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TRANSCRIPT

IN THE EYE OF THE BEHOLDER

*By: Dan Kahan**

I. Introduction.....7
II. Keynote Address.....10

I. Introduction

PROFESSOR PENNY WHITE: Good morning. Thank you so much for coming to the annual symposium of the *Tennessee Journal of Law and Policy*. My name is Penny White, and I have the distinguished opportunity to faculty advise this law [journal], the *Tennessee Journal of Law and Policy*. And that's why I am here today. I get the experience of working with incredible students at the College of Law. And one of those is Sean Francis, who is this year's Symposium Editor. I'm going to turn it over to Sean who will introduce our keynote address speaker. However, as you all know Micki, I have reminders for you from Micki before we get started.

Reminder number one, because of the crowd some of you will be sending in your big $25 check for CLE fees later. That's fine. But if you don't turn in your attendance report before you leave today, she will not give you credit. So you have that separate attendance report. Be sure and make sure

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* Dan Kahan is the Elizabeth K. Dollard Professor of Law and Professor of Psychology at Yale Law School. In addition to risk perception, his areas of research include criminal law and evidence. Prior to coming to Yale in 1999, Professor Kahan was on the faculty of the University of Chicago Law School. He also served as a law clerk to Justice Thurgood Marshall of the U.S. Supreme Court (1990–91) and to Judge Harry Edwards of the United States Court of Appeals for the D.C. Circuit (1989–90). He received his B.A. from Middlebury College and his J.D. from Harvard University.

Micki gets that before you leave.

Secondly, we don't apologize for the crowd, we're delighted by the crowd. But the reason that we do not have an overflow room with this on a television for you and others to watch is that we simply don't have enough space at the College of Law today with all the classes going on to have an overflow room. So I hope you won't be too uncomfortable, and I hope you'll just still be glad that you came even after a crowded day.

So with no more ado, Sean Francis, who has put this thing together.

MR. SEAN FRANCIS: I would like to echo Professor White. The turnout is great. We're very happy to have all of you here. As she said, my name is Sean Francis. I'm the Symposium Editor for the *Tennessee Journal of Law and Policy*.

If I may, I would like to get just a few thank-yous out of the way. Of course, I would like to thank the University of Tennessee College of Law. They provided these facilities here for us to have the symposium. Without them, we would be meeting at a Waffle House somewhere and it would not be nearly as nice, so we appreciate that.

Along that same vein, I would like to thank Micki Fox, the CLE director. You guys know how much work she puts into these things; the registrations, the fees, putting together the credits for you guys, getting the verification for CLE for the credits. All of that is Micki, and more. So we definitely thank her for her help. I would also like to thank Jeff Groah, our audio/visual guy. He's back there in the back making sure everything is working well. If anything goes wrong, you can blame him, so get a good look at his face. It's not my fault.

And then I would also like to thank the Advocacy and Dispute Resolution Center. They're the ones who provided the financial backing for all of this. They funded

the little snacks that we have for you guys. All of the fees and registration that we had for this, all of that was them. So we would like to thank them.

And, finally, we would like to thank the *Tennessee Journal of Law and Policy*. They provided the manpower behind all of this. They organized all of this. And without them, none of this would have been possible. So if I can have just a short plug for the *Journal*, it was established in 2004. It produces twice yearly publications on the subject of law as it intersects with decision-making or policy-making. So any of you who work with lawmakers or who are lawmakers, or who work in the policy-making arena, it's a really great resource for all of you. And even if you don't, you're just interested in those topics, I would encourage you to check out the editions that we have out and the future editions that we will publish.

One more short housekeeping note about the schedule today. So the morning session—I'll just go over that now. We'll begin with Professor Kahan's address here in a few minutes after I introduce him. After which, we'll have a short fifteen minute break. And then we'll have a panel of experts and practitioners in the field of law who will come up and react to his speech and answer questions from the audience. So, please, think of your questions as they speak and as Professor Kahan speaks, and feel free to ask as many questions as you might have.

So without any further ado, I would like to introduce Dr. Dan Kahan. He is the Elizabeth K. Dollard Professor of Law and Psychology at the University—at Yale University College of Law. He is also a member of the Cultural Cognition Project, which is a group of scholars who seek to analyze the impact of group values on perceptions and related facts.

And that's what he has generally come here to speak to us about today. So I would like to ask you to join me in welcoming Dr. Dan Kahan.

II. Keynote Address

PROFESSOR DAN KAHAN: It was really just an honor to receive the invitation. And I want to thank the *Journal* and also Penny for giving me this opportunity. And actually, everybody has been really nice to me since I got here. And I'm sure that that reflects a sort of friendship [indiscernible]. [Laughter.] It's really great to have that kind of relationship with you.

Now, I saw what's been going on here just a little bit in today's politics, and it made me realize that really, if you want to get people to listen to you, you have to make a really bold claim. Right. So I'm going to make three really bold claims. Kind of give me a chance here and don't all rush me [indiscernible] that way. But one of them that's especially bold is that judges and lawyers, they don't see things the way that ordinary people do. Now, you're already kind of saying, come on. And so I'll just add a little proviso. They don't see things the way that the public does, well, except when they do.

Now, the second claim, bold claim, this is generally a good thing, that judges and lawyers think differently from ordinary people. You know, just give me a chance here and I'll qualify it a little. It's generally good, but sometimes it can also be bad. So those are my three very bold claims. And I'm going to make out these claims by going through a series of studies with you. And the first one actually has to acknowledge that it has roots in Tennessee. It's a study that initially we pretested within Justice Koch's fellow members of the Inns of Court in Nashville. So I don't know if that disqualifies him from being on the jury, actually the judge, the work.

Now, the paper that reports the results of this study has a title based off protests, which is an allusion to a famous study conducted in the 1950s where the researchers asked students from two rival colleges to watch the tape of the

football game between their two schools and decide whether the referee had made the right call or the wrong call on certain disputed calls during the game. And what they found is that the students from Dartmouth, they were all convinced that the official must be a referee of Princeton or something, he was so biased. And whereas the students from Princeton, they said, you know, what's going on? Did they bribe the referee? We can't believe he's this unfair. Right. So the students were conforming what they saw on the tape essentially to their institutional affiliation. And this is what's referred to in psychology as identity protective cognition. People are going to selectively credit the information with the arguments of the judgments about the credibility of the speaker, it could be the quality of scientific data, to the interest of some kind of special group. They're going to do that because they want to maintain their standing and status in the group. And if you take positions that are contrary to the other group members, well, then sometimes they might look down on you. Right. So this is identity protective cognition. And what we wanted to do was see whether this might actually apply in law.

But by the way, don't you see the one from Tennessee, he's clearly out of bounds. Right. I mean, I see it, so. But we thought, well, does this identity protective cognition actually influence how fact finders in law are performing their duties? So we took a sample, not of judges and lawyers as we did that day at the Inns of Court with Dean Koch, but just ordinary individuals. Two hundred people who were drawn from a Nashville panel, the kind of people who might be on a jury. And we told them, imagine you are on a jury and it's a suit by political protestors against the police, that a political protestor said that the police violated their First Amendment rights when they ordered them to end their demonstration. And the police on the other hand said that they weren't violating the First Amendment rights of the protestors. The protestors had crossed the line from speech

to intimidation, that they were waving their signs in a menacing fashion at passersby, screaming in their face. That's not protected by the First Amendment. And blocking access to the building that you see in the background.

Now, we have an experimental component in this study. We told half the people that the protest was happening at an abortion clinic and that the protestors were against the right to an abortion. And we told the other half of the sample that this demonstration was at a college recruitment center, and that the demonstrators were expressing their opposition to excluding gay and lesbian individuals from the military. I see we have some younger people, that's well before your time. Actually, that used to be the policy of the United States. It got changed. But we did our—we collected our data before President—then President Obama had changed that.

There were also laws that were specific to each one of the two conditions, right, so that the subject—study subjects for the abortion clinic condition, they were to apply a statute that says it's illegal to interfere with, to obstruct or intimidate or threaten people who are trying to access a facility where abortions are being given. And the police have the power if people—they see people doing that, to disperse them or else arrest them. And then similarly in the recruitment center condition, anybody who was interfering, intimidating, blocking or what have you, the access to a facility where military recruitment is going on, they're breaking the law and the police can stop that too.

Now, there was one other thing that we measured here; the cultural worldviews and problems of our subjects and just preferences about how society should be organized along two different dimensions, individualism, communitarianism, hierarchy, and egalitarianism. And we measure that by having the subjects respond with a graded scale to statements, do they agree with them or disagree with them and how strongly. Things like, it's not the government's business to try to protect people from themselves. It's kind

of an individualistic sensibility, or the government should put limits on the choices the individuals can make so that they don't get in the way of what's good for society. You're more collectivist if you agree with that, that our society would be better off if the distribution of wealth is more equal than to egalitarian. And then something like this, society as a whole has become too soft and feminine. Now, that's kind of a traditionalist view.

So that's how we measured the cultural outlooks. And for our purposes, the communities who have these combinations of values that are reflected in the two-dimensional representation of the cultural worldviews, they're performing the same functions in our experiment as the students' college affiliations did, and they saw a gain, right. These are the groups who share these values with respect to which people are going to be judging by disputed evidence, in order to find that the status of their group in competition with other groups is actually predominant.

You have here the lawsuit by people who have distinctive, very strongly held and contested political positions, and that's going to put pressure on the study subjects to conform what they're seeing when they watch the tape to the outcome that's consistent with what their own group's values are.

And so here's what we saw. In the abortion clinic condition, the egalitarian individualists, they formed rather—well, they formed attitudes that were anti-protestor, like—either like egalitarian—kind of like libertarians. In their view, the police didn't go too far and shouldn't be enjoined from stopping this kind of demonstration in the future because of that, like the abortion protestors, that's what they thought they were, had crossed the line from speech to intimidation.

The higher up communitarians, in contrast, they thought that the police had clearly gone too far. And these are people who have more traditional values. They tend to

subscribe to the pro-life position, and for sure, the officers should be enjoined from doing this thing again in the future. Now, that was the response if they had been assigned to the abortion clinic conditions.

If they were assigned to the recruitment center condition, then they flipped around completely. All right. And we also, of course, have the egalitarian, communitarians, and the higher up individualists, they don't care that much about abortion, but they were clearly very polarized in the military recruitment condition. All right.

And the reason that they came to these conclusions is that they actually thought they were seeing different kinds of things. Right. People who have the—well, in any condition, people with one set of values would disagree with people who had other sets of values of whether, in fact, the protestors were blocking entry to the building and whether they were screaming in the face of onlookers. But across the conditions, right, people with the same values were disagreeing with each other. They are disagreeing with their counterparts in the other condition. If you thought you were watching the abortion condition, then you had very different reactions from somebody who had values like you in the military recruitment center condition.

All right. So people are conforming their impressions to the outcome that is most in line with their group's values. And you can see why this is going to be a problem for the First Amendment. I don't know if you recognize that the—does anybody get those Supreme Court advocate trading cards? Because here's—this is a woman who actually argued a case to the Supreme Court and won, and her name is Shirley.[1] She's from the Westboro Church, which is a hate group, and they're very emphatic, that's exactly what they are, who hate gays, for example. And you see they used to go around to the funerals of soldiers who died fighting in Iraq or Afghanistan and they would say,

[1] Snyder v. Phelps, 562 U.S. 443 (2011).

well, this is vengeance by God for the United States being too tolerant of homosexual rights. And as you can imagine, that didn't make the parents of the soldiers feel very good.

So one of them sued the Westboro Church, right, for intentional infliction of emotional distress, and they got some big judgment. It was reduced on appeal, but not by much, like five million dollars. And so they're appealing to the Supreme Court, saying this is contrary to the First Amendment to punish us on these grounds. And, in fact, they won. I don't think that that's really a surprise because the theory of the case that they were—that was presented against them, it kind of runs headlong into one of the essential pillars of First Amendment law, the non-communicative harm principle.

See, the Court said: "The record confirms that any distress occasioned by the Westboro's picketing"[2] —I mean, there's clearly distress, right, people are being severely traumatized by what they're doing. It "turned on the content in viewpoint of the message conveyed rather than any interference with the funeral itself."[3] And you recognize this because you can generalize it. If you regulate people engaged in speech activity, you have to have some goal or interest that can be defined independently of people just not liking the speech. It's not a cognizable harm that they were upset by the content of the speech—I mean, clearly, here the content of the speech is what upset the parents.

If the protestors had been saying, you know, welcome home, thank you, we appreciate your sacrifice, this wouldn't have happened. But if the harm is one that can be defined independently of First Amendment, then there's room for regulation. Interference with the funeral itself, right, they're blocking the procession and may be hitting people over the head with the sign, you can define the harm that's being inflicted there independently of whatever point

[2] *Snyder*, 562 U.S. at 457.
[3] *Id.*

they were trying to make by speaking, or even whether they were speaking at all. All right.

So we have—have this important First Amendment principle. It's reflected in the two laws that I showed you. They're trying to identify the kinds of non-communicative harm that people can suffer when they're subject to intimidation and threatening and so forth.

But here's the problem, right, if when fact finders are trying to determine whether the conditions of those laws are consistent with the First Amendment have been satisfied, their perceptions are going to be sensitive to the values of the protestors. They're more readily going to find the non-communicative harm principle to be satisfied when they don't like the message of the protestors than when they do. So in making these kinds of factual determinations under the influence or pressure of identity protective cognition, they're actually recreating a legal regime that determines whether people can engage in protests based on the values that they have. And that's really going to be a—prove to be a problem for the First Amendment. And some people think that's what the Supreme Court or even state courts are doing, they're being too political, maybe because they're reasoning in this way. And, I guess, you know, the question—

Did you say I could ask questions and quiz people or—

PROFESSOR PENNY WHITE: Sure.

PROFESSOR DAN KAHAN: Do you think our study actually supports this anxiety on the part of the public that judges are, in fact, political in their ruling? Do you think it does? I mean, there's one—do you think so?

UNIDENTIFIED VOICE: I don't know.

PROFESSOR DAN KAHAN: Well, I thought you were raising your hand. You need to get into the action here.

But you see, you know, the study, I told you, we did it on lay people. I mean, not people with any legal training, much less judges, right. And it's not new to the law that sometimes people are going to be biased politically and that it might even unconsciously affect their judgments. That's why you have strict scrutiny of laws that abridge the First Amendment, whether it's incidentally or not to see, well, were people really motivated by something else that they're not expressing here? We train the prospective lawyers to be able to apply these rules.

Now maybe—maybe the judges are going to be affected in the same way, but it's a question begging given that the judges that have been trained and allowed to experience the kinds of reasoning that lawyers do. They say, well, you must be like the public. And that's exactly what they're going to do, they're kind of checking influences in the public.

The only way we can figure out whether judges are going to react similarly is to do a study with judges in it. All right. So here's the second study. They saw a statutory ambiguity. And in this one, we had members of the public, students, lawyers and judges. Right. It was a fifteen hundred member sample, and we had all of these groups so we could kind of make some comparative judgments. And it's about ambiguous statutes. There are two statutes. One said that you can't deposit junk or debris in a national park. And so here we have a national park. I guess it's running along the Texas-Mexico border and we have people who left water—plastic water containers in this wildlife preserve or this national park with the expectation that they might come back and refill them and drink it. Well, is that depositing debris in the protected area? All right. That's a statutory ambiguity to have to try to figure out whether that's debris. Maybe it's not debris, they're going to drink out of it. But maybe it is

because, I don't know, a coyote might try to eat it and choke or something like this. All right.

In the other—the other ambiguous statute, you have a police officer who admittedly, knowingly distributed confidential law enforcement material to a non-governmental actor—that would never happen now, but it was a hypothetical. And the question is, when the statute says if you knowingly violate the standards and you're guilty, do you have to prove not only that he knew that he was distributing the confidential information to somebody who wasn't a law enforcement official, but knew that a violation would be something for which he could be punished. It's a classic mistake of law problem. Right. We see these kinds of things all the time. And sometimes it comes out one way and it knowingly applies not to the law, but only to the facts. And sometimes the other way, you have to know about the law. So we had that ambiguity too.

Now, again, we had experimental manipulation [indiscernible]. Right. These have to do with the identity of the parties. Right. So in the first case, where the issue is whether leaving the water—refillable water containers in the park is to be depositing debris. In one condition, the study was told that these were construction workers and maybe the people who are going to build President Trump's wall. Right. In the other condition, they were told that these were immigrants' rights activists who were worried that when people were trying to cross the border illegally, they might get thirsty and want to drink from these containers.

And no matter how you feel about the motivations of the actors, whether they're construction workers or immigrant aide workers, it doesn't make any difference to what the outcome is. The question is just whether when you leave the plastic bottle, refillable bottles in the desert, you're depositing debris.

In the second case with the disclosure, we vary the identity of the party to whom the disclosure was being made.

Right. So in one case, we had the officer who knew he was distributing the confidential information, giving it to a pro-life counseling center and saying, watch out, right, there's an abortion rights advocate who is trying to apply under false pretenses to work with you, so you better be careful. And in the pro-choice condition, the same thing, the officer saying—that they're telling the pro-choice facility, watch out, there's an abortion rights advocate who is trying to apply to sabotage your efforts. And, again, that doesn't really have any bearing whatsoever on the legal standard. All right. You have to determine whether his knowing violation is required or not.

But we did expect that that manipulation, as well as the one in the first case, could give a lot of motivation, unconscious most likely, to construe the reading of the statute to the position that was consistent with the identity of the study subjects. And so we're going to see that the relative impact of the manipulation on members of the public, students, lawyers, and judges. And so to start with the public and the judges, here's what we found. That in the layperson's standpoint, you saw again that people were polarizing depending on what condition they were in, and in ways that were congenial—held congenial to their own cultural values. They did that in both of these cases.

Judges, however, they weren't very different from each other. Right. They're converging on a particular outcome, no violation in the littering case regardless of who it is. And the same with the disclosure case. Right. It's a violation of the law regardless of the condition, regardless of their values.

Now, I can have a fancy statistical model, like this, where they put little asterisks down here that say, see, now you know, you better believe me, or something like this. If somebody does that, if they give you a chart like this and tell you that their conclusions have been satisfied, demand your money back. Right. That's what I'm going to do, have you to

demand your money back. So what you have to do is that this kind of information, it's not even by—it is by itself intelligible or easy to understand for somebody who is actually familiar with how these statistical models work. It's come up with some way that represent what the elements of the model mean in practical terms. All right.

So here's what I do. I use a simulation. This is kind of how Nate Silver determines who's going to win the election. I wouldn't say that given that he [indiscernible] job for the last time. Right. But you plug the values into the model that reflects whatever set of conditions you want it to test for. Right. And maybe you say, well, I want a hierarchical individualist that's a judge in the immigrant rights component, the control group would end the littering problem, and the formula—the model will spit out the answer. Right. But it does it with a kind of spitting. It doesn't do it with its hand. It hands out an answer with kind of a shaky hand. Right. So it imposes a little bit of random noise into the estimate reflecting the overall error in the model's various components. And it does that once. And then it does it again and again and again, about a thousand times. And then you can represent what the entire probability distribution is for somebody like that coming up with a conclusion to find a violation. So the hierarchical—if they're a hierarchical individualist in the construction group, you're not very—well, forty percent likely to find that there was a violation, well, plus or minus seven percent.

If you're a hierarchical individualist in the immigrant rights condition, well, then you're much more likely to find a violation. It's seventy-five percent. So that's a difference in thirty-four percentage points. If you're an egalitarian communitarian and you're in the immigrant rights condition, it looks like you're around fifty percent. But you're twenty-seven percentage points behind the hierarchical individualist for whom the conviction outcome was much more culturally congenial than it was to the egalitarian

communitarian.

And the egalitarian communitarian in the construction scenario, twenty-three percentage points difference between what the egalitarian communitarian would have found in the immigrant rights conditions. So they're polarizing. Right. It looks a lot like the last study. And you get similar kinds of results, polarization in the disclosure case. Right.

Now, let's look at the judges. You see, they're all smooshed [sic] up against each other. There's very little difference in what's going on in the littering version of the problem. It doesn't matter to whom—who the parties were to the judges. Right. No significant differences. But they're all basically of a piece—one piece of mind on what the outcome should be in the disclosure case. So those are pretty strong results showing that the public is subject to the identity protective cognition kinds of influences, but the judges aren't. And you can kind of generalize this, call this the identity protective cognition impact.

I mean, how many percentage points more likely is someone to find a violation if the person was assigned to the condition in which a violation would be congenial to that person's cultural outlooks, as opposed to the condition in which the finding of the violation wouldn't be congenial to that person. And it's about twenty-two percentage points for a member of the public—twenty-two percentage points more likely to find it's a violation if it's congenial culturally than non-congenial. And for the judges, that's minus five percent, plus or minus twelve percent. It's not meaningfully different from zero. And you've got a pretty big spread between the members of the public, twenty-seven percentage points more likely to be influenced by the congeniality of the conditions than are the judges.

We could look at the students and lawyers briefly. The lawyers, they look a lot like the judges. Right. They're basically agreeing on what the outcome should be regardless

of their values and regardless of what condition they're assigned to. The students, they're looking a little bit more like members of the public. The effect isn't as big. But, you know, that's why if there are any students here, we charge you this much for your tuition so that you can get to be like the lawyers and the judges and be perfectly neutral. It takes a lot of work, at least three years of law school. So this is the—you can do it too with simulations if you like. So judges and lawyers don't see things the way that ordinary members of the public do.

And I'm going to try a little experiment here because this is relevant. What's the mechanism and what's going on? Why should we understand judges and lawyers to be resisting these kinds of influences? And I guess the question in the first study, can you tell—this is a baby chick. Do you think it's male or female? Can you tell just by looking? Do we have any chick sexers in the audience? Well, you're laughing, but you wouldn't be if the chick sexers all went on strike because that would be really devastating to the poultry industry.

You see, chick sexers, they perform this extremely important function when the baby chick is just a few hours old. They're segregating the male from the female ones. And see, the female ones, well, they're going to have juicier meat. They're going to lay eggs. The male ones, they're going to peck at the female ones and they're not very good for eating and they don't produce the eggs. Well, you keep a few who lead a kind of privileged existence. The others, you're just tossing them away. And they're coming down a conveyor belt, okay. And if it's male, you throw it in that—and these guys are ninety-nine percent accurate.

And what makes this kind of astonishing is there's no visually ascertainable difference between the anatomical parts in question for male and female chicks at this stage of life. And you ask a chick sexer, how do you do this. And if he's honest, he goes, I don't know, you know. Somebody else

might say, well, I do it this way, you know, the male chick, he always tries to distract you. And he says something like how many games out of first place are the Red Sox, or something like that. That's confabulation. That's not what you're doing. And we know how somebody became an expert chick sexer from the tutelage of a chick sexer grand master, right. They went off and the grand master showed them slides, male, female, female, male, male. And so finally they developed this kind of intuitive sense of who is the male and who is the female.

Now, this sounds kind of exotic and weird, but it's not. In fact, it's completely mundane and ubiquitous. This is a psychological mechanism known as pattern recognition where you try to classify a potential instance of some thing, like a baby chick's gender based on a mental inventory that's richly stocked with examples because you've been doing this for a long time, and it's all over the place. That's how we read each other's emotions. It's how people in aerial surveillance when they look at the photos can tell Cuba is putting missiles—Russians are putting missiles in Cuba and maybe it will happen again soon. Right?

But here's—what—this is what happens, you see, when you go to the law school. Well, Karl Llewellyn had a theory very much like this, and this is one of Dean Koch's favorite writers. Karl Llewellyn called it situation sense, right, that you're immersed in the—with the culture of the law. And you start to develop these sensibilities to classify situations and then determine what the right result is. And that's why you get the tremendous convergence among lawyers and judges on admittedly vague kinds of statutes. Right? So that's what law school is. Right. It's the proximate causation, unreasonable restraint of trade, material misrepresentation. You keep showing the slides. You keep showing the examples and eventually students are going to get this kind of thing.

And that's what's going on, at least that's what I—

the theory we had when we did this study, that there's this kind of ingrained professional judgment that judges are going to have because they're immersed in a certain kind of culture that started with going to law school, but continued after that. And, you know, that's judges seeing things different from how ordinary members of the public do. But we still have this little proviso, except when they don't see things differently. And, you know, we also measure the cultural outlooks, as I've said, of the subjects in this study. Usually we use this measure to try to understand why people are fighting about different kinds of risks. And so it turns out that members of these groups, they form kind of clusters of perceptions about risk; environmental risk, guns and gun control, gays in the military, gay parenting, marijuana legalization, HPV vaccination. All the kinds of hot-button issues that you're careful when you first meet somebody and you don't get into that until you know them a little better.

And we did that for the judges in this case. And the public and the students, they both showed the characteristic polarizations on the issue of whether global warming was happening, right, but so did the lawyers and so did the judges. And the public was divided on legalization of marijuana. There's really not that much difference in how students, lawyers, and judges saw things. And so you get a sense, if the reason that judges are able to be neutral is that they have this situation sense that is a consequence of being immersed in the culture of the law. But when you're outside of that domain, there's no reason to expect them to be any different from anybody else. And that was true of our judges. So it's a kind of domain specific immunity. It's not the—it's not that the judges became superheroes because they're always kind of pumping justice in the weight room or something and they're never going to be experiencing any bias. But when they do their job, then they apply the habits of mind that are instinctive to what they're doing. So sometimes they actually do see things the way the public

does.

Now, you can see why this is generally good, because it means that if a judge is assessing the kinds of issues that might arise on remand in Shirley's case, whether the protestors crossed the line on the non-communicative harm principle, they should be able to do that pretty well. And, in fact, that case came out eight to one in the Supreme Court.[4] And just a couple terms later, there was a Supreme Court case in Massachusetts that had a very protective or restrictive, depending on how you look at it, provision on how close people can come to people at the abortion clinic to try to influence them.[5] And they said, no, you can't do that. It was a nine to zero opinion.[6] And they said you've got to follow the kind of standards that are in the Freedom of Access to Clinic[] [Entrances] Act, which is what's on the right.[7] And so that's pretty good. Judges are being pretty neutral. But here it can also be kind of bad sometimes.

And I'll give you an example, from trial administration—and it's another study actually that we did in *Scott v. Harris*[8]. The issue was whether when the police use deadly force against a fleeing motorist, meaning ramming their car into his and causing it to spin out, it's clearly deadly force. Are they justified in using deadly force under the Fourth Amendment under those circumstances? And there was a video, right, of the chase. And the late Justice Scalia said that's the scariest thing I've seen since *The French Connection*,[9] right, and he probably hasn't even seen a movie since *The French Connection*.

And then you had Justice Stevens—you know,

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[4] *Snyder*, 562 U.S. 443.
[5] MASS. GEN. LAWS ch. 266, § 120E (2012), *invalidated by* McCullen v. Coakley, 134 S. Ct. 2518 (2014).
[6] *McCullen*, 134 S. Ct. 2518.
[7] *Id.* at 2357.
[8] Scott v. Harris, 550 U.S. 372 (2007).
[9] Transcript of Oral Argument at 28, Scott v. Harris, 550 U.S. 372 (2007) (No. 05-1631).

Justice Breyer, the same thing, said he almost wet his pants when he saw it.[10] It was terrifying. And we had one justice, right, Justice Stevens who said, well, that didn't scare me. That's the way it looks when I'm really in a hurry to make it to court when you have to pass somebody on a two-lane road.[11] You know, some kind of Mr. Magoo or something like that. I knew you guys would get that. And so, you know, all he could do was say thank you to Justice Scalia and to Justice Stevens because they decided that people should just decide for themselves. And this is the first Supreme Court decision with a hyperlink in it.[12] Watch the video and decide for yourself. They both are convinced it's going to come out this way.

And, again, we have a model. We gave this to fifteen hundred people. And we can simulate how different kinds of jurors would react. Right. So you've got Ron who lives in Arizona, and he doesn't like the government touching his junk, right. But he's still relatively hierarchical and has strong opinions about who should do what in the household and so forth. And then we've got Bernie, who is a—he was even for several years before Bernie ran for president, a professor in Vermont who has very kind of hands-off views about regulations. People should be allowed to use marijuana and so forth. But if people are having trouble, the government should help them—he's got a kind of socialist orientation. Then there's Linda, who's a social worker in Philadelphia and she goes along with Bernie on a lot of issues except drugs. She thinks kids have to have more discipline. And, finally, there's Pat; and Pat, well, is sort of average in social outlook, average in income and average in gender. Pat is the survey mean, right, just an average American who doesn't exist. You see, people have opinions that reflect who they are. And there's nobody who is just a

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[10] *See Scott*, 550 U.S. at 387 (Breyer, J., concurring).
[11] *See id.* at 390 n.1 (Stevens, J., dissenting).
[12] *Id.* at 378 n.5 (majority opinion).

little bit of everything. Right. Ron, very likely to agree with the Supreme Court's outcome on the issue—the factual issue that the driver in *Scott v. Harris* was posing a deadly risk to others. Right. Then you've got Linda and Bernie who have a little bit more noise in their simulated values. But they think that's—no, and that's not—they're not very likely to find that outcome. And then there's, of course, Pat. And Pat's closer to Ron.

But here's the issue, right, whether when you have people disagreeing like this, is the disagreement sufficiently strong and you're just going to basically have summary judgment, which is what the Supreme Court ruled in that case, eight to one. Right. That it would be summary judgment because no reasonable juror could watch the tape and come to any other conclusion, but that this guy was a death machine on wheels. Right. No, it's not true. People who have different experiences, different identities, they might come to a different outcome. Maybe they're going to lose, you know, but the question is whether they should have a—at least have a chance to be heard by people in the community who don't agree with them and at least get a chance to maybe tell them why they feel differently. It can't be the case that summary judgment is warranted because the views of people like Bernie and Linda are just not reasonable. These are reasonable people.

And I think this is a consequence of—really of situation sense. The judges don't see things the way members of the public do. And when they have to predict what members of the public might think, they're at a risk of error that they're going to be imposing their own outlooks on that prediction. They need to do a better job on that.

The second problem is I think even more significant. I call it the neutrality communication problem. And, again, I want to go on a little detour here and get into science communication because my lab also studied both kinds of issues. And we wanted to know, well, how do

people form their understandings of scientific incentives on these kinds of issues. So what we did was we showed them, right, three people who look like they're pretty much experts on their subject matters. But they're—well, they all went to good schools. One went to a really great school. It's in my contract. I have to say stupid things like that whenever Yale and Harvard are on the same slide. Right. But they all went to elite schools. They're on the faculty at these prestigious universities. All members of the National Academy of Sciences. And we say, well, do you think that this is a genuine expert on the issue of climate change or, you know, gun control or nuclear waste. Right.

And we picked those issues because we know that people are very divided in these two cultural groups. But we also, again, have an experimental component. We tell half the people that the featured scientist is taking the high-risk position, that climate change is happening and there's consensus on it and we're going to die if we don't do something versus the low risk. Right. The computer models, they're subject to error. It's too early to say. We shouldn't do anything precipitous. Right. The kinds of arguments that they recognize.

The same thing with nuclear waste, high risk to put the waste in deep geologic isolation. No, low risk, that's been determined to be perfectly safe. And the same thing under the concealed—carry concealed guns. They make crime rates go up because more people are armed and there's going to be accidents and there could be deadly confrontations. No, it's going to make the crime rate go down because if you don't know, right, whether anybody you're dealing with is packing heat, you're kind of on your best behavior. You don't want to piss them off or anything. You're laughing so I know they're cultural orientation on that one. Right. Because what happened is that people when they're making these judgments about, is this really an expert on this issue, they're much more likely to form the judgment that the person was

a genuine expert when we depicted the expert as taking the position that was dominant in their cultural group.

All right. These are [indiscernible] seventy-two percentage points more likely to find that this is an expert when you're an egalitarian communitarian if it's in the global warming condition and the person says it's dangerous. Right. Similarly [indiscernible] effects for all of these issues. Now, this is just like, or very similar to, they saw a game. Right. People who have these different kinds of group commitments, they're looking at evidence that they're drawing some issue that divided their group from another. And they're selectively crediting it or not crediting it, depending on whether it's consistent with their group's view. Right.

That's why we have what I call the [indiscernible] communication problem, the persistence of strong partisan disagreement over issues of simple fact, right, that can be determined by empirical methods. And in some cases, have already been extensively studied. Right. Because you're filtering the information in a way that will make what you believe, what you think the facts are support your group's position on these kinds of issues.

Now, you have that because, you see, members of the public don't have the same kind of professional judgment. They don't have the inventory of prototypes that the scientists do. Right. If the scientists are perfectly neutral, then they're not going to be seen that way by members of the public who have these different kinds of outlooks. People aren't going to converge on what the best evidence is.

The same thing is happening, you see, in the law. Right. People see one of these charged issues like involving protests, for example. And for them, their own eyes are telling them, this is what happened. Right. And, you know, it doesn't matter it was eight to one in Shirley's case, nine to zero in *McCullen v. Coakley*.[13] Okay. People are going to

[13] McCullen v. Coakley, 134 S. Ct. 2518 (2014).

say, how could the justices do this? How could the State Supreme Court justices do this? How could a trial court—I can see it with my own eyes, they must be biased. And as these things accumulate, everybody becomes convinced that the courts are political, even if they're not. Right. And not surprisingly, right, whether you think that they're being political on the liberal side, well, yes, if you're a conservative. Or they're being political on the conservative side, yes, if you're a liberal, but not if you're a conservative. So you get the same kind of disagreement about whether the court itself is being political and why.

And this can very positively account for the declining public confidence in courts. The courts are being political. Even if they're not, right. Well, the judges—new proposition here, judges and lawyers need to learn to see what ordinary members of the public see as part of their professional craft, right. The same way—doing good science, is that the same thing as communicating what it means? Because doing good science depends on the kinds of habits that modern scientists have that most of the public don't. So you use the kinds of techniques that I have been showing you to try to figure out how to communicate science so that the validity of it is recognized by people who don't have the kinds of insights that the scientists do.

Well, there's a neutrality communication problem. No matter how impartial courts are being on these kinds of hot-button issues, it is the case that members of the public who don't like the results are going to see it as politically biased. Well, we need a new science of traditional neutrality communication. Just doing good judging doesn't by itself certify to members of the public that it's good judging or that it's neutral. But that's something that we ought to address within our profession, and starting with the education of law students.

So what should we do in that regard? Well, you tell me. You have more understanding of this as judges, as

practicing lawyers—you know what they say about those who can do and those who would rather not because it's so easy and fun to teach law, or something like that. But your intuitions are better than mine. You know, is there something with opinion writing? Is it the kind of common exaggeration that we know that eight—judges in the majority says, eighteen arguments, they all come out this way. A judge says, eighteen arguments, they all come out that way. Right. And maybe in a Supreme Court, which is already selecting the cases based on whether there's disagreement about it in the lower courts. It can't be the case, it's that simple. But they always—the judge is always right that it is that way. Maybe that has an impact on people who will believe that the decision is wrong, that there's no convincing of any kind of uncertainty. I don't know. This is what judges have told me you might want to consider. Or maybe that you would have some kind of additional public outreach so that people could learn more about the decisions in terms that they could understand and evaluate them as to whether they're neutral or not. Maybe a judicial selection criteria should reflect something like this. I don't know.

We should do things in legal education. Well, what? Right. What we really need is the creation of evidence-based capacity and practice in the judiciary. We look—where the judges and lawyers traffic in facts, the system that we attribute to is supposed to ascertain the truth. Well, we should use the kinds of empirical methods that are appropriate for assessing the performance of ourselves to see whether we, in fact, are projecting—teaching people about facts, ensuring that facts govern in the cases that we decide. All right.

So you tell me what would be a good way to help address this question, and then I'll help you by measuring and using the same kinds of methods that I've been talking to you about today. And that brings us to the close with the highlight on Pat, a very important member of our project.