35	4.01
Conservatives	4.66	4.44	2.87	5.15	4.85	4.80
Difference	0.53	0.43	0.42	0.39	0.50	0.79
Egalitarians	4.21	4.05	3.52	4.90	4.51	4.14
Hierarchs	4.61	4.40	2.84	5.05	4.74	4.73
Difference	0.40	0.35	0.32	0.15	0.23	0.59
Communitarians	4.27	4.09	3.38	4.94	4.52	4.23
Individualists	4.56	4.37	2.96	5.02	4.74	4.65
Difference	0.39	0.28	0.42	0.08	0.22	0.42

Bolded and underlined text indicates difference in means of paired groups significant at $p \leq .05$; bolded only and not underlined indicates differences in means of paired groups significant at $p \leq .10$.

Table 1. Mean Responses

	<i>Dependent Variable</i>				
	Force Justi- fied	Lethal Risk to Public	Lethal Risk to Police	Chase Not Worth Risk	Harris More at Fault
Female	-0.15 (0.10)	-0.01 (0.11)	0.09 (0.10)	0.03 (0.10)	-0.08 (0.12)
Black (v. White)	<u>-0.66</u> (0.22)	<u>-0.45</u> (0.22)	<u>-0.60</u> (0.22)	<u>0.46</u> (0.22)	<u>-0.92</u> (0.22)
Other Minority (v. white)	0.09 (0.16)	0.09 (0.17)	0.06 (0.16)	-0.03 (0.16)	<u>-0.32</u> (0.17)
Age	<u>-0.01</u> (0.00)	0.00 (0.00)	0.00 (0.00)	<u>0.01</u> (0.00)	-0.01 (0.00)
Household income	<u>0.03</u> (0.01)	<u>0.06</u> (0.02)	0.02 (0.01)	<u>-0.03</u> (0.01)	<u>0.04</u> (0.02)
Education	<u>-0.08</u> (0.03)	-0.05 (0.03)	<u>-0.06</u> (0.03)	0.03 (0.03)	-0.02 (0.04)
South (v. West)	-0.02 (0.14)	0.08 (0.14)	-0.10 (0.14)	0.08 (0.13)	-0.21 (0.16)
Midwest (v. West)	-0.21 (0.15)	0.06 (0.15)	-0.05 (0.15)	<u>0.27</u> (0.14)	-0.20 (0.17)
Northeast (v. west)	<u>-0.33</u> (0.15)	-0.17 (0.16)	-0.25 (0.15)	<u>0.30</u> (0.15)	<u>-0.48</u> (0.17)
Urban	0.15 (0.14)	0.18 (0.15)	0.13 (0.14)	0.04 (0.14)	0.14 (0.16)
Married	<u>0.27</u> (0.11)	<u>0.32</u> (0.12)	0.16 (0.11)	<u>-0.22</u> (0.11)	<u>0.31</u> (0.13)
Parent	-0.01 (0.12)	0.04 (0.13)	0.15 (0.12)	-0.07 (0.12)	0.17 (0.14)
Republican (v. Democrat)	-0.01 (0.13)	-0.03 (0.14)	-0.04 (0.13)	<u>-0.31</u> (0.13)	<u>0.29</u> (0.16)
Independent (v. Democrat)	-0.03 (0.33)	0.00 (0.33)	0.01 (0.33)	-0.03 (0.31)	0.15 (0.38)
Conservative	0.05 (0.05)	<u>0.09</u> (0.05)	0.05 (0.04)	0.03 (0.04)	0.08 (0.05)
Hierarchy	<u>0.46</u> (0.08)	0.10 (0.08)	<u>0.16</u> (0.08)	<u>-0.39</u> (0.08)	<u>0.39</u> (0.09)
Individualism	0.07 (0.09)	0.04 (0.09)	0.08 (0.08)	-0.08 (0.08)	0.07 (0.10)
R ² (McKelvey/Zavoina)	.11	.06	.04	.09	.14
log likelihood	-2060.64	-1731.62	-2049.7	-2296.53	-1393.14
Prob > Chi2	.00	.00	.00	.00	.00

N = 1,347. Dependent variables are indicated responses measures. Ordered log-odds (logit) coefficients. Bolded and underlined coefficients are significant at $p \leq .05$; bolded only and not underlined are significant at $p \leq .10$. Parentheticals indicate standard errors

Table 2. Logistic Regression Models for Response Measures

Table 1, which reports group means for the various items as well as the composite scale “Agree with Court,”⁸⁴ illustrates the mass of individual variation tucked into the main effects illustrated in Figure 2 and Figure 3. 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. As anticipated, women were also generally more pro-plaintiff as well.

Table 1 also revealed 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 deadly force 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 to from nonurban ones. But our results detected no such effect.

The impact of various individual characteristics relative to each other is reflected in the 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 variables in the model is held constant.⁸⁵ 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 for the public. Being from the Northeast likewise had a relative large (statistically significant) effect across all but two of the measures. Income had a relatively small (but significant) effect on every measure but one (perceived danger to the police from Harris’s driving).

Some characteristics of interest had no significant effect in the regression models. These included gender and the relative individualistic or communitarian worldview of subjects. This finding, of course, does not mean that these characteristics in fact have no influence on subjects’ perceptions of the *Scott*

⁸⁴ See p. 20 *supra*.

⁸⁵ See Jacob Cohen, Patricia Cohen, Stephen G. West & Leona S. Aiken, *Applied Multiple Regression/Correlation Analysis for the Behavioral Sciences* 6-7 (3rd ed. 2003).

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.⁸⁶

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, peoples' 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.⁸⁷ 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).⁸⁸ *Clarify* is intended to generate data analyses that simultaneously extract more information and present it more intelligibly.⁸⁹ 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 process. Then it repeats it again. Then it repeats it again and again and again—as many times as directed by the analyst (typically 1,000 times, or enough to approximate the entire probability distribution for the dependent variable). The resulting array of values for that dependent variable can then be analyzed with techniques that are statistically equiva-

⁸⁶ See *id.* at 79.

⁸⁷ See *id.* at 72, 78-79.

⁸⁸ See generally Jacob Cohen, Patricia Cohen, Stephen G. West & Leona S. Aiken, *Applied Multiple Regression/Correlation Analysis for the Behavioral Sciences* (3rd ed. 2003).

⁸⁹ See Gary King, Michael Tomz & Jason Wittenberg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 *Am. J. Pol. Sci.* 347 (2000).

lent to those used in survey sampling to determine an average predicted value, plus a precisely calculated margin of error.⁹⁰

This form of analysis has various advantages over conventional regression analysis. One is that it avoids the obscuring impact of partialing out covariance by building into its estimates the causal impact of typically covarying influences (e.g., race and cultural worldview), the values of which can be specified together.⁹¹ In addition, consistent with the growing movement in the social sciences to make statistical analysis more accessible,⁹² the outputs of Clarify simulations can be graphically displayed in a manner that more clearly illustrates their real-world significance to real-world people than does a standard regression output.⁹³

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've 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. That is the procedure we followed to generate Ron, Linda, Bernie, and Pat. Ron was endowed with characteristics associ-

⁹⁰ See generally *id.* at 349-51.

⁹¹ Accordingly, independent variables that are not statistically significant considered in isolation in a regression analysis can still 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*, 8 J. Statistical Software 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 independent variable included in the simulation will, of course, affect the precision of the resulting predicted value. But because “even coefficients that are not statistically significant can provide important information[—] after all, a coefficient that is not significantly different from zero will probably significantly different from almost all other numbers”—it makes more sense “to focus on the confidence intervals Clarify reports for each quantity it computes than the standard errors of coefficients.” *Id.*

⁹² See Andrew Gelman, Cristian Pasarica & Raul Dodhia, *Let's Practice What We Preach: Turning Tables into Graphs*, 56 Am. Stat. 121 (2002). Lee Epstein and her coauthors have forcefully espoused the use of these forms of analysis and presentation in empirical legal students. See Lee Epstein, Andrew D. Martin, and 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, and Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies*, Part II, 60 Vand. L. Rev. 799 (2007).

⁹³ See King, Tomz & Wittenberg, *supra* note 89, at 347 (explaining that monte carlo statistical simulations used in Clarify “extract . . . currently overlooked information” that “(1) convey numerically precise estimates of the quantities of greatest substantive interest, (2) include reasonable measures of uncertainty about those estimates, and (3) require little specialized knowledge to understand”).

ated 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) 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). We make no special assumptions about his family status and thus treat him as being as likely to be married and have children as the average American.

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 population mean (in the top quartile for both). She has an Associate’s Degree (that is, some college education short of a B.A.) and makes a modest salary (around \$25,000 per year) as a social worker. We no make 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,⁹⁴ 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 are set to the population mean.

Pat, of course, is an “average American.” All of his/her values (including gender) have been set to the 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 to the *Scott* tape. The results appear in Figure 4 to Figure 8 and Table 3 to Table 7.⁹⁵ 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

⁹⁴ See Gregory B. Lewis, *Black-White Differences in Attitudes Toward Homosexuality and Gay Rights*, 67 Public Opin. Q. 59 (2003) (review of studies finding African Americans more opposed to homosexuality than whites controlling for other influences); Clyde Wilcox, *Race Differences in Abortion Attitudes - Some Additional Evidence*, 54 Public Opin. Quart. 248 (1990) (African Americans more opposed to abortion than comparably liberal whites); see also Kahan, *supra* note 47, at 494-95 (finding that egalitarianism influences abortion risk perceptions less powerfully among African Americans than whites).

⁹⁵ The margins of error for all estimates reflect a 95% level of confidence.

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 4 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: at least 80% (83%, $\pm 3\%$) of the persons who share his defining characteristics disagree—at least 70% 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 unequivocally (that is, strongly or moderately) agree the chase wasn’t worth the risk, and another considerable slice (18%, $\pm 4\%$) are inclined (“slightly agree”) to feel the same; 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.

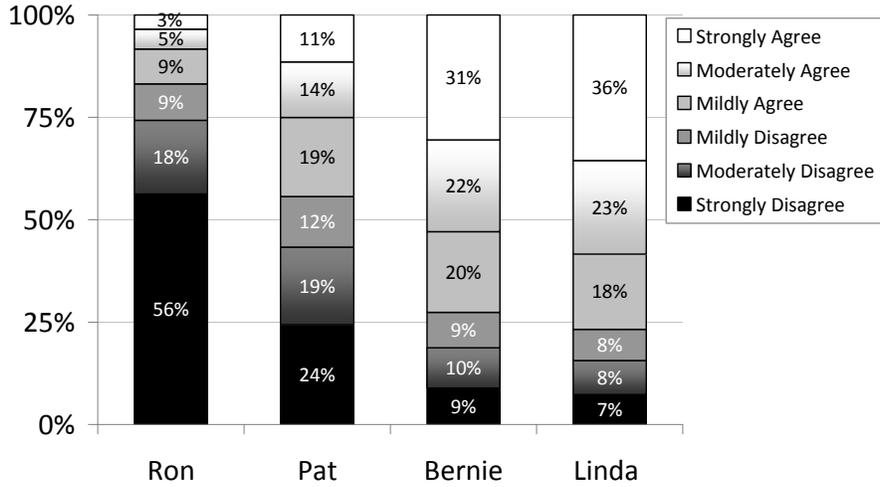


Figure 4. Chase Not Worth the Risk

	Ron	Pat	Bernie	Linda
Strongly Disagree	56% (± 16%)	24% (± 2%)	9% (± 3%)	7% (± 3%)
Moderately Disagree	18% (± 4%)	19% (± 2%)	10% (± 3%)	8% (± 3%)
Slightly Disagree	9% (± 3%)	12% (± 2%)	9% (± 3%)	8% (± 2%)
Slightly Agree	9% (± 4%)	19% (± 2%)	20% (± 3%)	18% (± 4%)
Moderately Agree	5% (± 2%)	14% (± 2%)	22% (± 3%)	23% (± 3%)
Strongly Agree	3% (± 2%)	11% (± 2%)	31% (± 9%)	36% (± 11%)

Table 3. Chase Not Worth the Risk

Figure 5 and Figure 6, 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: some 80% believe (over 60% either moderately or strongly) that he posed a deadly risk to the police, and some 85% (over 70% either moderately or strongly) that he posed a risk to the public. People who see the world the way Ron does hold these beliefs even more decidedly.

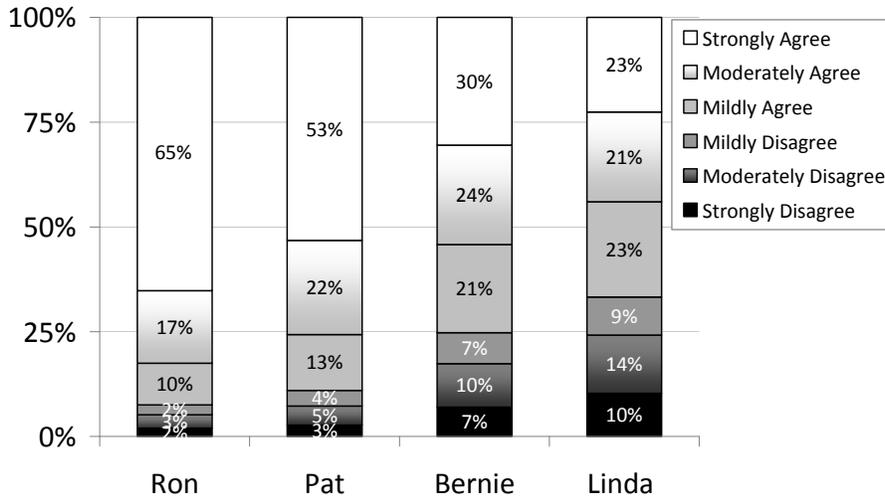


Figure 5. Harris a Lethal Danger to the Public

	Ron	Pat	Bernie	Linda
Strongly Disagree	2% ($\pm 1\%$)	3% ($\pm 1\%$)	7% ($\pm 3\%$)	10% ($\pm 5\%$)
Moderately Disagree	3% ($\pm 2\%$)	5% ($\pm 1\%$)	10% ($\pm 4\%$)	14% ($\pm 5\%$)
Slightly Disagree	2% ($\pm 1\%$)	4% ($\pm 1\%$)	7% ($\pm 3\%$)	9% ($\pm 3\%$)
Slightly Agree	10% ($\pm 5\%$)	13% ($\pm 2\%$)	21% ($\pm 4\%$)	23% ($\pm 3\%$)
Moderately Agree	17% ($\pm 6\%$)	22% ($\pm 2\%$)	24% ($\pm 3\%$)	21% ($\pm 5\%$)
Strongly Agree	65% ($\pm 16\%$)	53% ($\pm 3\%$)	30% ($\pm 9\%$)	23% ($\pm 9\%$)

Table 4. Harris a Lethal Danger to the Public

Bernie and Linda believe Harris's driving posed deadly risks, too, but their views are somewhat more equivocal. Only around one-half (44%, $\pm 5\%$) 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 23% ($\pm 3\%$) of those persons agree only "slightly" with that proposition. Even fewer (37%, $\pm 6\%$) of the Lindas in American society hold a firm conviction ("moderately" or "strongly agree") that Harris posed a lethal danger to the police. The median person of Bernie's characteristics likewise tends only slightly to agree that Harris posed a danger to the police. There is a strongly 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 without equivocation (that is, either "moderately" or "strongly").

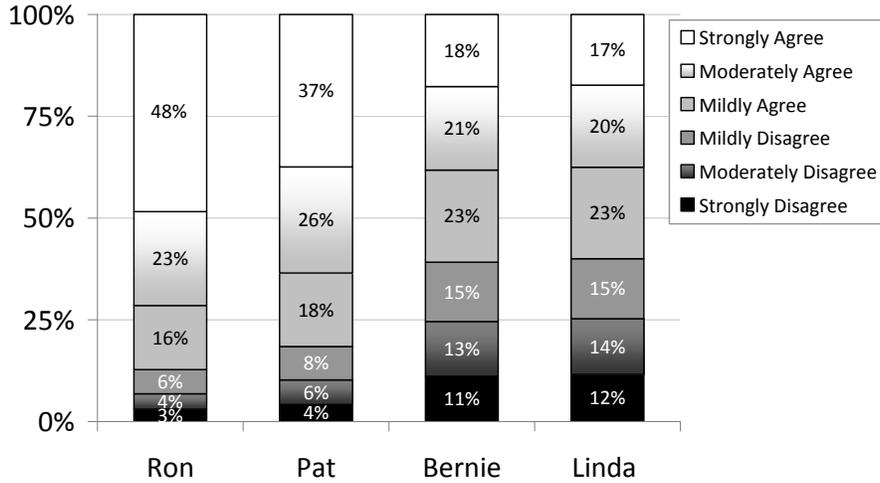


Figure 6. Harris a Lethal Danger to Police

	Ron	Pat	Bernie	Linda
Strongly Disagree	3% (± 2%)	4% (± 1%)	11% (± 4%)	12% (± 5%)
Moderately Disagree	4% (± 2%)	6% (± 1%)	13% (± 4%)	14% (± 5%)
Slightly Disagree	6% (± 3%)	8% (± 1%)	15% (± 4%)	15% (± 4%)
Slightly Agree	16% (± 6%)	18% (± 2%)	23% (± 3%)	23% (± 3%)
Moderately Agree	23% (± 4%)	26% (± 2%)	21% (± 4%)	20% (± 6%)
Strongly Agree	48% (± 15%)	37% (± 3%)	18% (± 6%)	17% (± 7%)

Table 5. Harris a Lethal Danger to Police

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 7 and Table 6). The vast majority of the persons who hold Ron’s defining attributes feel Harris was either “much more” (86%, ± 10%) or “slightly more” (7% ± 3%) at fault. Pat, representing the average American, isn’t much less emphatic in his/her condemnation: there is a 79% (± 2%) chance, the simulation suggests, that a member of the general public will see Harris as more at fault, and only a 5% (± 1 %) chance that he/she will regard the police as more culpable.

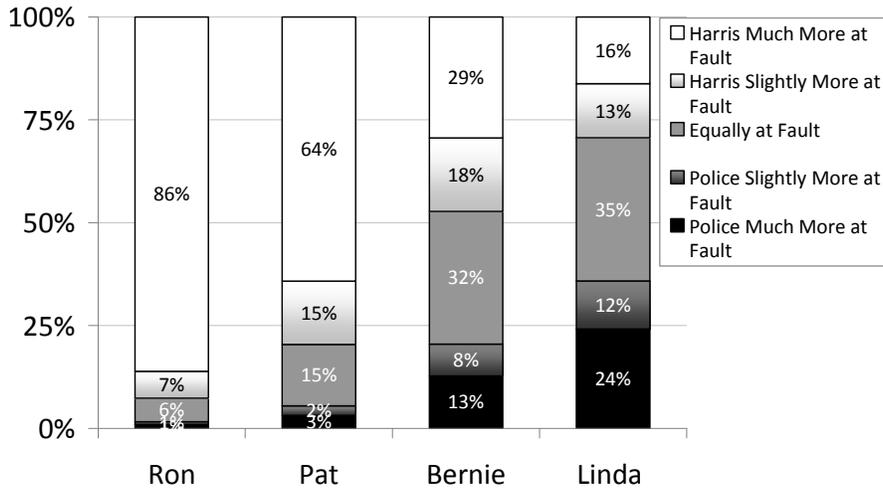


Figure 7. Relative Culpability

	Ron	Pat	Bernie	Linda
Police Much More at Fault	1% (± 1%)	3% (± 1%)	13% (± 5%)	24% (± 10%)
Police Slightly More at Fault	1% (± 0%)	2% (± 1%)	8% (± 3%)	12% (± 4%)
Equally at Fault	6% (± 3%)	15% (± 2%)	32% (± 6%)	35% (± 5%)
Harris Slightly More at Fault	7% (± 3%)	15% (± 2%)	18% (± 3%)	13% (± 4%)
Harris Much More at Fault	86% (± 10%)	64% (± 3%)	29% (± 9%)	16% (± 7%)

Table 6. Relative Culpability

Bernie and Linda, though, see matters differently. About one half (53%, ± 6%) 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%, ± 4%) of the persons who share Linda’s will say that Harris was more at fault; a person who shares her characteristics is at least five times more likely (36%, ± 4%) to say that the police were more at fault than is a member of the general population (5%, ± 1%).

Bernie and Linda also don’t agree with the *Scott* majority on the ultimate issue (Figure 8 and Table 7). Over three-fifths (65%, ± 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%, ± 2%) of the persons who hold Bernie’s characteristics are also likely to believe that deadly force was unreasonable.

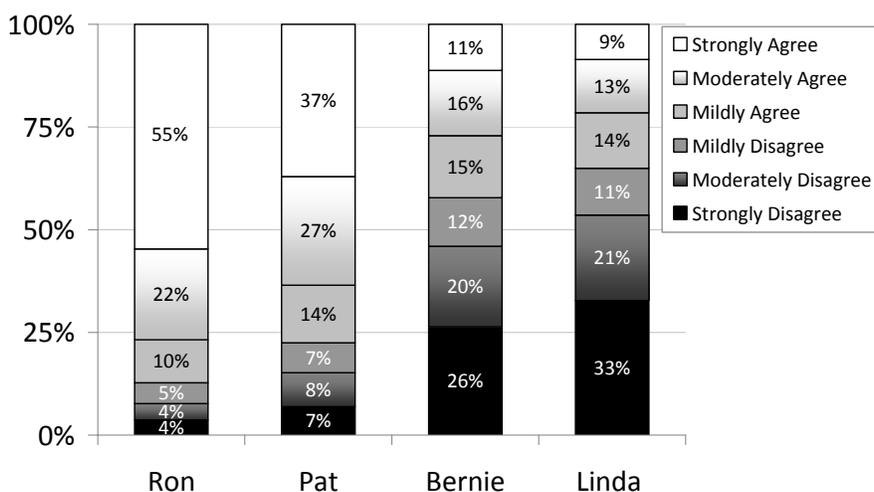


Figure 8. Deadly Force Termination Reasonable

	Ron	Pat	Bernie	Linda
Strongly Disagree	4% (± 2%)	7% (± 1%)	26% (± 9%)	33% (± 10%)
Moderately Disagree	4% (± 2%)	8% (± 1%)	20% (± 4%)	21% (± 4%)
Slightly Disagree	5% (± 2%)	7% (± 1%)	12% (± 2%)	11% (± 2%)
Slightly Agree	10% (± 4%)	14% (± 2%)	15% (± 3%)	14% (± 3%)
Moderately Agree	22% (± 6%)	27% (± 2%)	16% (± 4%)	13% (± 5%)
Strongly Agree	55% (± 16%)	37% (± 3%)	11% (± 4%)	9% (± 3%)

Table 7. Deadly Force Termination Reasonable

Pat does agree with the *Scott* majority, although not without a bit of equivocation. There is a 64% (± 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% (± 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 disagree—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 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, characteristics such as race, gender, income, education, political ideology and political-party affiliation all significantly contributed to variation in perceptions of the risks at issue in *Scott*. Subjects who differed along these lines gravitated toward factual interpretations consistent with the emotional reactions one would expect them to form in contemplating encounters between the police and individual citizens.

As hypothesized, we found that there were sharp differences of perception among persons based on characteristics and commitments typical of two recognizable cultural styles. Individuals (particularly white males) who hold hierarchical and individualist cultural worldviews, 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”)⁹⁶ 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.⁹⁷

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

⁹⁶ Gusfield, *supra* note 77, at 21; see p. 22 & note 80 *supra* (describing relationship between cultural styles and deeper forms of cultural affinity).

⁹⁷ See text at note 80 *supra*.

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 with them 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've discussed, the Court's opinion admits of some ambiguity on exactly which issues the video was deemed decisive.⁹⁸ Were a case like *Scott* to be submitted to a jury, of course, it would be called upon to decide (in the form of a general verdict) all the issues the Court identified as decisive to its analysis. That is, it 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 how to assess the "relative culpability" of the fleeing driver and the pursuing police officer for creating that risk, in determining whether the use of deadly force to terminate the chase was a reasonable.⁹⁹

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 can't 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 who do see something different from the Court majority—are necessarily "unreasonable." We consider next

⁹⁸ See text at notes 54-60.

⁹⁹ See, e.g., Eleventh Circuit Pattern Jury Instructions (Civil Cases) 230-31 (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").

whether such a conclusion can possibly be an appropriate one for the law to take.

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 wouldn't, 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 will endeavor to supply in this part. We'll 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'll 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 that 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, & 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. That's a necessary condition for concluding that the Court was correct to hold the case should be decided summarily, but is that 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.¹⁰⁰

¹⁰⁰ 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, *cf.* Fed. R. Civ. P. 56(c) *with* Fed. R. Civ. P. 50(a)-(b), "the inquiry [for all these dispositions] is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986). *See generally* *See* 9B Charles Wright & Arthur Miller, *Federal Practice and Procedure*, § 2532 (2d ed. 2007). 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 its factual evidence.

How large, how intense, and how uniform across groups must such consensus be for a court to say there's no point 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 mid-level theorizing is needed to show that the necessary properties of consensus were lacking in *Scott*.¹⁰¹

Presumably, a judge in a case like *Scott* shouldn't 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 isn't the point of jury decisionmaking. If that's what the justice system were after, it's pretty obvious it wouldn't use ordinary citizens to decide facts in a one-off fashion; it would 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.¹⁰² This isn't to say that a the-

¹⁰¹ Our theory is modest, too, in the sense that we don't 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 follow. The Court in *Scott*, of course, doesn't 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 generally* Patricia M. Wald, *Summary Judgment at Sixty*, 76 *Tex. L. Rev.* 1897, 1907-14 (1998) (linking evolving Supreme Court summary judgment standards to growing antipathy to jury trials); 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.

¹⁰² The case for professionalization of factfinding has a long pedigree and is well-developed. *See, e.g.*, Erwin Griswold, Harvard Law School Dean's Report 5-6 (1962-1963) ("Why should anyone thing that 12 persons brought in from the street selected in various ways, for the lack of general ability, should. Have any special capacity for deciding controversies between persons?"), quoted in Harry Kalven & Hans Zeisel, *The American Jury* 5 (1966). *See generally* John H. Langbein, *The Origins of Adversary Criminal Trial* (2003) (documenting the historical antagonism between truth-seeking and growing centrality of jury in adversary system of adjudication). Although the comparison presents methodological challenges, the weight of the evidence seems to suggest that judges probably render more accurate verdicts than juries. *See, e.g.*, Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 *J. Empirical Legal Studies* 305 (2007) (surveying past studies and using innovative statistical methods to determine relative error rates of judges and juries based on rates of disagreement). Some dispute this conclusion, but the most common reply is to demur: the exclusive focus on accuracy fails to account of 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* 248-49 (1986) (arguing that the "political functions of the jury" justify it wholly apart from its "fact-finding functions"); Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 *Colum. L. Rev.* 959, 983 (2006) ("the 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*

ory of when jury decisionmaking is worth the bother should be indifferent to accuracy; but it is to say such a theory must be sensitive in addition 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.¹⁰³ Facts "speak for themselves" only against the background of pre-existing 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.¹⁰⁴ 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 that the law is basing its commands on 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.

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.¹⁰⁵ Citizens would be unlikely to assent to legal determinations that seemed to reflect inaccurate judgments of fact—inaccurate because of their lack of correspondence

Efficiency, 12 *Law Human Behavior* 333 (1988) (presenting experimental evidence that ordinary citizens prefer jury on grounds of fairness to other modes of adjudication that appear to surpass it in accuracy).

¹⁰³ See, e.g., Jeffrey B. Abramson, *We, the Jury: the Jury System and the Ideal of Democracy* 18 (2000) ("[L]ocal knowledge . . . qualifies the jury to understand the facts 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.").

¹⁰⁴ See, e.g., *Maher v. People*, 10 Mich. 212, 214 (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 102, 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 generally community.")

¹⁰⁵ This is the positive conception of legitimacy associated with the social sciences. See generally C. K. Ansell, *Legitimacy: Political* in *The International Encyclopedia of the Social & Behavioral Sciences* 8704 (2001).

to ordinary citizens', as opposed to specialized professionals', understandings of how the world works.¹⁰⁶

"Legitimacy" in its normative sense refers to qualities that make the law morally *worthy* of assent.¹⁰⁷ 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 to impute the laws commands *to* them.¹⁰⁸ Jury factfinding is such a process: the view of the *facts* reflected in the law can be morally imputed to those governed by the law when the law uses a factfinding 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.¹⁰⁹ By affording a factfinding role to citizens from diverse subcommunities, whose understandings of reality reflect experiences and social influences peculiar to those subcommunities, the jury contributes to the law's legitimacy in the descriptive sense.¹¹⁰ To take an obvious example, the Jim Crow exclusion of African-Americans from juries led to a cynical and dispirited view of legal institutions in minority communities. Having no voice in that mode of the law's

¹⁰⁶ See Hans & Vidmar, *supra* note 102, at 248-49 (arguing that 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").

¹⁰⁷ See generally Ansell, *supra* note 105, at 8704 (describing normative conception of "legitimacy" of concern to political philosophers).

¹⁰⁸ This is the unifying theme of a diverse collection of "social contract" theories of legitimacy. See generally Ian Shapiro, *The Moral Foundations of Politics* ch. 5 (2003).

¹⁰⁹ 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 role of representative juries in dissipating resistance to verdicts likely to be controversial among discrete subcommunities).

¹¹⁰ See, e.g., *Glasser v. United States*, 315 U.S. 60, 86 (1942) ("the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a truly representative of the community, and not the organ of any special group or class").

production, those citizens naturally distrusted the rules that came from the jury.¹¹¹

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 facts, particularly where one side's initial view is less intensely held than the other's. 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.¹¹²

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.¹¹³ 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 without the experience of subjugation and domination that estranges them from the law.¹¹⁴

While supplying no mechanical algorithm, this account does bring 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 view of the facts reflects the minority's view of social reality, summary adjudication in that instance will deny the minority a

¹¹¹ See Abramson, *supra* note 103, at 108-12. See generally Robert A. Caro, *Master of the Senate* 946-47 (2002) (describing civil rights leaders' resistance to jury trial enforcement of 1957 Civil Right Act because of distrust of unrepresentative juries).

¹¹² See generally Abramson, *supra* note 103, at 100-01.

¹¹³ Cf. Hans & Vidmar, *supra* note 102, at 51, 248-49 (subcommunities aggrieved by controversial verdicts are more likely to see verdicts as fair if jury contains their members).

¹¹⁴ See generally Christopher Anderson, André Blais, Shaun Bowler, Todd Donovan & Ola Listhaug, *Losers' Consent: Elections and Democratic Legitimacy* (2005).

basis to accept, or for the majority to demand they accept, the law's view of the facts as their own. Before summary adjudication can be justified, then, the consensus that would attend 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 of fact”¹¹⁵ 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 endows 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, wasn't a case of that sort. Our data suggest that the minority who would see things differently after watching the tape *aren't* idiosyncratic statistical outliers; they are members of groups who share a distinctive understanding of social reality against which the facts have a meaning different for them from what it has for the majority. Moreover, the differences arise from a type of police-citizen encounter fraught with competing connotations in our society: a civil liberties case. Why assume that the disclosure of the experiences and social influences on which the minority's understanding rests couldn't *change* the view of social reality of the majority, and hence its view of the facts?

But even if we assume—as we think is likely—that such exposure would *not* change the perceptions of the “vast majority,” it still doesn't 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

¹¹⁵ Fed. R. Civ. P. 56(c).

understand) assent as anything other than acquiescence in their status as defeated and subjugated outsiders.

That's the upshot, we'd argue, of *Scott*. 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, sub-community 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 are 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 Court majority in *Scott* transformed an inevitably partial view of social reality reflected in law into a needlessly partisan one.

B. How to Defend the Outcome in Scott: Furnishing Reasons for, not merely Perceiving, the Result

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 the facts on matters 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've said in that regard implies, necessarily, that 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 just developed of the Court's reasoning in the case.

One such ground would have emphasized the unique approach that courts often take to factfinding in constitutional settings.¹¹⁶ So-called "constitutional facts," unlike those decided in cases presenting no constitutional issue, are often reviewed *de novo* in appellate courts.¹¹⁷ There are a number of reasons. One is to assure adequate enforcement of constitutional guarantees toward which there is majority antagonism that could seep into jury factfinding.¹¹⁸ Another is the importance of uniformity and predictability of constitu-

¹¹⁶ See generally Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 247-254 (1985) (history of courts application of constitutional fact review).

¹¹⁷ *Id.* at 261.

¹¹⁸ See, e.g., *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) (justifying judicial scrutiny of jury findings in cases involving 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" (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964))).

tional rules.¹¹⁹ This concern is particularly compelling, in fact, where a court can perceive that enforcement of a constitutional norm will turn on a type of factual perception that a discrete subcommunity doesn't share, for in that case summary adjudication is necessary to avoid inconsistent verdicts across jurisdictions and within particular jurisdictions over time.¹²⁰

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 judicial review.”¹²¹ To avoid that, Fourth Amendment doctrine is replete with rule-like *presumptions of reasonableness* for generically defined fact patterns (*e.g.*, the arrest and jailing of suspected misdemeanants without regard to their perceived dangerousness;¹²² “suspicionless interviews” of travelers at bus terminals;¹²³ the stopping of a vehicle upon probable cause to find a traffic violation without regard to officers' subjective motives for stopping¹²⁴), 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.¹²⁵

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-

¹¹⁹ See, *e.g.*, *Ornelas v. United States*, 517 U.S. 690, 697-98 (1996) (“*de 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))).

¹²⁰ 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 also Alafair S. Burke, *Equality, Objectivity, and Neutrality*, 103 Mich. L. Rev. 1043, 1048-50 (2005) (describing tension between empirical and normative strands of Fourth Amendment search jurisprudence); see generally David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. Pa. L. Rev. 541, 543 (1991) (identifying normative commitments in fact finding).

¹²¹ *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001)

¹²² See *id.*

¹²³ See *Florida v. Bostick*, 501 U.S. 429 (1991).

¹²⁴ See *Whren v. United States*, 517 U.S. 806 (1996).

¹²⁵ Cf. Mitchell N. Berman, *Constitutional Decision Rules*, 90 Va. L. Rev. 1, 110-111 (2004) (describing *Atwater* as a constitutional decision rule).

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”¹²⁶—that on a going forward basis could well shield from judicial scrutiny any police chase of a fleeing motorist.¹²⁷

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.¹²⁸ 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 are so unreasonable” as to violate the Fourth Amendment.¹²⁹ The concern that a 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 “strick[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.”¹³⁰ Finally, the prospect that jury decisionmaking might result in non-uniform 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.”¹³¹

¹²⁶ *Scott*, 127 S. Ct. at 1779.

¹²⁷ *But see Scott*, 127 S. Ct. at 1779 (“I do not read today’s decision as articulating a mechanical, *per se* rule. The inquiry described by the Court is situation specific.” (Ginsburg, J., concurring) (citations omitted); 127 S. Ct. at 1780 (“the video makes clear the highly fact-dependent nature of this constitutional determination”) (Breyer, J., concurring). *See generally* text at notes 57–60 (describing *Scott* opinion’s ambiguity on rule to be applied in car-chase cases and on the identity of the issues subject to determination by the factfinder).

¹²⁸ *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, 437 (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 argument 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).

¹²⁹ Akhil Amar, *An Unreasonable View of the Fourth Amendment*, *L.A. Times*, Apr. 29, 2001, at M1.

¹³⁰ *Id.*

¹³¹ Heather K. Gerken, *Dissenting by Deciding*, 57 *Stan. L. Rev.* 1745, 1756 (2005).

We take no position on the merits of judicial factfinding animated by constitutional stability concerns in this setting. 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.¹³²

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,"¹³³ "jurors, from the mode of their selection, coming from the various classes 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."¹³⁴ 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 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 of how damages verdicts—even intermittent ones—might change law-enforcement behavior than are individual jurors. 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

¹³² 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.

¹³³ *Duncan v. Louisiana*, 391 U.S. 145, 147 (1968).

¹³⁴ *Maher v. People*, 10 Mich. 212, 214 (1862).

of such misfortunes generally.¹³⁵ Even if one doesn't 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.¹³⁶

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 use of 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."¹³⁷ Since such perverse incentives would 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're 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,¹³⁸ particularly in communities whose members have considerable experience with the coercive incidences of them.¹³⁹ 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's also a bit odd for members of

¹³⁵ The 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.*, Michael J. Saks & Robert F. Kidd, *Human Information-Processing and Adjudication: Trial by Heuristics*, 15 *Law Soc Rev* 123-160 (1981); Dorothy K. Kagehiro, Ralph B. Taylor, William S. Laufer & Alan T. Harland, *Hindsight Bias and Third-Party Consentors to Warrantless Police Searches*, 15 *L & Human Behavior* 305-314 (1991); *cf.* Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 *Colum. Human Rights 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).

¹³⁶ *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 involving legal reasoning judges appear to display relatively greater resistance to biases than lay persons).

¹³⁷ *Scott*, 127 S. Ct. at 1779.

¹³⁸ *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 "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").

¹³⁹ *See generally* Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 *Geo. L.J.* 1153 (1998).

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,¹⁴⁰ the Court’s Fourth Amendment jurisprudence is highly sensitive to the *generality* of coercive state behavior. In a case like *Garner*—in which the police shoot a criminal suspect who is fleeing them on foot—coercion is *concentrated* on a single individual whose well-being is likely to be a matter of indifference (at best)¹⁴¹ to the general public. Popularly accountable officials thus 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.¹⁴² 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 sobriety¹⁴³ and other types of vehicle checkpoints,¹⁴⁴ which burden the ordinary citizens as drivers; random drug tests of high school students,¹⁴⁵ which burden ordinary citizens as parents; and warrantless “administrative” searches of businesses,

¹⁴⁰ See *generally* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

¹⁴¹ Although the Supreme Court famously avoids 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 the racially disparate impact of this law-enforcement technique. See *generally* Tracey Maclin, *Race and the Fourth Amendment*, 51 *Vand. L. Rev.* 333, 339-40 (1998).

¹⁴² See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (“the standard of reasonableness” under the Fourth Amendment turns on a “balanc[ing]” of the affected individual’s “privacy and personal security” and the government’s interest in securing “public order”).

¹⁴³ See *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1980).

¹⁴⁴ See *Illinois v. Lidster*, 540 U.S. 419 (2004) (upholding checkpoints aimed at apprehending hit-and-run driver).

¹⁴⁵ See *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (students involved in extracurricular activities generally); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 650 (1995) (high school athletes).

which burden citizens as consumers.¹⁴⁶ Precisely because the coercive effects of such exercises of law-enforcement authority are meaningfully visited on the citizenry at large, the approval of them by politically accountable actors furnishes compelling evidence that these policies strike a reasonable balance between liberty and order.¹⁴⁷ Courts thus treat such exercises of power as presumptively “reasonable” under the Fourth Amendment.¹⁴⁸

This reasoning could well have been adopted in *Scott*.¹⁴⁹ 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 the fleeing motorist or police pursuers.¹⁵⁰ 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 opinion 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.¹⁵¹

Once more, we aren’t 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

¹⁴⁶ See, e.g., *New York v. Burger*, 482 U.S. 691 (1987).

¹⁴⁷ See generally Dan M. Kahan & Tracey Meares, *The Coming Crisis in Criminal Procedure*, 86 Geo. L.J. 1153, 1173-74 (1998).

¹⁴⁸ 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); *Vernonia School Dist.*, 515 U.S. at 650 (citing “unanimous approval” of parents at public meeting as evidence that drug testing does not unreasonably burden privacy of students); *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”).

¹⁴⁹ It was in fact a disposition urged on them by an amicus group consisting of various municipal and state governments and officials. See Brief of the National Association of Counties, National League of Cities, Council of State Governments, International City/County Management Association, U.S. Conference of Mayors, and International Municipal Lawyers Association as *Amicus Curiae* in *Scott v. Harris*, No. 05-1631. This group was represented by one of the authors (Kahan) in his capacity as an instructor in the [Yale Law School Supreme Court Clinic](#).

¹⁵⁰ See *id.* 12 & n.9.

¹⁵¹ See *id.* at 15.

like Bernie and Linda, it would have been conveying in the terms most emphatically available to a court that the decision was to be made in a process—the enactment of law by democratically accountable representatives—in which the voices of all must theoretically be heard.¹⁵²

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've 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 juries. *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” only for an admitted minority of citizens.¹⁵³ 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'll 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*.¹⁵⁴ 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. 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 operate in us.

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 envi-

¹⁵² See generally Jeremy Waldron, *The Dignity of Legislation* (1999) (developing theory of how legislation recognizes dignity of minority at same time it recognizes authority of the majority) [hereinafter, Waldron, *Dignity*]; Jeremy Waldron, *Law and Disagreement* (1999) (same) [hereinafter Waldron, *Disagreement*].

¹⁵³ Fed. R. Civ. P. 56(c).

¹⁵⁴ See Robert J. Robinson, Dacher Keltner, Andrew Ward & Lee Ross, Actual Versus Assumed Differences in Construal: “Naïve Realism” in Intergroup Perception and Conflict, 68 *J. Personality & Soc. Psychol.* 404, 404-05 (1995).

ronmental threats; does the minimum wage make working class people better off or worse; will vaccinating school-age girls against the HPV virus 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 the minds of their (annoyingly smug, it seems) protagonists. They naturally proclaim as much—initiating an escalating cycle of recrimination and distrust.¹⁵⁵

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.¹⁵⁶ But because the factual beliefs they form on 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 locked 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.¹⁵⁷

We would 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 Stevens's

¹⁵⁵ See Kahan, *supra* note 16, at 130-42.

¹⁵⁶ See generally Morris P. Fiorina, Samuel J. Abrams & Jeremy C. Pope, *Culture War? The Myth of a Polarized America* (2005) (canvassing evidence that vast majority the of public cares more about material welfare issues than symbolic moral ones).

¹⁵⁷ See *id.* at 125-30.

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 petitioner; 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 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 the upon watching the tape) would be just as much bound up with cultural, ideological, and other commitments that disposed them to see the facts in a particular way.¹⁵⁸

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.¹⁵⁹

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*.

¹⁵⁸ Cf. Richard Posner, *The Role of the Judge in the Twenty-First Century* 86 B.U.L. Rev. 1049, 1065 (2006) (observing that when judges are confronted with ambiguous facts that touch on charged issues they like everyone else “fall back on their emotions or intuitions” and thus “practice, in Kahan and Braman’s term, ‘cultural cognition.’”).

¹⁵⁹ See Goldberg, *supra* note 120 (arguing that judicial factfinding responds to and reinforces cultural conflict); Kahan & Braman, *supra* note 71 (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 isn’t 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 16.

In a recent article, Cass Sunstein argues that an appropriate posture of humility counsels courts to be sensitive to community outrage. 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 outrage conventionally thought to be antithetical to the judicial mindset. Humility—borne 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. Sunstein suggests that outrage normally serves as corrective heuristic of this sort when it is experienced by a large majority, unless the judge perceives that the outraged minority has some special expertise or might be specially situated to resist the decision in a way that has had consequences for society overall.¹⁶⁰

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 valued-motivated cognition shape their and others' perception 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 can't 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

¹⁶⁰ See Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 Stan. L. Rev. 155 (2007).

facts risks conveying a denigrating 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 Bickel's celebrated defense of the "passive virtues," which counsels a rich array of avoidance techniques to steer the law clear of legitimacy-energating gestures of partisanship.¹⁶¹ 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.¹⁶² Research is growing, however, on the power of the judicial role to impart habits of mind that counteract certain types of biases,¹⁶³ including ones that distort moral reasoning.¹⁶⁴ 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 subcommunity¹⁶⁵—is one that would not 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*.¹⁶⁶

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 associated with the passive

¹⁶¹ See Alexander M. Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics* (1962); see also Sunstein, *supra* note 160, at 168-75 (grounding his defense of "humility" in theory of passive virtues).

¹⁶² Cf. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 Harv. L. Rev. 31, 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.'").

¹⁶³ See Guthrie, Rachlinski & Wistrich, *supra* note 136.

¹⁶⁴ See Jeffrey Rachlinski, Andrew Wistrich, Sheri Johnson & Chris Guthrie, *Does Unconscious Bias Affect Trial Judges* (unpublished, Feb. 16, 2008).

¹⁶⁵ Cf. Linda Greenhouse, *Justices Indicate They May Uphold Voter ID Rules*, N.Y. Times, Jan. 10, 2008, at A1 (reporting Justice Roberts' skepticism toward 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").

¹⁶⁶ We are grateful to Richard Posner for focusing our attention on this issue.

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 firearms,¹⁶⁷ say, or environmental regulation¹⁶⁸—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 and to refer readers to them for rhetorical purposes.¹⁶⁹ 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.¹⁷⁰ There might well be compelling grounds for objecting to these and like practices,¹⁷¹ 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's 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 on cultural lines (in a personal injury case, say, that the object the plaintiff is seen to be tripping on in a video is his own untied shoelace and *not* a raised board in the floor of the defendant's store). By the same token, where a factual

¹⁶⁷ 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 (T. D. Lytton ed., 2005) (arguing that use of litigation to regulate guns exacerbates cultural conflict).

¹⁶⁸ Cf. David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 U. Pa. L. Rev. 1741 (2007) (describing resort to tort cases in response to global warming).

¹⁶⁹ See, e.g., *Carnival Cruise Lines*, 499 U.S. 585, 605 (1991) (Stevens, J., dissenting) ("[O]nly the most meticulous passenger is likely to become aware of the forum-selection provision [in agreement printed on 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 eighth of the twenty-five 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 (1997).

¹⁷⁰ See, e.g., *Green v. New Jersey State Police*, 2007 WL 2453580 (3rd Cir. 2007) (using video evidence to establish facts but affirming denial of summary judgment); *Sharp v. Fisher*, 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).

¹⁷¹ See Dellinger, *supra* note 169.

inference *would* likely provoke cultural dissensus, our argument would counsel the judge not to draw it even if the basis for the inference is something 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've 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 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 law 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 subcommunity's view of reality as flawed. The Court could have done that in *Scott*, we pointed out, either by emphasizing 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 *de-meaning* 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 use care.¹⁷² In an action for breach of contract, individualists might believe that contracting parties should be bound to all promises, including those that courts routinely dismiss as "puffery."¹⁷³ 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.¹⁷⁴

¹⁷² See, e.g., Stephen G. Gilles, *The Invisible Hand Formula*, 80 Va. L. Rev. 1015, 1020-27 (1994) (describing and criticizing this position in academic commentary).

¹⁷³ 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).

¹⁷⁴ See generally Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 213 (1985); Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 Harv. L. Rev. 917, 920 (2003).

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.¹⁷⁵ 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.¹⁷⁶

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*.

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.¹⁷⁷ 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 paper 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.

¹⁷⁵ See Waldron, Dignity, *supra* note 152.

¹⁷⁶ See David A. Strauss, *Legal Argument and the Overlapping Consensus* 20-21 (unpublished manuscript, July 12, 1998); Cass R. Sunstein, *Legal Reasoning and Political Conflict* (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., Steven 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."); Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* 14-16 (1996) (defending idioms of justification that evidence "reciprocity" among persons of diverse values). 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* (1987).

¹⁷⁷ 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).

Our empirical study found that when we “allow the videotape to speak for itself,”¹⁷⁸ 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 Southern and Westerners, liberals and conservatives, Republicans and Democrats—all significantly disagreed on the risk that Harris posed, on the risk the police posed in deciding to pursue him, and on 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 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 majority of the Court. Those of the latter outlook, in contrast, were highly 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 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.¹⁷⁹

What should be made of these findings? We have argued that they are the basis for strongly objecting to the Court’s disposition 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 *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 as-

¹⁷⁸ *Scott*, 127 S. Ct. at 1775 n. 5.

¹⁷⁹ See Kahan *et al.*, *supra* note 16.

serting that the view of the facts these people came away with was one no “reasonable juror” could have formed, the *Scott* majority not only deprived 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 voice from even being heard.

There were *multiple* avenues available to the Court for reversing in *Scott*, we 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 don’t mean, however, to attribute bad faith to the Court. On the contrary, we have suggested that it’s likely 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 political practices are replete with practices that not only forbid full-blooded sectarianism of this type but that 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 forbid legislators and ordinary citizens to justify policies in terms that reflect a partisan conception of the good and instead to justify them on grounds accessible to persons of diverse moral and cultural persuasions.¹⁸⁰ In the legal arena, they include devices like formalism and minimalism, which enable judges to defend out-

¹⁸⁰ See, e.g., John Rawls, *Political Liberalism* 175, 217-18 (1993) (articulating norm of “public reason” that prohibits political actors in most contexts from invoking “comprehensive views” that “include[]conceptions of what is of value in human life, as well as ideals of personal virtue and character” and instead “explain . . . how the principles and policies they advocate and vote for can be supported by” considerations consistent with “a diversity of reasonable religious and philosophical doctrines”); Bruce Ackerman, *Social Justice in the Liberal State* 11 (1980) (defending norm of “constrained power talk” that prohibits any “power holder” from offering a justification for law that proclaims “his conception of the good is better than that asserted by any of his fellow citizens”); Steven 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.”).

comes and elaborate the law without resort to more contentious moral claims.¹⁸¹

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.¹⁸² It might seem natural to see judicial idioms that focus on "facts" as conflict avoiding for the same reason.¹⁸³ But because we inevitably recur to our cultural values to evaluate empirical claims about what conditions threaten our welfare and what policies promote it, a policy idiom of facts can polarize us every bit as much as one that deals with differences of value in a transparent way.¹⁸⁴

We've endorsed a form 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 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.

¹⁸¹ See generally Strauss, *supra* note 176; Sunstein, *supra* note 176.

¹⁸² See Martin Rein & Christopher Winship, *The Dangers of "Strong" Causal Reasoning in Social Policy*, Society, July/Aug. 1999, at 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").

¹⁸³ See, e.g., Goldberg, *supra* note 120 (imputing this approach to courts in constitutional law).

¹⁸⁴ See Kahan *et al.*, *supra* note 16, at 144.