

## The Self-Defensive Cognition of Self-Defense

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*Why do certain self-defense cases—ones, e.g., involving battered women who kill their sleeping abusers, or beleaguered commuters who shoot panhandling minority teens—provoke intense political conflict? The conventional and seemingly obvious answer is that people judge such cases in a politically partisan fashion. This paper, however, suggests a subtler and more complex explanation. Social psychologists have shown that individuals resolve factual ambiguities in a manner supportive of their defining values, both to minimize dissonance and to protect their connection to others who share their commitments. This form of self-defensive cognition, it is submitted, shapes individuals' perceptions of violent interactions between parties seen to be complying with or defying contested social norms. As a result, even individuals who are trying to decide such cases based on honest and politically impartial assessments of the facts polarize along cultural lines. The paper presents the results of an original empirical study (N = 1,600) that supports this hypothesis. It also explores the normative significance of this account of the origins of political conflict over self-defense cases and how such conflict can be mitigated.*

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## INTRODUCTION

Self-defense cases can be as politically controversial as they are physically violent. Their conflict-provoking potential is reflected in two icons: the battered woman who shoots her abusive husband in the head as he sleeps, and the beleaguered urban commuter who opens fire on an African-American teenager who solicits him for cash.<sup>1</sup> Behind these figures, however, stand broad, and continuously

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<sup>1</sup> The cases, of course, are patterned on real (indeed, in the case of Bernard Goetz, infamous) ones. *See* George Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (1990) (detailing facts and the controversy surrounding case of Bernard Goetz, beleaguered commuter acquitted of attempted murder of pan-

expanding, classes of disputed verdicts that variously move competing groups—conservatives and liberals, men and women, whites and minorities, straights and gays—to decry the partisan bias of the law.<sup>2</sup>

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handling African-American teens); *State v. Norman*, 78 S.E.2d 8 (N.C. 1989) (denying defense to battered woman who killed sleeping husband); *State v. Leidholm*, 334 N.W.2d 811 (N.D. 1983) (permitting defense to be asserted by battered woman who killed sleeping husband). Scores of commentators have addressed the relationship between the defense claims asserted by defendants (real and hypothetical) in cases presenting these basic facts. See, e.g., Jody D. Armour, *Race Ipsa-Loquitur: of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 Stan. L. Rev. 781 (1994); Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. Rev. 211, 286-91 (2002); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269, 327-33 (1996); Shirley Sagawa, *A Hard Case for Feminists: People v. Goetz*, 10 Harv. Women's L.J. 253 (1987). Perhaps the most fascinating exploration of the parallel structure of the defenses in these two iconic cases is presented by Mark Kelman, in *Reasonable Evidence of Reasonableness*, in *Questions of Evidence: Proof, Practice, and Persuasion Across the Disciplines* (J. Chandler, A. I. Davidson and H. Harootunian ed., 1994). As we'll explain, although we propose a different solution, the *puzzle* that Kelman identifies—why do people who clearly experience different ideological responses to these cases join issue on disputed *facts*—furnishes the central motivation for our study.

<sup>2</sup> One need only pick up (or click on) the newspaper, for controversial cases. See, e.g., Anemona Hartocollis, *Four Women Are Convicted In Attack on Man in Village*, N.Y. Times, Apr. 19, 2007, at B3 (“The trial attracted attention because both sides, though in opposite ways, framed the case as a bias attack involving lesbians and a straight man.”); Janine Anderson, *Man Guilty in Shooting Death of Teen*, Wisconsin State Journal (Madison, Wisc.), Nov. 14, 2006, at B3 (“The case divided Racine, with some people saying White was a vigilante. Others thought it was his right to stand up to crime in his neighborhood. . . . ‘It was a all-white jury. He’s a black man,’ [his sister] said. ‘If Adrian was a white man, he wouldn’t be in this situation.’”); Reva Mceachern, *Young, Black, Lesbian . . . and Always on Guard*, Star Ledger (Newark, N.J.), May 14, 2007, at 15 (“By portraying the Newark women, who were convicted last month of second-degree gang assault, as ‘avowed lesbians’ and a ‘seething Sapphic septet,’ [local newspaper] writers shed light on their own prejudices and made a mockery of men attacking lesbian women.”); Robert McFadden, *Verdict Bares Sharp Feelings on Both Sides*, N.Y. Times, Feb. 26, 2000, at A1 (“Strong and deeply polarized emotions—anger, bitter indignation and stunned disbelief on one side, and expressions of relief and vindication on the other—rippled across the metropolitan area last night as politicians, community leaders and ordinary New Yorkers reacted swiftly to the acquittal of four white police officers in the killing of an unarmed black immigrant . . . .”); *Mistrial Declared in Castration Case*, L.A. Times, Feb. 10, 1995, at B10 (reporting controversial case involving attack on sleeping husband alleged to have abused wife).

Contestation of this sort is disheartening. The contours of self-defense doctrine express the extreme value that the law attaches to human life and the dedication of the law to protecting the lives of *all* citizens regardless of social identity or moral outlook. Recurring political controversy not only confronts us with evidence that individual juries might sometimes be insufficiently dedicated to these values; it gives us reason to wonder how sincerely committed to these values *all* of us really are. If we are constantly falling into factional dispute about such decisions—one day applauding a verdict our adversaries denounce and the next day denouncing what they applaud—then either some large segment of our society is *consistently* rejecting the principles that inform the law or, more likely, we are all *selectively* rejecting them when we find their dictates unappealing. When push literally and lethally comes to shove, we all give in to the temptation to place our parochial attachments ahead of the universal values embodied in the law.

Or do we? Our aim in this paper is to suggest a more subtle and complex explanation of political conflict over self-defense. The account we propose does in fact acquit jurors, and the rest of us, of the charge of infidelity to the values embodied in the law. But it does so at a cost: the exposure of a threat to realization of the law's ends that is arguably even more troubling—because less amendable to detection and therefore to correction—than rank parochialism. The source of political contestation over self-defense, we will argue, are a set of related constraints on human cognition.

Known as “defensive bias” or “identity-protective cognition,” one of these constraints refers to the tendency of individuals to form factual beliefs that affirm their defining values. It's reassuring to believe that behavior one admires is beneficial to society, and behavior one finds offensive detrimental; it's disquieting to contemplate that the opposite might be true, particularly when such beliefs threaten to put one at odds with persons whose character one respects and whose good opinion one covets. For these reasons, it's natural for individuals subconsciously to resist evidence that challenges factual beliefs supportive of their values, particularly when those beliefs are widely held within groups with which they identify.<sup>3</sup> This dynamic

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<sup>3</sup> 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.* (forth-

has been shown to be the source of intense political conflict over diverse factual issues, from the causes of global warming to the safety of guns, from the deterrent effect of the death penalty to the efficacy of vaccinating young girls for HPV.<sup>4</sup>

We contend that the same mechanism generates political controversy over self-defense cases. As the iconic cases of the battered woman and beleaguered commuter illustrate, deadly confrontations can interact with contested group norms—ones relating to who should be afforded respect and deference by whom, and what sorts of behavior are appropriate for persons occupying different roles. Where that happens, jurors who decide self-defense cases, and citizens who react to what juries decide, are impelled by a form of *psychic self-defense* to form a view of the facts that affirms their groups' norms. These citizens aren't *ignoring* facts that denigrate their group commitments; rather they are *deriving* the facts from their commitments. As a result, citizens end up culturally polarized about the outcomes of such cases despite their good-faith intentions to judge them in a nonpartisan fashion.

To support this view, we present the results of an original experimental study. That study, which involved a diverse sample of some 1,600 Americans, strongly supports the conclusion that political disputes over self-defense cases arise from self-defensive cognition of the type we posit.

The obvious question posed by these findings is, What to do? One answer, of course, would be, Nothing. Perhaps nothing can be done. More important, perhaps there's no *reason* to do anything anyway: since the operation of self-defensive cognition is perfectly consistent with good-faith efforts on the part of decisionmakers to be

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coming 2007) [hereinafter "Cohen, *et al. Partisan Divide*"]; 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).

<sup>4</sup> See generally Dan M. Kahan, Donald Braman, John Gastil, Paul Slovic & C.K. Mertz, *Culture and Identity Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 *J. Empirical Legal Stud.* 465 (2007); Geoffrey L. Cohen, *Party over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 *J. Personality & Soc. Psychol.* 808 (2003); Cultural Cognition Project, *Second National Risk and Culture Study* (Sept. 27, 2007), available at, <http://ssrn.com/abstract=1017189>.

impartial, perhaps there's nothing morally problematic about judgments that reflect this influence. The discovery that self-defensive cognition is at work, it might be thought, dispels the anxiety that political controversy over self-defense cases is anything to fret about.

But we don't take this position. The contribution that self-defensive cognition makes to reactions to putative instances of self-defense, we believe, is a manifestation of another constraint on cognition that interferes with individuals' power of *moral* reasoning. *Cognitive illiberalism* refers to psychological tendency to impute harmful consequences (or to deny the same) to behavior that offends (or gratifies) one's cultural norms.<sup>5</sup> This condition *subverts* the ends of persons—we think the vast majority of citizens in American society—who genuinely believe the law should not be used to impose a cultural orthodoxy, even if the values being forced on others are their own.

Treating these condition as they afflict judgments in self-defense cases is no easy task. The effects of self-defensive cognition can't be counteracted through admonitions to be “fair minded” and “nonpartisan.” Citizens laboring under the influence of this form of subconscious cognitive motivation already *are* doing their best to be impartial.

Indeed, moralizing exhortations likely just make things worse. The phenomena of identity-protective cognition and cognitive illiberalism are related to—and indeed interact in a self-reinforcing way with—another psychological mechanism known as “naïve realism.”<sup>6</sup> Naïve realism consists in the tendency of persons to recognize the influence of group values on the factual perceptions of persons with whom they disagree while being oblivious to the like influence of their own values on their own beliefs. A deliberative environment in which citizens admonish their opponents to be “fair and reasonable,” then, predictably breeds reciprocal, self-righteous charges of “bias”—thereby magnifying the conviction of culturally aligned groups that their opposites are either morally bankrupt, profoundly stupid, or

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<sup>5</sup> See generally, Dan M. Kahan, *The Cognitively Illiberal State*, 60 *Stan. L. Rev.* (forthcoming 2007), available at SSRN: <http://ssrn.com/abstract=963929>.

<sup>6</sup> See generally 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. Psych.* 404 (1995).

both. This common apprehension transforms seemingly “factual” policy disputes into occasions for illiberal forms of cultural conflict, making it even more likely that individuals will react with self-defensive skepticism to views of facts that differ from their own.<sup>7</sup>

This dynamic, though, does suggest one modest intervention that citizens of good faith could take to ameliorate political divisions over self-defense. It is that they *stop* decrying the bias of the law when they see verdicts with which they disagree, and *stop* accusing their cultural opposites of the same bad-faith for forming impressions of those verdicts with which they disagree. Instead, they should openly recognize what is in fact true—that nearly all of us are honestly trying to be fair, yet we all labor under the constraints of self-defensive cognition. An environment in which citizens of diverse commitments reacted *this* way to inevitably disappointing verdicts would itself go a good way to dissipating the disheartening perception that none of us is fairly committed to the values embodied in self-defense law. And it is also a condition of more concrete institutional steps that might be taken to counteract the influence of self-defensive cognition on the law.

We will present this account in three parts. By way of background, Part I examines the animating rationale of self-defense doctrine, and its relationship to decisionmakers’ moral and psychological dispositions. Part II will describe and report the results of the experimental study we conducted to test the hypothesis that self-defensive cognition pervades the evaluation of controversial instances of asserted self-defense. And Part III will explain the distinctive nature of the problem this condition presents, and identify steps that might be taken to counteract it.

## I. DOCTRINAL AND THEORETICAL BACKGROUND

We propose to test the claim that political conflict over self-defense verdicts derives from the psychic stake that individuals have in forming factual judgments that affirm their group commitments. To make the nature of this claim more concrete, we start with an overview of the principles—doctrinal and normative—of self-defense law and then relate these to models of how group affiliations,

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<sup>7</sup> See Kahan, *supra* note 5.

values, and factual perceptions can interact with one another in the application of the doctrine.

*A. Self-Defense: The Doctrine and Its Precarious Rationale*

The standard formulation of self-defense in American law is both straightforward and concise. In essentially all jurisdictions, 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 himself.<sup>8</sup>

What is the rationale of the doctrine? Conventionally, theorists divide criminal law defenses into “justifications” and “excuses.” The former protect a person from liability where breaking a law generates a state of affairs that is more desirable (along some utilitarian or welfare metric) than would complying with it. The latter protect a person from liability for a crime, regardless of how undesirable the consequences, where that person is nevertheless morally blameless (usually, it is said, as a result of impaired volition).<sup>9</sup>

Self-defense doctrine can be rationalized along either of these lines. The doctrine can be characterized as a “justification,” for example, on the ground that where it reasonably appears a choice must be made between the lives of an aggressor and a nonaggressor the law prefers survival of the former.<sup>10</sup> Or, if one is averse to taking a position on the relative value of lives, authorizing the use of deadly force to repel a deadly attack can be defended as promoting a greater number of lives on net—the desired state of affairs, in justification terms—by furnishing an incentive to aggressively disposed actors not to engage in deadly attacks in the first place.<sup>11</sup>

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<sup>8</sup> See 2 Wayne R. LaFare, *Substantive Criminal Law* § 10.4(b) (2d ed. 2003). If the threat is of some less magnitude, a person may repel it with only nonlethal force. See *id.*

<sup>9</sup> See generally J.L. Austin, *A Plea for Excuses*, 57 *Proc. Aristotelian Soc’y* 1 (1956-1957); Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 *U.C.L.A. L. Rev.* 266, 274-75 (1975)

<sup>10</sup> See, e.g., George Fletcher, *Rethinking Criminal Law* 857-59 (1978).

<sup>11</sup> See, e.g., Glanville Williams, *The Theory of Excuses*, 1982 *Crim. L. Rev.* 732, 739.



Alternatively, if one focuses on the likely volition-impairing impact of the circumstances in which the doctrine permits resort to deadly force, one can also see self-defense as an “excuse.” On this account, the “primal impulse of self-preservation”<sup>12</sup> triggered by the prospect of an impending deadly attack is said to destroy one’s capacity to control the urge to resort to protective violence and to disrupt reasoned contemplation of alternatives.<sup>13</sup> In the same spirit of forgiving impaired volition, the basis for admitting expert testimony on Battered Woman Syndrome and like conditions is that the standard of “reasonableness” used to judge a defender’s beliefs in the need to resort to force should be sensitive to excusable defects in perception or will.<sup>14</sup>

But it turns out that one can fairly easily recast these excuse-based rationales in justification terms. If a person perceives (by virtue of genuine or imagined exigency) that she faces an act of deadly aggression, then no threatened punishment can possibly deter her from resorting to deadly self-defense.<sup>15</sup> Because punishment will make the defender suffer and deplete societal resources to no avail, affording her a complete defense instead generates a better state of affairs all things considered.<sup>16</sup>

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<sup>12</sup> *State v. Norman*, 378 S.E.2d 8, 12 13 (N.C. 1989); *see also* *United States v. Peterson*, 483 F.2d 1222, 1229 30 (D.C. Cir. 1973) (self-defense is “[h]inged on the exigencies of self-preservation” where the defender believed that “his response was necessary to save himself” from imminent peril of death or serious bodily harm).

<sup>13</sup> *See* Thomas Hobbes, *Leviathan* 345 46 (Penguin Classics 1985) (1651) (“If a man by the terror of present death, be compelled to doe a fact against the Law, he is totally Excused; because no Law can oblige a man to abandon his own preservation. . . . Nature . . . compels him to the fact.”); *see also* 3 William Blackstone, *Commentaries on the Laws of England* \*3-4 (1765-69) (“For the law . . . respects the passions of the human mind . . . and . . . when external violence is offered . . . makes it lawful to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain.”).

<sup>14</sup> *See, e.g.*, Kathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 *Am. U. L. Rev.* 11 (1986).

<sup>15</sup> *See* Oliver W. Holmes, Jr., *The Common Law* 47 (Dover 1991) (1881) (“[T]he law cannot prevent [use of deadly force in self-defense] by punishment, because a threat of death at some future time can never be a sufficiently powerful motive to make a man choose death now in order to avoid the threat.”).

<sup>16</sup> *See, e.g.*, Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self-Defense*, 28 *B.C. L. Rev.* 459, 501-02 (1987).

In virtue of the plasticity of the “justification” and “excuse” framework,<sup>17</sup> it is more edifying to add to the analysis some consideration of the historical and political context surrounding American self-defense law. From this perspective, the expansive range of circumstances in which the doctrine does *not* warrant resort to deadly force furnish more insight into its rationale than the relatively confined ones in which it does.

The conventional formulation effectively permits the use of deadly force only to protect one’s life. But one could easily imagine a doctrine that authorized the use of deadly force when necessary to protect myriad other interests—property, honor, autonomy, equality, and the like. This would still be a doctrine of *self*-defense, moreover, in any society that understood recognition of a person’s moral agency to demand respect not just for his bodily integrity but for his dominion over property, his entitlement to social deference, his enjoyment of individual liberty, and so on.

The conventional formulation also addresses persons in universal terms, supplying a unitary standard that makes no reference to the social identities of the persons entitled to use deadly force or those against whom they are entitled to use it. Here too one could easily imagine things being different. The doctrine, for example, could authorize deadly force to be employed to protect against *nondeadly* threats (to the body, property, or status of the defender) when posed by certain lower types of persons to higher ranking ones. Or it could deny persons of the lower rank the authority to use deadly force even to repel deadly threats when posed by persons of the higher rank.

One reason it’s easy to imagine a doctrine of this sort is that in fact it actually existed for centuries. Tolerance of the use of deadly force to protect nonvital interests—particularly incidences of status, such as displays of deference in public space and male dominion over the sexual lives of wives and daughters—*was* a conspicuous characteristic of societies guided by honor norms.<sup>18</sup> Historically, feudal and

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<sup>17</sup> See generally Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 Colum. L. Rev. 1897 (1984).

<sup>18</sup> See generally Richard E. Nisbett & Dov Cohen, *Culture of Honor: The Psychology of Violence in the South* (1996). <sup>19</sup> See generally David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, BYU J. Pub. L. (forthcoming 2007).

sectarian social orders *did* condition the privilege to use deadly force on persons' group identities in a manner reflective of the differential value of persons of different classes.<sup>19</sup> The law in antebellum American South did, too, denying Blacks the authority to use deadly force to protect themselves from deadly assaults by whites and affording whites greater authority to use deadly force against Blacks than against fellow whites.<sup>20</sup>

Contemporary American self-defense doctrine can be understood as embodying a distinctively *humanist*<sup>21</sup> repudiation of the moral understandings that inform these alternative honor-or status-protective self-defense regimes. The self-conscious refusal of contemporary doctrine to license deadly force to protect nonvital affronts, not only to one's person but even more significantly to prerogatives conspicuously associated with honor and status (e.g., the seduction of a man's wife or daughter) expresses the "supreme value of human life" recognized by "[a]ny civilized system of law."<sup>22</sup>

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<sup>20</sup> See, e.g., A. Leon Higginbotham & Anne F. Jacobs, *The Law Only as an Enemy: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C.L. Rev. 969, 1029 (1992) ("Despite the unrelenting punishments and beatings that a slave might receive at the hands of an overseer, an owner, or another white, there were only rare instances in which a slave might claim self-defense in the killing of a white person. Such cases generally involved whites of low socioeconomic background."); *McCleskey v. Kemp*, 481 U.S. 279, 329 & n.8 (1987) (Brennan, J., dissenting) (noting that "[d]uring the colonial period, black slaves who killed whites in Georgia, regardless of whether in self-defense or in defense of another, were automatically executed" but that "a person who willfully murdered a slave was not punished until the second offense, and then was responsible simply for restitution to the slave owner") (citing A. Leon Higginbotham, *In the Matter of Color: Race in the American Legal Process* (1978)).

<sup>21</sup> We do not appeal to any fully theorized conception of this term, but use it only to signify a basic moral orientation that treats satisfaction of the needs and interests of human beings as the paramount normative good, and that denies that entitlement of individuals to have their needs and interests satisfied should turn on their social status or identity or on their adherence to any particular cultural, religious, or moral orthodoxy.

<sup>22</sup> *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) (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").

Contemporary doctrine, moreover, attaches such value to *all* persons' lives, regardless of their social identity or their adherence to any orthodox moral code. This humanist commitment is reflected not only in the formal universality of the language of the doctrine. It is expressed too by the "objective reasonableness" requirement. In subjecting the defender's perceptions to searching *ex post* review, the law, remarkably, imposes a duty on the *defender* to take care not to extinguish the wrongful aggressor's life needlessly. By refusing to make the admitted aggressor alone bear the risk of mistake, this feature of the doctrine expresses the message that even the lives of *bad* persons have "extreme value" in the eyes of the law.

This account, it's true, must confront a variety of widely observed modifications of the doctrine that challenge its humanist pretensions. In some jurisdictions, for example, individuals can resort to deadly violence not only to repel lethal physical attacks but also to avert certain crimes, such as "kidnapping, forcible rape, forcible criminal sexual act[s] or robbery."<sup>23</sup> In many others, individuals can use deadly force to repel a deadly attack in a public space even when they could safely have retreated,<sup>24</sup> and in even more jurisdictions they can use deadly force to repel a deadly attack within their residence regardless of the feasibility of escape.<sup>25</sup> Because they seem to permit resort to deadly force when the alternative is apparently *not* death but rather an experience of profound subjugation or humiliation, these qualifications of the doctrine seem to bear the signature of the older, honor-based alternative.<sup>26</sup>

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<sup>23</sup> N.Y. Penal Law s 35.15; *see also* N.H. Rev. Stat. Ann. s 627:4(II)(b)(c) ("unlawful force against a person present while committing or attempting to commit a burglary," "kidnapping or a forcible sex offense"); Tex. Penal Code Ann. s 9.32 ("aggravated kidnapping, . . . sexual assault, aggravated sexual assault, robbery, or aggravated robbery"). Most jurisdictions, in contrast, permit deadly force to be used to prevent a felony only if the felony is "forcible and atrocious," a designation that requires a factual finding that the felony posed a danger of death or great bodily harm. *See generally* LaFave, *supra* note 8, § 10.7(c). Because an individual would be permitted to use deadly force under for self-defense in such circumstances, this position affords no special exemption from criminal liability when a person uses deadly force to prevent a felony. *See id.*

<sup>24</sup> *See* LaFave, *supra* note 8, § 10.4(f).

<sup>25</sup> *See id.*

<sup>26</sup> *See* Kahan & Nussbaum, *supra* note 1, at 329-30.

But the law (through those who expound it) is at pains to deny that this is so. The tolerance of deadly force to avoid certain crimes, for example, can be defended on the ground that the enumerated offenses present a risk of death sufficiently high in general to justify a presumption in all cases that deadly force to repel them is necessary to protect their intended victims' lives.<sup>27</sup> Dispensing with any duty to retreat can be attributed to the volition-destroying impact that threatened deadly assaults have on defenders: "detached reflection cannot be demanded in the presence of an uplifted knife,"<sup>28</sup> after all. When such an assault occurs in the close confines of person's residence, as opposed to the public square, both the statistical probability of danger and the reason-disrupting impact of fear converge to justify relieving her of the obligation to retreat.<sup>29</sup>

Critical commentators have shown the fragility of the assumptions underlying these rationalizations.<sup>30</sup> But in exactly the way that hypocrisy pays homage to virtue, the very energy with which those who expound the law are moved to *rationalize* away, rather than acknowledge, these departures from the humanist principles of conventional self-defense doctrine is a tribute to the shared professional and cultural understanding that these principles *ought* to be normative for our law.

Of course, rationalizations of these troublesome qualifications of the conventional doctrine are also an acknowledgement that those who are governed by contemporary self-defense law have not completely liberated themselves from the sensibilities that guided its

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<sup>27</sup> See 2 Paul Robinson, *Criminal Law Defenses* § 131(d) (1998) ("[E]numerated-felonies provisions that govern the justification of deadly force . . . commonly list felonies . . . that by their nature involve the potential for violence to the defendant.")<sup>28</sup> *Brown v. United States*, 256 U.S. 335, 343 (1921) (Holmes, J.).

<sup>29</sup> See, e.g., *State v. Carothers*, 594 N.W.2d 897, 901, 903-04 (Minn. 1999) (reasoning that one has no duty to retreat before using deadly force to prevent a felony in the home because actor in that situation will invariably experience reasonable sense of great danger); Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J.L. & Econ. 201, 204 (1971) (making same argument).

<sup>30</sup> See, e.g., Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 Cal. L. Rev. 1181, 1217-19 (1994); Kahan & Nussbaum, *supra* note 1, at 329-30; Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 413, 430-31 (1999).

honor-based predecessor. We do remain tempted to regard some important dignitary ends (honor, equality, autonomy, and the like) as worthy of protection even at the expense of the lives of those who threaten them. We understandably remain tempted to view the lives of those who threaten those interests as worth less than those of persons who live virtuous lives. And, as individuals who continue to define our identities with reference to certain intensely held group commitments, we no doubt remain vulnerable, in a way that can be expected to influence our assessment of self-defense cases, to differentially valuing the lives of those who do and don't share those affinities.<sup>31</sup>

In this sense, the rationale of the contemporary self-defense doctrine obviously isn't so much a passive reflection of what contemporary American values *are* as it is a considered articulation of what we believe our societal values *should be*. And in that sense, too, when we judge the appropriateness of a deadly confrontation between citizens—particularly ones who are behaving in ways that defy norms integral to our defining group commitments—the doctrine *tests* our capacity to live by the best understanding we have of ourselves.

### *B. Evaluating Self-Defense Evidence: Three Models*

Self-defense doctrine, we've suggested, constrains not just individuals engaged in violent confrontations but also those who judge those individuals. In particular, it enjoins the judges—legal decisionmakers, certainly, but the rest of us, too, to the extent that it rests on morally sound precepts—to set aside partisan values, particularly ones born of parochial group attachments, and evaluate the facts based on humanist criteria that attach supreme value to the life of all persons, regardless of social identity. That constraining function makes certain assumptions about how values founded on group commitments, perceptions of the facts, and judgments about the appropriateness of self-defense relate to one another. We now consider three simple decisionmaking models—one in which these phenomena interact in the way self-defense doctrine demands, one in which

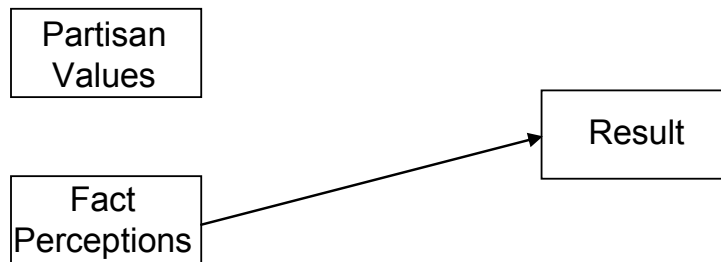
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<sup>31</sup> Cf. Randall Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388, 1441-42 (1988) (concluding that such affinities influence disposition of jurors to impose death penalty).

they clearly don't, and another in which whether they do or not is open to significant debate.

### 1. Neutral Umpire

The first model can be called the "Neutral Umpire" position. On this account, individuals base their judgments of the appropriateness of lethal self-defense entirely on their perceptions of the facts that the doctrine, consistent with its rationale, identifies as dispositive. Their parochial moral and cultural commitments play no role in their appraisals. This is the form of decisionmaking that the doctrine demands for realization of its humanist aspirations.



*Figure 1. Neutral Umpire Model*

It's worth noting that nothing in the Neutral Umpire Model implies that judgments about outcomes in self-defense (or other types of) cases will or should be uniform across individuals. People will obviously disagree under this model whenever they differ about what the facts are. Moreover, it should be perfectly obvious that people of different backgrounds are likely to disagree about doctrinally relevant facts (most of which, such as the intentions of the parties, or what the consequences of refraining from deadly force would have been, cannot be directly observed) because of the varying impact that diverse experiences have on how they interpret bits and pieces of ambiguous evidence. What matters under the Neutral Umpire Model (or at least any conception of it that is even minimally susceptible of implementation) is only that individuals base their decisions on their honest view of the facts, even when that produces outcomes that disappoint their partisan values.

### 2. Political Partisanship

Next is the "Political Partisanship Model." This is a decision-making style that subverts the doctrine's aspirations. In it, evaluators

judge the appropriateness of self-defense based entirely on their partisan values. They approve or disapprove of the use of lethal force based on group-based commitments that determine both the value they attach to human life in relative to other nonvital interests and the comparative value they attach to the lives of particular persons. They simply ignore the facts that the law deems dispositive if those facts generate a result that their partisan values disapprove of.

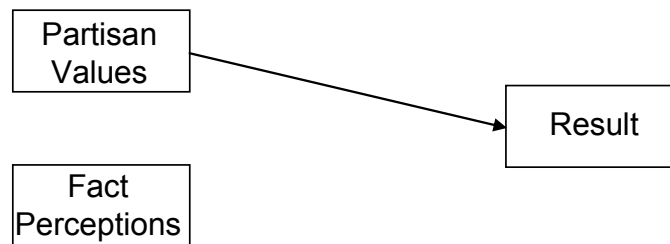


Figure 2. Political Partisanship Model

Diverse groups of commentators perceive this model of decisionmaking to be endemic. The most prominent version of this position is the “abuse excuse” critique, which takes aim at expert psychiatric testimony in cases involving battered women and other defendants exposed to chronic abuse or social privation.<sup>32</sup> Such testimony, the critics argue, rests on junk science and, more importantly, is incompatible with the premise of “individual responsibility” that has historically informed American criminal law. Decisionmakers’ receptivity to such evidence, they maintain, is fueled by a form of “political correctness” that moves decisionmakers to express support for members of historically oppressed by excusing their use of violence against members of groups that have traditionally tormented them.<sup>33</sup> But “forsaking objective law in favor of shared group feelings,”<sup>34</sup> warn the critics, is a dangerous move. “Such group[-]thought once led white jurors to acquit whites who had killed blacks . . . and to convict blacks who may or may not have killed whites, whatever the

<sup>32</sup> See, e.g., Alan M. Dershowitz, *The Abuse Excuse: and Other Cop-outs, Sob stories, and Evasions of Responsibility* (1994); Charles J. Sykes, *A Nation of Victims: the Decay of the American Character* (1992); James Q. Wilson, *Moral Judgment : Does the Abuse Excuse Threaten Our Legal System?* (1997).

<sup>33</sup> See Sykes, *supra* note 32, at 144-49; Dershowitz, *supra* note 32, at 3-42.

<sup>34</sup> Wilson, *supra* note 32, at 111.



evidence.<sup>35</sup> The beleaguered commuter, it is implied, is the unplanned progeny of the battered woman.

Other scholars have critiqued the “abuse excuse” critique in turn. Styled the “new normativity” by Victoria Nourse,<sup>36</sup> this position denies the premise that criminal law has ever genuinely been guided by a principle of individual responsibility uninformed by culturally partisan values. Courts and juries historically exonerated—whether by self-defense, insanity, or provocation—the cuckold who killed his unfaithful wife or her lover, the father who slew the “ravager” of his unmarried daughter, and the “true man” who stood his ground rather than flee the site of a deadly altercation. When they did so, they invariably cited generalizations about conditions that “unseat reason” and “disable self-control”—ones certainly no more well grounded in scientific data than the battered woman syndrome. But much more critical than the wholly unperceivable intensity of exonerated offenders’ passions, New Normativists argue, was the manifest *moral quality* of them. Offenders were relieved from liability when (and only when) their fear, rage, or disgust revealed an appropriate commitment to goods (honor, patriarchal sovereignty, autonomy) that they were *entitled* to enjoy by virtue of their social roles and that their *victims*, by virtue of theirs, had no right to deprive them of.<sup>37</sup>

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<sup>35</sup> *Id.* at 110-11; see also Dershowitz, *supra* note 32, at 27 (“The tactic of putting the dead or maimed victim on trial and getting the jury to identify with the defendant can be dangerous. . . . Everyone loves vigilante justice when the vigilantes are on ‘our side,’ but they hate it when it the vigilantes are on ‘their side.’”).

<sup>36</sup> Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 *Stan. L. Rev.* 1395 (1998).

<sup>37</sup> See *id.* at 1449-53; see also Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (2003) (arguing that traditional defenses have been patterned and applied in ways that reflect dominant gender and race norms); Kahan & Nussbaum, *supra* note 1, at 307-11, 327-38, 342-46 (arguing voluntary manslaughter doctrine, and self-defense, duress, and insanity defenses all evaluate defendants’ and victims’ characters against background of dominant norms); Carol S. Steiker, *Punishing Hateful Motives: Old Wine in a New Bottle Revives Calls for Prohibition*, 97 *Mich. L. Rev.* 1857, 1864-67 (1999) (concluding self-defense, insanity, duress, provocation and necessity doctrine all “turn on some normative evaluation of the defendant’s reasons for acting”); Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 *Yale L.J.* 1331 (1997) (concluding that moral assessments of motive explain application of Model Penal Code “Extreme Emotional or Mental Disturbance” conception of manslaughter). For a New Normativist critique of the use of “voluntarist” rhetoric in Canadian criminal law, see Ben-

Growing receptivity to the claim of battered women and like defendants, according to the New Normativists, reflects merely a shift in the cultural norms that decisionmakers (and the rest of us) use to appraise the appropriateness of the values expressed in offenders' emotions.<sup>38</sup> It's a *politically partisan* objection to that shift in norms that explains why abuse-excuse critics see a denigration "individual responsibility" only in the law's solicitude to the battered woman, and not in its historical (and now contested) solicitude toward the cuckold.<sup>39</sup>

But as strongly as the New Normativists disagree with abuse-excuse critics, they actually *share* the critics' apprehension of the dominance of the Partisan Values Model of decisionmaking. Whereas the critics express disappointment over the denigration of the Neutral Umpire Model, the New Normativists take issue only with the reluctance of those who expound the law (whether from the bench or from the ivory tower) to *admit* that the Neutral Umpire Model is and always has been a fiction. Nourse and others call for a critical "unmasking" of the law—a relentless deconstruction of the "voluntarist" and "consequentialist" idioms out of which "justification" and "excuse" rationales are constructed—so that the law's "evaluative" face can be exposed to plain view.<sup>40</sup> Undistracted by assertions that only

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jamin L. Berger, *Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Law* 51 *McGill Law Journal* 99 (2006).

<sup>38</sup> See Kahan & Nussbaum, *supra* note 1, at 346-51.

<sup>39</sup> See Nourse, *supra* note 36, at 1461 ("Enamored by tradition, Wilson fails to see . . . that law has always exercised judgment, [and] simply has lost the ability to see that this is what it is doing. . . . Wilson . . . is only willing to judge in one direction, headed toward the past. If this is common sense, then it is a particular kind—what is common turns out to be what is well-established and, if this is judgment, then it is a particular kind. . . ."); see also Dan M. Kahan, *Two Liberal Fallacies in the Hate Crimes Debate*, 20 *L. & Phil.* 175, 192 (2001) ("The only thing that makes the 'abuse excuse' epithet resonate is that the identity of the virtuous outlaw has changed as traditional hierarchical norms have come under attack from new, egalitarian ones: he used to be the vengeful cuckold; she's now the battered woman."); Steiker, *supra* note 37, at 1871 ("Wilson's inability to see that his defense of the 'traditional' law of provocation was a kind of 'abuse excuse' itself, arose from the uncontroversial nature of that traditional (partial) excuse. . . . It is only when law reformers seek to write in new judgments about reasonableness that the evaluative nature of the criminal law appears prominent and, necessarily, controversial.").

<sup>40</sup> Nourse, *supra* note 36, at 1461, 1466-67; see also Kahan & Nussbaum, *supra* note 1, at 373 ("Our primary normative claim in this Article has been that the law would

one side or the other is being partisan rather than “neutral,” we can then proceed to debate *which* partisan values we want to inform the law—those that would exonerate the battered woman, those that would acquit the beleaguered commuter, or some other set of understandings entirely. The New Normativity is, at root, deeply hostile to the humanist rationale that animates conventional self-defense doctrine.

### 3. Self-Defensive Cognition

In his essay, *Reasonable Evidence of Reasonableness*, Mark Kelman presents what is arguably the most elegant and compelling analysis of the parallels between the iconic battered woman beleaguered commuter cases.<sup>41</sup> Reconstructing the discussion that transpires in a typical law school classroom, Kelman shows how the factual issues each case presents (the risk of danger posed by the victim; the alleged acuity of insight that each defendant might possess by virtue of his or her personal experiences; the excusing *deformity* of perception that each defendant might be thought to be suffering from by virtue of circumstances not of his or her own choosing; the adequacy and feasibility of relying on alternative, lawful remedies), as well as the nature of the probabilistic inferences an observer would have to employ in resolving them, are essentially identical.

The impasse, Kelman notes, is integral to the structure of the debate. Factual claims that are only “hypothetically falsifiable” can never “be uncontroversially verified [or] falsified.”<sup>42</sup> Accordingly, whatever position a person takes on those claims must “reflect distinct social understandings that are doubtless as much about aspiration as interpretations.”<sup>43</sup>

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be better if, in all instances, it were expressly evaluative.”); *cf.* Kahan, *supra* note 39, at 192 (“progressives should ruthlessly expose the partisan moral judgments that underlie the doctrines they want to abolish, and defend without embarrassment the ones that underlie the doctrines they propose instead.”); Steiker, *supra* note 37, (“controversy [over which motives the law should approve of should be] brought to the surface”).

<sup>41</sup> See Kelman, *supra* note 1.

<sup>42</sup> *Id.* at 188.

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

Rather than implausibly insist, then, that the positions we favor reflect correct assessment of the “facts,” we should, Kelman argues, own up to the normative aspirations that we are relying on. We should “focus less on the accuracy of the defendants’ factual judgments and more” on what sort of society we are constructing when we side with one or the other “in situations in which both they, and we, must inevitably be factually uncertain.”<sup>44</sup> For Kelman himself, the claim of the beleaguered commuter is less compelling “not because he ‘inaccurately’ assessed risks, . . . but because the consequences of acting as he did, given his perception of risk, [are] so horrible.”<sup>45</sup> When we can’t possibly know how dangerous the targets of lethal self-defense really are, it is “markedly less acceptable” to tolerate the killing of those who might be “utterly innocent”—mere panhandlers, or perhaps “taunters” or “nonviolent robbers”—than those “who certainly were not innocent”—battering men who, even if they did not intend to kill, were “established assaulters.”<sup>46</sup> It “is even more reprehensible” to tolerate possibly mistaken killings “when the victims are selected on the bias of their membership in a historically subordinated racial group.”<sup>47</sup>

More striking, though, than Kelman’s response to the parallels in the iconic cases—an argument that aligns him with Nourse’s New Normativists—is a puzzle Kelman poses and frets over. *Why* is the debate—in his classroom and outside it—framed in factual terms? He finds this especially perplexing in the case of his left-leaning students, whom he perceives are philosophically disposed toward a “strong antipositivism” but who nevertheless feel constrained, probably for strategic reasons, to “fall back on the claim that they

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<sup>44</sup> *Id.* at 177.

<sup>45</sup> *Id.* at 186.

<sup>46</sup> *Id.* at 177, 186.

<sup>47</sup> *Id.* at 176, 186. Cass Sunstein advances a similar position in an insightful comment on Kelman’s essay. Sunstein argues that “sympath[y] with the battered wife’s claim of self defense” and “skepticism about the claim of self-defense in the subway case” reflects commitment to an “anticaste principle,” which furnishes reliable moral guidance on “what it is best to do or how it is best to act in the face of factual uncertainty.” Cass R. Sunstein, *On Finding Facts*, in *Questions of Evidence: Proof, Practice, and Persuasion Across the Disciplines* 197 (J. Chandler, A. I. Davidson and H. Harootunian ed., 1994).

have got the cold, brute-facts correct.”<sup>48</sup> Indeed, Kelman surmises that even those who find his own analysis persuasive are likely to continue to find themselves impelled to defend their positions with empirical claims: “We may ultimately trust our normative judgments more,” he writes “but we are still likely to claim, with unbending support from our political allies, that we are assessing factual judgment, objective clarity of vision.”<sup>49</sup> Why exactly? Kelman surmises that political advocacy is constrained by an “Enlightenment dogma—that facts are universal, values particular”—that makes overt appeal to partisan commitments taboo or suspect.<sup>50</sup>

What we are describing as the third model of self-defense decisionmaking—the Self-defensive Cognition position—suggests a different solution to Kelman’s puzzle. Kelman’s leftist students, his own ideological allies, and everyone else *really believe* that the “cold, brute-facts” support the outcomes they favor in the battered woman and beleaguered commuter cases. They *don’t* think that they are siding one or another self-defense claimant based on their political ideologies. Nevertheless, what *causes* those individuals to find some defendants’ claims factually credible and others’ not is the psychic costs and benefits of such beliefs to persons who hold their defining commitments.

In effect, the impact of values on outcome judgments is *mediated* by fact perceptions. That is, instead of directly appraising an instance of deadly force by applying partisan values that themselves might be extraneous or even hostile to the humanist principles the doctrine embodies, decisionmakers’ values *indirectly* determine their appraisals by shaping what they perceive doctrinally relevant facts to be.

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<sup>48</sup> Mark Kelman, *A Rejoinder to Cass R. Sunstein*, in *Reasonable Evidence of Reasonableness*, in Questions of Evidence: Proof, Practice, and Persuasion Across the Disciplines 202 (J. Chandler, A. I. Davidson and H. Harootunian ed., 1994).

<sup>49</sup> Kelman, *supra* note 1, at 188.

<sup>50</sup> Kelman *supra* note 48, at 202.

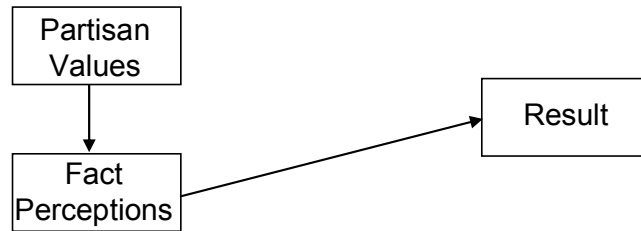


Figure 3. Self-Defensive Cognition Model

This account flows out of three psychological theories. The first is the *culpable control* theory of blame attribution.<sup>51</sup> Across persons and societies, blame attributions have been shown to conform to a relatively uniform template, the elements of which—volition, action, causation, and harm—inform judgments of the *control* that a putatively blameworthy agent exerted over an undesirable outcome. But based on an extensive body of experimental research, the “culpable control” theory posits that individuals’ *perceptions* of the elements of the blame template are guided by affective and moral responses to facts *extraneous* to those elements. Facts most likely to generate this effect relate to the agent’s conformity to social norms generally. Thus, a person who deviates from widely held community expectations (ones, say, relating to drug use or to sexual behavior) will be more likely to be perceived as having acted “volitionally” or having “caused” an undesirable result unrelated to such deviancy (say, a car accident) than will a person who conforms to those same norms.<sup>52</sup> In effect, individuals are motivated to *conform* their perceptions of blame-relevant facts, particularly ones that defy direct observation, to the their norm-pervaded evaluations of a person’s values and character more generally.

The second theory is *identity-protective cognition*. Individuals tend to process factual information in a manner that reinforces “self-definitional beliefs,” including ones tied to their “values [and] social

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<sup>51</sup> See generally Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 *Psych. Bull.* 556 (2000).

<sup>52</sup> See *id.* at 564; Mark D. Alicke, *Culpable Causation*, 63 *J. Personality & Soc. Psych.* 368 (1992).

identities.”<sup>53</sup> Obviously, values don’t *logically* depend on beliefs.<sup>54</sup> But practically speaking, certain beliefs—that virtuous conduct is not harmful to others or our ourselves; that vicious or base conduct doesn’t conduce to personal or societal well-being—make it easier to persist in our values than do their opposites. Because abandoning or revising his or her values can undermine a person’s sense of integrity, and thus lower his self-esteem, it is natural for an individual, psychologically speaking, to resist information that challenges beliefs supportive of that person’s values.<sup>55</sup> This dynamic is accentuated when the values and associated with beliefs are connected to group with which a person strongly identifies. Individuals depend on group membership for various benefits—material, reputational, and emotional.<sup>56</sup> Individuals thus have even more incentive to resist acceptance of information that threatens to drive a wedge between them and their peers. Accordingly, as a means of psychological self-protection, individuals selectively credit information depending on whether it bolsters or challenges beliefs that cohere with their self-defining values, particularly ones that predominate in or support practices important to a self-defining group.<sup>57</sup>

The third supporting theory is *cultural cognition of risk*. Cultural cognition refers to the tendency of persons, as a result of identity-protective cognition and other mechanisms, to conform beliefs about the extent of societal dangers to shared understandings of how society should be organized.<sup>58</sup> Persons who hold an “individualist” worldview, for example, react skeptically to claims of environmental

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<sup>53</sup> Serena Chen, Kimberly Duckworth & Shelly Chaiken, *Motivated Heuristic and Systematic Processing*, 10 Psych. Inq. 44, 45 (1999).

<sup>54</sup> *See, of course*, David Hume, *A Treatise of Human Nature*, bk. 3, pt 1, § 1 (1739-40).

<sup>55</sup> *See generally* Cohen *et al.*, *Partisan Divide*, *supra* note 3.

<sup>56</sup> *See generally* Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 Psychol. Bull. 497 (1995).

<sup>57</sup> *See generally* Sherman & Cohen, *supra* note 3, at 119-20; Cohen *et al.*, *Partisan Divide*, *supra* note 3; Giner-Sorolla & Chaiken, *supra* note 3; Serena Chen, Kimberly Duckworth & Shelly Chaiken, *Motivated Heuristic and Systematic Processing*, 10 Psychol. Inq. 44 (1999).

<sup>58</sup> *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 (2006).

risks, the widespread acceptance of which would threaten the autonomy of markets and other private orderings; persons who subscribe to an “egalitarian” worldview, in contrast, find it congenial to credit such claims because they justify regulating commercial activities productive of inequalities in wealth and status. Cultural norms can also generate variance in the risk perceptions of those who share a worldview: hierarchical and individualistic men, for example, rely much more on access to firearms to enable their performance of cultural roles, and thus tend to be much more skeptical of the risks guns pose to society, than do hierarchical and individualistic women.<sup>59</sup>

The Self-Defensive Cognition Model blends these three theories together. Self-defense doctrine supplies a particular type of blaming template. Accordingly, one might expect, consistent with the culpable control theory, that persons evaluating self-defense cases would conform their perceptions of the elements of that template—whether the putative aggressor did in fact pose a deadly threat to the defender; whether the defender honestly and reasonably perceived matters in that way; whether the defender’s capacity to avoid any threat by non-deadly alternatives—to extradoctrinal social norms. The theory of self-protective cognition implies that those norms are likely to be ones that are central to their identities.

For its part, the cultural cognition theory suggests which norms are likely to have this impact—namely, the ones associated with the worldviews that that theory features. Appraisals of self-defense, like appraisals of the dangers of climate change, gun possession, socially deviant behavior, and the like, involve perceptions of risk. And like those issues, controversial self-defense cases are likely to *be* controversial precisely because they are pregnant with implications for competing norms, hierarchical and egalitarian, individualistic and communitarian. Does racism remain prevalent in public attitudes and behavior? Is society organized in an objectionably patriarchal fashion? Is our society being damaged by a decline in authority in public and private spheres? Is that decline a byproduct of an *excessive* concern about racial or gender inequality? Is the law typically an instrument of repression of vulnerable groups? Or is the law now insuffi-

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<sup>59</sup> See 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*, J. Empirical L. Stud. (forthcoming 2007) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=995634](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=995634).



ciently responsive to protecting law-abiding citizens from predation by lawbreakers? Is private physical force an appropriate means for securing order, in public or private domains? Is the protection of individuals from *unwarranted* violence primarily a responsibility of the community or is it an inalienable prerogative of those individuals themselves? Even if individuals don't understand themselves to be answering *these* questions when they apply self-defense doctrine, they are impelled to views of the facts supportive of their preferred answers.

Values do drive outcome judgments, on this account, but in a manner different from that contemplated by proponents of the Partisan Value Model. The abuse excuse critics paint too cynical a picture of self-defense decisionmakers. Such individuals aren't brazenly ignoring facts that disappoint their partisan values; they are honestly deciding based on the facts, albeit the ones that their values dispose them to perceive. The New Normativists, in contrast, impute too much sophistication to the protagonists in political disputes over self-defense cases. These citizens aren't covert Aristotelians engaged in appraising offenders' and victims' motives and characters against the background of dueling conceptions of the good life.<sup>60</sup> Nor are they (outside of Stanford law classrooms, certainly, but probably even inside them) epistemologically skeptical "antipositivists" who are strategically availing themselves of "Enlightenment dogma—facts are universal, values particular"—to disguise their agenda to conform the law to their "aspirations."<sup>61</sup> Culturally diverse individuals (jurors, but citizens forming judgments about self-defense cases generally) honestly believe they are putting their own partisan commitments aside and basing their judgments on their perception of the facts in exactly the way the Neutral Umpire Model contemplates. But because their partisan values *shape* their cognition of the facts, they systematically differ in their perceptions of "balls" and "strikes".

This interpretation of political conflict over self-defense verdicts, we're convinced, raises a thicket of complicated normative and pre-

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<sup>60</sup> Cf. Kahan & Nussbaum, *supra* note 1, at 304 (claiming that "it is possible to make sense of the law only by imputing to it a theory of moral accountability consistent with the evaluative conception of emotion" such as "Aristotle's position on character—that it is appropriate to expect a person to value the right things, in the right ways, at the right times").

<sup>61</sup> Kelman, *supra* note 1, at 202.

scriptive questions. By delimiting the conditions under which private citizens can avail themselves of lethal violence, self-defense doctrine plays an important regulatory function. But as our account of its rationale makes clear, the doctrine also performs a critical *political* function, affirming the law's humanist commitment to the *supreme* value of human life and the *equal* value of all citizens' lives. The doctrine obviously can't perform either of these functions effectively if citizens ignore the facts and rely instead on partisan group commitments when they appraise instances of private violence. But can it do it effectively if citizens honestly conform their judgment to facts that cognitively *derive* their partisan values? Do factual disagreements founded on self-defensive cognition pose challenges to the accuracy of verdicts, or to their political legitimacy, that are any different from factual disagreements originating in myriad other sources? If so, is there anything that can be done to mute the impact of this particular psychological dynamic?

Interesting questions, we believe. But the importance of answering them presupposes that the Self-Defensive Cognition Model really *does* explain political conflict over self-defense verdicts. Whether that is so is, of course, an empirical question. And it is one that we conducted an experimental study to try to answer.

## II. THE EXPERIMENTAL STUDY

We conducted an experimental study designed to pit the Neutral Umpire, Partisan Value, and Self-Defensive Cognition Models against one another. As we'll explain in more detail, subjects read one of two vignettes patterned on the iconic "battered woman" and "beleaguered commuter" cases. Subjects then responded to a battery of questions, which were analyzed to assess the relationship between the subjects' perceptions of key facts, their positions on the appropriate results in the cases, and their values, political leanings, and other individual characteristics, all of which were also measured.

Although subjects were requested to adopt the perspective of jurors in the cases, the design of the study was primarily intended to shed light on how members of the public form judgments about controversial self-defense cases generally. Political conflict over self-defense verdicts is the phenomenon we are trying to explain. Such conflict inheres less in the verdicts of individual juries than in public reactions to them. Members of the public (not unlike law students in

the classroom) react, by and large, not to their first-hand exposure to the evidence presented in such cases but rather to more abbreviated, derivative accounts that, like our vignettes, tend to be subject to competing interpretations. On what basis, then, are members of the public forming such confident conclusions about the correctness or incorrectness of jury verdicts in such cases? Are they relying on their best albeit speculative judgments about the facts? Are they simply reacting to the more accessible cultural or political overtones such cases present? Or are they, as the Self-Defensive Cognition Model supposes being motivated to resolve factual ambiguities in the manner most supportive of their defining commitments?

#### *A. Study Design and Hypotheses*

##### 1. Sample

The study sample consisted of approximately 1,600 individuals. Approximately 51% female, 75% white, and 9% African-American, the subjects were drawn randomly from a demographically diverse and nationally representative panel of some 40,000 on-line survey respondents assembled by Knowledge Networks for participation in scholarly public opinion analysis.<sup>62</sup>

##### 2. Vignettes

Subjects were randomly assigned to one of two treatment groups, which were labeled “Battered Woman” and “Beleaguered Commuter,” respectively.<sup>63</sup> In the former, subjects read a vignette in which Julie, a woman chronically beaten and degraded by William, her abusive husband, shot him in the head as he slept. In the latter, subjects read a vignette in which George, a middle-aged white man, shot and killed Alvin, a male African-American teenager, on a subway

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<sup>62</sup> 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/2005aapor.html>; <http://www.knowledgenetworks.com/ganp/docs/List%20of%20Journals%208-28-2006.pdf> A more complete description of the composition of Knowledge Networks and of the demographic characteristics of the sample used in this study appears in Appendix A.

<sup>63</sup> The vignettes appear in Appendix A.

platform after Alvin stated, “Give me some money, man.” The vignettes were described as presenting the “facts and evidence” in “a controversial criminal trial,” and each subject was advised that we were interested “to know what you would decide if you were on the jury in that trial.” Although patterned loosely on real cases (*State v. Norman*<sup>64</sup> and *State v. Goetz*,<sup>65</sup> respectively), the vignettes were structured to be reasonably parallel in a number of respects that we anticipated would generate factual disagreements among subjects.<sup>66</sup>

*a. Victim dangerousness.* In both vignettes, the facts were characterized in a manner intended to create ambiguity as to whether the victim posed—or might reasonably have been perceived to pose—an immediate threat of death or great bodily harm. The most obvious reason to doubt that in Battered Woman was that William was sleeping at the time he was shot. Nevertheless, he had beaten Julie earlier in the day and was now only napping, suggesting the possibility that he might at any moment awaken and immediately resume his pattern of violence. At least some persons, then, would likely credit as reasonable Julie’s (professed) perception that she had to act immediately because she “knew when [William] woke up this time he was going to hurt me really bad.”

In Beleaguered Commuter, Alvin had no previous contact of any sort, violent or otherwise, with George and had not explicitly threatened him. Nevertheless, Alvin’s request for money would likely strike some, but certainly not all, persons as menacing, and George stated that he “could tell from [Alvin’s] body language and the aggressive tone of his voice” that Alvin “was going to hurt me real bad.” Some, but certainly not all, persons would also likely view Alvin’s race, age, and gender, as well as the urban setting of the encounter, as reinforcing the inference that Alvin’s request for money was a prelude to a violent attack.<sup>67</sup>

A “pocket knife” was also found on Alvin’s person. Those disposed to see him as potentially dangerous would likely see this fact as

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<sup>64</sup> 78 S.E.2d 8 (N.C. 1989).

<sup>65</sup> 497 N.E.2d 41 (N.Y. 1986).

<sup>66</sup> In this respect, we were guided in particular by Kelman’s superb discussion of the factual parallels in the iconic cases as they are typically presented in law school discussions. See Kelman, *supra* note 1.

<sup>67</sup> See Armour, *supra* note 1, at 790-93.

confirmation of Alvin's violent intentions. Others would point out that George didn't have any awareness that Alvin was carrying the knife, possession of which is consistent with perfectly innocent intentions (including self-defensive ones on Alvin's own part).

*b. Previous exposure to violence.* In both vignettes, the defendants were described as having been exposed to previous acts of violence. This parallel too injects factual ambiguity into both cases.

Julie had suffered repeated physical beatings at the hands of William, "some of which resulted in injuries (facial cuts; broken ribs; twice a broken nose) requiring emergency medical treatment." This behavior, in addition to reinforcing the impression that William posed an objectively reasonable threat of violence, also supports the inference that Julie *honestly* perceived William would harm her upon awakening.

Yet one could also draw exactly the opposite set of inferences. William's "persistent[] abuse[]" of Julie "during their ten-year marriage," some might argue, had never created the *degree* of risk—one of "death or *great* bodily harm"—contemplated by the doctrine. So why suppose that Julie honestly or reasonably perceived that she faced a threat of that magnitude in this instance?

One reply is that precisely because she had endured so many attacks over so long a period, Julie had developed unique insight into William's propensities and was thus better situated than anyone else to gauge whether "this time," as she said, "he was going to hurt [her] really bad."<sup>68</sup> But just as plausibly (some might think) the string of violent but nonlethal attacks could be viewed as supplying Julie with a motive—resentment or hatred—to kill William notwithstanding the absence of any genuine apprehension that failing to do so would have put her at risk of a deadly attack.

George had suffered three previous muggings, during one of which he had "been beaten and required fifteen stitches under his eye." These attacks had been carried out by persons other than Alvin. Nevertheless, some might conclude that a person who had been

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<sup>68</sup> See *State v. Kelly*, 478 A.2d 364, 374 (N.J. 1984) ("Depending on its content, the expert's testimony might also enable the jury to find that the battered wife, because of the prior beatings, numerous beatings, as often as once a week, for seven years, from the day they were married to the day he died, is particularly able to predict accurately the likely extent of violence in any attack on her.").

mugged multiple times in the past would be more likely to perceive he was about to be assaulted again in a situation like the one George faced.<sup>69</sup> In addition, because the muggers in those instances, too, had been “teenaged, African American males,” it is plausible to imagine (that is, to imagine some readers’ imagining) that Alvin’s race, age, and gender might have created at least an *honest* apprehension on George’s part that Alvin also meant him harm.<sup>70</sup>

But again opposing inferences are also possible. The previous muggings, although in one case quite violent, hadn’t (some would say; others would disagree) posed a *lethal* risk, so why suppose George either honestly or reasonably perceived he’d be subjected to that level of physical danger rather than merely robbed? The reply might be that the previous muggings, combined with experience from urban living generally, endowed George with superior insight into the violent potential of such interactions, one that people without a similar background are in particular unfit to second guess.<sup>71</sup> But just as plausibly (to some), those muggings could be understood to have filled George with a passion—informed, very likely, by racial animus—to avenge the humiliating treatment he perceived himself to have suffered. In that case, George might have been expected to lash out with lethal violence against Alvin, as a symbolic representative of the class of persons who had mistreated him, despite the lack of any genuine (much less reasonable) apprehension that Alvin posed a deadly threat.

*c. Opportunity to flee.* Another parallel in the vignettes relates to the feasibility of flight as an alternative to the use of deadly violence. Julie, some would observe, could have (indeed, would have) simply left her home during William’s nap if she genuinely perceived that he would attack her upon awakening. But others would likely dispute the feasibility of flight (to where? for how long? without packing essentials—or after taking the time to do so, incurring the risk of discovery and violent retaliation by a roused William, etc.). They could bolster

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<sup>69</sup> See Kelman, *supra* note 1, at 174-75.

<sup>70</sup> See Armour, *supra* note 1, at 799-800.

<sup>71</sup> See Kelman, *supra* note 1, at 175; cf. Elijah Anderson, *Streetwise: Race, Class, and Change in an Urban Community* (1990) (observing that urban residents develop intuitive sensitivity to “code of the street” that is essential to avoiding dangerous confrontations).

their reasoning with the rationale, if not the letter, of the so-called “Castle Doctrine.”<sup>72</sup>

Similar issues arise in the Beleaguered Commuter case. George, it might be thought, could have (would have) backed away, yelled for help, or simply turned and run had he really thought that he was about to be mugged, much less lethally assaulted. But some would dismiss this suggestion as naïve, the product likely of inexperience with the resolve of violent inner-city criminals, the cramped confines of crowded subway stations, and the cowardice or selfish indifference of urban residents in the face of the brazen acts of predation. Much like an “uplifted knife,”<sup>73</sup> it could be said, such circumstances do not conduce to calm assessments of one’s options.

*d. Previous involvement of police.* The defendants in both vignettes were also depicted as having previously availed themselves unsuccessfully of police assistance. George reported each of the three previous muggings, “but the police failed to make any arrests.” Some readers might suspect that the apparent lack of ability on the part of the state to protect George (and one might suppose other mugging victims) would increase his anxiety and fear and thus dispose him honestly (perhaps even reasonably) to perceive the need to use self-help to protect himself from serious harm. Others would see the same experiences with the police as a motivation to resort to vigilantism.

“Three times the police arrested William for assaulting Julie, but released him from custody each time after Julie declined to press charges.” Julie’s failure to follow through might be thought to support the inference that she wasn’t genuinely convinced that he posed a deadly threat. And if she didn’t see him that way in general, it seems less likely she would have perceived him that way on the occasion in which she finally shot him. Alternatively, Julie might be thought to

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<sup>72</sup> In many jurisdictions, the “Castle Doctrine” would not excuse retreat in a case involving cohabitants. See Catherine L. Carpenter, *Of the Enemy Within, The Castle Doctrine, and Self-Defense*, 86 Marq. L. Rev. 653, 671-72 (2003). Nevertheless, in those states, a jury could still consider the difficulty of or uncertainty surrounding escape in determining whether a person who used deadly force against a cohabitant honestly and reasonably perceived a threat of death or great bodily harm. See, e.g., *Cooper v. United States*, 512 A.2d 1002, 1004 (D.C. 1986). Our subjects received no specific instructions relating to Castle Doctrine or to the duty (or lack thereof) to retreat in self-defense cases.

<sup>73</sup> *Brown*, 256 U.S. at 343.

have dropped the charges because of a well-founded perception that pressing charges would only increase her risk by infuriating William, whom the state would not have the resources or resolve to incapacitate. If so, one might find it easier to imagine that Julie would have formed the honest (perhaps even reasonable) belief that one day she'd need to use lethal force to incapacitate William herself.

*e. Premeditation.* Both defendants shot and killed their victims with handguns. George obtained his weapon after the third mugging; Julie obtained hers from her mother's home on the day she shot William, after he had severely beaten her. One could see the decision of either defendant or of both as evidencing a premeditated motive to kill for purposes of vengeance or vindication of dignity, honor, or autonomy. Alternatively, one could see the decision of either or both as manifesting a level of fear that matured into an honest (even reasonable) perception of deadly risk at the fateful moment when the victim was shot.

*f. Expert psychiatric testimony.* Each defendant was described as having presented expert psychiatric testimony at trial. Subjects who read *Battered Woman* learned that "Dr. Leonard Wallace, a Ph.D. psychiatrist on the faculty of a major university," had testified that Julie was suffering from "battered woman syndrome"; subjects who read *Beleaguered Commuter* learned that that the same witness had testified that George was suffering from "post-traumatic stress disorder." Readers could have understood Dr. Wallace's description of the offenders' respective conditions as supporting the genuineness of their perceptions that they honestly faced inescapable threats to their lives. Readers so inclined could also have treated his testimony as evidence of the *reasonableness* of either offender's perception, given Dr. Wallace's characterization of the effect of previous exposure to violence "on [his or her] psyche." Finally, Dr. Wallace's statements on the stand echoed each defendant's own claim that he or she "felt no choice" but shoot the victim, an element of each vignette designed to suggest excusing impairment of volition.

Nevertheless, readers of either case could also have dismissed the testimony of Dr. Wallace, a defense witness, as noncredible. Indeed, a reader disposed to accept the "abuse excuse" critique (whether as a result of prior exposure to it or as a result an instinctive skepticism of psychiatric testimony) could even have treated the



presence of Dr. Wallace's testimony as confirming the absence of any genuine merit in the defendant's self-defense claim.

### 3. Measures

*a. Perception of Facts.* We measured subjects' perceptions of various facts by asking them to indicate on a six-point scale the level of their agreement or disagreement with various propositions. The propositions concerned facts that a juror would likely consider if she were motivated to decide her assigned case consistent with self-defense doctrine understood in light of its conventional justification-based and excuse-based rationales:

It isn't likely that [William/Alvin] would have severely harmed or killed [Julie/George] if [Julie/George] hadn't shot him.

It was unreasonable for [Julie/George] to shoot [William/Alvin] because there were other ways [she/he] could have protected [herself/himself].

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

Because [she had been beaten so many times before/George had been violently mugged before], [Julie/George] was in a better situation than other people to judge how much of a danger [William/Alvin] posed to [her/him] when he shot him.

The failure of the police to keep [her/him] safe gave [Julie/George] good reason to believe [she/he] had to use deadly force to protect [herself/himself].

[William/Alvin] himself was responsible for causing [Julie/George] to believe [she/he] faced a threat of death or grievous bodily harm.

Considered individually or jointly, these items are only a proxy for a subject's perception of the facts in the case. Accordingly, subject responses to the fact items in both the Battered Woman and Be-leaguered Commuter treatment groups were combined into scales, BW\_Facts and BC\_Facts, which by virtue of their high degree of reliability ( $\alpha = .73$  and  $\alpha = .77$ , respectively) can be regarded as valid indicators of subjects' latent dispositions to adopt interpretations of the

facts supportive or hostile to the respective defendant's self-defense claims.<sup>74</sup>

*b. Outcome Judgments.* In each treatment group, subjects were instructed to that the cases would be decided according to the following legal directives:

*Murder.* Anyone who intentionally kills another person without a lawful defense is guilty of murder and shall be sentenced to life imprisonment.

*Self-defense.* A person has a defense to murder if that person honestly and reasonably believed that deadly force was necessary to repel an immediate threat of death or severe bodily harm.

The subjects' own perceptions of the appropriate results in the cases were measured with two items, which stated propositions with which the subjects were to indicate on a six-point scale the level of their agreement or disagreement:

[Julie/George] should be convicted of murder.

[Julie/George] should be acquitted of murder because she killed in self-defense

Responses again formed highly reliable scales (BW\_Aquit,  $\alpha = .87$ ; BC\_Aquit,  $\alpha = .79$ ), which were used to represent latent dispositions to acquit the respective defendants.

*c. Cultural worldviews.* Subjects' "cultural worldviews" were also measured. The purpose of collecting this information was to facilitate assessment of the subjects' worldviews in their perceptions of the facts and their assessments of the appropriate result.

The worldview scales were patterned on a scheme developed by the late anthropologist Mary Douglas. Douglas characterizes worldviews, or preferences for how society should be organized, along two cross-cutting dimensions, "group" and "grid."<sup>75</sup> A "high group" worldview generates a preference for a *communitarian* ordering in

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<sup>74</sup> Cronbach's alpha ( $\alpha$ ) is a statistic for measuring the internal validity of attitudinal scales. In effect, it measures the degree of intercorrelation that exists among various items within a scale; a high score suggests that the items can be treated as a valid measure of a latent, or unmeasured, attitude or trait. Generally,  $\alpha \geq .70$  suggests scale validity. See generally Jose M. Cortina, *What Is Coefficient Alpha: An Examination of Theory and Applications*, 78 J. Applied Psychol. 98 (1993).

<sup>75</sup> See Mary Douglas, *Natural Symbols: Explorations in Cosmology* (1970).

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.

The two dimensions of worldview contemplated by “group-grid” were measured (before subjects read the assigned vignette and responded the fact and result items) with scales used in previous studies of the cultural cognition of risk.<sup>76</sup> “Individualism-Communitarianism” (or simply, “Individualism”) consisted of “disagree-agree” items that assessed the relative priority that subjects assigned to group and individual interests (*e.g.*, “The government should do more to advance society’s goals, even if that means limiting the freedom and choices of individuals”) and their expectations about how responsibilities should be divided between society and its members (*e.g.*, “Too many people today expect society to do things for them that they should be doing for themselves”). “Hierarchy-Egalitarianism” (or simply, “Hierarchy”) consisted of items that assessed subjects’ attitudes toward socially stratified roles (*e.g.*, “We have gone too far in pushing equal rights in this country”) and their toward deviancy from the same (*e.g.*, “A lot of problems in our society today come from the decline in the traditional family, where the man works and the woman stays home”). Both Individualism ( $\alpha = .84$ ) and Hierarchy ( $\alpha = .82$ ) were highly reliable 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

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<sup>76</sup> See Kahan *et al.*, *supra* note 59.

as either “Hierarchs” or “Egalitarians” and as either “Individualists” or “Communitarians.”

*d. Individual characteristics generally.* Finally, we collected data on various other individual characteristics that we anticipated might influence subjects’ perceptions of the facts and results in the Battered Woman and Beleaguered Commuter cases. These included socio-demographic characteristics, such as gender, race, household income, education level, and community type (urban or nonurban). They also included political dispositions, measured by self-reported ideology (on a seven-point, liberal-conservatism scale) and party affiliation (Democrat, Republican, Independent/Other).

#### 4. Hypotheses

We have proposed that self-defensive cognition generates political conflict over self-defense cases. The study was geared to permit testing of several discrete sets of hypotheses that flow out of this claim.

*a. Overall effect of values.* One is that the Battered Woman and Beleaguered Commuter vignettes would in fact divide subjects of diverse values. Consensus on the outcomes, or disagreement unrelated to partisan values, would be consistent with the Neutral Umpire Model. We predicted, however, that our vignettes would in fact generate mirror-image forms of political polarization.

Thus, in the Battered Woman condition, subjects who identified themselves as liberals and Democrats, we surmised, would be inclined to accept, those who identified themselves as conservatives and Republicans to reject, the defendant’s asserted claim of self-defense. In the Beleaguered Commuter condition, the positions of subjects so defined would be reversed.

We anticipated similar patterns for subjects defined by their cultural worldviews. For Hierarchs, the behavior of the victim in Beleaguered Commuter would likely connote the breakdown of social order in urban settings, and the response of the defendant a righteous vindication of the honor of norm-abiding persons. Egalitarians, in contrast, would readily identify the defendant’s behavior, and positive reactions to them, with racial dominance. Individualists, we conjectured, would see in the defendant’s resort to self-help a virtuous assertion of self-reliance. Communitarians, in contrast, would likely associate the defendant’s response with an encroachment on the pre-

rogative of society at large to secure order. They would also likely resent approval of his actions as an implicit denial of society's complicity in conditions that conduce to crime and disorder, and its obligation to ameliorate the same. We thus predicted that Hierarchs and Individualists, but not Egalitarians and Communitarians, would be disposed to credit the defendant's self-defense claim.

The Battered Woman vignette, too, is ripe with competing cultural meanings. Egalitarians would thus likely equate approval of the defendant's self-defense claim in that case with due recognition of the injustice of male domination and society's failure to take effective action to protect women from domestic violence. Hierarchs might not be completely averse to the use of physical force as a mode of maintaining discipline within a well-ordered home; but even if (as likely) they understood William to have engaged in violence unsanctioned by an prerogative associated with his role, they would likely react skeptically to the "battered woman defense" as evidencing general hostility to patriarchal modes of household organization. We thus predicted that Egalitarians but not Hierarchs would be inclined to afford Julie a defense.

The Battered Woman case was likely to strike Communitarians and Individualists, however, as less clear cut. We surmised that Communitarians would likely see William's behavior as a tyrannical breach of norms of solidarity that should inform household life. At the same time, they would also likely be leery of Julie's resort to self-help, much as they would be leery of George's in the Beleaguered Commuter condition, as a tacit denigration of societal prerogatives and responsibilities to police such breaches. By the same token, Individualists might well approve of Julie's resort to self-help, much as they would George's, as an expression of virtuous self-reliance. However, it also struck as possible that Individualists would react less sympathetically to Julie insofar as use of a gun for self-protection would likely seem more in keeping with individualist norms that define *male* roles of men than those that define *female* ones.<sup>77</sup> We thus formed no clear hypothesis about the likely effect of the Individualist-Communitarian dimension of cultural worldview on subjects' outcome judgments in that condition.

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<sup>77</sup> *See id.*

*b. Values, results, and fact perceptions.* We hypothesized not only that subjects' values would generate differences of opinion on the correct outcomes in the two cases, but also that they would do so in the manner associated with the Self-Defensive Cognition Model. Whereas the Partisan Value Model posits that values determine favored outcomes in controversial cases directly, the Self-Defensive Cognition Model assumes that values determine outcome judgments indirectly (and subconsciously), though the influence that values have on decisionmakers' perceptions of the facts. Accordingly, we predicted that the impact of partisan values on subjects' outcome judgments would, in both conditions, be mediated by the impact of those values on subjects' perceptions of the facts. That is, after controlling for their impact on fact perceptions, subjects' values, we predicted, would *not* explain variance in their views of what the results in the cases should be.

We also predicted that cultural worldviews would have a larger impact on subjects' perceptions of facts than would their political ideologies and party affiliations. Because conventional political commitments cohere with group commitments essential to individuals' identities, it would be perfectly consistent with the Self-Defensive Cognition Model for them to influence subjects' factual perceptions. But based on previous studies, we anticipated that cultural worldviews would exert a greater influence than ideology and party affiliation, in part because the worldview constructs furnish a more nuanced representation of how individuals' defining values vary and in part because worldview measures do better than do political commitment ones in explaining that policy preferences of individuals with moderate degrees of political sophistication.<sup>78</sup>

*c. Impact of other individual characteristics.* We anticipated that other individual characteristics would also likely correspond with differences in outcome judgments in the cases. We predicted, in particular, that women would likely be more disposed than men to credit the self-defense claim in *Battered Woman* and that whites would be more

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<sup>78</sup> See Aaron Wildavsky, *Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation*, 81 *Am. Pol. Sci. Rev.* 1 (1987); Donald Braman, Dan M. Kahan & Paul Slovic, *The Wildavsky Heuristic: The Cultural Orientation of Mass Political Opinion* (July 2005) (unpublished manuscript, [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=341841](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=341841)).

disposed than African-Americans to credit the self-defense claim in Beleaguered Commuter.

Such effects could reflect a number of mechanisms. One would be a connection between these characteristics and self-defining group commitments that influence how individuals react to the cases. Gender and race might themselves be groups of the sort or might correlate with others (political affiliations, e.g.) that are. If so, women might differ from men and African-Americans from whites either as a result of the *direct* effect of partisan group values on outcome judgments or as a result of the *indirect* effect of such values on fact perceptions.

Another reason to expect race and gender effects would be the correlation of these characteristics with differences in experiences, unrelated to values, that bear on individuals' perception of the facts in the cases. Women, for example, might more readily take note of instances of domestic violence, or feel more vulnerable to it, and thus credit asserted fears of it more readily than do men. Likewise, whites might more readily take note of or otherwise feel vulnerable to interracial violence and thus more readily credit expressed fears of it than do African-Americans; or African-Americans might be more aware of instances of racism than are whites, and thus more readily impute racist motives to persons in the position of the defendant in the Beleaguered Commuter case.

We formulated a number of testable hypotheses aimed at sorting these possibilities out. One was that gender and race would *not* influence subjects' outcome judgments directly, in a manner unmediated by their effect on subjects' perceptions of the facts. Such a finding would rule out the inference that gender and race were connected to group commitments that influence subjects' decisionmaking in the manner posited by the Partisan Value Model.

Another hypothesis was that the impact of one or more direct partisan-value measures—either cultural worldviews, political ideology, or party affiliation—would *persist* even after the impact of gender, race, and other demographic characteristics on fact perceptions was taken into account. *Absent* such a finding, it would be impossible to *rule out* the possibility that political conflict over self-defense verdicts arises from demographic characteristics that generate experience-based variance in fact perceptions unrelated to values. Indeed, it would arguably be consistent with the Neutral Umpire Model to find

that neither cultural worldviews, political ideology, nor party affiliation generate variance in fact perceptions (or judgments of results directly) after controlling for race, gender, and other individual characteristics. Conversely, a finding that individual characteristics exert little or *no* impact on fact perceptions relative to direct partisan-value measures would be most strongly corroborative of the Self-Defensive Cognition Model.

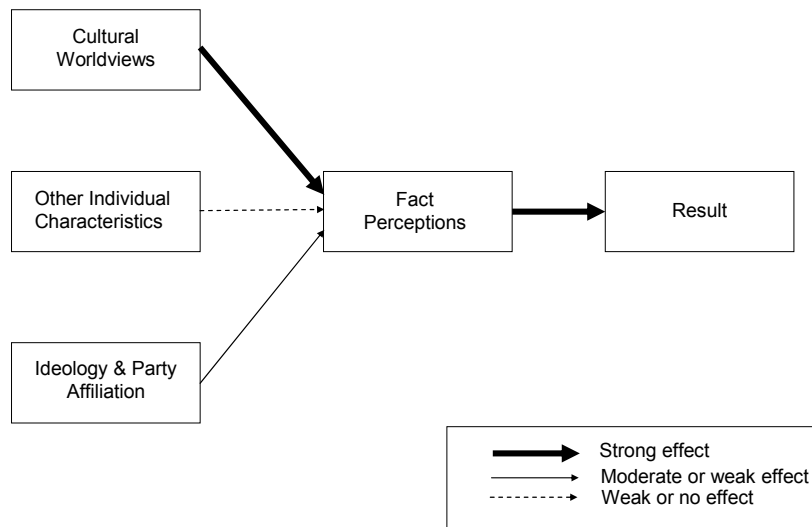


Figure 4. Summary of Hypotheses on Influence of Values, Other Characteristics, and Fact Perceptions on Correct Result

## 5. Statistical Tests

We analyzed the results with several statistical tests. We computed the percentage of subjects defined by their values and by their individual characteristics who favored either acquitting or convicting the defendants, and the mean scores of subject so identified on the verdict scales (BW\_Aquit and BC\_Aquit). Those results enable us to evaluate hypotheses on the overall effects of values and individual characteristics on preferred results in the cases.

We used structural equation modeling (SEM) to test the hypothesized relationship between values, characteristics, fact perceptions, and outcome judgments. Combining factor analysis for latent variables, linear regression, and path analysis, SEM enables the influence of independent variables on a dependent variable and on one



another to be measured simultaneously.<sup>79</sup> As such, it is particularly well suited for testing hypothesis that involve mediating relationships between latent variables such as attitudes and beliefs.<sup>80</sup> We used SEM techniques to assess the relative strength of models in which values, individual characteristics, and fact perceptions exerted the effects on one another and on subjects' outcome judgments predicted by the Neutral Umpire Model, the Partisan Value Model, and the Self-Defensive Cognition Model, respectively.

Statistical power for the SEM analyses was ample. The size of the subsamples was 838 and 772 for the Battered Woman and the Battered Commuter conditions, respectively. Accordingly, at a two-tailed significance criterion of .05, the likelihood of detecting small to medium effect sizes ( $r = .25$ ) was well over 95% for the planned SEM analyses.<sup>81</sup> Accordingly, nonsignificance findings are not appropriately attributable to type II error.<sup>82</sup>

## 6. Missing Data

Missing data were modest (< 5% of the values overall). Stochastic regression was used to impute missing values.<sup>83</sup>

### *B. Results*

We report the results in two steps. We start with a summary of simple outcome judgments, overall and across subjects of different types, in both conditions. We then present, again for both conditions, the SEM analyses of the relationship between subjects' values, their fact perceptions and their preferred outcomes.

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<sup>79</sup> See generally Rebecca Weston & Jr. Paul A. Gore, *A Brief Guide to Structural Equation Modeling*, 34 *Counseling Psychol.* 719 (2006).

<sup>80</sup> See *id.* at 719-20.

<sup>81</sup> Jacob Cohen, *Statistical Power Analysis for the Behavioral Sciences* tbls. 2.3.5, t3.3.5 (1988).

<sup>82</sup> See generally David L. Streiner, *Unicorns Do Exist: A Tutorial on "Proving" the Null Hypothesis*, 48 *Canadian J. Psychiatry* 756 (2003).

<sup>83</sup> See generally Roderick J.A. Little & Donald B. Rubin, *The Analysis of Social-Science Data with Missing Values*, 18 *Social Method Res.* 292 (1989).

## 1. Simple Outcome Judgments

Outcome judgments for each condition are reflected in Table 1. The values for “guilty” and “self-def” reflect the percentage of the subjects of the specified type who “agreed” either mildly, modestly, or strongly with the proposition that the relevant defendant should be convicted of murder or acquitted on grounds of self-defense. The difference between 100% and the sum of “guilty” and “self-def” reflects the percentage of subjects who disagreed with both propositions, possibly because they believed the defendant should be convicted of some crime, just not murder.

	<i>Battered Woman</i>		<i>Beleaguered Commuter</i>	
	Guilty	Self-Def	Guilty	Self-Def
Overall	47%	46%	33%	56%
Men	<b>50%</b>	44%	34%	54%
Women	<b>44%</b>	47%	32%	57%
Whites	48%	44%	<b>29%</b>	<b>61%</b>
Blacks	41%	42%	<b>56%</b>	<b>32%</b>
Republicans	<b>51%</b>	<b>40%</b>	<b>24%</b>	<b>66%</b>
Democrats	<b>43%</b>	<b>49%</b>	<b>39%</b>	<b>50%</b>
Conservatives	<b>56%</b>	<b>38%</b>	<b>23%</b>	<b>66%</b>
Liberals	<b>42%</b>	<b>50%</b>	<b>43%</b>	<b>46%</b>
Hierarchs	<b>51%</b>	<b>40%</b>	<b>23%</b>	<b>67%</b>
Egalitarians	<b>42%</b>	<b>49%</b>	<b>44%</b>	<b>43%</b>
Individualists	<b>51%</b>	43%	<b>26%</b>	<b>65%</b>
Communitarians	<b>43%</b>	48%	<b>40%</b>	<b>45%</b>

For Battered Woman,  $n = 838$ ; for Beleaguered Commuter,  $n = 772$ . Bold type-face indicates significant difference ( $p \leq .10$ ) between percentages of subjects within paired groups “agreeing” with indicated outcome.

*Table 1. Outcome Judgments Overall and by Class of Subject*

Both cases were reasonably controversial overall. Battered Woman was especially close, dividing subjects more or less evenly. To our surprise, compared to subjects in Battered Woman, subjects in Beleaguered Commuter were on the whole considerably more disposed to acquit. Nevertheless, with 44% of the subjects unwilling to exonerate the defendant on grounds of self-defense and 33% willing to convict him of murder, sentiment for acquittal in Battered Commuter was by no means overwhelming.

Outcome judgments displayed the opposing forms of polarization. Subjects who identified themselves as “conservatives” or “Re-

publicans” were significantly more disposed toward conviction in Battered Woman, and toward acquittal in Beleaguered Commuter, than were subjects who identified themselves as “liberals” or “Democrats.” Egalitarians and Communitarians were significantly more disposed toward conviction in Beleaguered Commuter (although in absolute terms they were fairly evenly divided) than were Hierarchs and Individualists. Also as predicted, Egalitarians were also significantly more disposed toward acquittal than were Hierarchs in Battered Woman. We were unsure how subjects defined with reference to their worldviews along the Individualism-Communitarian dimension would react in Battered Woman, but it turned out that Individualists were significantly more inclined to convict (although not significantly less inclined to acquit on grounds of self-defense).

The relationship between outcome judgments and other individual characteristics also matched our predictions. As hypothesized, whites were significantly more disposed toward acquittal in Battered Commuter than were African-Americans, and men were significantly more disposed than women toward conviction in Battered Woman (although differences between the two were not significant with respect to acquitting on grounds of self-defense).

## 2. SEM Analysis

SEM analyses were performed separately for both Beleaguered Commuter and Battered Woman. In each case, we started by testing for adequacy of fitness a model that reflected the hypothesized relationship between values, individual characteristics, fact perceptions and outcome judgments. We then assessed the fit and strength of this model in comparison to others that reflected different hypotheses about the relationship of these variables.

SEM analysis features a notoriously wide variety of “goodness of fit” indexes.<sup>84</sup> The “exact fit” or chi-square ( $\chi^2$ ) test is the most common one, but is known to generate a high rate of false rejections of adequate models, particularly when sample sizes are even modestly large.<sup>85</sup> Not surprisingly, *every* model tested in connection with both

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<sup>84</sup> See generally Weston & Gore, *supra* note 79, at 741

<sup>85</sup> See Paul Barrett, *Structural Equation Modeling: Adjudging Model Fit*, 42 *Personality & Individual Differences* 815 (2007) (“Mathematically, this occurs as the sample size is a ‘multiplier’ of the discrepancy function in the exact-fit test. In general, the larger the sample size, the more likely a model will fail to fit via using the  $\chi^2$  goodness

the Beleaguered Commuter ( $n = 772$ ) and Battered Woman ( $n = 838$ ) failed the  $\chi^2$  test. “Researchers have addressed the  $\chi^2$  limitations by developing goodness-of-fit indexes that take a more pragmatic approach to the evaluation process.”<sup>86</sup> We selected as our pragmatic goodness-of-fit tests that have been deemed especially suitable for large-sample studies of latent personality and related traits in social psychology:<sup>87</sup> (1) relative chi-square ( $\chi^2/df$ )  $< 5$ ; (2) standardized root mean square residual (SRMR)  $\leq .08$ ; and (3) root mean square error of approximation (RMSEA)  $\leq .08$ .<sup>88</sup>

*a. Beleaguered Commuter analyses.* Figure 5 displays the model constructed to test the hypotheses generated by the Self-Defensive Cognition Model as applied to Beleaguered Commuter. The only direct influence on outcome judgments (“Acquittal,” as measured by the latent variable, BC\_Acquittal) is subjects’ perceptions of the facts (“Pro-Dfct Fact Perceptions,” as measured by the latent variable BC\_Facts).<sup>89</sup> Subjects’ partisan values (reflected in the ideology and party affiliation measures and the latent cultural worldview variables) influence their outcome judgments only *indirectly* through the influ-

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of fit test.”); Sik-Yum Lee, *Structural Equation Modeling: a Bayesian Approach* 111 (2007) (“As pointed out in the statistic literature there are problems associated with [ $\chi^2$ ],” which rejects models “too frequently with large sample sizes.” (citations omitted); Barbara M. Byrne, *Structural Equation Modeling with AMOS: Basic Concepts, Applications, and Programming* 81 (2001) (“Thus, findings of well-fitting hypothesized models, where the  $\chi^2$  approximates the degrees of freedom, have proven to be unrealistic in most SEM empirical research.”)

<sup>86</sup> Byrne, *supra* note 85, at 81.

<sup>87</sup> See André Beauducel & Werner W. Wittmann, *Simulation Study on Fit Indexes in CFA Based on data with Slightly Distorted Simple Structure*, 12 *Structural Equation Modeling* 41, 73 (2005) (concluding that of simulation study that “a model evaluation strategy that focuses on RMSEA, SRMR, and perhaps the  $\chi^2/df$  values . . . for psychometric research on personality traits and for other areas of psychology”).

<sup>88</sup> See Li-tze Hu & Peter M. Bentler, *Cutoff Criteria for Fit Indexes in Covariance Structure Analysis: Conventional Criteria versus New Alternatives*, 6 *Structural Equation Modeling* 1 (1999); Matthew Thomson, Deborah J. MacInnis & C Whan Park, *The Ties That Bind: Measuring the Strength of Consumers' Emotional Attachments to Brands*, 15 *J. Consumer Psychol.* 77 (2005).

<sup>89</sup> Consistent with convention, observed variables are represented by rectangles, while unobserved or latent variables are represented by ovals. See Weston & Gore, *supra* note 79, tbl. 1. The observed variables from which the latent variables are derived (via factor analysis) are omitted for ease of display. See *supra* Part II.A.3 (describing measures used to construct latent variables).

ence of their values on the perceptions of the facts. The model fit the data adequately under each of the selected fitness indexes.

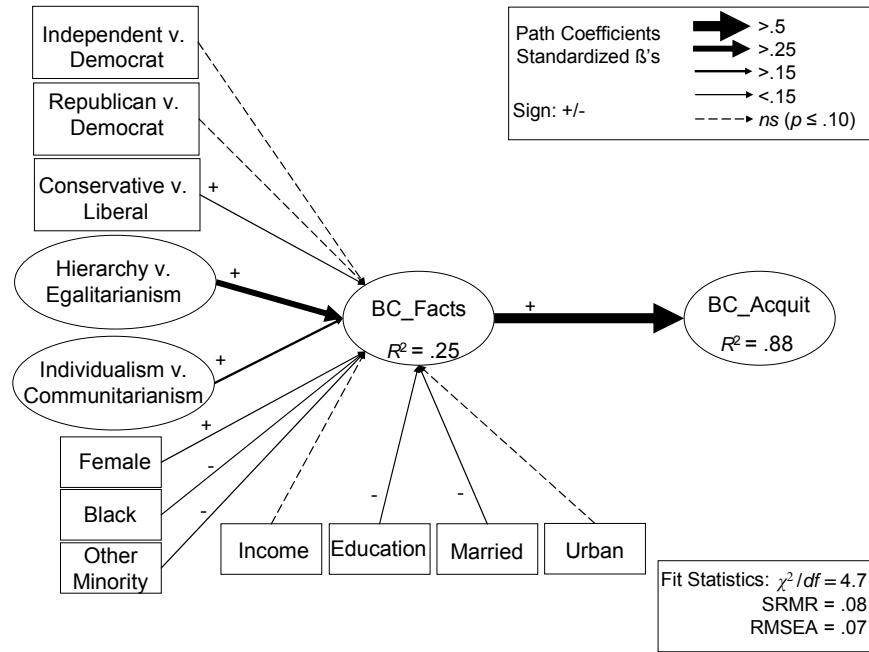


Figure 5. "Self-Defensive Cognition" SEM Model in Beleaguered Commuter Condition

The size and significance of the path coefficients (represented in the form of a multivariate regression Table 2) enable the impact of various influences on pro-defendant factual perceptions to be disentangled and compared. Consistent with our hypotheses, Hierarchy-Egalitarianism and Individualism-Communitarianism both inclined subjects to form a pro-defendant view. Indeed, these variables had the largest impacts, respectively, of all the influences on factual perceptions. Conservatism also weakly predicted a pro-defendant view of the facts, but interestingly, party membership did not generate any significant effect once other influences were controlled for.

<i>Standardized Beta Weights</i>	
Female	.059*
Black	-.108***
Other Minority	-.068**
Income	.000
Education	-.106***
Urban	-.036
Married	-.083**
Hierarchy	.270***
Individualism	.172***
Conservatism	.075*
Republican	.003
Independent	.035
R <sup>2</sup>	.25

*n* = 772. \*\*\* *p* ≤ .01, \*\* *p* ≤ .05, \* *p* ≤ .10. Dependent variable is BC\_Facts.

Table 2. Influences on Pro-Defendant Fact Perceptions in Beleaguered Commuter

After Hierarchy and Individualism, the next biggest impact was associated with being African-American (rather than white). As expected, this individual characteristic, which can plausibly be seen as influencing cognition of facts either as a proxy for group-held values or as a proxy for experiences unrelated to values, negatively influenced subjects' views of the pro-defendant facts. Gender, another characteristic that could influence cognition either through its correlation with self-defining values or its correlation with experiences, weakly predicted a pro-defendant view of the facts.

Two influences that are seemingly unrelated to values also affected perceptions of the facts. One of these was education: the more educated subjects were (holding all other influences constant), the more likely they were to form a view of the facts hostile to the defendant's case. The other was marital status, which likewise (modestly) inclined subjects toward a pro-conviction view of the facts. Income had no effect. Nor did residing in an urban community.

Figure 6 depicts a model constructed to test the relationship between variables associated with the Neutral Umpire Model. In it, only characteristics that arguably exert influence independently of values are treated as affecting fact perceptions, which are themselves treated as the only influence on outcome judgments. Precisely because it takes no account of subjects' values, this model explains over 60% less of the variance in subjects' fact perceptions ( $R^2 = .09$ ) relative to

the previous one ( $R^2 = .25$ ). The model also displayed poor relative fit (SRMR = .10). Overall, then, for Beleaguered Commuter a model that reflects Neutral Umpire hypothesis does not supply as convincing an account of the relationships observed in the data as one that reflects the Self-Defensive Cognition account.

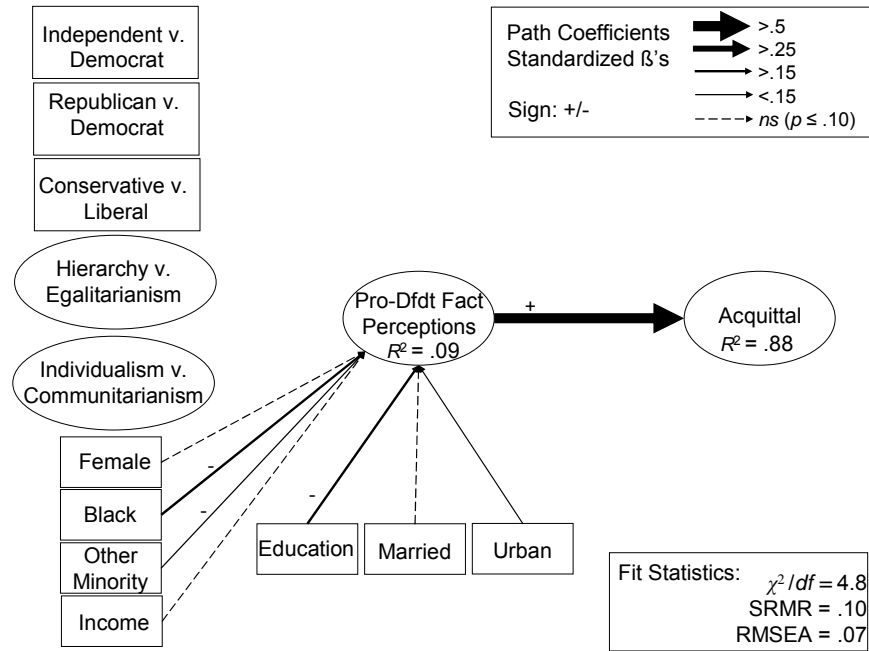


Figure 6. "Neutral Umpire" SEM Model in Beleaguered Commuter Condition

The same is true for a model that reflects the relationships posited by the Partisan Value position. As depicted in Figure 7, that model treats self-defining values (including characteristics with which such values might correlate) as influencing outcome judgments directly, without mediation by fact perceptions, which are themselves deemed to have no effect. That model also does not satisfy the specified fit indexes ( $\chi^2/df = 5.3$ ; SRMR = .11). Failing to take account of the influence of subjects' fact perceptions reduces the power of this model to explain outcome judgments by over 67% ( $R^2 = .20$ ) relative to the two previous models ( $R^2 = .88$ ). Interestingly, once the impact of Hierarchy ( $\beta = .297$ ;  $p < .001$ ) and Individualism ( $\beta = .142$ ,  $p = .02$ ) are taken into account, neither conservative-liberal ideology ( $\beta = .044$ ,  $p = .36$ ) nor Republican-Democrat party affiliation ( $\beta = -.018$ ,  $p = .69$ ) has any significant impact on outcome judgments.

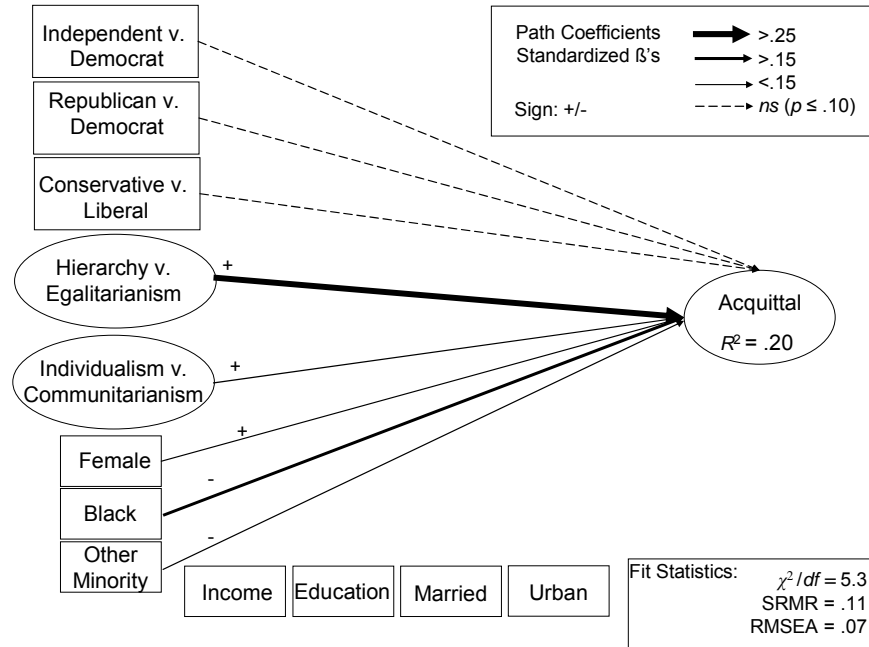


Figure 7. "Partisan Value" SEM Model in Beleaguered Commuter Condition

As we hypothesized, a model based on the Self-Defensive Cognition position fits the data better than ones based on the Neutral Umpire and Partisan Value positions. But as is almost always true in SEM analyses, it remains possible to construct numerous models in *addition* to the hypothesized ones that also satisfy the utilized criteria of fitness. These models, in which values (and characteristics correlating with values) are treated as influencing outcome judgments *both* directly *and* indirectly, essentially involve hybrid combinations of the Self-Defensive Cognition and Partisan Value positions. Fully testing our hypotheses requires a comparison of the adequacy of the Self-Defensive Cognition model reflected in Figure 5 and these other ones.<sup>90</sup>

A technique employing the Bayesian Information Criterion (BIC) was used to perform such a test. BIC is one approach to Bayesian model testing, which computes the odds that any particular model

<sup>90</sup> See generally Adrian E. Raftery, *Bayesian Model Selection in Social Research*, 25 *Sociological Methodology* 111, 113, 120-21 (1995) (describing as "arbitrary" the common practice of accepting an hypothesized model that adequately fits data without evaluating it relative to others that also adequately fit and that generate "different answers to the main questions of interest").



*better* explains the data than another within a specified set of models.<sup>91</sup> BIC uses an algorithm that initially assigns all models an equal likelihood of being the best fitting and that thereafter updates its estimations in light of the relative fit of each model compared to that of every other one.<sup>92</sup> In our BIC analysis, we compared the model depicted in Figure 5 to the 255 potential alternative models formed when the 8 variables representing subjects values (Hierarchy, Individualism, Conservatism, Republican, and Independent, as well as Black, Other Minority, and Female) were treated as potentially influencing not just factual perceptions but also outcome judgments, either uniquely or in combination with one or more of the others.<sup>93</sup>

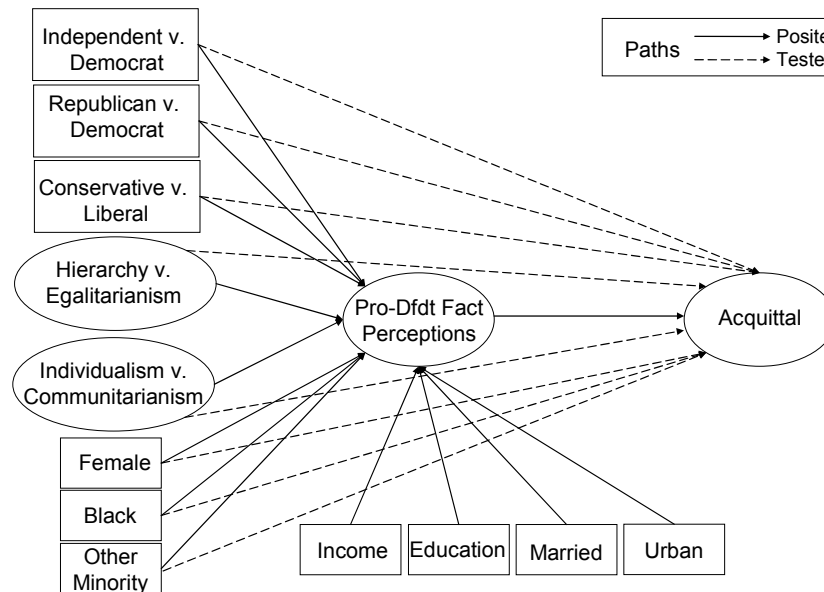


Figure 8. Posited Relationships and Tested Alternatives in Beleaguered Commuter BIC Analysis

This analysis indicated that the model in Figure 5 was the *most* likely of the tested models to be the best fitting one. The odds that that model was the best-fitting were greater than 3:1—the cutoff

<sup>91</sup> See Lee, *supra* note 85, at 113-15, 127-28.

<sup>92</sup> See Raftery, *supra* note 90, at 111, 130-33, 137-38.

<sup>93</sup> The total number of possible models when each of the eight value-related variables can be individually included or excluded is 2<sup>8</sup> or 256.

conventionally deemed to furnish “positive” proof that the less plausible model should be rejected<sup>94</sup>—for every alternative except one. That one, which had a BIC score of 1.13 (approximately 2.1:1 against being a better fit), was identical to the one in Figure 5 except that it treated the variable “Independent vs. Democrat” as influencing outcome judgments both directly as well as indirectly through its impact on fact perceptions. The effects associated with this variable were small ( $\beta = .060$ ,  $p = .10$ , for BC\_Facts;  $\beta = -.067$ ,  $p = .02$ , for BC\_Acquittal). In addition, the *signs* were opposed to one another. The meaning of this result is complex: essentially, subjects who described themselves as Democrats were (all else equal) slightly less inclined to have a pro-defendant view of the facts, yet *controlling for pro-defendant fact perceptions* more inclined toward acquittal, than ones who described themselves as independents. Far from undermining the proposition that self-defensive cognition explains political division in the Beleaguered Commuter case, this result suggests that *more* than 100% of the disposition of Democrats to convict relative to independents is mediated by the influence of being a self-described Democrat on subjects’ values on their cognition of facts. On the whole, though, it would seem unsound to assign much significance to this statistical quirk, particularly given that the most meaningful political divisions in Beleaguered Commuter are between Democrats and Republicans, not Democrats and independents.

*b. Battered woman.* To analyze the data in the Battered Woman condition, we again constructed models that would allow us to assess the relationships among variables of interest associated with the Self-Defensive Cognition, the Neutral Umpire, and the Partisan Value positions. The models utilized the Battered Woman fact perception and outcome judgment variables (BW\_Facts and BW\_Acquittal, respectively) but were otherwise identical to those depicted in Figures 5-7. We again found that the Self-Defensive Cognition model adequately fit the data ( $\chi^2/df = 4.7$ ; SRMR = .08; RMSEA = .07). Partisan Value again did not ( $\chi^2/df = 5.4$ ; SRMR = .09; RMSEA = .07). But this time Neutral Umpire also did ( $\chi^2/df = 4.7$ ; SRMR = .08; RMSEA = .07).

Not surprisingly, it was possible to construct various other, non-hypothesized models that combined various elements of these three that also adequately fit the data. Accordingly, to assess the relative

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<sup>94</sup> See Raftery, *supra* note 90, Tbl. 6.

plausibility of these various models, we again performed a BIC analysis. Models that contemplated various combinations of values influencing outcome judgments either directly or indirectly were again included in the testing set. But this time so were models that contemplated that none of the value measures would have any effect whatsoever on outcome judgments, the relationship asserted by the Neutral Umpire Position. The tested combinations of relationships, which formed 8,192 discrete models, are reflected in Figure 9.

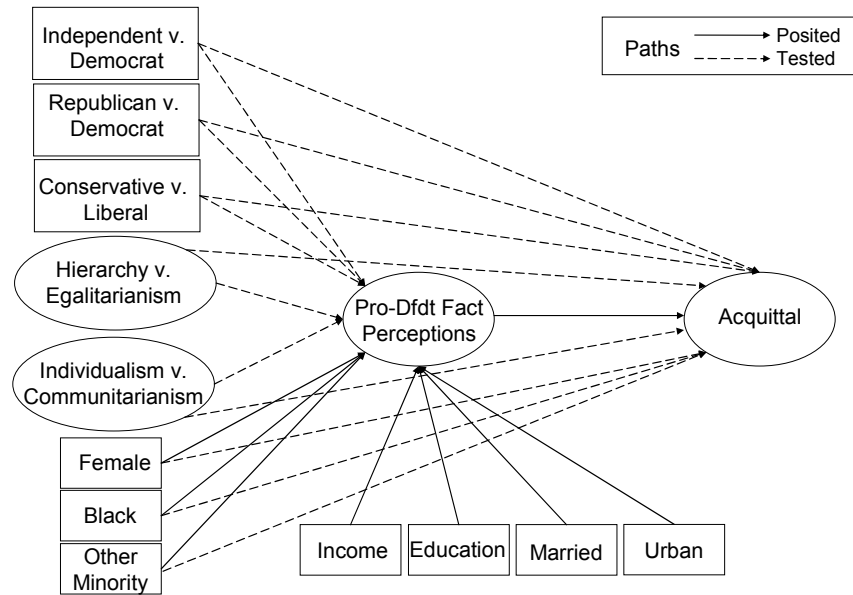


Figure 9. Posited Relationships and Tested Alternatives in Battered Woman BIC Analysis

The model deemed most likely to be the best fitting one is displayed in Figure 10. Inconsistent with the Neutral Umpire position but consistent with the Self-Defensive Cognition position, variables unambiguously associated with subjects' values—namely, the Hierarchy-Egalitarian measure of worldview, and liberalism-conservatism—influence subjects' positions, and do so indirectly through their effect on subjects' pro-defense perception of the facts. These effects are large, relative to other influences. The Individualism-Communitarianism dimension of worldview does not affect subjects' fact perceptions, a result not unexpected, given the ambiguity of the social meaning of Battered Woman relative to this constellation of norms. Nor does party affiliation. As expected, gender has a positive

effect on subjects' factual perceptions. So does being married. Education has a weak negative effect.

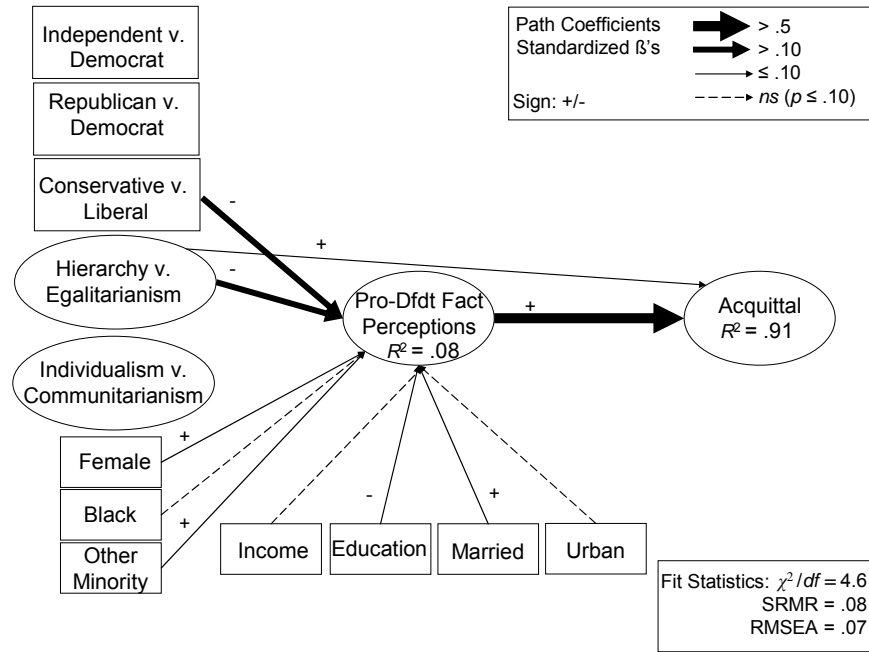


Figure 10. Most Probable Best-Fitting Model in Battered Woman

Although it posits that fact perceptions strongly explains variation in outcome judgments, the model explains only a modest amount of the variation in subjects' fact perceptions ( $R^2 = .08$ ). Its explanatory power in this regard is about one-third as large of that of the Beleaguered Commuter in Figure 5 ( $R^2 = .25$ ). Absent a plausible conjecture as to how any omitted variables might correlate to the observed ones, however, there is no reason to doubt that the model accurately captures the influence of, and relationship between, the variables deemed to influence fact perceptions.<sup>95</sup>

<sup>95</sup> See Jacob Cohen, Patricia Cohen, Stephen G. West & Leona S. Aiken, *Applied Multiple Regression/Correlation Analysis for the Behavioral Sciences* 143 (3rd ed. 2003).

<i>Standardized Beta Weights</i>	
Female	.060*
Black	-.018
Other Minority	.064*
Income	-.045
Education	-.067*
Urban	-.025
Married	.092**
Hierarchy	-.143***
Conservativism	-.109**
R <sup>2</sup>	.08

*n* = 838. \*\*\* *p* ≤ .01, \*\* *p* ≤ .05, \* *p* ≤ .10. Dependent variable is BW\_Facts.

Table 3. Influences on Pro-Defendant Fact Perceptions in Battered Woman

In this model, the Hierarchy-Egalitarian dimension of worldview also has a small and significant *direct* effect ( $\beta = .060$ ,  $p = .02$ ) on outcome judgments. This relationship would appear more in keeping with the Partisan Value position than with the Self-Defensive Cognition one. But this appearance is misleading.

The *sign* of the direct effect of Hierarchy on outcome judgments is *positive*, the opposite of the larger ( $\beta = -.140$ ,  $p = .00$ ) indirect effect of Hierarchy on pro-defendant fact perceptions. In other words, being hierarchical, as expected, influences subjects to adopt an anti-defendant view of the facts in Battered Woman. It also inclines them to favor acquittal *when factual perceptions are held constant*, but this result is merely a statistical artifact of the immense size of the mediating effect of fact perceptions on hierarchs' and egalitarians' positions on the Battered Woman case. In effect, the overall effect of a hierarchical orientation on the disposition to convict the defendant is so strongly concentrated on the impact of values on subjects' fact perceptions that the *mediated* effect of worldviews explains *more than* 100% of the overall variance in the disposition of Egalitarians and Hierarchs to acquit her.

Only one other model tested in the BIC analysis survived the 3:1 cutoff criterion for positive proof of inadequacy. That model, which had a BIC score of .768 (odds of approximately 9:8 against being superior to the model depicted in Figure 10), was identical to the one depicted in Figure 10 except that it posited a *direct* effect between the Individualism-Solidarism and outcome judgments. That effect was

small and insignificant ( $\beta = -.035$ ,  $p = .29$ ). The potential superior fitness of this model, then, furnishes no meaningful basis for questioning the basic results of the model depicted in Figure 10.

### C. Discussion

#### 1. Summary of Results

The aim of the study was to examine a set of hypotheses supportive of the larger proposition that self-defensive cognition, not partisan disregard of facts and controlling law, explain political conflict over self-defense cases. The results of the study strongly supported these hypotheses.

First, we found, not surprisingly, that cases patterned on the iconic battered woman and beleaguered commuter do divide people of diverse values. The divisions, moreover, form mirror images of each other. In the beleaguered commuter case, persons of egalitarian and communitarian worldviews, and persons who describe themselves as liberals or Democrats, are more likely to convict than persons of hierarchical and individualist views, and those who describe themselves as conservatives or Republicans. In the battered woman case, the positions of these sets of persons is reversed.

Second, we found that the influence that values exert over outcome judgments is *mediated* by the impact of the commitments on individuals' perceptions of the facts. Consistent with the self-defensive cognition hypothesis, the data showed that subjects of differing values formed opposing views of the key facts (which were structured to be largely parallel in both cases). The proposition that subjects would favor outcomes that fit their values independently of their view of the key facts not supported by the evidence. SEM models that treated values as influencing outcome judgments *directly*, independently of their influence on fact perceptions, failed to fit the data. Models that posited that values could *simultaneously* influence perceptions of facts and outcome judgments suggested that *holding fact perceptions* constant persons of particular commitments were inclined to decide cases in the manner that was *contrary* to the positions associated with their values—an anomaly that only confirms how decisive the contribution of varying fact perceptions is to the political conflict actually observed in such cases.

Not surprisingly—or unexpectedly—values turned out not to be the *only* influence on our subjects' fact perceptions. Two others that did—race and gender—are themselves recognized to be correlated with values (cultural, moral, and otherwise) that are essential to individual identity. But at least two other characteristics that mattered—level of education and marital status—would seem to be connected to value-independent experiences that influence the sorts of understandings people might use to assess the plausibility of competing factual claims in the battered woman and beleaguered commuter cases. But *none* of these individual characteristics had as strong a bearing on subjects' factual perceptions as the values did.

Third and finally, we found that cultural worldviews—a species of value that is known to motivate identity-protective cognition—made a relatively large contribution to variance in our subjects' factual perceptions. This was especially true in *Beleaguered Commuter*, where Hierarchy-Egalitarianism and Individualism-Communitarianism were the two largest fact-perception influences.

Hierarchy-Egalitarianism, but not Individualism-Communitarianism, affected fact-perceptions in *Battered Woman*, once all other influences were controlled for. This was not totally unexpected, since we were unable to form an unequivocal hypothesis about how the Individualism-Communitarianism dimension of worldview would dispose subjects to view the actors involved.

The impact of conventional political commitments was mixed. Political party affiliation made no significant contribution to variance in fact perceptions in *Beleaguered Commuter* once other influences were controlled for, and did not figure in the best-fitting models in *Battered Woman*. Liberal-conservative ideology made a significant but very modest contribution in *Beleaguered Commuter* after cultural worldviews were taken into account. However, in *Battered Woman*, liberal-conservative ideology had a bigger impact, one that approached that of Hierarchy-Egalitarianism. The performance of liberal-conservative ideology in the analyses bears on the question of how important ideology is relative to culture in orienting individuals' understanding of how the world works.<sup>96</sup> But because it is not disputed that political ideology can be a source of values essential to individual identity, the contribution that liberal-conservative ideology

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<sup>96</sup> See generally Wildavsky, *supra* note 78; Braman *et al.*, *supra* note 78.

made in this case is perfectly consistent with—indeed unambiguously supportive of—our primary claim: that self-defensive cognition is the source of political conflict over self-defense cases.

## 2. Issues for Future Research

*a. The missing link.* The study examined the connection between people's values and their reactions to certain types of self-defense cases. Our conclusion was that persons aren't ignoring facts at odds with their preferred outcomes; rather they are psychologically motivated to conform their view of the facts to the outcomes most in keeping with their values.

It should be possible, though, to refine and enrich this picture of how values enter into cognition of facts. Self-defensive cognition posits that individuals are drawn (subconsciously) to facts supportive of their values, particularly ones connected to group commitments. But *some* process must also be occurring that enables subjects to *recognize* what those facts are.

One might suspect that subjects are *first* identifying what result they prefer on the basis of their values and then subconsciously working backward, as it were, to identify and find support for the facts that cohere with that outcome. Because it accepts that individuals end up honestly believing that the outcome they support is dictated by facts independent of their values, this "confirmation bias"<sup>97</sup> thesis would move persons of diverse values to disagree on politically controversial cases in patterns consistent with those of self-defensive cognition thesis.

Nevertheless, we suspect the confirmation bias does *not* accurately capture the psychological experience of persons evaluating self-defense cases like the ones featured in this study. That is, we doubt that persons self-consciously identify the outcome they prefer *before* they look at the facts in the case; we imagine, at least, that they perceive themselves to be deferring an outcome judgment until *after* they have consulted the facts in a manner that comports with neutral decisionmaking. If so, then something other than a "peek" at the result

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<sup>97</sup> See generally C. R. Mynatt, M. E. Doherty & R. D. Tweney, *Confirmation Bias in a Simulated Research Environment--Experimental-Study of Scientific Inference*, 29 Q.J. Exp Psychol. 85 (1977).



must nevertheless be making them converge on facts congenial to their values. What might that other influence be?

We can think of two related ones. The first is *social meaning*. The Battered Woman and Beleaguered Commuter vignettes likely evoke competing sets of culturally resonant symbols—of the historic denigration of social prerogatives within the home; of heroic opposition to entrenched forms of patriarchy; of the breakdown of legitimate social order and a righteous attempt to reverse the same; of the imposition of racial dominance; of virtuous self-reliance; of the disparagement of nonviolent, reasoned self-governance. Which of these symbols the fact patterns evoke in individuals and their evaluation of them—matters strongly conditioned by individuals' self-defining values—dispose individuals to adopt corresponding views of the facts.<sup>98</sup>

Another possible link between values and fact perceptions is *affect*. Contemporary work in psychology and neuro-science suggests that emotions play a critical role—a preverbal one, not reproducible by reflective or deductive reasoning—in enabling individuals to perceive what states of affairs, and what stances toward them, best express their values.<sup>99</sup> Mark Alicke, the originator of the “culpable control” model of blame attribution, posits that affective responses to norm-violative behavior guide individuals' cognition of the existence of factual predicates of blame.<sup>100</sup> Work on the cultural cognition of risk suggest that affective judgments enable the same expressively rational stance taking when individuals form factual judgments about putatively dangerous activities.<sup>101</sup> It seems plausible that individuals who encounter facts like those in the Battered Woman and Belea-

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<sup>98</sup> See Geoffrey L. Cohen, *Party over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. Personality & Soc. Psych. 808 (2003) (finding support for mediating influence of social meanings on effects of in-group affinity on belief formation).

<sup>99</sup> See generally Antonio R. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (1994); Martha Craven Nussbaum, *Upheavals of Thought: The Intelligence of the Emotions* (2001).

<sup>100</sup> See Alicke, *supra* note 51, at 558.

<sup>101</sup> See Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, Penn. L. Rev. (forthcoming 2008); Ellen M. Peters, Burt Burraston & C. K. Mertz, *An Emotion-Based Model of Risk Perception and Stigma Susceptibility: Cognitive Appraisals of Emotion, Affective Reactivity, Worldviews, and Risk Perceptions in the Generation of Technological Stigma*, 24 Risk Analysis 1349 (2004).

guered Commuter vignette are likewise forming affective judgments, themselves conditioned by their values, that guide them to adopt views of the facts that best express their defining commitments.

Indeed, social meaning and affect might well work in tandem. That is, the immediate symbolic connotations that such cases evoke in persons of diverse values themselves trigger or become the objects of emotions that then dispose individuals toward value-supportive views of the facts.

These hypotheses, too, are worthy of study. Appropriately designed experiments could assess what contribution, if any, confirmation bias, social meaning, and affect play within the perception of facts in controversial self-defense cases. Such studies would not only help to validate, and extend understanding of, the function of self-defensive cognition in this setting. It might also furnish insights on forms of structuring information about such cases that counteracts the influence of self-defensive cognition—assuming counteracting it is in fact an appropriate end.<sup>102</sup>

*b. Deliberation.* Each subject in our study assessed on her own the facts of the self-defense case that she was assigned to decide. In the real world, individuals tend to evaluate facts like these in groups, whether as members of juries deciding cases or citizens debating whether jury verdicts are sound. Adding elements of deliberation would be a worthwhile way to extend the research carried out in our study.

In fact, the impact of deliberation on legal and political decisionmaking has already been subject to extensive assessment. Certain forms of highly structured group discussion appear sometimes to mute disagreements on policy matters.<sup>103</sup> But most forms of deliberation, including ones that occur in real-world legal settings, have exactly the opposite effect. The phenomenon of “group polarization” refers to the tendency of individuals to adopt progressively more extreme views as they exchange views on disputed issues.<sup>104</sup> The effect is particularly acute when members of diverse groups deliberate, re-

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<sup>102</sup> See text at notes 139-140.

<sup>103</sup> See Bruce A. Ackerman & James S. Fishkin, *Deliberation Day* (2004).

<sup>104</sup> See generally Cass R. Sunstein, *The Law of Group Polarization*, 10 J. Pol. Phil. 175 (2002)..

sulting, typically, in highly uniform views within such groups and highly opposed ones across them.<sup>105</sup>

It's unlikely that a study of deliberation in politically controversial self-defense cases would generate different results. Nevertheless, adding deliberation to a study like the one we performed could profitably be used to examine at least two issues.

One would be the comparative effects of deliberation on jury verdicts, on the one hand, and public reactions to jury verdicts, on the other. Left to their own devices, individuals tend to expose themselves to information sources (whether media outlets, authority figures, or peers) that share their own cultural and ideological outlooks.<sup>106</sup> This disposition can be expected systematically to magnify political and cultural polarization. Jurors, in contrast, discuss matters in relatively small groups whose membership they cannot influence; individuals deliberating under such circumstances continue to migrate toward extremes,<sup>107</sup> but the orienting signal of culture or ideology is necessarily diluted for them. It's conceivable that this effect explains why juries, even relatively diverse ones, might converge with relative ease on unanimous verdicts that nevertheless generate intense political divisions in the public at large. Such a finding would be relevant to assessing the often-asserted importance of juries in gaining acceptability for or "legitimizing" potentially controversial outcomes.

Including deliberation in the study of controversial self-defense cases would also allow investigation of potential responses to the effects of self-defensive cognition. Empirical work in other settings has suggested techniques that can mitigate the disposition of individuals to resist information that threatens their values.<sup>108</sup> If mitigation of the effects of self-defensive cognition is deemed socially desirable, experimental studies could be designed to determine how that objec-

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<sup>105</sup> See generally See generally David Schkade, Cass R. Sunstein & Reid Hastie, *What Happened on Deliberation Day?*, 95 Cal. L. Rev. 915 (2007) (demonstrating effect experimentally); Donald Braman, Dan M. Kahan & James Grimmelman, *Modeling Facts, Culture, and Cognition in the Gun Debate*, 18 Soc. J. Res. 283-304 (2005) (simulations of this effect).

<sup>106</sup> See *id.*

<sup>107</sup> See Sunstein, *supra* note 104.

<sup>108</sup> See Cohen, *et al.* *Partisan Divide*, *supra* note 3; Cohen, *et al.*, *Affirming the Self*, *supra* note 3.

tive might be pursued, both in the jury room and in the town square. Whether society *ought* to view self-defensive cognition as a phenomenon worthy of neutralization in the resolution and evaluation of controversial criminal cases, and if so what sorts of interventions might have that effect, are matters we take up in the next Part of this paper.

### III. THE SELF-DEFENSIVE COGNITION OF SELF-DEFENSE: AN APPRAISAL

Our study considered the wide-spread perception that partisan values account for popular controversy over self-defense cases. They do, our results suggest, but in a way that defies the dominant academic versions of this claim. There's every reason to believe that citizens of diverse moral and cultural persuasions are faithfully applying the doctrine; it's the *unperceived* cognitive impact of their values on their cognition of the facts that induces them to disagree on what those criteria entail in particular cases.

We now want to consider the moral and practical significance of the self-defensive cognition of self-defense. Is the influence of individuals self-defining values on their perceptions of facts in self-defense cases something to be concerned about? If so, what, if anything, can be done?

#### *A. Is There a Problem? Self-Defensive Cognition Meets Cognitive Illiberalism*

As we've discussed, both popular and scholarly debate over self-defense has been consumed with the conflict between the Neutral Umpire and Partisan Value Models. Abuse-excuse critics lament the subversion of the former by the latter. New Normativists complain only about the reluctance of decisionmakers and commentators to acknowledge the dominance of the Partisan Value position so that members of the public can see and react to the contribution contested visions of the good can make to the law.<sup>109</sup>

We can imagine how those on both sides of this dispute might in fact welcome the finding that self-defensive cognition is at work in controversial self-defense cases. Abuse-excuse critics—or at least those who are dismayed by their indictment of the law—might be relieved to learn that citizens (legal decisionmakers and those who react to what decisionmakers have done) *aren't* in fact putting their

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<sup>109</sup> See *supra* text at notes 36-50.

partisan commitments ahead of the law's impartial commands but instead are judging based on their honest perception of the facts. To be sure, citizens of diverse values *disagree* about the facts. But honest disagreements of fact are hardly extraordinary and aren't normally understood to pose a threat to the law's legitimacy. It's enough, one might think, that citizens, sincerely *try* to be impartial; no sensible conception of neutrality in law could require that impartially motivated citizens always come to the same conclusions.

New Normativists might also take heart in the contribution of self-defensive cognition to disputes over self-defense. They perceive in the law's focus on facts (ones relating dangerousness, volition, and the like) a design to *conceal* the impact of partisan values. But the phenomenon of self-defensive cognition complicates the fact-value distinction. Citizens who react to media and other popular depictions of battered women and beleaguered commuter cases (not to mention law students who react to judicial opinions featuring them) can only speculate about what was going on in the minds of the parties involved or what would have transpired had the defendant not resorted to deadly force. Even jurors who sit in judgment in such cases have no direct access to evidence of such matters. Individuals draw on their own common sense to form judgments on these issues; yet it turns out their sense of how the world works turns primarily on shared understandings of how it *should*. Charting the impact of self-defensive cognition promotes the New Normativist agenda of moral transparency by revealing factual conflict to be just another way we contest competing understanding of the good life through law.

But we are much less sanguine. The basis of our anxiety about self-defensive cognition is the phenomenon of *cognitive illiberalism*.<sup>110</sup> Cognitive illiberalism refers to the tendency of individuals to conform their perceptions of how risky or harmful putatively dangerous behavior is to their cultural or moral evaluations of that behavior. It can be viewed as a distinctive bias in *moral* reasoning for persons who believe the law should eschew the enforcement of a partisan moral orthodoxy and confine itself to the promotion of secular ends agreeable to persons of diverse moral and cultural persuasions.<sup>111</sup>

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<sup>110</sup> See Kahan, *supra* note 5.

<sup>111</sup> See *id.*

We think the possible reactions we've attributed to abuse-excuse critics and New Normativists fail to recognize that the self-defensive cognition is, in this context at least, a species of cognitive illiberalism. By way of response to these positions, we'll present two points that reflect this theme. One relates to how self-defensive cognition likely disappoints the ends of individuals who desire to judge impartially, and the other to how this phenomenon defeats society's ends in reaching legitimate outcomes in self-defense cases that respect the cultural and moral identities of its citizens.

### 1. Individual Judgments: Values or Blunders?

The normative status of beliefs formed through self-defensive cognition is a complicated issue. Those beliefs are factual in nature and relate, typically, to personal and societal dangers (the impact of climate change, the hazards of gun ownership, the effects of illegal drug distribution, etc.). They derive, however, from individuals' defining values, which motivate them to resolve factual ambiguities in a way that supports conclusions favorable to activities and social roles vital to their identities.<sup>112</sup> Of course, the idea that reality is as one wishes it to be is not a very reliable guide for action; it can indeed be viewed as a form of cognitive error.<sup>113</sup> For that reason, one might conclude there is little reason for persons who hold such beliefs, much less others they have entrusted to make decisions about how best to secure their safety and well-being, to view them as worthy of any particular deference or respect.<sup>114</sup>

While not simply wrong, this account is, in our view, too simple. Self-defensive cognition, like dynamics of cultural cognition generally, is not perfectly analogous to, say, "base rate neglect," "overgeneralization," "extremeness aversion," "the gamblers fallacy," and various other forms of cognitive bias.<sup>115</sup> These dynamics are manifestations

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<sup>112</sup> Kahan *et al.*, *supra* note 59.

<sup>113</sup> See Jon Elster, *Alchemies of the Mind: Rationality and the Emotions* 20-21 (1999) (describing how "wishful thinking" borne of cognitive-dissonance avoidance can "lead[] to false beliefs about the world, . . . [the] acting [on which] can have bad consequences").

<sup>114</sup> See Cass R. Sunstein, *Misfearing: A Reply*, 119 Harv. L. Rev. 1110, 1111 (2006) (making this argument about factual beliefs that arise from cultural cognition).

<sup>115</sup> See *generally* Judgment under Uncertainty: Heuristics and Biases (Daniel Kahneman, Amos Tversky, & Paul Slovic eds., 1982).

of “bounded rationality”; they reflect ubiquitous limits on the power of individuals to process information in a way that promotes their well-being.<sup>116</sup> Individuals don’t identify with these constraints on their computational acumen; they regret them. As a result, they might indeed welcome the intervention of others—perhaps expert risk regulators—who possess the training, technology, and resources necessary to make decisions undistorted by these influences. Self-defensive cognition, in contrast, is a product of our attachment to our most deeply held values. Whatever their influence on our cognition, we would never disown them; they are integral to our sense of who we are. When an expert regulator or another acting on our behalf decides to afford no weight to such beliefs, she is necessarily leaving out of her decisionmaking framework a vital element of *our* agency.<sup>117</sup>

But that doesn’t mean, we’d argue, that beliefs that are the product of self-defensive cognition should invariably be viewed as normative for our decisions or the decisions of those who represent us. Action based on those beliefs, if they are in error, might have noxious consequences that the person holding those beliefs would herself view as unacceptable. In addition, indulging those beliefs just *because* they derive from values might offend *other* values the person holds, including ones that relate to *whether* the sorts of values that have given rise to the belief in question are proper sources of guidance for law.<sup>118</sup>

To sort out these complexities, we’d propose that the entitlement of such beliefs to moral respect be tested by asking this question: *If* the person who held such belief could be *shown* that it arises from self-defensive cognition, how would *she* feel about it? Again, a person who could be shown she’d made a computational error based on some dynamic of bounded rationality would repudiate any conclusion that follows from it. She might not do the same, however, for a belief that arises from her self-defining values. Cultural individualists, for example, tend to believe that private gun ownership reduces

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<sup>116</sup> See generally Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 Am. Econ. Rev. 1449 (2003).

<sup>117</sup> See Kahan *et al.*, *supra* note 58, at 1104-06.

<sup>118</sup> See generally Dan M. Kahan & Paul Slovic, *Cultural Evaluations of Risk: “Values” or “Blunders”?*, 119 Harv. L. Rev. F. 1110 (2006) (developing this argument)

rather than increases crime.<sup>119</sup> But if they learned that their disposition to believe this proposition had been influenced by the cultural value they attach to guns and the stake they have in occupying social roles that involving owning one, it seems unlikely they would assent immediately to a hand gun ban.<sup>120</sup> On the contrary, they might be relieved to learn that they can rely on their values (likely through the mediating influence of emotion<sup>121</sup>) to identify the position an uncertain factual question that best *expresses* their cultural commitments. Or they might see the cultural values (self-reliance, individual courage, freedom, and the like) that motivated them to form that belief as justifying gun rights whatever the impact of gun ownership might be.

The critical issue, then, is whether individuals who could be shown that their self-defining values had shaped their view of the facts in cases like Battered Woman and Beleaguered Commuter would be similarly unshaken in their conclusions about how those cases should be decided. We think the answer is *no*. On the contrary, we think they would view it as the distinctive form of bias in moral reasoning characteristic of cognitive illiberalism.

Our position here is based on a mixture of informed speculation about how people *do* feel about the relationship between their values and self-defense cases and our own moral view about how they *should*. Our fundamental premise is that most citizens are *not* (and should not be) moral imperialists. They have views—deeply held ones—about the nature of the good life. But they by and large accept (as they ought to) the fundamental tenet of political liberalism that the law should not force their view of the good on others, who should be free (subject to laws necessary to secure equal liberty for all) to pursue their own understanding of the best way to live.<sup>122</sup> Such individuals, we believe, would perceive that the actors involved

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<sup>119</sup> See Kahan *et al.*, *supra* note 59.

<sup>120</sup> Cf. Cultural Cognition Project, *What Matters More--Consequences or Meanings?*, <http://research.yale.edu/culturalcognition/index.php?option=content&task=view&id=104> (reporting finding that 87% of Americans who oppose stronger gun control laws agree with proposition that “[e]ven if banning handguns would greatly reduce crime, it would be wrong for society to forbid law-abiding people from owning guns for self-protection.”).

<sup>121</sup> See Kahan, *supra* note 101.

<sup>122</sup> See generally John Rawls, *A Theory of Justice* 31-32 (1971); John Stuart Mill, *On Liberty*, 14 (D. Spitz ed., 1975).



in controversial self-defense cases—the putative aggressors and the putative defenders, alike—are often involved in patterns of living that variously gratify and offend contested views of the good life. But they would *not* believe it was appropriate to condition the right to defend oneself through violence, or to be protected from violence not reasonably necessary for another’s self-defense, to depend on their own particular view. If they believed that, we would have found that that Partisan Value Model best explained the results in our study. Instead, such individuals would desire to decide such cases according to criteria—the very ones reflect in the dominant doctrine of self-defense—that make the privilege to defend and the entitled to be protected available to all regardless of their cultural or social identities. That’s why we found that individuals of all cultural and political persuasions do conform their outcome judgments to their perceptions of the *facts* in cases like Battered Woman and Beleaguered Commuter.

We think persons who see the task of judging in controversial self-defense cases this way would be profoundly disappointed to learn that what they perceive the facts to be is itself a product of their partisan values. They would not adopt the view—attributed to us at the outset to the relieved abuse-excuse critic—that honest efforts at impartiality are sufficient to quiet the anxiety of partisan bias in the law. These people (our subjects, as we interpret the data from our study) *want* to be neutral umpires; they would be no more heartened to learn that their partisan values were exerting secret control over their perceptions of the facts than would a real baseball umpire to learn that his rooting interest for a particular team was subconsciously subverting his goal to call a fair game. Nor would these individuals accept the advice of our imagined New Normativist. They would not want to be told openly to *embrace* the values expressed by their perception of the facts; they want to be told how, given their commitment to the law’s own humanist aspirations, they can learn to see the facts in a way that *isn’t* just a disguised reflection of their vision of the ideal society.

## 2. Collective Judgments: Accuracy, Legitimacy, and Illiberal Status Competition

Whether or not baseball can handle variance in strike zones across umpires,<sup>123</sup> it's clear that what we have called the Neutral Umpire Model can tolerate at least some forms of variance in factual perceptions among self-defense decisionmakers. The effect and weight a legal decisionmakers affords to evidence depends on general understandings about how the world works, and those understandings are certain to vary based on all manner of experience—education, sociodemographic background, significant personal events, and the like. Knowing that jurors perceive facts differently based on the diversity of their backgrounds doesn't undermine our confidence in verdicts. On the contrary, reliance on the jury helps (it is thought) to legitimize verdicts by assuring that the *law's* perception of facts reflects exactly this diversity in popular understandings of the workings of the world.<sup>124</sup>

The reaction we attributed to the relieved abuse-excuse critic presupposes that conflicting fact perceptions that originate in diverse *values* can be accommodated by the Neutral Umpire Model in exactly the same way. In our view, this is not the case.

To start, whereas the contribution that diverse life experiences make to factual perceptions arguably enhances rational decisionmaking, the contribution made by self-defensive cognition seems to subvert it. A rational decisionmaker will necessarily draw on all the information her experiences afford her. She'll also revise her beliefs in light of new experiences, including exposure to other persons who have different backgrounds and hence different interpretations of ambiguous evidence.<sup>125</sup> This is not how individuals reason when they are laboring under the influence of self-defensive cognition, however.

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<sup>123</sup> See Nick Cafardo, *Ortiz: It's No Ball Figuring out What Is a Strike*, Boston Globe, Apr. 6, 2006, at D13 (“With the help of Red Sox video coordinator Billy Broadbent, Ortiz put together a video of all the pitches he took for strikes last season, and he said he was stunned by some of the pitches umpires called strikes, some of which the designated hitter claims were way out of the zone.”).

<sup>124</sup> See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 529-30 (1975) (“the requirement of a jury's being chosen from a fair cross section of the community” enables the jury to promote “public confidence in the fairness of the criminal justice system”).

<sup>125</sup> See generally Howard Raiffa, *Decision Analysis: Introductory Lectures on Choices Under Uncertainty* (1968).

In that situation, they selectively attend to information based on its congeniality to identity-affirming beliefs and construe ambiguous evidence in a way that confirms their identity-affirming priors. They also reject as non-credible information that unequivocally threatens those beliefs, particularly when they come from people they perceive as holding contrary values or group identities.<sup>126</sup> As a result, differences of factual perceptions founded on diversity of values would seem to pose a much greater threat to *accuracy* in outcome judgments than differences founded in diversity of life experiences.

Equally important, differences in such perceptions would also pose a much bigger threat to the law's legitimacy. The political acceptability of law depends on its power to assure disparately situated citizens that the law's judgments have been arrived at in a way that takes their interests and identities into account. There seems little reason to believe that differences in factual beliefs founded on citizens' diverse backgrounds will erode that power, particularly given the existence of institutions—like juries and popularly elected legislatures—designed (it's thought) to pool and aggregate the insights furnished by citizens' collective experiences.<sup>127</sup>

But factual disagreements based on self-defensive cognition are another matter. Those sorts of disagreements, again, are much more likely to survive, and even deepen, over the course of deliberation.<sup>128</sup>

What's more, precisely because such beliefs bear such an intimate connection to citizens' identities, the law is much more likely to inflict a deep sense of resentment and alienation in the losers when it picks sides on these issues than it does when it take a position on other types of facts citizens disagree with. The reason has to do with

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<sup>126</sup> See Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in *Barriers to Conflict Resolution* 27 (Kenneth J. Arrow *et al.* eds., 1995).

<sup>127</sup> On juries, see, for example, Jeffrey Abramson, *We the Jury: The Jury System and the Ideal of Democracy* 11 (1994) (“Long ago, Aristotle suggested that democracy's chief virtue was the way it permitted ordinary persons drawn from different walks of life to achieve a ‘collective wisdom’ that none could achieve alone. At its best, the jury is the last, best refuge of this connection among democracy, deliberation, and the achievement of wisdom by ordinary persons.”). On legislatures, see, for example, John Gastil, *By Popular Demand* 113 (2000) (defending “deliberative discussion” as “creat[ing] more educated and active citizens and reveal[ing] popular and effective solutions to pressing national and local problems”).

<sup>128</sup> See *supra* notes 104-105.

another psychological dynamic: naïve realism. Ordinary people, social psychologists have documented, can readily perceive that the factual beliefs of their opponents in political debate derive from the congeniality of those beliefs with the latter's self-defining values and group commitments. In this sense, ordinary people are *realists*. What makes them simultaneously *naïve* is their inability to detect that *their own* factual beliefs have the same source.<sup>129</sup> Because it induces reciprocal charges of stupidity and dishonesty, naïve realism generates an atmosphere of distrust, which reinforces the disposition of citizens to accept the arguments of persons who hold cultural allegiances different from their own. It also heightens everyone's sense of identity-threat: in a deliberative climate in which citizens are conspicuously divided along cultural and moral lines, and in which each insists the others' position is the product of bad-faith or lack of reason, citizens of all persuasions *converge* on the understanding that what's being adjudicated is not merely an issue of fact, but rather the relative social competence and status of those who hold competing sets of defining values.<sup>130</sup>

This distinctive form of status competition between groups of contending worldviews is in fact endemic in our political life. The real "culture wars" in the United States are not over values but over facts. Polls show that most citizens actually care less about highly charged cultural issues like gay marriage or the pledge of allegiance than about straightforward instrumental ones relating to their health, safety, and economic well-being.<sup>131</sup> Nevertheless, the latter types of issues inevitably turn on disputed facts—is the climate heating up and are humans the source? do gun control laws increase crime or reduce it? does the minimum wage raise the standard of living of poor Americans are increase unemployment? will vaccinating young girls for HPV actually undermine their health by inducing them to engage in unprotected sex and thus contract HIV?—on which peoples' positions are conspicuously associated with holding one or another competing set of cultural values.<sup>132</sup> Through the self-reinforcing interac-

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<sup>129</sup> See Robinson *et al.*, *supra* note 6.

<sup>130</sup> See Kahan, *supra* note 5.

<sup>131</sup> See generally Morris P. Fiorina, Samuel J. Abrams & Jeremy C. Pope, *Culture War? The Myth of a Polarized America* (2005).

<sup>132</sup> See Kahan, *supra* note 5. See generally Wildavsky, *supra* note 78.

tion of naïve realism and identity threat, seemingly instrumental policy debates transmute into bitter contests to capture the expressive power of law to affirm the status and virtue of one culturally defined group over its adversaries. This is the central *collective* pathology of cognitive illiberalism.<sup>133</sup>

This pathology extends to the adjudication of cases like those of the battered woman and the beleaguered commuter. As a result of self-defensive cognition, we adopt the view of the facts in such cases that affirms our identities. As a result of naïve realism, we react with incredulity to professed opposing beliefs of persons who we know hold alternative values—and with resentment toward the incredulity those persons profess toward *our* beliefs.<sup>134</sup> In the face of these reciprocal recriminations, we and they inevitably come to *share* the understanding that what's being adjudicated, at least in the court of public opinion, is not merely the “facts” of particular cases but the honesty, intelligence, virtue, and ultimately the status of groups of persons defined by their commitment to particular views of the good. It's precisely the amenability of controversial cases to this interpretation that *makes* them so conspicuous and controversial.

In the end, we do not disagree at all with the New Normativist who draws the conclusion from self-defensive cognition that *fact* claims are just another of the idioms citizens use to contest the nature of the good life through law. We only dispute, as a descriptive matter, that this is what they really want and, as a moral matter, that, as citizens of a liberal democracy, they really should.

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<sup>133</sup> See Kahan, *supra* note 5.

<sup>134</sup> In an insightful recent article, Suzanne Goldberg convincingly argues that factual claims are used to contest the status of social groups in constitutional law. See Suzanne Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 Colum. L. Rev. 1955 (2006). Goldberg suggests that the use of empirical claims in that setting is strategic, enabling judges to conceal reliance on partisan norms. The results of our experiment suggest that this phenomenon might have a cognitive source: as a result of self-defensive cognition, judges are disposed to credit or discredit empirical rationalizations for contested laws depending on whether those claims cohere with the judges' cultural orientations. Consistent with naïve realism, moreover, judges can be expected to denounce fellow jurists who disagree with them for “departing from [their] role . . . as neutral” arbiters and “tak[ing] sides in the culture war,” *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting), without appreciating how their own judgments are shaped by their own cultural commitments.

### B. *What to Do?*

As difficult as it is to unearth the influence of self-defensive cognition on perceptions of self-defense, and as challenging as assessing its normative implications might be, identifying an effective means for *counteracting* this dynamic is all the more daunting. There is one prescriptive strategy—judgmental exhortation—that we are sure *does not* work. In explaining why, we'll derive some lessons that help to identify another—charity and affirmation—that might.

#### 1. Against Exhortation and Excoriation

Obviously, exhorting citizens (in their capacities as jurors or as interested observers) to be “fair minded” and “nonpartisan” in their judgments won't work. The reason isn't that citizens won't take heed of such an admonition; it's that they already *are* doing just that: self-defensive cognition generates division among culturally diverse citizens *despite* their genuine attempts to be even handed in appraising the facts of self-defense cases.

Indeed, we would go further. Moralizing exhortations not only aren't a solution to the problem that self-defensive cognition creates in self-defense cases; they are part of the problem.

In effect, prominent commentators have been aggressively pursuing the exhortation strategy for years. Abuse-excuse critics implore defenders of the “battered woman defense” and related doctrines to cease putting “empathy for some group of disadvantaged defendants” ahead of “neutral principles of law.”<sup>135</sup> New Normativists answer by demanding that the abuse-excuse critics acknowledge that *their* view of law is not neutral but deeply partisan: invoking the supreme value of life to deny only the battered woman a defense while permitting cuckolds, true men, and other members of historically advantaged groups<sup>136</sup> to protect their “honor and dignity” through resort to deadly violence “betrays either extreme confusion or hypocrisy.”<sup>137</sup>

This is a form of debate that both reflects and reinforces the impact of self-defensive cognition and naïve realism on political dis-

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<sup>135</sup> Wilson, *supra* note 32, at 111, 112.

<sup>136</sup> See Nourse, *supra* note 36, at 1455.

<sup>137</sup> Kahan & Nussbaum, *supra* note 1, at 333.

course. *Each* side perceives that the other's factual beliefs and interpretations of law are shaped, either consciously or subconsciously, by their commitment to partisan norms, yet don't recognize—or at least don't recognize fully—that the norms they are committed to have the same impact on their own beliefs and views about the law. As a result, each charges the other with either inability or unwillingness to use reason, and each bristles indignantly at the very same accusation when made against it. The basic structure of the debate is identical to the ones over climate change, gun control, smoking, economic policy and countless others in which opposing cultural and ideological factions mobilize to fight one another *not* over the content of their values but over the accuracy of fact perceptions that *shaped* by their respective values.<sup>138</sup> Precisely because these competing views fact are so conspicuously aligned with the cultural identities of the citizens who hold them, moreover, both sides come to see the outcome as a referendum on the competence and status of their own group. And that reaction itself ultimately strengthens the self-defensive motivation of individuals to dismiss any evidence that their own view of the facts might be wrong.

## 2. For Affirmation and Charity

We've suggested that the self-defensive cognition of self-defense is in large part *constructed by* a deliberative climate that makes resolution of disputed factual questions a status contest between competing culturally and ideologically defined groups. The key to counteracting self-defensive cognition, then, is to create a climate that *divests* resolution of those factual questions of that public meaning. Without suggesting that it is certain to succeed or to succeed fully, we will describe a strategy that seeks to achieve that end.

The foundation for the strategy is a psychological mechanism known as *identity affirmation*. In a series of studies, the psychologist Geoffrey Cohen and his collaborators have shown that the effect of self-defensive cognition *can* be neutralized when individuals are first exposed to personally affirming experience such as a high test score or information on some desirable skill or trait they possess. The boost in self-esteem an affirmed person experiences effectively buffers the identity threat that she would otherwise experience when confronted with information that challenges beliefs connected supportive

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<sup>138</sup> See Kahan, *supra* note 5.

of her values and group commitments. Accordingly, that person doesn't experience the impulse to reject such information. Cohen and his associates have shown that identity-affirmation promotes open-mindedness and potential changes in position on various controversial issues—from the death penalty to abortion to American policy in the Middle East—that have in the past been shown to trigger self-defensive cognition.<sup>139</sup>

One potential direct application of identity affirmation would be to jury decisionmaking. In a case in which a judge anticipated factual disputes of the sort that tend to provoke self-defensive cognition, he or she could have jurors engage in one of the self-affirmation exercises shown to be effective in Cohen's studies.<sup>140</sup> Jurors might then be expected to give more open-minded consideration to evidence that challenges their identity-supportive beliefs and to react with greater receptivity to arguments advanced in deliberations by jurors of potentially competing cultural persuasions.

Even if it worked, however, such a procedure would have only a limited impact on the problem of the self-defensive cognition of self-defense. As we have emphasized, the location of that problem is not so much the jury room as the virtual town square. Jurors, for whatever reason, seem to reach agreement in battered women, beleaguered commuter and similar cases. It's the culturally and ideologically polarized reaction of public to verdicts in those cases that creates the perception of widespread partisanship, either on the part of jurors who decide the cases, members of the public who won't accept the outcomes in particular ones of them, or both.

Elsewhere, we have described political analogs of identity-affirmation designed to defuse self-defensive cognition and other elements of cognitive illiberalism in political discourse generally.<sup>141</sup> "Expressive overdetermination" is a technique for framing policies

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<sup>139</sup> See articles cited in note 3, *supra*.

<sup>140</sup> Jurors, for example, could be instructed to write essays relating "three or four personal experiences in which their most highly rated characteristic [as disclosed in a previous questionnaire] had made them feel good about them selves." Cohen, Aronson & Steele, *supra* note 3, at 1153. Perhaps appellate judges, too, should be required to engage in such exercises. *Cf.* Cass R. Sunstein, *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (2006) (finding that appellate judges sitting in multi-judge panels are prone to polarize on ideological grounds).

<sup>141</sup> See Kahan, *supra* note 5; Kahan, *et al.*, *supra* note 58, at 1097-1100.



that make them resonate simultaneously with, and thus affirm, a range of diverse and competing cultural orientations. The use of tradable emissions permits in the Clean Air Act is an example. By showing that air pollution could be solved with a *market* mechanism—an outcome affirming to Individualists—the Act made accepting evidence that industrial emissions damage the environment less threatening to persons of that persuasion. At the same time, its recognition of *the need* to address the environmental damage associated with commerce affirmed Egalitarians, making it less threatening for them to accept the mounting evidence that “command and control” forms of regulation were in fact ineffective. As they converged on a shared policy, moreover, the cycle of recrimination associated with naïve realism similarly abated, thereby reducing still further the psychic pressure on both sides to hold fast to their beliefs as a way to protect their identities.<sup>142</sup>

We don’t know whether it is possible to implement “expressive overdetermination” in the context of self-defense cases, but we can think of a related discourse strategy that might have similar effects in dissipating conditions of identity threat in this domain. It’s what Cass Sunstein calls “political charity”:

Three practices seem to constitute political charity. First, those who display political charity do not question the motives of those with whom they disagree. On the contrary, they cast those motives in the best possible light. . . . Second, those who display political charity try to endorse the deepest moral commitments of those with whom they disagree. If they cannot endorse those commitments, at least they show respect for them. . . . Third, those who display political charity try for reforms and innovations that can be accepted by people who reject or even abhor what they take (fear?) to be the defining commitments of the reformers and innovators.<sup>143</sup>

What we would propose is that those engaged in public discussion of controversial self-defense cases—in particular, those who, like legal commentators, play a highly visible and influential role in them—follow these principles. In particular, they should *refrain* from the contemptuous attacks on one another’s motives and intelligence that now dominate the Abuse Excuse/New Normativist debate. These commentators are in a position to see—we’ve shown them—

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<sup>142</sup> *See id.* at 1097-98.

<sup>143</sup> Cass Sunstein, Political Charity, *The New Republic Open University* (Nov. 19, 2006), <http://www.tnr.com/blog/openuniversity?week=2006-11-13>.

that in fact they are *wrong* in their interpretations of the source of political conflict surrounding self-defense cases. It is *not* the case that jurors and judges who afford defenses to battered women, or the citizens who support doing so, are “forsaking objective law” to indulge “politically correct” sympathies for “some disadvantaged [group]”;<sup>144</sup> it’s not the case that the Abuse Excuse Critics are “hypocri[tically]” indulging their “conservative” ideologies when they exempt from their critique defenses for “true men” and enraged cuckolds. Rather, commentators on both sides, and more importantly the citizens who share their understandings of what the results should be in politically controversial cases, are honestly appraising the facts, albeit in a manner shaped by self-defensive cognition. To show respect for one another, commentators on both sides should recognize the *good faith* of their interlocutors, and also *acknowledge* that any distorting impact self-defensive cognition exerts on their opponents’ perceptions of the facts *also* operates on their own.

Most important of all, both sides should *stop* calling for reforms that assault their opponents’ defining commitments. Proposals to abolish the “battered woman” defense,<sup>145</sup> or to implement one or another transparently partisan conception of emotion-based defenses in criminal law generally,<sup>146</sup> heighten the general sense of status conflict that pervades debate about controversial cases, and thus reinforce the disposition of citizens to form beliefs about those cases that support their partisan worldviews.

There are two reasons why political charity might function as an identity-affirmation analog in the public discussions of self-defense cases. The first is the critical role that uncharitable discourse plays in *creating* self-defensive cognition. Self-defensive cognition presupposes a context: the denial of particular beliefs can threaten a person’s sense of self only if some set of social influences have invested those beliefs with meanings critical to that person’s identity. The primary social

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<sup>144</sup> Wilson, *supra* note 32, at 111, 112.

<sup>145</sup> See *id.*; Dershowitz, *supra* note 32

<sup>146</sup> See, e.g., Dan M. Kahan, *The Progressive Appropriation of Disgust*, in *Critical America* 63 (S. Bandes ed., 1999); Kelman, *supra* note 1, at 186-88 (proposing that self-defense doctrine reflect “error cost” associated with result that denigrates egalitarian values); Sunstein, *supra* note 47, at 197-98 (“anticaste principle” should guide outcomes in cases in which “error costs” include entrenchment of racial or gender hierarchy); Lee, *supra* note 37, at 226-59.

influence of this sort in the setting of controversial self-defense cases, we believe, is conspicuous and conspicuously recriminatory public debate. When a person sees others whose values she shares, whose credibility she accepts, and whose good opinion she covets denouncing or defending a particular decision, that's a strong cue that the beliefs on which that assessment rests are ones integral to her defining commitments. A person is all the more likely to form that impression if she can see that those who hold her values are advancing that position in response to contrary arguments of persons whose fundamental values they *reject*. If those on both sides are attacking the character of the other for holding the position they do, then participants will naturally perceive that what's at stake in the debate is the competence and status of their defining group.

A discourse of political charity can reverse these dynamics. To begin, it lowers the stakes: when each side acknowledges that the other has formed an honest and good faith view of the facts, neither has reason to perceive that the debate is judging the character of its members. In that climate, moreover, individuals might well approach controversial cases with a more open mind. When they see that those whose values they share acknowledge that persons of good faith can disagree, individuals will feel less anxiety that adopting any particular position will estrange them from their peers. Some for that reason *will* likely acknowledge publicly that they have formed factual beliefs different from the ones predominant within their group. And their willingness to do that will itself move other members of their group to infer that those beliefs *aren't* in fact essential to the identity of persons of their cultural or ideological persuasion.

Obviously, political charity can have these effects only if it is practiced. In addition, it would be an obvious mistake to assume that political charity *will* be practiced just because it can be expected to have a beneficial impact. For political charity to be regarded as a meaningful response to the problem of self-defensive cognition, there has to be reason to think a discourse norm of this sort can be propagated in an effective way.

The strategically central position of those whom we are urging to propagate it—legal commentators—is the second reason to think that political charity might generate an identity-affirmation effect in public debate over self-defense cases. Legal commentators play a critical role in shaping public understandings of high-profile self-

defense cases. Indeed, through formulation of the abuse excuse critique and the New Normative response to it, they have materially contributed to the widespread public *mis*perception that such cases are being decided in an objectionably partisan way. They are thus in a position now to *correct* that misunderstanding. If commentators, particularly ones who hold elite credentials, stop accusing decisionmakers, members of the public, and one another of bad faith, and instead help members of the public to understand that such cases involve honest, good-faith disagreements about the facts, their behavior can itself be expected to have a significant impact in dissipating the anxiety that feeds self-defensive cognition.

#### IV. CONCLUSION

In this paper, we have pursued three objectives. First, we have sought to explain recurring, high-profile political conflict over self-defense cases. Contrary to the prevailing view among commentators, decisionmakers in such cases (and members of the public who react to what decisionmakers do) are not willfully overriding their perception of doctrinally relevant facts to satisfy their partisan values. Rather, consistent with the dynamic of self-defensive cognition, they are subconsciously relying on their values to determine what the facts are. Confronted with factual disputes, individuals are motivated to adopt (and to persist in) the beliefs that cohere best with their defining cultural and ideological commitments, both to avoid a form of dissonance and to protect their connection to others who share values. We presented evidence, in the form of an original empirical study, to show that this is exactly what happens when individuals encounter prototypically controversial self-defense cases. Indeed, what makes such cases controversial consists precisely in interaction of the factual claims they present and competing cultural norms. As a result of self-defensive cognition in this context, individuals of diverse persuasions end up culturally polarized in their judgments of the correct outcomes in these cases *notwithstanding* their honest, good-faith effort to decide based on an impartial application of the facts.

Second, we have offered an appraisal of this phenomenon. The impact of self-defensive cognition, we've argued, doesn't imply that there isn't a problem in public reactions to self-defense cases; it suggests only that the problem is different from what it is normally thought to be. It is in fact a relief, we agree, to learn that members of the public are trying to decide controversial cases impartially and not

simply picking outcomes based on their ideological affinity to the defendants and victims. Nevertheless, we think it would be *disappointing* to members of the public were they to learn that the factual perceptions they are forming in good faith are nevertheless subconsciously influenced by those very affinities. There may be many debates (on the effects of gun control, say, or on the acceptability of certain types of environmental risks) in which individuals will happily embrace factual judgments that, in the face of uncertainty, enable them to express their conception of the virtuous life and the just society. But in this context, we think, the cognitive impact of such values on factual perceptions *defeats* a commitment that most individuals would have to making a basic civic entitlement—the right to protect oneself from unjustified violence and to be protected from the same—available equally to all citizens regardless of their cultural outlooks and persuasions. We view the self-defensive cognition of self-defense as an instance of a distinctive sort of cognitive bias—cognitive illiberalism—that defeats individuals’ desire to judge fellow citizens in a manner respectful of their moral autonomy, and that injects certain identifiable pathologies into the politics of a society that aspires to the same.

Third, we have endeavored to identify at least a partial solution to the problem of self-defensive cognition of self-defense. It is the practice of political charity—a form of discourse characterized simultaneously by respect for one’s adversaries and humility about one’s own powers of judgment—among legal commentators.

In our opinion, the impact of self-defensive cognition in the creation of political conflict over self-defense cases is itself at least in part an artifact of what legal commentators have been arguing in recent decades. Abuse Excuse Critics and their New Normativists detractors have relentlessly insisted that the positions of their opponents on cases like those of the battered woman the beleaguered commuter are grounded in unacknowledged political partisanship. Their arguments contribute to a climate in which individuals form the impression that beliefs about the facts in such cases do in fact cohere with membership in particular ideologically and culturally defined groups. That impression in turn fuels the defensive impulse to form and advance beliefs characteristic of one’s group, both to protect one’s membership in it and to resist the implicit claim that one and one’s peers are dishonest or deluded.

Commentators are now in a position to reverse this process. If they acknowledge that good-faith disagreements of fact are possible here, if they acknowledge that their own perceptions are vulnerable to distortion, they can help to mute the cues that induce persons subconsciously to equate changing their minds is akin with betraying their defining commitments.

Of course, there's no guarantee that a discourse of political charity among commentators will work. But in a condition of uncertainty, proceeding as if it could would itself express the commitment of such individuals to trying to use their special position in public deliberations in a manner that is politically constructive.<sup>147</sup> What's more, because the best evidence that can now be assembled suggests it simply *isn't* the case that most members of the public are putting their partisan values ahead of their obligation to judge putative instances of violent self-defense in an impartial way, it would just be *wrong*, morally, for commentators (especially ones who, without the benefit of such evidence, have taken a contrary position in the past) to persist in asserting otherwise.

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<sup>147</sup> Cf. Kelman, *supra* note 1, at 177, 187; Sunstein, *supra* note 47, at 197.

## **APPENDIX A. STUDY VIGNETTES**

### **Battered Woman**

*We'd like to know how you would decide issues raised in a controversial criminal trial. We would like to know what you would decide if you were on the jury in that trial. First, please read the following summary of the facts and evidence:*

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 through 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.

**Beleaguered Commuter**

*We'd like to know how you would decide issues raised in a controversial criminal trial. We would like to know what you would decide if you were on the jury in that trial. First, please read the following summary of the facts and evidence:*

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 into 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.

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.

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.