
THE PERILS OF THE FIGHT
AGAINST COGNITIVE ILLIBERALISM

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Responding to Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going To Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

Scott v. Harris,¹ involving the tragic consequences of a police-initiated car chase, would not be on anyone's list of important Supreme Court criminal procedure decisions. The case did not announce new doctrine, but rather simply applied the law of excessive force in upholding summary judgment against Victor Harris, the plaintiff who was rendered quadriplegic by the chase. The decision was rendered even more trivial by the Court's explanation for its holding, an explanation that avoided providing any institutional reasons for taking a lax approach to high-speed chases,² but rather focused solely on the facts, thus depriving the case of any broad precedential value. In *Whose Eyes Are You Going To Believe?*, however, Professor Kahan and his co-authors strive to make *Scott* of much greater interest. They advance the provocative argument that the Court's seemingly minimalist treatment of the case, far from assuring its blandness, could not only occasion disillusionment with the Court and the law generally, but also exacerbate cultural tensions.³

The principal target of *Whose Eyes Are You Going To Believe?* is the Supreme Court's conclusion — a conclusion contrary to that of the court below — that any “reasonable” juror who watched the video of the car chase would have to conclude that Officer Scott did not create a culpably grave risk to other drivers on the road. Using an innovative type of composite regression technique, the authors' analysis of their survey of approximately 1350 people indicated that a significant minority of the survey subjects disagreed with this assessment, especially if they were African-American, liberal, Democrat, well-educated,

* Milton Underwood Professor of Law, Vanderbilt University Law School. A version of this paper was presented at the 2008 Harvard Law School Criminal Justice Roundtable, which included Professor Kahan as a participant, as well as Professors Rachel Barkow, Paul Butler, Jeff Fagan, David Garland, Brandon Garrett, Bernard Harcourt, Maximo Langer, Tracey Meares, Daniel Meltzer, Erin Murphy, Dan Richman, Stephen Schulhofer, David Sklansky, Carol Steiker, Jordan Steiker, and Marie-Eve Sylvestre.

¹ 127 S. Ct. 1769 (2007).

² See Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going To Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 887–94 (2009) (discussing policy rationales Court could have advanced for its decision).

³ See *id.* at 843.

or some combination thereof.⁴ Based on this finding, the authors suggest that the Court's pronouncement that no reasonable juror could interpret the facts differently was erroneous.⁵

But the authors go well beyond this surmise. They also conjecture that the Court's mistake was due to what they call "cognitive illiberalism," an inability to recognize how cultural background influences one's own (as opposed to others') decisionmaking.⁶ Cognitive illiberalism bothers the authors not only because it might produce erroneous judicial conclusions of the type they think occurred in *Scott* but because, as they put it, it "needlessly magnifies cultural conflict over and discontent with the law."⁷

The article ends with the assertion that the Court could have reached the same result it did in *Scott* on any number of grounds, all of which the authors consider less divisive. For instance, they note, the Court could have justified its decision declaring the car chase reasonable by pointing to the need for uniform, easily applied rules for the police or by expressing concern about the over-deterrent effect of a contrary ruling.⁸ Or it could have opined that the courts need not intervene aggressively in such cases because given the danger high speed chases pose to the innocent public, politically accountable officials will usually assure that police don't abuse them.⁹ The authors end by counseling judges to be humble when evaluating facts in summary judgment cases. Specifically, judges should attend to whether a finding of unreasonableness will prompt outrage from an identifiable sub-community, or instead will merely upset of a small group of idiosyncratic outliers; only in the latter situation, they suggest, should summary judgment be granted.¹⁰

One of the main points of *Whose Eyes Are You Going To Believe?* is that judges should worry about lay views. I want to comment on that idea from a couple of angles. First, I question the premise of the paper, which is that opinions like *Scott* cause more than a ripple among the populace. Second, even if the authors' concern about the case's effect on social cohesion is correct, I wonder whether we should care, given the implications of the authors' analysis for judicial review and Fourth Amendment doctrine.

⁴ See *id.* at 864–69.

⁵ See *id.* at 841.

⁶ *Id.* at 842–43.

⁷ *Id.* at 881.

⁸ *Id.* at 888–90.

⁹ *Id.* at 893–94.

¹⁰ *Id.* at 898–99.

I. LAY REACTION TO JUDICIAL DECISIONS

Certainly some Supreme Court opinions — *Roe v. Wade*¹¹ and *Furman v. Georgia*¹² come to mind — have riled up large segments of the population. But Fourth Amendment decisions rarely upset anyone outside of the academy and the defense or prosecution bar, primarily because non-lawyers don't hear about them. Who in the general public knows about *Scott*, or for that matter, *Tennessee v. Garner*,¹³ the precedent most relevant to resolving *Scott*? And even if people do find out about a Court decision, they are very unlikely to attend to the Court's precise reasoning, a fact that seriously undermines the authors' thesis, which depends on community outrage not about the fact that Harris lost, but about the Court's conclusion that no reasonable juror could view the facts differently. Finally, even if people do hear about a holding and understand its reasoning, it is not clear that outrage will be the usual response of those who disagree with the Court, at least when the opinion is of the type that concerns the authors — that is, one that does not announce a broad holding but rather is fact-specific, as in *Scott*.

It would have been interesting to ask the 1350 participants in the authors' survey about all of these points. Had the participants heard of *Scott*? If so, did they grasp the Court's reasoning? And if so, how bothered were the Bernies and Lindas (the white Northeastern liberals and the African-American females) about the decision? My guess is that virtually none of them had heard of *Scott*, that those who had knew nothing about the Court's rationale and that, even had they understood it, the Bernies and Lindas who had would have been only mildly piqued at the fact that a jury was not allowed to weigh in on the reasonableness issue (given their ambivalence about the case reflected in the authors' findings¹⁴).

Second, even if one can find demonstrable anger among certain groups over opinions that take factual issues away from juries, stronger proof is needed that such anger undermines the Court's legitimacy or exacerbates societal tensions and divisiveness. The authors' assumption that it does flows from the procedural justice literature, which suggests that in some types of situations the choice of procedure can affect attitudes about government actors.¹⁵ But none of this literature directly addresses attitudes toward the identity of the decisionmaker, the issue associated with *Scott*. And, as a somewhat

¹¹ 410 U.S. 113 (1973).

¹² 408 U.S. 238 (1972).

¹³ 471 U.S. 1 (1985).

¹⁴ See Kahan et al., *supra* note 2, at 878 (Table 7).

¹⁵ Cf. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 269–76 (2d ed. 2006) (noting that people judge legitimacy of law by whether legal authorities are procedurally just).

empirical counter to the authors' assertion, consider that European court systems do not appear to have a major legitimacy problem despite the fact that they routinely rely on judges or judge-jury panels rather than lay-only juries to answer most factual questions.¹⁶

Third, even if a decision like *Scott* creates concrete negative consequences — outrage and a loss of legitimacy — a contrary decision, which would mean giving the case to a jury, might not avoid them. The jury decision in the Rodney King case led to riots and the jury decision in the O.J. Simpson case was viewed as a travesty by many whites. In the likely event that a jury given the case would have found against Harris, the Bernies and Lindas in the community with a tendency to outrage might *still* be incensed, this time on the ground that the case's result shows the system doesn't work, either because it kept fellow Bernies and Lindas off the jury or because it somehow co-opted them.

II. HOW MUCH INPUT SHOULD THE LAITY HAVE?

But let's assume that the pronouncement in *Harris* — that a view contrary to the Court's is "unreasonable" — *does* appreciably undermine judicial legitimacy and societal cohesion and that lay participation *can* mitigate that effect. The problem then becomes limiting the scope of the authors' claim about who should be deciding Fourth Amendment issues. All Fourth Amendment questions are about reasonableness, that is, whether it is reasonable to require a warrant, reasonable to require probable cause, reasonable to say probable cause exists, or reasonable to conclude that a particular location is entitled to an expectation of privacy.¹⁷ If one agrees with the authors, why should the Court, on its own and without consulting the polity through a jury or in some other fashion, *ever* be able to declare a particular position unreasonable when a significant subcommunity might oppose that view (which will usually be the case, given the political nature of Fourth Amendment issues)?

The authors might respond that there is a distinction between facts, which were the focus of *Scott*, and policies and principles, which are the focus of many Fourth Amendment cases. But it almost goes without saying that the difference between facts and law is not always clear. Perhaps it should be up to courts to decide, as a matter of "law," whether the Fourth Amendment's reasonableness command requires warrants in all non-exigent circumstances, probable cause for all

¹⁶ JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW 396 (1998) (no juries in civil cases).

¹⁷ See generally CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 113–58 (5th ed. 2008).

searches of homes, and protection against all police actions that infringe on reasonable expectations of privacy. But what are exigent circumstances? What is probable cause? And when is an expectation of privacy reasonable? If one agrees with the authors, then shouldn't all of these issues be decided by juries?¹⁸

The potential consequences of the authors' position do not end there. For even decisions about matters that are more clearly about policy rather than facts could create social divisiveness, most obviously in very politically charged cases like *Roe*, but even in the relative backwater of Fourth Amendment law. For instance, the authors argue that *Atwater v. City of Lago Vista*¹⁹ and *Whren v. United States*²⁰ are cases where the Court avoided the problem the authors see in *Scott* by declaring that arrests of misdemeanants for traffic violations are presumptively reasonable regardless of the driver's dangerousness or the police officer's real motivation — in other words, the authors contend, the Court minimized community-antagonizing effects by focusing on the need for administrability, not a second-guessing of the facts.²¹ Yet these decisions, which in effect declare that pretextual stops are “reasonable,” are much more likely than *Scott* to cause outrage, particularly among minority communities that daily experience the huge potential for police abuse of traffic offenses.²² If avoidance of outrage is the goal, shouldn't laypeople somehow be involved in deciding whether these types of presumptions are warranted? Indeed, all of the alternative rationales for deciding *Scott* that the authors find more palatable — which in addition to the need for uniform and easily followed rules involve assumptions that either judges or politically accountable officials know more about the world than laypeople do — could occasion real umbrage among certain subgroups of the citizenry, regardless of how humble or minimalist judges are in adopting them, or the pains they take to explain carefully their decisions.

Of course, *juries* are a poor vehicle for deciding when administrability or institutional expertise should drive the relevant rules. But that fact doesn't minimize the outrage that people might feel if the procedural justice point the authors are making is valid. If social division is a real concern, then *legislatures* rather than judges should be

¹⁸ Cf. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 774–77, 818–19 (1994) (arguing that juries should decide reasonableness under the Fourth Amendment).

¹⁹ 532 U.S. 318 (2001).

²⁰ 517 U.S. 806 (1996).

²¹ See Kahan et al., *supra* note 2, at 888–90.

²² See generally David A. Harris, Essay, “*Driving While Black*” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997).

making these decisions. That might be the ultimate implication of the authors' argument.

III. CONCLUSION

The overarching issue broached by Professors Kahan, Hoffman, and Braman is when lay views should affect Fourth Amendment law. In other work, I have argued that such views ought to be very influential in at least one Fourth Amendment context — determining when expectations of privacy are reasonable and thus when the Fourth Amendment's protections are triggered.²³ However, my primary rationale for this reliance on lay views is not the legitimacy-cohesion argument made by the authors, but rather rests on two other observations: (1) the fact that the Court's own test on the search issue calls for an assessment of the expectations that *society* is prepared to recognize as reasonable;²⁴ and (2) the fact that, as Professor Robert Post has noted, when privacy "is understood as a form of dignity," as he posits it is in the Fourth Amendment context, "there can ultimately be no other measure of privacy than the social norms that actually exist in our civilization."²⁵

Perhaps these more context-specific types of considerations, rather than guesses about a decision's impact on legitimacy and social cohesion, ought to determine when courts should consult the laity about Fourth Amendment issues. In the context of summary judgment motions like the one in *Scott*, judges should be alert to the potential that cognitive illiberalism will lead them to dismiss alternative interpretations of facts too easily. But recognition of this danger does not also require them to go down the precipitous road suggested by procedural justice concerns, at least until we get better evidence that such concerns are based on more than speculation.

²³ See CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 32–35 (2007); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 *DUKE L.J.* 727 (1993).

²⁴ The current test for deciding when a police action is a search for Fourth Amendment purposes is whether the action infringes "expectations of privacy . . . that society is prepared to recognize as 'legitimate,'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985)), or "reasonable," *Florida v. Riley*, 488 U.S. 445, 453 (1989) (O'Connor, J., concurring in the judgment).

²⁵ Robert C. Post, *Three Concepts of Privacy*, 89 *GEO. L.J.* 2087, 2094 (2001).