CULTURAL COGNITION AND THE REASONABLE PERSON

by
Donald Braman[*]

The reasonable person does a yeoman's job. She lifts the burden of painful decision-making from the legislature's shoulders; she helps keep legal standards current by adjusting legal outcomes to shifting norms; she shields the law from excessive professionalization; and she helps snuff out evasive loop-holing by clever and well-informed bad actors. We know these aspects of her well; but she has other features that have not been sufficiently described or articulated. The features I have in mind relate to the management of social dissensus, dissensus that is endemic to modern liberal democracies. In this Essay, I examine the way two phenomena, factualization *and* cultural cognition, *constrain the way reliance on the reasonable person standard can manage such conflict. The law's deference to the concept of reasonableness allows, I will argue, for a cultural hedge. It elides—at least partially—hotly contested normative disputes over racial anxiety, gender roles, physical violence, and other divisive issues, by shifting attention away from explicitly political valuations by the state and toward factual judgments. The balancing and subtle exchange of normative standards and factual findings is the crux of what makes the reasonable person standard so useful and so pervasive; and it is those very same features that make it—which is just another way of saying* us*—intolerant and unjust. As with many flesh-and-blood persons, then, the most attractive qualities of the reasonable person are bound up with those qualities that are also the most objectionable.*

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[*] Associate Professor, George Washington University Law School. I thank Dan Kahan, David Hoffman, Katharine Richards, and the participants of the conference.

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I. INTRODUCTION

The reasonable person does a yeoman's job.[1] She lifts the burden of painful decision-making from the legislature's shoulders;[2] she helps keep legal standards current by adjusting legal outcomes to shifting norms; she shields the law from excessive professionalization;[3] and she helps snuff out evasive loop-holing by clever and well-informed bad actors.[4] All of these functions have been elsewhere described and extolled, and I agree that they are important. But there are other functions that have escaped attention and are equally important. The functions I have in mind relate

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[1] She also provides an opportunity to revisit and revise many of the ideas developed in other work by members of the Cultural Cognition Project. *See* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999); Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1 (2008); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

[2] It would be impossible for a legislature to answer with any precision, for example, the question of whether the killing of an unfaithful spouse or spousal paramour is murder or manslaughter. What if the wife had just kissed her lover? Would it matter if all the parties were intoxicated? What if the couple had an open marriage? Or the husband had refused the wife sex for extended periods of time? What if they were engaged, but not married? What if they were not married or engaged, but had lived together for years and promised fidelity? What if they both worked in the adult film industry? The reasonable person answers this question by referencing social norms. On this account, it is our norms, not the law, that help us understand what constitutes "adequate provocation." *See generally* MODEL PENAL CODE § 210.3 cmt. (1962) (explaining that adequate provocation is measured by the standard of the reasonable man).

[3] The example of "adequate provocation" in manslaughter doctrine is again instructive. Historically, the standard was left to judicial construction and elaboration, employing a host of determinations: a blow to the face was adequate, a boxing of the ears not; the infidelity of a man's wife was adequate, the infidelity of a man's fiancée or girlfriend not. *See generally* MODEL PENAL CODE § 210.3 cmt. 5(a) (describing the traditional role of courts in making generalizations about reasonable human behavior to structure the doctrine).

[4] The more formalized the law becomes, the easier it is for calculating actors to manipulate circumstances to their advantage. Holmes's "bad man," cares not about morality but cares intensely about avoiding prison. *See* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

to the management of social dissensus, dissensus that is endemic to modern liberal democracies.[5]

In this Essay, I examine the way two phenomena, *factualization* and *cultural cognition*, constrain the way reliance on the reasonable person standard can manage such conflict. Consider the following three illustrative cases: Five police officers, following a high-speed chase through Los Angeles, severely beat their suspect, Rodney King, before taking him into custody;[6] Bernard Goetz, after being mugged, purchases a gun and shoots three black youths on a subway platform after one of them said: "Give me five dollars.";[7] Judy Norman, after suffering years of violent abuse, and following a severe beating, shoots her husband in the back of his head while he sleeps.[8] Other examples abound,[9] but I'll focus on these well-known cases.

The path from the facts in each case to a determination of innocence or guilt depends in large part on what a fact-finder believes a reasonable person in those circumstances would perceive and how a reasonable person would behave. And in each case, the law's reliance on the concept of reasonableness of the act allows for a cultural hedge. It elides—at least partially—hotly contested normative disputes over racial anxiety, gender roles, physical violence, and other divisive issues, by shifting attention away from explicitly political valuations by the state and towards factual judgments during jury deliberations or in the judge's chambers. I call this underappreciated effect of the reasonable person standard *factualization*.

It is not hard to understand the utility of factualization in a diverse society.[10] When forced to reach a decision in cases that involve controversial issues, it would be disquieting to find that, *as a matter of law*, one's conception of the good society has been rejected for some competing conception. Rather than privileging a specific outlook as a matter of law, then, a normative question can be turned into a series of local factual inquiries into what a reasonable person would perceive, thereby decentralizing the normative judgments and transforming them

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[5] This parallels similar arguments made about self-interest and deterrence. *See* Stephen Holmes, *The Secret History of Self-Interest*, *in* PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 42, 52 (1995); Kahan, *supra* note 1, at 414–16.

[6] Koon v. United States, 518 U.S. 81 (1996).

[7] People v. Goetz, 497 N.E.2d 41 (N.Y. 1986).

[8] State v. Norman, 378 S.E.2d 8 (N.C. 1989).

[9] A husband shoots his wife after finding her in bed with another man. A corporation promotes its stock with boastful speech about its balance sheet. Squatters occupy an uninhabited building, change the locks, and claim it as their own. *See, e.g.*, Gonzales v. State, 546 S.W.2d 617 (Tex. Crim. App. 1977); Jones v. Corpus Bankshares Inc., 701 F. Supp. 2d 1014 (N.D. Ill. 2010); Radvansky v. City of Olmsted Falls, 395 F.3d 291 (6th Cir. 2005).

[10] As I will discuss below, factualization through the reasonable person standard is, of course, just one of several forms of factualization that can occur. *See infra* notes 21–22.

into discrete assessments distributed across diverse communities. While not always effective, the devolutionary function of the reasonable person standard often helps legal actors avoid unnecessary political confrontations in just this way.[11]

The ability of the reasonable person standard to help cool cultural disputes, however, is constrained by another phenomenon: *cultural cognition*. Cultural cognition is a collection of social and psychological mechanisms that cause individuals to conform their factual beliefs to their core values and cultural commitments. A growing body of research shows that cultural cognition pervades a broad array of factual disputes over subjects as diverse as climate change, gun control, nuclear power, synthetic biology, abortion, drug use, HIV risks, terrorism, foreign policy, and—perhaps most importantly for the purposes of this Essay—a variety of criminal and civil cases. In each, individuals have been shown to hold factual beliefs strikingly consistent with salient values they hold. This is, further studies have shown, both because individuals process information in ways that minimize the dissonance between their factual beliefs and their values, and because they are more likely to seek out and be exposed to information from those with whom they feel they share important values.

I acknowledge that the conversion of evaluations of controversial norms into factual inquiries can help reduce social conflict outside of the courtroom.[12] In this Essay, though, I look at the darker side of factualization. The conversion of normative disputes into factual inquiries and the divergence of factual perceptions along cultural lines regularly generate intense conflict. In such cases, cultural cognition will move some groups to view the verdicts in culturally sensitive cases as intelligible and understandable applications of a neutral standard, but will move others to view those same verdicts as clearly biased attempts at papering over cultural animus with claims of objective and neutral findings of fact.[13] The determination that the police who beat Rodney King reasonably perceived him to be a threat,[14] the determination that

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[11] The reasonable person standard, on this account, is part of a set of "vocabularies and concepts that determine how we talk to each other about what the law should be . . . . [W]hether [we] speak softly or raise [our] voices, use terms that connote respect or express contempt—influences how likely [we] are to reach agreement, and how easily [we'll] be able to get along with each other if [we] don't." Kahan, *supra* note 1, at 419.

[12] *See, e.g.*, Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 804 (2010) ("By striving to formulate laws in a manner that admits of a variety of potential—even potentially contradictory—cultural justifications, officials can furnish persons of diverse persuasions with the resources necessary to see affirmation of their identities no matter what position the law takes.").

[13] *See* Kahan, Hoffman & Braman, *supra* note 1, at 896 (describing the role of cognitive illiberalism shaping conceptions of reasonableness in the *Scott v. Harris* case).

[14] *See* Koon v. United States, 518 U.S. 81, 87 (1996).

Bernard Goetz was reasonable to view black youths asking for money as warranting the use of deadly force,[15] the refusal to find Judy Norman or other abused women reasonable in their use of deadly force against their abusers,[16] and other controversial findings of fact have generated conflict and distrust that may have exceeded what would have resulted from resolution of the matter on explicitly normative grounds. Fact-finding, on this account, is not necessarily less provocative than explicitly political normative debate.

Even when the factualization of normative questions goes unnoticed, though, it is not clear that the obscuring of the contestable normative issue or the consequent avoidance of conflict is desirable. The reasonable person standard may aid the liberal state in assuaging conflict over contested norms; but it does so by granting fact-finders the freedom to privately succumb to the kind of bias that would, if made public, offend our liberal commitments not only to shared forms of justification, but also to equality, the universal value of human life, and public reason. Reliance on local and private factual findings, on this account, may calm social dissensus, but the cost may be fairness, transparency, and consistency.

As with many flesh-and-blood persons, the most attractive qualities of the reasonable person are bound up with those qualities that are also the most objectionable. If the balancing and subtle exchange of normative standards and factual findings is the crux of what makes the reasonable person standard so useful and so pervasive, it is those very same features that make it—which is just another way of saying *us*—intolerant and unjust.

II. THE MANAGEMENT OF SOCIAL DISSENSUS

Begin with a central and inescapable fact of life in a diverse society: Because we view the law as reflecting shared values, and because values in a diverse society vary, the law is inevitably the site of social conflict. The decision to punish sodomy, abortion, prostitution, gambling, drug possession, pornography, and other controversial acts depends in large part on judgments about what the good society looks like, and that is a thing over which people, reasonable or not, disagree.[17] Precisely because the law is viewed as a statement about which norms inhere in the good society, citizens will feel deeply aggrieved if their values are disregarded or disparaged by the law. The law can become a site for status

[15] *See* People v. Goetz, 497 N.E.2d 41 (N.Y. 1986).

[16] *See* State v. Norman, 378 S.E.2d 8 (N.C. 1989).

[17] In saying this I do not mean that there will be disagreement over most cases—far from it. But the more diverse the cultural outlooks in a society, the more likely it is that conflict will arise. *See* Donald Braman, Dan M. Kahan & David Hoffman, *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. (forthcoming 2010) (manuscript at 3, 29), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443552##.

competition—sometimes quite fierce competition—among social groups, particularly where they view their norms as incompatible with those of other groups with whom they are vying for social status.

To avoid this form of conflict and placate the groups involved, the state can offer—or, at the very least, claim to offer—due process, representative juries, and universal standards that do not take social status or identity into account when seeking to protect the "supreme value of human life" recognized by "[a]ny civilized system of law,"[18] and it can favor forms of argument and public reason disconnected from status or identity.[19] The reasonable person standard, in addition to all its other functions, is properly viewed as serving this same end. With the reasonable person standard in hand, a state need not resolve all of the contested conceptions of the good society; instead, it can pass off the task of evaluating potentially controversial conduct in relation to local norms.

There are two ways that an appeal to the reasonable person standard helps the state avoid having to answer these questions directly.

A. Decentralization

The first involves the decentralization of potentially controversial normative evaluations. In place of the state's formulation of law through democratic deliberation, the state—within the law itself—explicitly invites local formulations developed through non-public deliberation; it shifts the burden of determining what kinds of judgments and behaviors are acceptable from the legislature to a jury.[20] The potential utility of decentralization in managing social dissensus is linked to the value of the

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[18] State v. Nodine, 259 P.2d 1056, 1071 (Or. 1953) (holding that deadly force may not be used to prevent a man from cohabitating and having sexual relations with the minor daughter of another); *see also* State v. Clay, 256 S.E.2d 176, 182 (N.C. 1979) (holding that the conventional formulation of self-defense "precludes the use of deadly force to prevent . . . offensive physical contact and in so doing recognizes the premium we place on human life").

[19] *See* Holmes, *supra* note 5, at 65; John Rawls, *The Idea of Public Reason*, *in* POLITICAL LIBERALISM 212, 212–13 (1993); *see also* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 8–12 (1980) (arguing for constraints on "power talk" that are grounded in the idea that nobody can claim a privileged insight into the moral universe); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 52–53 (1996) (concluding that deliberative democracy requires participants to seek "fair terms of social cooperation for their own sake").

[20] Marc Galanter put it well:

> Every legal system that embraces a diverse population faces the problem of accommodating local norms and giving expression to local concerns while securing uniformity. . . . Thus we come to the basic sources of diversity and discrepancy between the law in the books and the law in action—the multiplicity of legal agencies themselves, the necessity of accommodating local interest and concerns, the necessity of accommodating values and interests that are not explicitly acknowledged by the legal system.

Marc Galanter, *The Modernization of Law*, *in* MODERNIZATION: THE DYNAMICS OF GROWTH 157–58 (Myron Weiner, ed., 1966).

jury more generally; where legislative norm resolution may be controversial, local resolution of norms may be more capable of reflecting the kind of cultural diversity we see across communities.

Think, for example, of the alternative formulations of self-defense doctrine that run from "duty to retreat"[21] to "stand your ground."[22] In jurisdictions that employ a "duty to retreat" approach, defendants must show that that they could not reasonably retreat from a threat before resorting to deadly force. In jurisdictions that employ a "stand your ground" formulation, defendants need only show that they were not the first aggressor[23] and had a legal right be in the location where they remained;[24] if those conditions are met, they have no duty to retreat and may "meet force with force." But even in these jurisdictions, the legislature can—and does—embed the standard within a general formulation that requires that the use of deadly force be *reasonable*.[25]

This kind of deference to local norms generalizes to other types of self-defense cases and to the use of the reasonable person standard more broadly. When a jury found that a reasonable person in Bernard Goetz's position would be justified in using deadly force, it partook of just this form of delegated evaluation. Similarly, when a jury decided that a reasonable person in Judy Norman's position would be justified in using deadly force, it too made just such a normative evaluation.

In many cases, the shifting of the evaluation from the legislature to the judge or jury may render it less provocative than a similar decision made by the state. This structural function in managing dissensus is enabled, in part, by several features that accompany the delegation of determinations about reasonableness to trial courts and juries. Perhaps most importantly, a local trial court verdict—because it is made by a member of the local community—is more likely to reflect local norms rather than those of the state, avoiding dissensus by coordinating verdicts with the diverse norms across and within jurisdictions. A verdict by a jury that radically misjudges local norms may be set aside by a judge with better intuitions (informed, no doubt, by public outcries and political pressures). And a verdict by a judge or jury that is out of line with local norms still has the ability to draw animosity or outrage away from the state.

In any case, judges and jurors who make normative judgments at odds with the local community are still less likely to provoke public anti-state unrest than centralized law-making by the executive or legislature. Few local trials are covered by the media the way legislation is, and few trials that are covered actually explicitly state the normative consideration underlying the verdict. And even where an unpopular verdict is

[21] *See, e.g.*, ALA. CODE § 13A-3-23(b) (LexisNexis 2005).

[22] *See, e.g.*, FLA. STAT. ANN. § 776.012 (West 2010).

[23] *See, e.g.*, FLA. STAT. ANN. § 776.041; ALA. CODE § 13A-3-23(b).

[24] *See, e.g.*, ALA. CODE § 13A-3-23(b).

[25] *Id.*

publicized, the scope and location of the controversy can be effectively localized in ways that would not be possible were the state to decide the issue through some centralized decision-making process.

Trial courts arguably both partake in *and* subvert this function when ruling that a perception is or is not reasonable as a matter of law.[26] In *Norman*, for example, the court ruled as a matter of law that a sleeping husband, however abusive he may have been, cannot reasonably be thought to present an imminent threat of death or great bodily harm, and thus disallowed arguments for perfect self-defense. In doing so, it openly decided an issue on which many people disagree, imbuing the law with a potentially controversial normative perspective.

But even in such circumstances, a decision can be couched as resting on a legal requirement the origins of which are tradition rather than a normative evaluation by the state, and judges can—and often do—describe the law as a doctrinal constraint on their judgment in a way that a legislature cannot. Given the arcane nature of most doctrinal analysis, even members of the public who disagree with the outcome can view the judgment as a technical problem rather than an offensive expression explicitly derogating their conception of the proper social order.

B. Factualization

The second feature of the reasonable person standard that assists the state in avoiding open conflict and dissensus involves the more subtle recharacterization of normative questions as factual ones, which for the sake of brevity I will call *factualization*. This, I think, is a pervasive but less recognized function to which the reasonable person standard contributes.

Although no one to my knowledge has detailed the role it plays with respect to social dissensus, many scholars have noted the pervasiveness of, and speculated as to the pressures underwriting, factualization. Mark Kelman, for example, has developed a subtle and sophisticated account of the role factualization plays in cases like *Goetz* and *Norman*. Kelman suggests that we submit to factualization because we are constrained by an "Enlightenment dogma—facts are universal, values particular"—that makes resolution of disputes on factual grounds preferable to normative debate.[27]

As Kelman describes,[28] the factual issues the *Goetz* and *Norman* cases present (the danger posed by the victim; the acuity of insight that each

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[26] This is related to the central point of our prior work on Cognitive Illiberalism in the cases of *Scott v. Harris*, *Norman*, and *Goetz*. *See generally* Kahan, Hoffman & Braman, *supra* note 1; Kahan & Braman, *supra* note 1.

[27] Mark Kelman, *A Rejoinder to Cass R. Sunstein*, *in* QUESTIONS OF EVIDENCE: PROOF, PRACTICE, AND PERSUASION ACROSS THE DISCIPLINES 199, 202 (James Chandler et al. eds., 1994).

[28] Mark Kelman, *Reasonable Evidence of Reasonableness*, *in* QUESTIONS OF EVIDENCE, *supra* note 27, at 169, 170.

defendant might posses by virtue of his or her personal experiences; the excusing deformity of perception that each defendant might be suffering from; the adequacy and feasibility of relying on alternative, lawful remedies), and the nature of the probabilistic inferences an observer would have to employ in resolving them, are essentially identical.

The conflict that captivates students of these cases, Kelman notes, is not over the law—few challenge self-defense doctrine itself—but rather over the facts. The factualization of moral evaluations, on Kelman's account, allows potentially political questions to be transformed into specific empirical ones. The particularized factual inquiry replaces the controversial nature of the questions that underwrite the moral evaluations involved in each case.

Kelman believes the cases can be distinguished by the "error costs" of killing, given the clearly immoral prior behavior of the sleeping husband to the terrified wife and the possible innocence of the black youths asking for (or demanding) money. But the question I want to ask is how factualization occurs and what the implications are for the management of social dissensus. The answer, I will suggest, turns on the role of *cultural cognition*, the process by which individuals conform their factual beliefs to their preferred—and sometimes partisan—conceptions of appropriate social order.

III. CULTURAL COGNITION AND SELF-DEFENSE

If the law is underwritten by social norms that vary,[29] those evaluating the acts of others may sometimes describe their disagreements in terms of *explicit* value differences as they self-consciously reflect on their own normative commitments. But even when individuals agree on an explicit legal or moral standard, they may disagree over whether, in fact, those standards have been met. The theory of cultural cognition suggests that this latter form of dissensus will often reflect *implicit* influence of our diverse cultural commitments on our factual beliefs. As a result, individuals may disagree about the facts of a case as much as—or even more than—they disagree about the moral standard endorsed by the law.

My broader goal is to shed light on the question of whether and under what circumstances this displacement of explicit normative arguments by factual inquiries is effective and desirable. But to get there, I need to develop an empirical account of the role cultural cognition plays in that displacement.

A. Goetz v. Norman

By way of illustration, consider two examples from a series of large-scale experiments conducted by the Cultural Cognition Project which are

[29] What we once took to be patently obvious has turned out to be far more controversial than we imagined. *See* Braman, Kahan & Hoffman, *supra* note 17.

reported in greater detail elsewhere.[30] In each, we asked members of the public to serve as mock jurors on a case, and in each case participants were asked to make factual findings and determine guilt.

1. The Beleaguered Commuter

The first, modeled on the facts of the Bernard Goetz case, featured a slight white man who shot a larger black youth after the youth said, "Give me five dollars." The defendant had been mugged twice before and claimed that this time, based on past experience, he knew that his victim was about to seriously hurt him. He also claimed, and an expert witness avowed, that as a result of his prior muggings he suffered from post-traumatic stress syndrome. Participants were asked to read the following summary of the facts before making any factual findings or rendering a verdict:[31]

> George is charged with murdering Alvin.
>
> George (a 48-year old white male; 5' 7", 142 lbs.) fatally shot Alvin (a 17-year old African American male; 6' 2", 215 lbs.) after Alvin stated "give me some money, man." The shooting occurred on a city subway platform at 5:30 p.m. on a weekday evening. After shooting Alvin, George fled but turned himself in to police three hours later.
>
> George had been mugged on three previous occasions. On one of these, he had been beaten and required fifteen stitches under his eye. George had reported the robberies, each of which had been committed by persons George described as "teen aged, African American males," but police failed to make any arrests. George bought the handgun used in the shooting after the third mugging.
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> Testifying in his own defense, George told the jury that, although he'd never seen Alvin before, George "could tell from his body language and the aggressive tone of his voice" that Alvin was "going to mess with me." "It was exactly like the other time I had been attacked," George stated. "I felt I had no choice but to shoot him," George said, "because I knew if I didn't he was going to hurt me real bad." Alvin had a pocket knife on his person, but had not displayed it before being shot.
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> The defense also called an expert witness: Dr. Leonard Wallace, a Ph.D. psychiatrist on the faculty of a major university. Based on a thorough psychiatric examination of George, Wallace offered his opinion that George was suffering from "post-traumatic stress syndrome." "Like many victims of repeated violent beatings," Wallace testified, "George lived in constant fear of additional attacks." "In my opinion, George honestly perceived that Alvin would attack him if he didn't kill him first; that belief was quite reasonable, given the muggings George had previously suffered, and the effect of those muggings on his psyche," Wallace concluded.

[30] *See generally* Kahan & Braman, *supra* note 1.

[31] *See id.* at 65.

2. The Battered Wife

The second, based on the trial of Judy Norman, features a wife who, after years of severe physical abuse, shot her husband in his sleep. She too claimed that, based on past experience, she sensed that her husband would seriously hurt or kill her when he awoke. She also claimed, and an expert witness avowed, that as a result of her prior abuse she suffered from battered-spouse syndrome. Participants were asked to read the following summary of the facts before making any factual findings or rendering a verdict:[32]

> Julie is charged with murdering her husband, William, whom she shot in the head as he slept.
>
> William had persistently abused Julie during their ten-year marriage. This mistreatment included physical beatings, some of which resulted in injuries (facial cuts; broken ribs; twice a broken nose) requiring emergency medical treatment. Three times the police arrested William for assaulting Julie, but released him from custody each time after Julie declined to press charges.
>
> Testifying in her own defense, Julie told the jury that William had beaten her on the morning of the shooting after returning home from a night of hard drinking and then fallen asleep in the bedroom. Julie testified that she then went to her mother's nearby home and obtained the hand gun used in the shooting. "I felt I had no choice except to shoot him," she stated, "because I knew when he woke up this time he was going to hurt me really bad."
>
> The defense also called an expert witness: Dr. Leonard Wallace, a Ph.D. psychiatrist on the faculty of a major university. Based on a thorough psychiatric examination of Julie, Wallace offered his opinion that Julie was suffering from "battered woman syndrome." "Like other victims of chronic domestic violence," Wallace testified, "Julie believed that she was powerless to leave and that no one could or would help her." "In my opinion, Julie honestly perceived that her husband would attack her if she didn't kill him first; that belief was quite reasonable, given the beatings she had previously suffered, and the effect of those beatings on her psyche," he concluded.

Participants who read these scenarios were also provided with jury instructions summarizing the doctrinal standard and specifying the relevant facts they needed to find in order to convict or acquit. Participants were then asked to answer a series of questions regarding legally relevant facts and, once they had made those findings, to render a verdict.

3. Dissensus

How did the participants react to these stimuli? To begin with, there was significant variation across several dimensions. Blacks were more

[32] *See id.* at 64–65.

likely to convict George than they were to convict Julie, while whites were more likely to convict Julie than George. Similar patterns emerged for women and men, Democrats and Republicans, liberals and conservatives, egalitarians and hierarchs, and communitarians and individualists. In each case, the former were more likely than the latter to see George as more deserving of punishment than Julie. The results are provided in *Table 1* below.

Guilty Verdicts Across Groups

	George	Julie
N=	*766*	*832*
black : white	**56% : 29%**	**41% : 48%**
male : female	34% : 32%	**50% : 44%**
republican : democrat	**24% : 39%**	**51% : 43%**
liberal : conservative	**43% : 23%**	**43% : 56%**
egalitarian : hierarch	**43% : 22%**	**42% : 51%**
individualist : communitarian	**25% : 40%**	**51% : 43%**

Table 1. Frequencies of guilty verdicts for George and Julie across race, gender, party, ideology, and cultural orientations. Bolded figures show differences significant at $p<0.01$.

These cross-tabulations begin to suggest what the differences across the population are like. Every demographic group listed above showed significant differences in determinations of guilt with one exception: men and women did not significantly differ over George's case.

But this kind of simple comparison is far from an ideal evaluation of differences of opinion across the population. People are not generically black or white, male or female, republican or democrat, liberal or conservative, egalitarian or individualist; these characteristics and values tend to come in packages. How would more fleshed-out types of people react to each of the cases?

Imagine two Americans (see *Figure 1*)[33] 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. Linda is an African-American woman employed as a social worker in Philadelphia, Pennsylvania. She is a staunch Democrat and unembarrassed to be characterized as a "liberal."

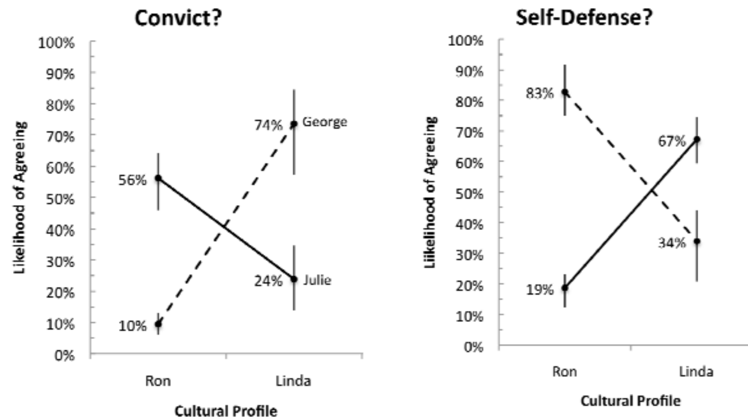
[33] Yes, these are the same folks made famous in a recent and brilliant article assessing the Supreme Court's decision in *Scott v. Harris*. *See* Kahan, Hoffman & Braman, *supra* note 1, at 849–50.

Figure 1. Two Members of the American Venire

Zelig, a statistical application designed by Kosuke Imai, Gary King, and Olivia Lau,[34] facilitates simulating such complex profiles, furnishing the means for comparing responses across more detailed types of people. It allows reasonable statistical predictions of perceptions of fairly specific types of people by setting pertinent characteristics—cultural values, gender, race, region of residence, political ideology, and party affiliation—to appropriate values in *Zelig* simulations.

So how would these two members of the American venire evaluate these cases? As indicated in Figures 2 & 3 below, in remarkably different ways.

[34] *See* Gary King, Michael Tomz & Jason Wittenberg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 347 (2000). 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. *Zelig* is intended to generate data analyses that simultaneously extract more information and present it more intelligibly. Using *Zelig*, 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 10,000 times, or enough to give a reasonable approximation of the probability distribution for the dependent variable). The resulting array of values for that dependent variable can then be analyzed with techniques that are statistically equivalent to those used in survey sampling to determine an average predicted value, plus a precisely calculated margin of error. *See generally id.* at 349–51; Kosuke Imai, Gary King & Olivia Lau, *Toward a Common Framework for Statistical Analysis and Development*, 17 J. COMPUTATIONAL & GRAPHICAL STAT. 892 (2008), *available at* http://gking.harvard.edu/files/z.pdf.



"[Defendant] should be convicted of murder."

"[Defendant] should be acquitted of murder because [s]he killed in self-defense."

Figures 2 & 3. The differences in Ron and Linda's willingness to convict or acquit on grounds of self-defense.

Our Goetz-like defendant, George, is far more likely to be convicted by someone like Linda than someone like Ron; and the reverse is true for our Norman-like defendant, Julie. How is it that, when given a single standard to apply to a detailed set of facts, individuals *still* disagree in their judgments of guilt and innocence? What could explain the degree of *systematic* disagreement in these cases?

B. Cultural Cognition

The theory of *cultural cognition* provides an answer. When deliberating about what course of action is just, individuals will rarely have direct access to the answers themselves. Instead, they must judge whether the stories in which the information is embedded are plausible and are consistent with one another. And when interpreting a legal standard, they must consider which of the norms implicit in the standard are relevant, given the facts as they know them. All the empirical evidence we have suggests that individuals will do this through interlocking social and cognitive mechanisms that cause them to rely on a culturally contingent situation sense; an implicit knowledge of how the material and social world works.

I describe this form of cognition as *cultural* because it is sensitive to values that vary along culturally distinguishable lines and because the information that shapes and interacts with these values is conveyed

through the same social networks that are the lifeblood of socialization and cultural transmission.[35]

There are several interlocking cognitive and social mechanisms of cultural belief formation, three of which are particularly illustrative. *Cognitive-dissonance avoidance*, as numerous studies have demonstrated, moves individuals to seek psychic comfort by viewing those things believed to be noble as also benign, and those things believed to be base as also dangerous.[36] Rather than accepting new beliefs that threaten the beliefs, commitments, and affiliations central to their identity, "people may dismiss, deny, or distort" the information they receive in a defensive fashion.[37]

Affect, also coded in cultural terms, shapes the visceral reactions individuals have to many objects and acts, from guns and hunting to condoms and same-sex intercourse to environmental pollution and the production of nuclear power. In particular, perceptions of the harmfulness of such objects and activities are powerfully influenced by affect, and the positive or negative valence of that affect is determined largely by cultural values.[38]

Finally, *interpersonal trust* dramatically shapes how individuals receive and evaluate information.[39] Few people, for example, can investigate the full effects of gun regulation on crime, the health risks related to the presence of nuclear power plants, or the behavioral effects of including sex education in a public school curriculum. Instead, they must rely on trusted sources for information to help them evaluate competing claims and conflicting evidence. And they tend to trust, naturally enough,

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[35] Wildavsky described cultural theory as "attempt[ing] to unify heuristics by suggesting that these chains have but one link: the internalization of external social relations." Aaron Wildavsky, *Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation*, 81 AM. POL. SCI. REV. 3, 10 (1987). Preferences, on this account, are endogenous to culture because the heuristic mechanisms by which preferences are formed are also endogenous to culture.

[36] *See generally* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

[37] David K. Sherman & Geoffrey L. Cohen, *Accepting Threatening Information: Self-Affirmation and the Reduction of Defensive Biases*, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 119, 120 (2002). *See also* Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099 (1979).

[38] *See, e.g.*, Paul Slovic, *Trust, Emotion, Sex, Politics and Science: Surveying the Risk-Assessment Battlefield*, *in* THE PERCEPTION OF RISK 390, 404–05 (2000) (noting that perceptions of risk and benefit for risky technologies is always inversely correlated, a finding suggesting that risk perceptions are influenced by cognitive dissonance). *See also* George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307, 310 (1982) (suggesting that cognitive dissonance deflates demand of workers to be compensated for accepting occupational risks).

[39] *See* Geoffrey L. Cohen, *Party over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCHOL. 808, 808 (2003); Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: "Naive Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 405, 415 (1995).

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others who "share their worldviews—and who for that reason are likely biased toward one conclusion or another by virtue of forces such as cognitive-dissonance avoidance and affect."[40]

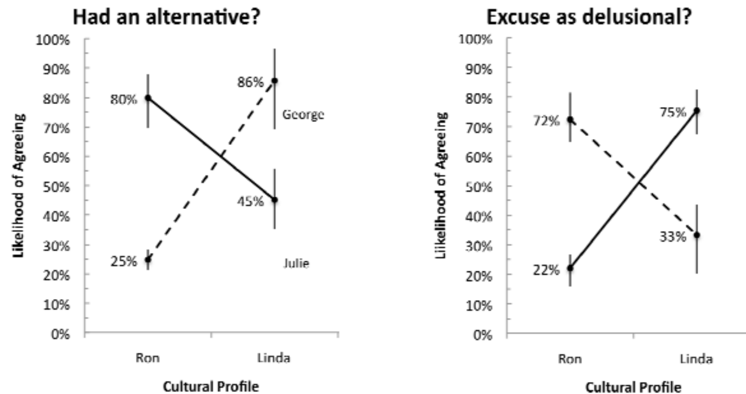
C. Factualization and Reasonableness

How do these mechanisms shape understandings of facts in specific cases? The evidence about factual beliefs that we gathered from respondents sheds light on this question. People with cultural profiles like Ron and Linda will, on this account, have distinctive views of facts made relevant by the doctrine of self-defense operative in just about every American jurisdiction. Under that standard, a person who has not otherwise provoked aggression is entitled to resort to deadly force against another (and hence is protected from criminal liability for doing so) when she honestly and reasonably believes that deadly force is necessary to prevent an imminent threat of death or great bodily harm to herself.

To elicit participants' legally-relevant factual perceptions, we asked them whether they agreed or disagreed with a number of factual statements, such as: "It was unreasonable for [the defendant] to shoot [the victim] because there were other ways [the defendant] could have protected [herself/himself]," and "[b]ecause [the defendant] suffered from [battered woman syndrome or post-traumatic stress syndrome], [the defendant] can't be blamed for any mistake [she/he] may have made about how much of a danger [victim] posed at the time [the defendant] shot him."

Again, we used *Zelig* to assess how Ron and Linda would respond to these questions.

[40] *See* Donald Braman, Dan M. Kahan & James Grimmelmann, *Modeling Facts, Culture, and Cognition in the Gun Debate*, 18 SOC. JUST. RES. 283, 289–90 (2005).



"It was unreasonable for [the defendant] to shoot [the victim] because there were other ways [the defendant] could have protected [herself/himself]."

"Because [the defendant] suffered from [battered woman syndrome or post-traumatic stress syndrome], [the defendant] can't be blamed for any mistake [she/he] may have made about how much of a danger [victim] posed at the time [the defendant] shot him."

Figures 4 & 5. The differences in Ron and Linda's perception of relevant facts.

First, note the clear differences that emerge over whether the shooting was reasonable in light of nonlethal alternatives. Those with a cultural profile like Linda's are significantly more likely to perceive George as being unreasonable in light of the other avenues they believe were available to him than they are to perceive Julie as so. Those with a cultural outlook similar to Ron's, on the other hand, are likely to perceive the availability of alternatives and the defendants' reasonableness in the opposite way.

The Rons and Lindas of the world disagree, too, when it comes to whether the defendants' claims to a psychiatric disorder brought on by prior victimization should excuse any mistake they may have made regarding the danger the victim may have posed at the time of the shooting. While those with a Ron-like cultural profile are skeptical of Julie's claim, they are quite sympathetic when presented with George's psychiatric excuse. But those who share Linda's outlook have just the reverse intuitions about who should be excused.

The reason that people disagree over the *Goetz* and *Norman* cases, then, is not that they have decisively different conceptions about the

explicit standard that should be embodied in the law, but rather that they disagree about the facts of the matter. Research into how jurors decide paints a rich picture of how the mechanisms of cultural cognition come into play when jurors consider competing factual frames. The most comprehensive account of how jurors reach verdicts, the "story model"[41] of juror decision-making, first developed by psychologists Reid Hastie and Nancy Pennington[42] and subsequently refined and expanded by others,[43] suggests how cultural cognition operates as a powerful extra-legal force. Using a series of experimental studies, story-model researchers have shown that jurors decide cases by fitting the evidence presented by the parties into one or more "verdict stories," and then selecting the story that appears most plausible and coherent to them. Jurors, these researchers find, have "preconceptions and attitudes that lead them to entertain particular stories about what may have happened, . . . stories [that] are used to process the facts presented in the case . . . [and] to arrive at a legal decision or verdict."[44]

The verdict stories that jurors rely on come from shared experiences and socially constructed understandings of the natural and social world—in other words, from culture.[45] These culturally-contingent associations profoundly shape considerations of evidence. In fact, jurors are less likely to even *recall* evidence that is inconsistent with their preferred verdict story, removing culturally unacceptable evidence from consideration.[46] And of course, to the extent that jurors in a culturally diverse society are likely to enter the jury room with diverse and even antagonistic cultural

[41] *See* Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1138 (2001) ("The Story Model is widely accepted as a general description of how jurors process information and reach their decisions.").

[42] *See* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520 (1991).

[43] *See, e.g.*, Jill E. Huntley & Mark Costanzo, *Sexual Harassment Stories: Testing a Story-Mediated Model of Juror Decision-Making in Civil Litigation*, 27 L. & HUM. BEHAV. 29, 29–30 (2003); Yvette Tinsley, *Juror Decision-Making: A Look Inside the Jury Room*, 4 CRIMONOLOGY & CRIM. JUST. (2001), http://www.britsoccrim.org/v4.htm.

[44] Lynda Olsen-Fulero & Solomon M. Fulero, *Commonsense Rape Judgments: An Empathy-Complexity Theory of Rape Juror Story Making*, 3 PSYCHOL. PUB. POL'Y & L. 402, 418 (1997).

[45] *See* Norman J. Finkel & Jennifer L. Groscup, *Crime Prototypes, Objective Versus Subjective Culpability, and a Commonsense Balance*, 21 LAW & HUM. BEHAV. 209, 211–12 (1997) (cultural prototypes, not abstract moral theories, determine judgments of blame); Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857, 858 (1991) (showing that jurors follow socially constructed prototypes, not legal definitions in assessing evidence).

[46] *See* Huntley & Costanzo, *supra* note 43, at 31 ("[I]n a memory test, jurors' recognition of elements consistent with their verdict stories was significantly higher than their recognition of elements not consistent with their verdict stories."); Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making: The Effects of Memory Structure on Judgment*, 14 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 521, 526 (1988).

prototypes, they will sometimes disagree over verdicts because they won't agree on what the evidence means—or even what the evidence is.[47]

Also highlighting the primacy of culture are the "total justice" and "commonsense justice" theories of jury decision-making. Studies supporting the "total justice" theory suggest that jurors "strive to work their emotions and their judgments into a satisfying totality"[48] even when this directly contradicts jury instructions about how to evaluate evidence.[49] Similarly, studies of "commonsense justice" suggest that in their legal role jurors often rely on "adages, images, and rules of thumb"[50] that they would use in everyday reasoning.[51] Under both theories, jurors will conform their understanding of the evidence to their cultural values, which determine *how* jurors morally and emotionally conceive of what "total justice" is and what "common sense" dictates.[52]

Finally, culture influences juror cognition through the mechanism of "culpable causation."[53] Culpable causation can be described as the tendency to attribute causal import to acts, and responsibility to those who perform them, in proportion to the moral blameworthiness of those acts or actors.[54] But many activities do not have such clear-cut social

[47] *See* Reid Hastie, *The Role of "Stories" in Civil Jury Judgments*, 32 U. MICH. J.L. REFORM 227, 237–38 (1999). *See also* Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 516 (1992) (It is the "expectations and preconceptions" that jurors bring with them to the jury box, the divergent ways that they "consciously or unconsciously process information" and "interpret[] ambiguities" that ultimately accounts for their divergent decisions); Shari Seidman Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 JUDICATURE 178, 178 (1990) ("The evidence presented at trial cannot account for initial disagreements among jurors: all jurors are exposed to the same evidence. The difference in juror reaction must stem from preexisting differences among the jurors.").

[48] NEIL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 107 (2000).

[49] *See id.* at 17 ("Jurors want to decide the accident case in a way that reduces or eliminates the bad feelings that perceived injustice arouses."); *see also* Gerold Mikula, Klaus R. Scherer & Ursula Athenstaedt, *The Role of Injustice in the Elicitation of Differential Emotional Reactions*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 769, 769–71 (1998) (examining emotional responses to feelings of injustice).

[50] FEIGENSON, *supra* note 48, at 103.

[51] *See* NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 63 (1995); *see also* Jason Schklar & Shari Seidman Diamond, *Juror Reactions to DNA Evidence: Errors and Expectancies*, 23 LAW & HUM. BEHAV. 159, 180 (1999) (indicating that jurors are often unimpressed by statistical evidence, however rigorous or definitive).

[52] FEIGENSON, *supra* note 48, at 104.

[53] Mark Alicke, who developed the theory, conducted a study showing that, for example, a driver involved in an accident will be perceived as more causally responsible for the accident if he was speeding on his way home to hide some illegal drugs than if he was speeding on his way home to hide an anniversary present. *See* Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368, 369–70 (1992).

[54] *Id.* at 368–70.

meanings, as the vignettes described above indicate. Jurors like Ron and Linda will often disagree, even when there is a single set of evidence and a single legal standard to meet. Where there is disagreement about the social meaning of an act, cultural cognition will orient reasonable people of diverse values to different evaluations of the defendant's causal relationship to harm and thus to his culpability.

As a result of this variation, juries will sometimes deadlock, with different jurors crediting different evidence. Indeed, just as the theory of cultural cognition would predict, "hung juries" that deadlock on one or more counts typically *do not* disagree about what the law requires, nor do they fail to reach consensus because cases are particularly complex. Instead, they disagree about the credibility of witnesses and what the evidence presented to them proves. Also, just as cultural cognition would predict, in cases where this occurs jurors tend to perceive one another to be "unreasonable."[55] In light of cultural cognition, this makes perfect sense: From the perspective of those jurors who are in agreement on one side of the case, the other jurors are evaluating the evidence in light of cultural norms alien to the first group—in other words, *unreasonably*.

IV. IMPLICATIONS

What can we glean from these sets of data? They illustrate the way that the reasonable person standard both supports and subverts liberal democratic norms.

A. *Dissensus Management*

Individuals, on this account, are typically honest in their attempts to be objective; in their sincere attempts, however, they are guided by all of the cognitive and social mechanisms described above to resolve factual questions in ways that are consistent with their worldviews. Culturally diverse individuals honestly believe they are putting their own partisan commitments aside and basing their judgments on their perception of the facts of the matter—but those perceptions vary along culturally predictable lines.[56] People with different outlooks may arrive at different

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[55] PAULA L. HANNAFORD-AGOR ET AL. THE NAT'L CTR. FOR STATE COURTS, ARE HUNG JURIES A PROBLEM? 68 (2002), http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf).

[56] Cognitively speaking, there is probably a cycle in which people reassess culpability in light of the factual evidence presented, then evaluate factual claims in light of their gut feelings about who is guilty and who is innocent, going back and forth until they have resolved the issues satisfactorily in their minds. But as we point out in a prior work based on these experiments, structural equation modeling suggests that models in which cultural outlooks run through facts to results tend to fit the data better than models that have individuals forming factual beliefs in order to justify their culturally-derived verdict preferences. *See generally* Kahan & Braman, *supra* note 1, at 3–4.

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assessments of culpability, then, but they do so through earnest attempts to be objective.

By transferring the burden of evaluation from explicit normative judgment to factual inquiry, even people who disagree with a verdict are forced into a form of assessment that is less contentious. This mirrors a point that Dan Kahan has developed at greater length about deterrence talk and the death penalty:

> The conventional expressive arguments on the death penalty are pregnant with accusation: if I favor the death penalty because it's essential to vindicating the worth of the victim, then you must be against it because you don't sufficiently appreciate her worth and overvalue the worth of the wrongdoer; if I oppose the death penalty because it is administered in a way that devalues the lives of African Americans, then you must be for it because you are a racist. In contrast, if I claim to be for/against the death penalty because it is/is not the penalty most likely to protect lives—a claim that is abstract enough to fit within essentially all recognizable cultural and ideological commitments—then I can be seen as saying only that you are factually misinformed, rather than morally obtuse, for feeling otherwise. In much the way that Justice Holmes resorted to deterrence rhetoric because he resented being implicated in fundamental moral conflict as a judge, we resort to it because we resent being implicated in such conflict as citizens.[57]

By focusing jurors on facts in the cases rather than explicit normative evaluations in the debate over *Goetz* and *Norman*, the reasonable person standard moves them away from contentious status-based arguments that would otherwise be read as accusations about racism, sexism, or the denial of the value of the victim or defendant's life.

But factualization *can* fail, and when it does it can breed even greater distrust and dissensus. This is in large part because the substitution of factual claims for normative claims can be viewed not only as unreasonable, but duplicitous. There is a widely documented phenomenon related to affect and trust that dramatically shapes the persuasive power of factual argument. "Naïve realism" describes the ability of individuals to construe people with differing opinions on a matter as occupying an opposing normative stance rather than a differing construal of the event altogether.[58] As Ross and Ward have noted, people may "differ markedly in the assumptions they make about content and surrounding context when they see someone rebuke a ragged individual seeking a handout, or hear a politician endorse 'family values,' or read about a reported incidence of spousal abuse."[59] Rather than empathizing with those who perceive such things differently, most

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[57] Kahan, *supra* note 1, at 446.

[58] *See* Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, *in* VALUES AND KNOWLEDGE 103, 110–11 (Edward S. Reed et al. eds., 1996).

[59] *Id.* at 109.

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are "inclined not only to make different attributions about the relevant actors, but also to reach unwarranted conclusions about each other."[60] Both parties typically fail to recognize that, in fact, they have "responded to *different* events, or least to different social *constructions* of those events."[61] And, as the parties "begin to exchange accusations of bias or unreasonableness . . . they . . . further compound their difficulties [through the similarly] distorted attributions [they make] about each other's accusations."[62] The ability of factualization to cabin dissensus is thus itself cabined by cultural cognition and the naïve realism.

These problems can, I concede, be overcome through careful deliberation and generous interpretations of the motivations of others; but as Ross and Ward have noted, these are often in short supply when the parties are already in disagreement and view one another as having fundamentally different values.

B. Dissensus Mismanagement

The reasonable person standard can also be misused in ways that are likely to blunt its ability to manage dissensus—or, worse, exacerbate it. After five Los Angeles police officers severely beat an African-American motorist, Rodney King, four of the officers were charged with using excessive force to arrest King in violation of his civil rights.[63] The officers were initially tried in state court for violation of state law.[64] That trial was moved to Simi Valley in Ventura County, a far less racially diverse suburb near Los Angeles, on the ground that adverse pretrial publicity would make it too difficult to obtain an impartial jury in Los Angeles.[65] The Simi Valley jury, which contained no African-Americans, acquitted three of the four defendants on all charges and acquitted the fourth of all but one charge, on which the jury hung.[66] The verdict sparked five days of rioting in Los Angeles, leaving an estimated 52 people dead, thousands injured, and just over $1 billion in damage.[67]

The jury instructions on excessive force have, at their core, a question of whether and how much force a *reasonable* officer would use given the totality of the circumstances in that particular case.[68] The

[60] *Id.*

[61] *Id.* at 109–10.

[62] *Id.* at 110.

[63] Koon v. United States, 518 U.S. 81, 85–87 (1996).

[64] *Id.* at 87.

[65] RANDALL KENNEDY, RACE, CRIME, AND THE LAW 117–18 (1997); Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1543–44 (1993).

[66] *Koon*, 518 U.S. at 87–88; KENNEDY, *supra* note 65, at 118.

[67] *Koon*, 518 U.S. at 88; KENNEDY, *supra* note 65, at 118.

[68] This requires fact-finders to consider, among other things, citizen's interest in liberty, the community's interest in effective law enforcement, and the officer's

determination that the police who beat Rodney King *reasonably* believed that the amount of force that they used was necessary to King's arrest was a factual undertaking, but one that many believed reflected poorly-concealed racial and class bias.

On this account, the rioting in light of the verdict in the Rodney King case—and in particular, the removal of the criminal trial in state court from the community in which the beating took place—takes on a new light. Those who rioted believed not that the jury had seen the facts through situationally and culturally distinctive lenses, but rather that they were looking at the same facts that everyone else had seen on television and were, in essence, giving clear expression to their racial and class animus. Based on that view, the verdict appeared to many to be based on patently offensive distinctions between the relative worth of Rodney King and the police, on a grossly discriminatory vision of the status and respect afforded different racial and socioeconomic groups in our country, and on a confidence that the law was a tool that would sustain those distinctions; moreover, those offensive distinctions were arrived at, it was keenly noted, by people who occupied the socially privileged racial and socioeconomic categories.

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interest in personal safety. The instructions given by the judge at trial were fairly representative of the instructions given in other such cases:

> It is lawful for a peace officer to use force in the arrest if a reasonable peace officer in the same or similar circumstances would believe that such force is necessary to make the arrest or to prevent escape or to overcome resistance. In doing so, such peace officer may use that force and means that a reasonable peace officer, in the same or similar circumstances, would believe to be necessary to make such arrest or to prevent escape or to overcome resistance. The right of a peace officer to use reasonable force exists only so long as it would appear to a reasonable peace officer, in the same or similar circumstances, that that force is necessary to make such arrest or to prevent escape or to overcome resistance. When that force would no longer appear to a reasonable peace officer, in the same or similar circumstances, to be necessary, the right to use reasonable force no longer exists and the use of such force is not reasonable. The use of force that is not reasonable is unlawful and without lawful necessity. . . . The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer under the same or similar circumstances. The test of reasonableness is not capable of precise definition or mechanical application. Its proper application requires, careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others and whether he is actively resisting or attempting to evade arrest by flight. The question is whether the totality of the circumstances justifies a particular sort of force.

Transcript of Record, People of the State of California v. Laurence Powell et al. (on file with author).

Figure 6. The Rodney King Incident

This last point is important in assessing the function of the reasonable person standard. The failure of the Rodney King trial to cool social conflict may, in fact, not reveal anything wrong with the reasonable person standard, but rather the failure of the state to fully avail itself of the standard's potential utility. The value of the localized findings of fact that the reasonable person standard invites was lost when the venue for the trial was changed from Los Angeles County to Ventura County. That shift altered the social meaning of the trial by moving it away from the locale that felt most aggrieved by the event and leaving the decision in the hands of a jury without a single African-American. There are circumstances in which the reasonable person standard, even deployed to its greatest effect, will not calm the social conflict. But there are many circumstances in which it *does*. There is, I should also stress, value in this kind of dispute-reduction in a diverse liberal democracy.[69] The state's decision to abandon the conflict-reducing features of the reasonable person standard by forcing it out of the locale in which it would be most effective and into one in which it would be likely to provoke offense is a lesson in its power and, it must be added, its limits.

C. The Potential for Bias

This account is consistent with a shift in our understanding of the way that race and gender bias functions in our society. The specter of bias has long haunted the American criminal justice system, but the

[69] *See generally*, Holmes, *supra* note 4; Kahan *supra* note 1.

understanding of that bias has changed dramatically in recent years. In part because most *explicit* bias has been driven from the law, the greater concern in contemporary legal settings is *implicit* bias.[70] Far harder to detect and cure, implicit bias works not through overt reference to or conscious consideration of race, but rather through subtle effects on cognition that subtly shape actors' perceptions and reactions.[71]

On the one hand, the shift furnishes some welcome news: The vast majority of Americans today explicitly reject the stereotypes and legal decision-making influenced by explicit racial bias. On the other hand, these same studies indicate that the bias that most Americans disavow is difficult to eradicate. Americans succumb to bias along racial, gender, and other lines despite their expressed desire to do otherwise.

Consider, for example, the potentially disputed factual issues in a racially charged case like *Goetz*. In that case—and our adapted version of it—the question was not just whether three youths posed a danger to a man, but whether three *black* youths posed a danger to a *white* man in New York at that time. Those who strongly agree with the factual predicates of self-defense in the *Goetz*-style case, we found, were also far more likely to agree with statements like: "Nowadays it seems like there is just as much discrimination against whites as there is against blacks" and "[w]e have gone too far in pushing equal rights in this country."

Of course, the converse is also true: Those who were most skeptical of the factual predicates of acquittal in the *Goetz*-style case were also far more likely to *disagree* with those same statements. Neither of those statements on its own constitutes bias against African-Americans, but whatever one's position on the *Goetz* case, surely it is disappointing to learn that findings of fact are so strongly correlated with racial attitudes.

A similar—and similarly troubling—relationship exists between perceptions of factual predicates of acquittal in the *Norman*-style case and attitudes towards gender equality. Those who are more likely to view the facts as supporting a conviction in *that* case are also far more likely to agree that "the women's rights movement has gone too far," and that "a lot of problems in our society today come from the decline of the traditional family, where the man works and the woman stays at home." Citizens are free, of course, to view the facts in a criminal case from their own perspective and to do so without embarrassment. But it is embarrassing—or at least it *should* be embarrassing—to learn that our understandings of the facts are so tightly intertwined with precisely those partisan attitudes that we hope to put aside when assessing claims in such a case.

[70] Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006); Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1490 (2005).

[71] Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1326 (2002).

The reasonable person standard, in the service of reducing social conflict, allows us to avoid explicitly grounding legal decisions on partisan and controversial perspectives through the process of factualization. But, on this account, factualization does not necessarily remove the influence of contested cultural outlooks; rather it channels it through cognitive processes that lead fact-finders to believe they are engaging in objective determinations when, in fact, those determinations are powerfully driven by the psychological processes of cultural cognition. In some cases the influence of factualization and cultural cognition will, on balance, not matter much. But in other cases it will, and in those cases—cases like *Goetz*, *Norman*, and the Rodney King trials—the cloaking of culturally partisan perspectives in ostensibly objective factual inquiries should be a concern.

It is a concern, of course, when the social dissensus management function of the reasonable person standard is improperly managed and thus provokes social conflict, as the court in the first Rodney King trial arguably did when it moved the jury from Los Angeles to Ventura County. But it should also be a concern when the social dissensus management of the reasonable person standard is *too successful* in quelling discomfort with racial or gender bias in cases where that discomfort is entirely appropriate.

V. CONCLUSION

Managing a dissensus in a diverse state is a complex and difficult undertaking. I am sensitive to the need for tools that allow diverse social groups to coexist and cooperate. Indeed, much of the work of the Cultural Cognition Project is devoted to developing strategies for furthering that end. The reasonable person standard is one such tool. Reasonable people can have differing opinions about how to formulate the self-defense doctrine, and if that inquiry is factualized into a series of questions about whether it is practical in a given circumstance, then the use of the reasonable person standard to convert normative dissensus into objective inquiries into fact should not be so troubling. It gives us the illusion that we are employing a single standard. Conflicts will no doubt arise, but the decentralization that the reasonable person standard allows means they will occur less often and, where they do occur, will have less serious implications for the state.

On the other hand, we should be alert to the potential for illicit bias. It is one thing for groups to have differing conceptions of appropriate social interaction within what they envision to be the good society. But if the factualization of moral inquiry facilitated by the reasonable person standard masks implicit racism or sexism, then there is cause for concern. Legal actors may honestly believe that they are objectively evaluating the facts of a case, when in fact they are succumbing to bias that they themselves disavow.