

Frames of Injustice: The Bias We Overlook[†]

ADAM BENFORADO^{*}

INTRODUCTION.....	1334
I. CONNECTING PROJECTS: UNDERSTANDING COGNITION	1337
A. THE CULTURAL COGNITION PROJECT.....	1337
B. THE PROJECT ON LAW AND MIND SCIENCES	1339
II. THE EXTERIOR SITUATION OF <i>SCOTT V. HARRIS</i>	1347
A. CAMERA PERSPECTIVE BIAS.....	1347
B. TOWARD A MORE COMPLETE MODEL	1360
III. THE BROADER OUTLOOK.....	1375
A. THE MANY CAMERAS OF CRIMINAL LAW	1375
B. OVERLOOKING RELEVANT FRAMES IN OTHER CCP WORK.....	1376
CONCLUSION.....	1378

The Cultural Cognition Project (CCP) at Yale Law School and the Project on Law and Mind Sciences (PLMS) at Harvard Law School draw on similar research and share a similar goal of uncovering the dynamics that shape risk perceptions, policy beliefs, and attributions underlying our laws and legal theories. Nonetheless, the projects have failed to engage one another in a substantial way. This Article attempts to bridge that gap by demonstrating how the approach taken by PLMS scholars can crucially enrich CCP scholarship. As a demonstration, this Article engages the case of Scott v. Harris, 550 U.S. 372 (2007), the subject of a recent CCP study.

In Scott, the Supreme Court relied on a videotape of a high-speed police chase to conclude that an officer did not commit a Fourth Amendment violation when he purposefully caused the suspect's car to crash by ramming the vehicle's back bumper. Challenging the Court's conclusion that "no reasonable juror" could see the motorist's evasion of the police as anything but extremely dangerous, CCP Professors Dan M. Kahan, David A. Hoffman, and Donald Braman showed the video to 1350 people and discovered clear rifts in perception based on ideological, cultural, and other lines.

Despite the valuable contribution of their research in uncovering the influence of identity-defining characteristics and commitments on perceptions, Kahan, Hoffman, and Braman failed to engage what may well be a more critical dynamic shaping the cognitions of their subjects and the members of the Supreme Court in Scott: the role of situational frames in guiding attributions of causation, responsibility, and blame. As social psychologists have documented—and as PLMS scholars have emphasized—while identities, experiences, and values matter, their operation and impact is not

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stable across cognitive tasks, but rather is contingent on the way in which information is presented and the broader context in which it is processed.

In large part, the Scott video is treated—both by the Supreme Court and by Kahan, Hoffman, and Braman—as if it presents a neutral, unfiltered account of events. However, it does not. Studies of viewpoint bias suggest that the fact that the video offers the visual and aural perspective of a police officer participating in the chase—rather than that of the suspect or a neutral third party—likely had a significant effect on both the experimental population and members of the Court.

Had the Supreme Court watched a different video of the exact same events taken from inside the suspect's car, this case may never have been taken away from the jury. Any discussion of judicial "legitimacy"—in both the descriptive and normative sense—must start here. The real danger for our justice system may not ultimately be the "visible fiction" of a suspect's version of events, as Justice Scalia would have it, or cognitive illiberalism as Kahan, Hoffman, and Braman would, but the invisible influence of situational frames systematically prejudicing those who come before our courts.

INTRODUCTION

The cop-car camera: scourge of the sadist police officer and savior of the innocent and vulnerable. Before its unblinking gaze, fabricated stories wilt and the truth is revealed—or so the Supreme Court would have us believe.

Though reluctant to turn the lens on themselves,¹ recently, the camera-shy members of the Court have been anything but bashful in their embrace of video technology as a tool of justice. Petitioners have taken notice. In his February 2009 filing, Jesse D. Buckley encouraged the Court to view a videotape taken from a dashboard camera showing him being Tasered by an officer while lying on the ground, crying, with his hands cuffed behind his back.² As Michael R. Masinter, one of Buckley's lawyers, told the *New York Times*, "video evidence is inherently more compelling than recorded testimony."³ It "offers a uniquely clear record of events against which to articulate a standard for future cases."⁴

1. See, e.g., *Financial Services and General Government Appropriations for 2008: Hearing Before the Subcomm. on Financial Services and General Government Appropriations of the H. Comm. on Appropriations*, 110th Cong. 28–29 (2007) (statement of Anthony M. Kennedy, J., Supreme Court of the United States) ("[A]ll in all, I think it would destroy a dynamic that is now really quite a splendid one and I don't think we should take that chance."); C-Span.org, *Cameras in the Courts*, <http://www.c-span.org/camerasinthecourt> ("I have come to the conclusion that it will misinform the public rather than inform the public to have our proceedings televised." (quoting Antonin Scalia, Associate Justice, Supreme Court of the United States, Remarks at a "Constitutional Conversation" at the Nat'l Constitution Ctr. (Apr. 21, 2005))).

2. Petition for Writ of Certiorari, *Buckley v. Rackard*, No. 08-996, *cert. denied*, 129 S. Ct. 2381 (2009), available at <http://www.aclufl.org/pdfs/BuckleyCert-final.pdf>. As Buckley pointed out in his petition, the video is available in the lower court record and was posted on YouTube.

3. Adam Liptak, *Supreme Court Enters the YouTube Era*, N.Y. TIMES, Mar. 3, 2009, at A12.

4. Petition for Writ of Certiorari, *supra* note 2, at 12.

Buckley's attorneys had reason to be confident in such assertions: just two years ago, the Supreme Court signaled its agreement in *Scott v. Harris*.⁵ In that case, involving a young man who was rendered a quadriplegic when the police purposefully rammed his car at the end of a high-speed chase, the Court based its determination that "no reasonable" juror could find that the man's driving did not expose the public to a deadly risk entirely on video footage taken from inside the pursuing police cars.⁶ Calling the "[r]espondent's version of events . . . utterly discredited by the record," Justice Antonin Scalia explained that "[t]he Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape."⁷ In a showing of confidence, the Court posted a link to the video on its website and invited members of the public to watch it.⁸

With the invitation made, three members of Yale Law School's Cultural Cognition Project (CCP)—Dan M. Kahan, David A. Hoffman, and Donald Braman—decided to call the Court's bluff that "the videotape . . . speak[s] for itself" and had a diverse sample of 1350 Americans watch a clip and then offer their assessments of the depicted events.⁹

The results were startling.¹⁰ While "[a] fairly substantial majority did interpret the facts the way the Court did,"¹¹ the sample demonstrated significant stratification of opinion concerning the video along ideological, cultural, and other lines. Affluent, politically conservative white males, with hierarchical and individualist cultural

5. 550 U.S. 372 (2007). Although *Scott* may be accurately classified as a watershed case, it was not the first time that the Supreme Court had occasion to affirm the value of film in determining what really happened in a case. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 547 (1965) ("Our conclusion that the entire meeting from the beginning until its dispersal by tear gas was orderly and not riotous is confirmed by a film of the events taken by a television news photographer, which was offered in evidence as a state exhibit. We have viewed the film, and it reveals that the students, though they undoubtedly cheered and clapped, were well-behaved throughout.").

6. While the Supreme Court repeatedly refers to a single videotape, see, for example, *Scott*, 550 U.S. at 378 (referencing "existence in the record of a videotape capturing the events in question"), there were "four police tapes which captured portions of the pursuit, all recorded from different officers' vehicles" entered into evidence and viewed by the court of appeals panel, *id.* at 395 n.7 (Stevens, J., dissenting).

7. *Id.* at 380–81.

8. *Id.* at 378 n.5. In fact, two videos were uploaded to the Supreme Court's website. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going To Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 856 (2009) [hereinafter Kahan et al., *Whose Eyes?*] ("The two tapes were recorded by the two pursuing police cars, which, at around the midpoint of the chase, swap positions relative to the fleeing Harris.").

9. See Kahan et al., *Whose Eyes?*, *supra* note 8, at 841. The footage that Kahan, Hoffman, and Braman used was a composite of the two videos uploaded by the Supreme Court, each taken from a car participating in the chase. "The study video consist[ed] of those portions of each tape recorded when the filming vehicle was the lead car in the chase and omit[ted] those portions of each recorded when the car filming was in the trailing position." *Id.* at 856.

10. For a law review article, the study has garnered an unusual amount of popular attention. See, e.g., Liptak, *supra* note 3; Christopher Shea, *Cognitive Illiberalism*, N.Y. TIMES, Dec. 13, 2009, (Magazine), at 30.

11. Kahan et al., *Whose Eyes?*, *supra* note 8, at 841.

worldviews, were far more prodefendant in their perceptions of the police chase than educated, but less affluent, African American, liberal women with egalitarian and communitarian views.¹² Watching the same tape, identifiable subgroups of citizens reached strongly divergent conclusions concerning whether the chase was worth the risk, whether Harris posed a lethal danger to the police and the public, whether the police were justified in terminating the chase using deadly force, and whether Harris was more at fault than the police.¹³

With evidence that individuals' defining characteristics and backgrounds clearly matter when it comes to perception, Kahan, Hoffman, and Braman took the Supreme Court to task for failing to acknowledge "that there was [not] only one 'reasonable' view of the facts."¹⁴

Under these circumstances, ordering that the case be decided summarily based on the video was wrong precisely because doing so denied a dissenting group of citizens the respect they were owed, and hence denied the law the legitimacy it needs, when the law adopts a view of the facts that divides citizens on social, cultural, and political lines.¹⁵

As explored in this Article, the admonition was sound, but ultimately incomplete. While Kahan, Hoffman, and Braman were correct to attribute the rifts in interpretation of the video to the psychological proclivity of "individuals to resolve disputed facts in a manner supportive of their group identities,"¹⁶ they failed to address another—and perhaps more critical—element informing the cognition of facts, risks, and culpability at issue in the case: the role of exterior situation in shaping the processing and interpretation of taped events. When watching the same incidents, "*different* people, with different experiences, can *see different things*,"¹⁷ yet, just as crucial, the *same* person can also see *different* things depending on how information is presented and the broader context in which it is perceived.

Overall, the choice of the CCP not to engage social psychological evidence on the influence of exterior situation is a major limitation for the approach. The purpose of this Article is to demonstrate the great benefits of incorporating insights, in this regard, from Harvard Law School's Project on Law and Mind Sciences (PLMS), another major scholarly endeavor dedicated to uncovering the dynamics that shape the perceptions, beliefs, and attributions underlying our laws and legal theories. Taken together, these projects offer a robust challenge to the dominant conception of the human actor envisioned by conventional law and economics, and Part I of this Article considers the strong parallels and connections between the two undertakings, before turning to a key distinction concerning the power of exterior situation.

To better understand the significance of this divergence in a concrete, real-world setting, Part II then takes up the subject of a recent CCP study, the videotaped chase in *Scott v. Harris*. As an illustration of the importance of exterior situation, this Article,

12. *Id.* at 879.

13. *Id.* at 872–79.

14. *Id.* at 838.

15. *Id.* at 887.

16. *Id.* at 838.

17. *Id.* at 848 (emphasis in original).

first, examines research from the mind sciences on the impact of viewpoint bias on attributions and, second, applies that research to the details of the *Scott* case and the CCP study. The analysis suggests that the fact that the video in *Scott* offers the visual and aural perspective of a police officer participating in the chase—rather than that of the suspect or a neutral third party—likely had a significant effect on the processing and construal of essential facts by both members of the Supreme Court and the experimental population. In light of this discussion, the Article explores the implications of acknowledging the effects of camera perspective bias for the CCP project's normative claims and, more crucially, for the authority of our legal system. The principal threat to justice presented by the Supreme Court's opinion may not ultimately be “the cost to democratic legitimacy associated with labeling the perspective of persons who share a particular cultural identity ‘unreasonable’ and hence unworthy of consideration in the adjudicatory process,”¹⁸ but rather the Court's sanction of a technology that, by offering an invisible but compelling situational frame, systematically prejudices those who come before our courts. We may need to worry less about potential jurors and more about actual suspects. Part II concludes with an overview of how viewpoint bias fits into the wider array of situational factors that are affecting cognition of the key facts in *Scott*.

Part III presents some of the broader implications of the preceding analysis for criminal law and suggests that the critique presented in this Article may be applicable to other CCP work.

I. CONNECTING PROJECTS: UNDERSTANDING COGNITION

What shapes our risk perceptions, policy beliefs, and attributions? What makes us favor the death penalty? What influences our conviction that guns make society safer? What pushes us to blame the obese or the bankrupt for their conditions? These types of questions are vitally important to law and legal theory because without a sound understanding of human cognition, there is little hope of developing effective strategies for addressing societal problems.

Two projects—one at Yale and one at Harvard—have been created in the last few years to address just such issues. Although the projects share similar aims and draw on similar resources, they have not engaged each other in a substantial way and the purpose of this Article is to show the potential for that collaboration.

A. The Cultural Cognition Project

The CCP at Yale Law School is composed of a set of academics dedicated to using social psychology, anthropology, communications, and political science, among other fields, to uncover how cultural values influence public risk perceptions and associated policy beliefs.¹⁹ The term “cultural cognition,” itself, references the proclivity of

18. *Id.* at 842.

19. For a sample of scholarship from the CCP, see Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569 (2006); John Gastil, Justin Reedy, Donald Braman & Dan M. Kahan, *Deliberation Across the Cultural Divide: Assessing the Potential for Reconciling Conflicting Cultural Orientations to Reproductive Technology*, 76

humans “to conform their beliefs about disputed matters of fact . . . to values that define their cultural identities.”²⁰ While those with divergent cultural values may interpret the same evidence very differently, people with shared backgrounds and identities often engage information similarly because they rely on common culture when they go to make sense of actors and events.²¹ Their shared values act as a powerful constraint on cognition: “people are motivated to believe that behavior they find noble is also socially beneficial (or at least benign) and behavior they find base is also socially harmful.”²² Thus, individuals “fit their perceptions of how the world *does* work to their shared appraisals of how the world *should* work: forming beliefs at odds with their core values exposes them to dissonance and risks putting them in conflict with others whose opinions of them affect both their material and emotional well-being.”²³

Egalitarians and communitarians, for example, worry about environmental risks (nuclear power accidents, global warming, air pollution, etc.), the abatement of which would justify regulating commercial activities that generate inequality and legitimize the unconstrained pursuit of individual self-interest.

Individualists, in contrast, reject claims of environmental risk precisely because they cherish markets and private orderings. They worry instead that excessive gun control will render individuals unable to defend themselves—a belief congenial to the association of guns with individualist virtues such as self-reliance, courage, and martial prowess.²⁴

“[T]he unperceived cognitive impact of” these values and identities drives many key divisions in society²⁵—including debates over homosexuality, the death penalty,

GEO. WASH. L. REV. 1772 (2008); Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007) [hereinafter Kahan, *The Cognitively Illiberal State*]; Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149 (2006) [hereinafter Kahan & Braman, *Cultural Cognition*]; Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1 (2008) [hereinafter Kahan & Braman, *Self-Defensive Cognition*]; Kahan et al., *Whose Eyes*, *supra* note 8. For other papers, see The Cultural Cognition Project at Yale Law School, <http://research.yale.edu/culturalcognition>.

20. The Cultural Cognition Project at Yale Law School, *supra* note 19. These scholars are also interested in a related set of social psychological processes—including the culpable control model of blame and identity-protective cognition—that explain how group values and identities can influence cognition of facts. See Kahan et al., *Whose Eyes?*, *supra* note 8, at 852 (“[C]ognition of blame-relevant ‘facts’ (volition, action, causation, harm) is *motivated* by the subconscious desire to form blame attributions that accord with moral evaluations of the agent’s character or lifestyle. . . . As a means of psychological self-defense . . . people tend to process information in a selective fashion that bolsters beliefs dominant within their self-defining groups.” (emphasis in original)).

21. Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in “Acquaintance Rape” Cases 3* (Yale Law Sch. Pub. Law Working Paper No. 196, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1437742##.

22. Kahan et al., *Whose Eyes?*, *supra* note 8, at 852.

23. Kahan, *supra* note 21, at 3.

24. Kahan, *The Cognitively Illiberal State*, *supra* note 19, at 123.

25. Kahan & Braman, *Self-Defensive Cognition*, *supra* note 19, at 49 (emphasis omitted);

abortion, subversive speech, and drug use²⁶—and the CCP’s explicit normative goal is “to identify processes of democratic decision making by which society can resolve culturally grounded differences in belief in a manner that is both congenial to persons of diverse cultural outlooks and consistent with sound public policy making.”²⁷

B. *The Project on Law and Mind Sciences*

The PLMS at Harvard Law School is composed of a related set of academics (known as “critical realists,” “situationists,” or “behavioral realists”) focused on employing the insights of social psychology, social cognition, cognitive neuroscience, and associated disciplines to better understand the origins of human behavior and, consequently, to build a more realistic account of the human animal upon which legal analysis and theory can be grounded.²⁸ For scholars involved in the project, engaging evidence from the mind sciences means rejecting a common-sense dispositionist account of human action, based on a myth of stable preferences, rationality, and free choice, in favor of an account acknowledging the powerful role of situational factors—

see also Kahan & Braman, *Cultural Cognition*, *supra* note 19, at 14–50.

26. *See* Kahan & Braman, *Cultural Cognition*, *supra* note 19, at 149–50; Kahan et al., *Whose Eyes?*, *supra* note 8, at 853.

27. The Cultural Cognition Project at Yale Law School, *supra* note 19. As Kahan and Braman explain further, cognitive illiberalism “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.” Kahan & Braman, *Self-Defensive Cognition*, *supra* note 19, at 5 (emphasis in original).

28. For a sampling of PLMS scholarship, see Adam Benforado, *The Body of the Mind: Embodied Cognition, Law, and Justice*, 54 ST. LOUIS U. L.J. (forthcoming 2010); Adam Benforado & Jon Hanson, *Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights*, 57 EMORY L.J. 1087 (2008) [hereinafter Benforado & Hanson, *Legal Academic Backlash*]; Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499 (2008) [hereinafter Benforado & Hanson, *Naïve Cynicism*]; Adam Benforado & Jon Hanson, *The Costs of Dispositionism: The Premature Demise of Situationist Law and Economics*, 64 MD. L. REV. 24 (2005); Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 328–38 (2008) [hereinafter Benforado & Hanson, *The Great Attributional Divide*]; Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645 (2004) [hereinafter Benforado et al., *Broken Scales*]; Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004) [hereinafter Chen & Hanson, *Categorically Biased*]; Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004); Jon Hanson & Michael McCann, *Situationist Torts*, 41 LOY. L.A. L. REV. 1345 (2008); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003) [hereinafter Hanson & Yosifon, *The Situation*]; Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004) [hereinafter Hanson & Yosifon, *The Situational Character*]; Goutam U. Jois, *Stare Decisis Is Cognitive Error*, 75 BROOKLYN L. REV. 63 (2009); Julie Seaman, *Hate Speech and Identity Politics: A Situationalist Proposal*, 36 FLA. ST. U. L. REV. 99 (2008); David Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 GEO. MASON L. REV. 681 (2008).

that is, generally unappreciated cognitive proclivities and structures (interior situation) and external environmental forces (exterior situation)—in shaping behavior.²⁹

1. Interior Situation

PLMS scholars would consider the values and basic cultural commitments that define an individual's cultural identity and that shape an individual's cognition to be elements of interior situation (more specifically, in characterizing the same dynamics, they would describe the operation of such worldviews with respect to knowledge structures, affective states, and motives, among other things).³⁰ Just like those engaged in the CCP, they would readily accept that these values (in PLMS terms, underlying knowledge structures, motives, and the like) are the result of life experiences, genetics, or some combination of the two, and that they have a powerful influence on cognitive process, attitudes, and behavior.³¹

With this shared understanding, the two projects both identify a potent divide concerning the interior situations of Americans. In both bodies of work, this divide in worldviews informs the major policy conflicts of our times.³²

29. See generally Hanson & Yosifon, *The Situational Character*, *supra* note 28.

30. For example, as PLMS professors Jon Hanson and David Yosifon have explained, We process stimuli “through preexisting systems of schematized and abstracted knowledge—beliefs, theories, propositions, and schemas. These knowledge structures label and categorize objects and events quickly and, for the most part, accurately. They also define a set of expectations about objects and events and suggest appropriate responses to them.”

Thus, the benefit of such knowledge structures is that they provide us, often automatically, with a way of understanding our world so that we can operate reasonably well within it, at the same time that they free up cognitive capacity to cope with other pressing issues.

Hanson & Yosifon, *The Situational Character*, *supra* note 28, at 51 (quoting RICHARD E. NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 7 (1980)); see also Chen & Hanson, *Categorically Biased*, *supra* note 28, at 1182 (“When a particular emotion is activated . . . schemas and other cognitive materials that are tagged with that emotion will be primed for both the identification of mood-congruent stimulus material and for the recall of congruent material from memory.’ In other words, affect influences the schemas people apply to interpret events.” (quoting Walter H. Crockett, *Schemas, Affect, and Communication*, in *COMMUNICATION, SOCIAL COGNITION, AND AFFECT* 33, 46–47 (Lewis Donohew et al. eds., 1988) (alteration in original))).

31. See Benforado & Hanson, *The Great Attributional Divide*, *supra* note 28, at 381–99 (discussing research concerning the genetic and external situational influences on worldviews); Dan M. Kahan & Paul Slovic, *Cultural Evaluations of Risk: “Values” or “Blunders”?*, 119 HARV. L. REV. 166, 170 (2006) (“Perhaps because of upbringing, perhaps because of genetic disposition, or perhaps because of some combination of the two, people form hierarchic, egalitarian, individualistic, or communitarian cultural commitments. These commitments, in turn, supply the values to which individuals conform their beliefs and define the relevant groups within which social influences on belief operate.”).

32. Benforado & Hanson, *The Great Attributional Divide*, *supra* note 28, at 403 (“[S]tretching across and defining most policy debates, there is a gaping divide arising from two fundamentally different ways of explaining behavior and events.”); Gastil et al., *supra* note 19, at 1788 (“[T]he divide . . . is at the heart of American politics, encompassing (among other

The CCP scholars have focused on “two prominent and recognizable cultural styles, which [they] designate[] ‘*aleph*’ and ‘*bet*.’ *Alephs* hold conspicuously hierarchical and individualistic cultural worldviews and (on most questions, at least) highly conservative political leanings. . . . *Bets*, in contrast, hold disproportionately egalitarian and communitarian views. Their politics are more liberal and Democratic.”³³ According to Kahan and his coauthors, *aleph* and *bet* cultural styles are pitted against each other in a range of issues “from affirmative action to gun control, from nuclear power to abortion, from the death penalty to gay rights.”³⁴ *Alephs* and *bets* demonstrate significant divergence on risk perceptions, but even more so with respect to apportioning fault in the creation of risk.³⁵ Relatedly, while *alephs* approve of highly punitive responses to defiance of dominant norms, *bets* tend to support social welfare programs and view harsh punitive measures as ineffective deterrents.³⁶

Scholars in the PLMS have identified a very similar pair of salient interior situations, defined by an attributional divide:

[T]he *dispositionist* approach, which explains outcomes and behavior with reference to people’s dispositions (i.e., personalities, preferences, and the like), and the *situationist* approach, which bases attributions of causation and responsibility on unseen or unappreciated influences within us and around us. Those different methods of constructing causal stories and assigning fault not only color individual issues from gay marriage to welfare and from abortion to social security reform, but also help define the walls of the broader liberal-conservative crevasse.³⁷

The *aleph* and the dispositionist share much in common: both have extremely hierarchical and individualistic cultural worldviews and are conservative leaning.³⁸ Similarly, the *bet* and the situationist exhibit significant consistencies: both have disproportionately egalitarian and communitarian views and are liberally leaning.³⁹

To see the connections more clearly, consider the issue of poverty. For the dispositionist, the poor man is poor because of his flawed disposition: he is lazy; he is foolish; he abuses drugs. In this view, every person has only himself to blame for success or failure and, as a result, society should not offer the man assistance. Harsh treatment—not coddling—is the only way he will be incentivized to change his behavior. For the situationist, by contrast, poverty is often the result of situational factors: lack of educational opportunities, the legacy of racism in America, macroeconomic shifts in the economy, and culturally infused implicit stereotypes and prejudices, among other things. Consequently, inequality is not viewed as inevitable

things) the partisan divide between Democrats and Republicans, as well as the . . . split between feminism and religious conservatism.”).

33. Kahan et al., *Whose Eyes?*, *supra* note 8, at 862 (emphasis in original).

34. *Id.* at 862.

35. *Id.* at 880.

36. *Id.* at 863–64.

37. Benforado & Hanson, *The Great Attributional Divide*, *supra* note 28, at 314 (emphasis added).

38. *See id.* at 383–92.

39. *See id.*

(and unproblematic), and the situationist is inclined to believe that society has a responsibility to help those who are struggling.

Thus, although important nuances exist, the attributional approaches that the PLMS has identified appear to share much with the cultural styles identified by the CCP.

In addition, both projects are concerned with social psychological evidence on our blindness to our own biases and our quickness to see bias in others:⁴⁰ what Lee Ross and his collaborators have dubbed “naïve realism.”⁴¹ As summarized in a recent PLMS article, naïve realism has three essential components:

First, we naively believe that we see the world in an objective, neutral manner. Second, we assume that other reasonable people view the world in the same way we do—that is, accurately. Finally, when we encounter individuals that see things in ways that conflict with our own views, we conclude that the difference of opinion is due to a lack of information, intelligence, or objectivity on their part.⁴²

In both projects, this tendency is of primary importance to the core theory.

For PLMS scholars, naïve realism offers an explanation for how dispositionism manages to sustain its dominance as an attributional framework despite the fact that it misses so much of what actually moves us and is generally less accurate than situationism: rather than engage situationist evidence that might force a reappraisal, dispositionists “maintain [their] favored views by disparaging the problematic [situationist] message, discrediting the messenger, or attacking any associated institution.”⁴³ Put differently, as a result of naïve realism (and an attendant concept of naïve cynicism), “[o]ur laws and legal theories—far from being determined in a meritocratic battle based upon accuracy and effectiveness—have been shaped, and continue to be shaped, by largely unsupported intuitions and outward claims of ignorance, misinformation, bias, irrationality, and disloyalty.”⁴⁴ When public health experts, academics, and journalists have provided evidence that obesity has situational origins and is not just a “personal responsibility” issue, their work has been attacked as against common sense and totalitarian.⁴⁵ They have been written off as know-it-all nannies and pointy-headed academics and as further proof of the liberal bias of academia and the media.⁴⁶ Likewise, in the wake of 9/11, situationist accounts of events at Abu Ghraib, Guantanamo Bay, and other detention centers engendered a similar backlash that focused not on the contents of those accounts, but on how they (and those who asserted them) were biased and a dangerous threat.⁴⁷ Other PLMS work

40. See, e.g., Benforado & Hanson, *Legal Academic Backlash*, *supra* note 28; Benforado & Hanson, *Naïve Cynicism*, *supra* note 28; Kahan et al., *Whose Eyes?*, *supra* note 8, at 895–900.

41. Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in *VALUES AND KNOWLEDGE* 103, 110 (Edward S. Reed, Elliot Turiel & Terrance Brown eds., 1996).

42. Benforado & Hanson, *Naïve Cynicism*, *supra* note 28, at 513–14 (citing Ross & Ward, *supra* note 41).

43. *Id.* at 534.

44. *Id.* at 573.

45. See Benforado et al., *Broken Scales*, *supra* note 28, *passim*.

46. See *id.*

47. Benforado & Hanson, *Naïve Cynicism*, *supra* note 28, at 542–72.

has noted the influence of naïve realism and naïve cynicism in the reaction of the Catholic Church to Galileo and his heliocentric views,⁴⁸ responses to the abolitionist movement in the antebellum South,⁴⁹ backlash to research on global climate change,⁵⁰ and the reception of social psychological criticisms to the rational actor model of law and economics.⁵¹

For CCP scholars, the interest in naïve cynicism comes in its use in understanding the “dynamics that are likely to distort judicial decision making on factual issues that divide competing cultural and social groups” and, more broadly, in explicating the “escalating cycle of recrimination and distrust” in many of our major policy debates.⁵²

Because [individuals] are not generally aware of their own disposition to form factual beliefs that cohere with their cultural commitments, legislators, policy analysts, and ordinary citizens manifest little uncertainty about their answers to these questions. But much worse, because they *can* see full well the influence that cultural predispositions have on those who *disagree* with them, participants in policy debates often adopt a dismissive and even contemptuous posture toward their opponents’ beliefs. This attitude in turn provokes resentment on the part of their opponents, who, as a result of naïve realism, bridle at the suggestion that they are conforming their factual beliefs to their values yet see exactly that sort of process going on in the minds of their (annoyingly smug, it seems) antagonists.⁵³

“The result is a state of *cognitive illiberalism*”⁵⁴—a state that includes judges as active citizens. CCP scholars believe that illiberal status competition is deepened when “the law picks sides in factual disputes that arise from culturally conflicting worldviews.”⁵⁵ Thus, a judge ought to temper her “decisionmaking with a prudential sensibility.”⁵⁶ “Due humility obliges her to consider whether privileging her own view of the facts risks conveying a denigrating and exclusionary message to members of . . . subcommunities.”⁵⁷

2. Exterior Situation

Despite the evident similarities between the two projects, one important difference is in the treatment of exterior situation.⁵⁸ As noted earlier, both projects consider

48. See Hanson & Yosifon, *The Situation*, *supra* note 28, at 189–91, 206–25.

49. See *id.* at 303–27.

50. See Benforado & Hanson, *Naïve Cynicism*, *supra* note 28, at 542.

51. See Benforado & Hanson, *Legal Academic Backlash*, *supra* note 28, *passim*.

52. Kahan et al., *Whose Eyes?*, *supra* note 8, at 895–96.

53. *Id.* at 895–96 (emphasis in original); see also Kahan & Braman, *Self-Defensive Cognition*, *supra* note 19, at 5.

54. Kahan et al., *Whose Eyes?*, *supra* note 8, at 897 (emphasis in original).

55. *Id.*

56. *Id.* at 899.

57. *Id.* at 898.

58. Although it is beyond the scope of this Article, another important difference between the projects comes with respect to the issue of whether certain cultural styles or attributional proclivities embody more accurate worldviews than others. The CCP appears to take a deliberately neutral position in this regard and to view nonneutrality as a problem. See, e.g.,

exterior situation to be an important factor in shaping interior situation over time. Growing up in a wealthy white conservative family in a rural western town would be expected to encourage an *aleph* cultural style and a dispositionist attributional approach.⁵⁹ Yet, in contrast to the PLMS, the CCP does not address exterior situation more broadly; indeed, in general, it treats interior situation as fixed when it comes to the instance of interpreting facts and evaluating risks.⁶⁰ People bring different values and identities to the table, but once at the table, the values and identities are consistent and stable. In other words, perhaps with the goal of isolating a dynamic and simplifying the model, the CCP does not focus attention on exterior situation as an active element *at the moment of engagement with a stimulus*. This Article, as part of the PLMS, asserts that, in many contexts, this omission may be critical: exterior situation may frequently overwhelm interior situation.⁶¹ Humans may tend to conform their beliefs about disputed matters of fact to align with their cultural identities, but

Kahan, *The Cognitively Illiberal State*, *supra* note 19, at 131 (“Disputes over who is being ‘realistic’ and who ‘naïve’ about the relationship between cultural commitments and perceptions of harm is another familiar form of illiberal status competition in our society.”). Indeed, David Arkush has asserted that “[c]ultural cognition theorists are ambivalent about the normative implications of their work.” David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory*, 2008 BYU L. REV. 1275, 1349.

Those working on the PLMS, by contrast, argue that social psychology and related fields have shown that situationism is more accurate (or less certainly inaccurate) than dispositionism in explaining human behavior. See Benforado & Hanson, *The Great Attributional Divide*, *supra* note 28, at 317–39. Given that other research has documented that attributional tendencies are powerfully influenced by elements in our situations, PLMS scholars have been working to understand which situations tend to encourage dispositionism and which tend to encourage situationism to understand the sources that “have the greatest potential for developing the accurate attributions of human behavior that are so important to law.” *Id.* at 319. This distinction between the two projects is extremely important and will hopefully inspire deeper investigation in future work.

59. See Kahan et al., *Whose Eyes?*, *supra* note 8, at 862. See generally Benforado & Hanson, *The Great Attributional Divide*, *supra* note 28.

60. The CCP also does not engage the possibility that powerful entities might have an incentive and ability to encourage certain attributional approaches or cultural worldviews by manipulating exterior situation. This is of great interest to PLMS scholars, who refer to the efforts by individuals and entities to influence attributional schemas as *deep capture*. See, e.g., Benforado et al., *Broken Scales*, *supra* note 28, at 1727–1805 (offering evidence of deep capture in respect to attributions concerning obesity); Hanson & Yosifon, *The Situation*, *supra* note 28, at 202–84 (introducing the notion of deep capture).

61. See, e.g., Benforado & Hanson, *The Great Attributional Divide*, *supra* note 28, at 328 (“The interior sources of dispositionism are often powerfully linked to exterior sources, cues, and frames. . . . [T]he strength of our dispositionism changes based on whether we are making a causal attribution for our own behavior or for others’ behavior and based on whether the outcome is good or bad. We may also make different attributions based on whether we are caught in the moment or trying to make sense of a past event. Moreover, in some cases, elements in our environment that appear quite separate from the attribution at hand may influence the extent of our dispositionism. For example, since the strength of our dispositionism seems to depend significantly on whether we are facing an outside threat, a series of terrorist attacks may make us more likely to explain a homeless person’s condition as the result of a poor disposition, as opposed to systemic problems.”); see also *infra* Part II.A.

different cultural identities within an individual may be implicated based on the nature of the external situational frame. Put a different way: an *aleph* does not always engage the world as an *aleph*; and a dispositionist does not always see, think, or act as a dispositionist. Even when confronting the same set of facts, if the situational presentation or backdrop is altered, a different set of cultural commitments or a different attributional framework may be highlighted. As social psychological experiments have shown, sometimes an *aleph* can be encouraged to view matters or behave like a *bet*.

Although the context is slightly different, recent studies on the power of stereotypes offer strong confirmation of the fact that “people carry with them many rich dimensions of social identity, and different social situations and goals trigger different identities,”⁶² which, in turn, impacts mental processing. In one representative experiment, female Asian-American math majors were given a math test.⁶³ Prior to the test, some participants had their Asian ethnic identity made salient, while others had their gender identity highlighted.⁶⁴ “Performance on the quantitative test was best in the Asian-identity-salient condition, intermediate in the control condition, and worst in the female-identity-salient condition.”⁶⁵ The way the exterior situation was structured by the experimenters—subtly activating a particular sociocultural category—powerfully influenced engagement with the stimulus. As other research has substantiated, different women may bring different identities and experiences to a test situation—and those identities and experiences do affect cognition of the problems individuals are asked to answer; yet, *all women* may have their performance impacted by implicitly activating gender stereotypes.⁶⁶ Consequently, if the goal is a complete picture of the processes at work, it is necessary to consider the effects of both interior *and exterior* situation, and the interaction between the two.

62. Margaret Shih, Todd L. Pittinsky & Nalini Ambady, *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 80 (1999) (citations omitted) (“For example, a white, male, Christian accountant may be identified as a male, as white, as a Christian, or as an accountant. Because different social identities are associated with different stereotypes, individuals may be susceptible to different, and in some cases even conflicting, stereotypes.”).

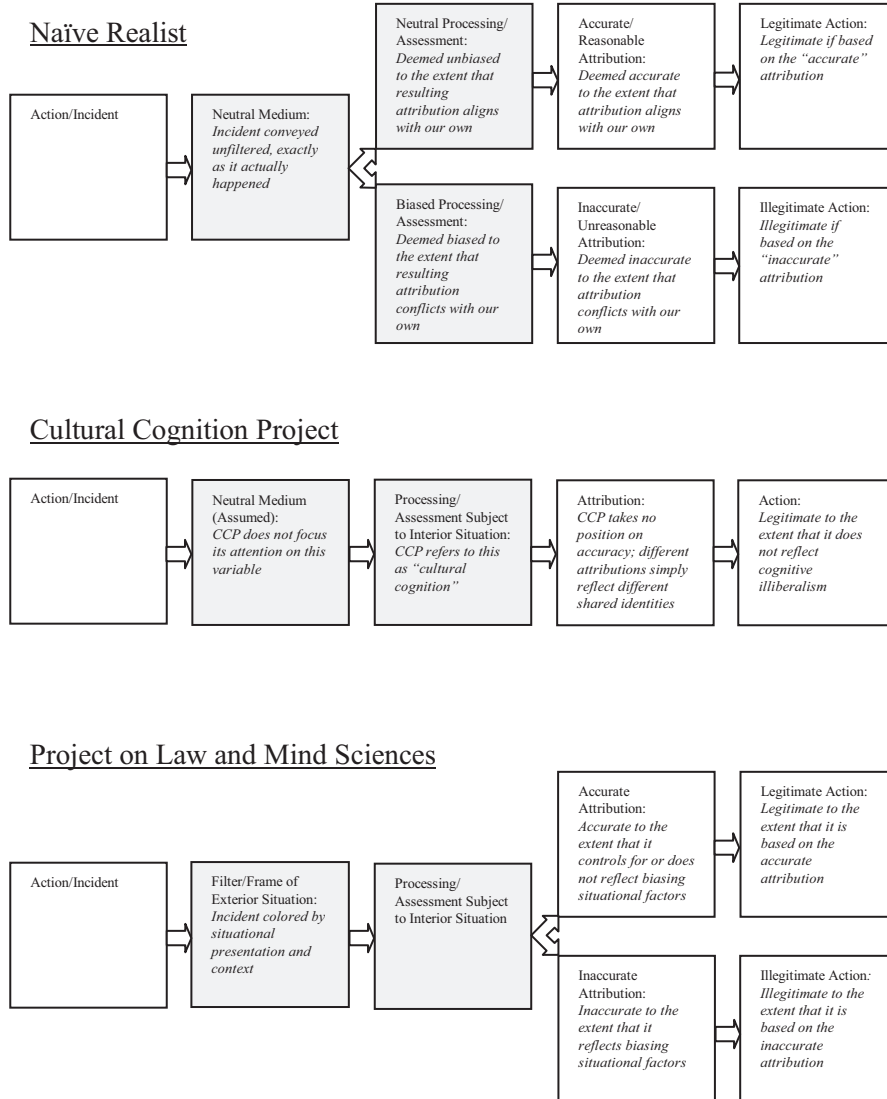
63. *Id.*

64. *Id.* at 80 (“Common cultural stereotypes hold that Asians have superior quantitative skills compared with other ethnic groups and that women have inferior quantitative skills compared with men.”).

65. *Id.* at 81.

66. See, e.g., Joshua Aronson, Diane M. Quinn & Steven J. Spencer, *Stereotype Threat and the Academic Underperformance of Minorities and Women*, in PREJUDICE: THE TARGET’S PERSPECTIVE 83 (Janet K. Swim & Charles Stangor eds., 1998); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997).

Figure 1: Three Models of Mental Processing



To better understand the potential blind spot of the CCP and appreciate the benefits of incorporating a PLMS approach, it is helpful to turn back to the context of the videotaped police chase in *Scott v. Harris*. Evidence from the mind sciences suggests that exterior situation likely played a vital role in the Supreme Court’s decision, with powerful implications for Kahan, Hoffman, and Braman’s study and its normative conclusions. In the interests of focusing the discussion, the next Part begins with an investigation of a particular exterior situational dynamic—what is commonly referred to as “camera perspective bias” (or “illusory causation”)—before considering the relationship between such bias and other situational factors that are influencing the cognition of events in *Scott*, in particular implicit racial bias.

II. THE EXTERIOR SITUATION OF *SCOTT V. HARRIS*

A. Camera Perspective Bias

1. The Power of Perspective

In countless experiments over many decades, social psychologists have shown that the way we construe events and the way we make attributions of causation, responsibility, and blame are powerfully influenced by how facts, images, and stories are revealed to us. Yet, despite the potent effects of situational framing, we tend to remain largely oblivious to its influence.⁶⁷ Indeed, there is a strong human tendency, among both the sophisticated and naïve among us, “to accept problem formulations *as they are given*. . . . [To] remain, so to speak, mental prisoners of the frame provided to us by the experimentalist, or by the ‘expert,’ or by a certain situation.”⁶⁸

In one famous study, individuals were told that the United States was readying for an epidemic in which 600 people were expected to die.⁶⁹ Participants were then asked which of two programs to combat the disease they favored: if Program A were adopted, exactly 200 people would be saved; if Program B were adopted, there would be a one-third probability that 600 people would be saved and a two-thirds probability that no

67. See Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 343 (1984). As Gary Blasi and John Jost note, “The terms *frame* and *framing* have come to mean slightly different things in several different disciplines, each of which has penetrated law and legal scholarship to a different degree.” Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119, 1149 (2006) (emphasis in original). This Article uses the terms to refer to the way that information about the world is presented to us, which impacts how we define problems, causal agents, and solutions, among other things. For example, a small, run-down house may be “reframed” in a real estate brochure as a “cozy, fixer-upper.” Likewise, the agent may choose a photograph taken from a particular angle that makes the home look larger than it actually is or that hides a rotting porch. In both cases, the frames alter how we make judgments and answer key questions: Is this home a good investment? Will I be happy if I buy this house? Will others be impressed with my purchase?

68. Massimo Piattelli-Palmarini, *Probability Blindness: Neither Rational nor Capricious*, BOSTONIA, Mar./Apr. 1991, at 28, 30 (emphasis in original). In a well known demonstration of the profundity of our blindness to situational manipulations, individuals were randomly assigned as questioners and contestants in a fake game show. Lee D. Ross, Teresa M. Amabile & Julia L. Steinmetz, *Social Roles, Social Control, and Biases in Social-Perception Processes*, 35 J. PERSONALITY & SOC. PSYCHOL. 485 (1977). The questioners were given fifteen minutes to make up their own general-knowledge trivia questions and then the contestants were tested. Although observers of the experiment were *fully informed of the setup of the quiz*—that is, the fact that the questioners, allowed to choose trivia from what they already knew, were clearly advantaged in comparison to the contestants, who had no control over the nature of the subject matter—observers nonetheless rated the general knowledge of the questioners as extremely high and that of the contestants as low after the contestants missed many of the questions. Those watching ignored the power of the frame; for them, the game show appeared to present a neutral forum for making an objective assessment of the dispositions of the participants.

69. Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 453 (1981).

people would be saved.⁷⁰ Participants in a second group were asked to rate two other programs: if Program C were adopted, exactly 400 people would die; if Program D were adopted, there would be a one-third probability that nobody would die, and a two-thirds probability that 600 people would die.⁷¹ Clearly, the choices presented to the two groups of participants were effectively identical. What changed was the frame: with the first group, the outcome was described in terms of lives saved; with the second group, the outcome was described in terms of lives lost. That seemingly inconsequential alteration had a big effect with “a pronounced shift from risk aversion to risk taking” in the experimental population: the first group greatly favored Program A (“the prospect of certainly saving 200 lives is more attractive than a risky prospect of equal expected value, that is, a one-in-three chance of saving 600 lives”);⁷² the second group greatly favored Program D (“the certain death of 400 people is less acceptable than the two-in-three chance that 600 will die”).⁷³ For both groups, although the question seemed to offer an entirely neutral means to gauge people’s natural preferences, the manner in which each was framed changed the way people thought about the dilemma beyond their conscious awareness and in a systematic way. Further, the power of the frame seemingly transcended group boundaries: people of different backgrounds and experiences—including university faculty and physicians—were similarly influenced.⁷⁴

The operation and impact of framing is not confined only to phrasing and word choices, but also involves shifts in visual perspective, among other things.⁷⁵ Indeed, one of the situational frames that scientists have found to be particularly significant is whether we are encouraged to see matters from the perspective of an actor or an observer.⁷⁶ Point of view seems to matter. Although research suggests that human behavior is often influenced far more by situational factors than dispositional ones, when observing *others’* acts or circumstances, people exhibit a strong tendency to offer explanations focused on internal causes (e.g., he is poor because he is lazy) while ignoring the role of situation (e.g., many business are not hiring and he is discriminated

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *See id.* (“Alternative frames for a decision problem may be compared to alternative perspectives on a visual scene. Veridical perception requires that the perceived relative height of two neighboring mountains, say, should not reverse with changes of vantage point. Similarly, rational choice requires that the preference between options should not reverse with changes of frame. Because of imperfections of human perception and decision, however, changes of perspective often reverse the relative apparent size of objects and the relative desirability of options.”).

76. *See generally* Edward E. Jones, *The Rocky Road from Acts to Dispositions*, 34 AM. PSYCHOLOGIST 107 (1979); Edward E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior*, in *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* 79 (Edward E. Jones et al. eds., 1972); Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in *COGNITIVE THEORIES IN SOCIAL PSYCHOLOGY* 337 (Leonard Berkowitz ed., 1978). *But see* Bertram F. Malle, *The Actor-Observer Asymmetry in Attribution: A (Surprising) Meta-Analysis*, 132 PSYCHOL. BULL. 895 (2006).

against by potential employers because of his accent).⁷⁷ People are less likely to exhibit this proclivity when making sense of *their own* identical behavior: engaging the world as actors, individuals tend to acknowledge more readily situational demands and constraints.

In an early experiment, greatly relevant to the *Scott* case, Michael D. Storms demonstrated the power of the actor-observer difference by using a video camera to manipulate the visual orientation of individuals asked to perform an attribution task after engaging in or observing a conversation.⁷⁸

[W]hen videotape reproduced subjects' original orientations, actors attributed their behavior relatively more to situational causes than did observers. . . . But under conditions of reorientation, when subjects saw a new point of view on videotape, the attributional differences between actors and observers were exactly reversed. Reoriented, self-viewing actors attributed their behaviors relatively less to situational causes than did observers.⁷⁹

As Emily Pronin and Lee Ross have explained, “[T]he actor-observer difference in attribution is rooted in differences in the information available or salient to actors versus observers. For one, observers’ visual attention tends to focus on the actor in a given situation whereas actors’ visual attention tends to focus on the circumstances attending that situation.”⁸⁰ In other words, different points of view (i.e., the different frames) mean that different things draw our focus and it is those conspicuous elements to which we tend to overattribute causality.⁸¹ As the Storms study showed, people are not stable in their attributional proclivities: if you change the visual perspective, you can change the attribution. The same person—with all of her identity-defining characteristics, commitments, and accumulated experiences—can be made to see things differently by changing her frame of reference.⁸²

77. See G. Daniel Lassiter, Andrew L. Geers, Patrick J. Munhall, Ian M. Handley & Melissa J. Beers, *Videotaped Confessions: Is Guilt in the Eye of the Camera?*, 33 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 189, 197 (2001) (“[T]he findings regarding the fundamental attribution error and salience effects lead to the conclusion that observers routinely fail to appreciate fully the causal influence of external factors or pressures on another individual’s behavior and that the problem is compounded when those situational forces are rendered even less visible or salient by virtue of observers’ visual perspective.”).

78. Michael D. Storms, *Videotape and the Attribution Process: Reversing Actors’ and Observers’ Points of View*, 27 *J. PERSONALITY & SOC. PSYCH.* 165 (1973).

79. *Id.* at 171.

80. Emily Pronin & Lee Ross, *Temporal Differences in Trait Self-Ascription: When the Self Is Seen as an Other*, 90 *J. PERSONALITY & SOC. PSYCHOL.* 197, 197 (2006); see also DONALD C. PENNINGTON, *SOCIAL COGNITION* 43–44 (2000).

81. The term “illusory causation” is commonly used to describe the tendency of people to “attribute unwarranted causality (influence) to a stimulus simply because it is more noticeable or salient than other available stimuli.” G. Daniel Lassiter, *Illusory Causation in the Courtroom*, 11 *CURRENT DIRECTIONS IN PSYCHOL. SCI.* 204, 204 (2002).

82. It is worth noting that those interested in film studies have long understood the power of camera perspective. See, e.g., Jessica M. Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 *COLUM. J.L. & ARTS* 107 (2005); Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 *U. MICH. J.L. REFORM* 493 (2004).

More recently, G. Daniel Lassiter and his colleagues have conducted a number of studies specifically assessing how camera perspective bias may alter the assessment of whether a videotaped confession is voluntary.⁸³ In an initial experiment, experimenters had subjects watch a videotaped confession in which the camera was directed at the interrogator, directed at the suspect, or directed equally at the suspect and the interrogator.⁸⁴ Following the viewing, subjects who observed the suspect's perspective (with the camera focused on the interrogator) judged the confession to be the most coerced; subjects who watched the confession from the interrogator's perspective (with the camera focused on the suspect) judged the confession to be the most voluntary; and subjects who watched the equal-focus video demonstrated an intermediary assessment.⁸⁵ Notably, "participants who had read only a written transcript of the confession made voluntariness judgments that were most similar to those in the detective-focus condition," implying that by using a camera angle reflecting the interrogator's perspective, observers were being led "to judge this particular interrogation to be less coercive than they would have judged it had the confession been presented in a more traditional format."⁸⁶

Additional studies have shown that camera perspective bias may not only affect judgments of whether a confession is voluntary but may also increase the propensity to find a defendant guilty on the basis of the confession and the severity of a recommended sentence.⁸⁷ With experiments documenting strong effects across shoplifting, burglary, rape, drug trafficking, and manslaughter confessions, the bias appears to be potent and generalizable.⁸⁸ "[I]n one instance, the simple change from an equal-focus confession to a suspect-focus confession doubled the conviction rate!"⁸⁹

The impact of illusory causation is evident in the judgments of individuals of varying identities, backgrounds, and experiences. Even those individuals who naturally exhibit high needs for cognition and motives for critical thinking—characteristics linked to reductions in biased judgments in other experiments—have demonstrated a susceptibility to camera perspective bias.⁹⁰ In addition, expertise does not appear to

Howard Wasserman also has a nice summary analysis building on some of Sibley's film-studies work. See Howard M. Wasserman, *Video Evidence and Summary Judgment: The Procedure of Scott v. Harris*, 91 JUDICATURE 182 (2008).

83. See Jennifer J. Ratcliff, G. Daniel Lassiter, Heather C. Schmidt & Celeste J. Snyder, *Camera Perspective Bias in Videotaped Confessions: Experimental Evidence of Its Perceptual Basis*, 12 J. EXPERIMENTAL PSYCHOL. 197, 197 (2006) (providing an overview).

84. G. Daniel Lassiter, *Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion*, 3 J. APPLIED SOC. PSYCHOL. 268, 268 (1986).

85. *Id.*

86. G. Daniel Lassiter, Andrew L. Geers, Ian M. Handley, Paul E. Weiland & Patrick J. Munhall, *Videotaped Interrogations and Confessions: A Simple Change in Camera Perspective Alters Verdicts in Simulated Trials*, 87 J. APPLIED PSYCHOL. 867, 868 (2002).

87. See Lassiter, *supra* note 81, at 206; Ratcliff et al., *supra* note 83, at 197. Other experiments have demonstrated that "camera perspective bias, or illusory causation, is a primarily perception-based phenomenon," rather than a memory-based phenomenon: the viewing frame influences how information is initially registered and perceived, which in turn impacts attributions. *Id.* at 202.

88. Lassiter, *supra* note 81, at 206.

89. *Id.*

90. See Lassiter, *supra* note 81, at 206; Ratcliff et al., *supra* note 83, at 203.

protect people from the influence of the bias.⁹¹ When experimenters presented a videotaped mock confession to judges and law enforcement officers with significant experience with interrogations, the judgments of the experts reflected camera perspective bias just as the assessments of laypeople did.⁹²

Equally troubling, the dynamic is surprisingly persistent and difficult to eliminate. As Lassiter and his coauthors describe, “[j]udicial instruction emphasizing the need to be cognizant of reliability and fairness concerns in evaluating the confession and, in some cases, directly alerting mock jurors to the potentially prejudicial effect of camera perspective *did not mitigate the bias.*”⁹³ Similarly, introducing scenarios of high accountability (in which participants were informed that they would have to justify their judgments) did not diminish the bias, although it did lead to more careful and diligent information processing.⁹⁴ And, encouraging participants to carefully deliberate by providing them with a greater opportunity to do so was comparably ineffective.⁹⁵

2. Overlooking the Frame

Despite the valuable contribution of their research in uncovering the impact of group identities on perceptions, Kahan, Hoffman, and Braman chose not to engage what may very well be a more critical dynamic shaping the cognitions of their subjects and the cognitions of the members of the Supreme Court: the role of the situational frame in guiding attributions. In large part, the *Scott* video is treated—both by the Supreme Court and by Kahan, Hoffman, and Braman—as if it presents a neutral, unfiltered account of the events.⁹⁶

For Kahan, Hoffman, and Braman, the videotape is not the relevant variable when it comes to cognition; the relevant variable is the person doing the watching (and the individual characteristics and shared cultural orientation that the person brings to the observation). From the authors’ perspective, it would seem to matter little whether subjects make an attribution for behavior or assess risk after watching a videotape or after watching real life. In other words, their concern is that different people interpret the objective reality of a videotape in different ways because of their particular interior

91. G. Daniel Lassiter, Shari Seidman Diamond, Heather C. Schmidt & Jennifer K. Elek, *Evaluating Videotaped Confessions: Expertise Provides No Defense Against the Camera-Perspective Effect*, 18 PSYCHOL. SCI. 224, 225 (2007).

92. Lassiter et al., *supra* note 91, at 224–25; G. Daniel Lassiter & Andrew L. Geers, *Bias and Accuracy in the Evaluation of Confession Evidence*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 197, 207 (G. Daniel Lassiter ed., 2004) (“This was true even for the judges who had the most prior experience dealing with confession evidence (i.e., those who had previous experience as prosecutors, criminal defense attorneys, and trial court judges hearing criminal cases).”).

93. Lassiter, *supra* note 81, at 206 (emphasis added) (“This was true whether the judicial instruction preceded or followed the presentation of the confession.”).

94. G. Daniel Lassiter, Patrick J. Munhall, Andrew L. Geers, Paul E. Weiland & Ian M. Handley, *Accountability and the Camera Perspective Bias in Videotaped Confessions*, 1 ANALYSIS SOC. ISSUES & PUB. POL’Y 53, 53, 63 (2001).

95. See Ratcliff et al., *supra* note 83, at 203.

96. Unlike the majority, however, the authors assert that different people will interpret the objective reality of the tape in different ways because of their unique interiors (i.e., their personal characteristics and shared cultural orientation).

situations, not that videotapes do not offer objective reality (such that different camera perspectives can result in different perceptions of underlying facts).⁹⁷

In contrast to Kahan, Hoffman, and Braman, who simply elect not to address the possibility of the video's potential biasing effects, the Supreme Court is far more active in asserting the tape's value in capturing and presenting an incident exactly as it actually happened. As Justice Scalia suggested in the majority opinion, since "[t]here are no allegations or indications that this videotape was doctored or altered in any way,"⁹⁸ it naturally follows that the video is an objective record of reality.⁹⁹ Taking the cue from the Court, in his February 2009 petition for certiorari, Jesse D. Buckley emphasized that, as in *Scott*, "the video [of his arrest] precludes arguments over the course of events. The indisputable record of these events facilitates clarity too often foreclosed by conflicting accounts of facts . . ."¹⁰⁰ Lower courts have offered similar reasoning. As the Tenth Circuit put it in the recent case of *Mecham v. Frazier*, "The facts are in little doubt since [the officer's] squad car was equipped with a dashboard camera which recorded the incident."¹⁰¹ A videotape, it would seem, ends the debate.

97. Kahan, Hoffman, and Braman admit as much:

It should also be clear that we are not advancing any sweeping indictment of judicial consideration of visual or other demonstrative evidence. It is not unprecedented for the Supreme Court to attach photographs, maps, pictures, and exhibits to its opinions as support and to refer readers to them. In the aftermath, too, of *Scott*, judges might well feel emboldened to give more decisive weight to the factual inferences they themselves are inclined to draw from videos or photographs in deciding summary judgment motions. There might well be compelling grounds for objecting to these and like practices, but the particular criticism we are making of *Scott* doesn't go to the propriety of what might be called a "sensory jurisprudence" generally.

Our concern with the Court's reliance on the *Scott* tape is much more focused. Kahan et al., *Whose Eyes?*, *supra* note 8, at 900 (footnotes omitted).

98. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

99. In the words of the majority, "the videotape . . . speak[s] for itself." *Id.* at 378 n.5. It is worth noting that Justice Scalia's unwillingness to consider the biasing potential of film with respect to a police-cruiser camera stands in contrast to his ready acknowledgment of the potential for bias with respect to his own situation—that is, the videotaping of Supreme Court oral arguments:

I wouldn't mind having the proceedings of the court . . . televised, if I thought it would only go out on a channel that everyone would watch gavel-to-gavel. But if you send it out on C-SPAN, what will happen is, for every one person who sees it on C-SPAN gavel-to-gavel . . . 10,000 will see 15-second sound takeouts on the network news, which I guarantee you will be uncharacteristic of what the court does . . . So, I have come to the conclusion that it will misinform the public rather than inform the public to have our proceedings televised.

C-Span.org, *Cameras in the Courts*, <http://www.c-span.org/camerasinthecourt> (second and third alterations in original).

100. Petition for Writ of Certiorari, *supra* note 2, at 23. Indeed, as Buckley emphasized, the existence of the video precludes the need for other evidence concerning the nature of events: "no more compelling confirmation . . . is necessary than the video." *Id.* at 17.

101. *Mecham v. Frazier*, 500 F.3d 1200, 1202 n.2 (10th Cir. 2007); *see also* Zellner v. Summerlin, 494 F.3d 344, 371 (2d Cir. 2007) ("Incontrovertible evidence relied on by the moving party, such as a relevant videotape whose accuracy is unchallenged, should be credited

But does a patrol-car-mounted video camera actually offer a court—or anyone else—an unfiltered lens on the facts?

The answer must certainly be “no.” In *Scott*, we are not just watching a high-speed chase; we are watching a high-speed chase *from the perspective of a police officer participating in the pursuit*.¹⁰² Viewing the tape, we are placed literally inside the lead car,¹⁰³ hot on the tail of the suspect: we see what the cop closest to the action sees and hear what he hears, including “radio communication between the pursuing cars and the police dispatcher.”¹⁰⁴ As we stare at the screen, watching the suspect pilot his Cadillac in front of us, we are told by the dispatcher to “take him out.”¹⁰⁵

To make the point a bit starker, imagine, for a moment, if we had other video footage. What if the only item in the Supreme Court record had been a clip filmed from inside a car passing in the opposite direction or by a pedestrian standing at an intersection? What if the videotape had been taken from a news helicopter circling above, showing the number of officers in pursuit, all of the police roadblocks up ahead, and the lack of other vehicles on the road? What if the videotape had been taken from inside Harris’s vehicle looking back at the police cars in pursuit? And, on that tape, what if we could hear the sirens screaming and Harris crying or cursing his bad luck or wondering aloud if he might be beaten by the officers if he pulled over?

If the video footage in *Scott* had offered one of these other perspectives, would the 1350 Americans in the CCP study still have felt the same about the recorded events? Would

[a] very sizable majority of [the] diverse, nationally representative sample [still have] agreed with the *Scott* majority that Harris’s driving exposed the public and the police to lethal risks, that Harris was more at fault than the police for putting the public in danger, and that deadly force ultimately was reasonable to terminate the chase[?]¹⁰⁶

Would the members of the Supreme Court have been as quick to dispositionalize Harris’s actions, finding him to have “intentionally placed himself and the public in danger”?¹⁰⁷ There is good reason to be skeptical. Identities, experiences, and shared cultural orientations matter, but the situational frame may ultimately be more influential.

As part of a seminar, “Law and Mind Sciences,” I had students in the class watch the *Scott* video and offer their assessment of the portrayed events prior to reading Kahan, Hoffman, and Braman’s article. Just as the CCP study found, the individual

by the court on such a motion [for judgment as a matter of law] if it so utterly discredits the opposing party’s version that no reasonable juror could fail to believe the version advanced by the moving party.”); *Marvin v. City of Taylor*, 509 F.3d 234, 239 (6th Cir. 2007) (“[W]here [a party’s] version of the facts cannot be countenanced based upon what the video shows, this Court will adopt the video as fact rather than [the party’s] version.”).

102. See Kahan et al., *Whose Eyes?*, *supra* note 8, at 855.

103. *Id.* at 856 (“The study video consists of those portions of each tape recorded when the filming vehicle was the lead car in the case and omits those portions of each recorded when the car filming was in the trailing position.”).

104. *Id.* at 855.

105. *Id.*

106. *Id.* at 879.

107. *Scott v. Harris*, 550 U.S. 372, 373 (2007).

characteristics of the students—including their race, party affiliation, and cultural worldviews—seemed to matter. However, I was struck in our subsequent conversation by the ways in which student comments appeared to be shaped by the visual (and audio) perspective of the video. The personal anecdotes that individuals felt prompted to share largely had the students in positions analogous to the police in the video. In a particularly striking example, one of the most liberal students in the class, who had expressed strong communitarian and egalitarian perspectives in the previous weeks, explained how watching the tape reminded her of when she had been driving in Texas with her girlfriend and two men had followed them in a pickup truck for many miles after they had stopped at a gas station. She explained how threatened and frightened she had felt and how, if she had been able to take the pickup truck out, like the police in the video, she would have. Thus, remarkably, in recounting a story about being *chased* and explaining how frightening that experience had been, the student related herself to the *pursuer* in the videotape. When asked why she had not naturally sympathized with the party being chased, she had no explanation and was puzzled with her reaction. After all, she agreed, thinking about it more, being a nineteen-year-old black man in Georgia pursued by multiple police cars with their lights flashing and sirens blaring, knowing how police officers tend to react to those who flee, being familiar with well-publicized incidents of police brutality toward minority suspects, and noting the lack of witnesses on the largely empty road to record or intervene in any potential abuse, maybe continuing to drive on was what most reasonable people in the suspect's position would do.¹⁰⁸ Why had these things not occurred to her before?

The answer, quite simply, is that the chase video did not put her in a position for these thoughts to be triggered.

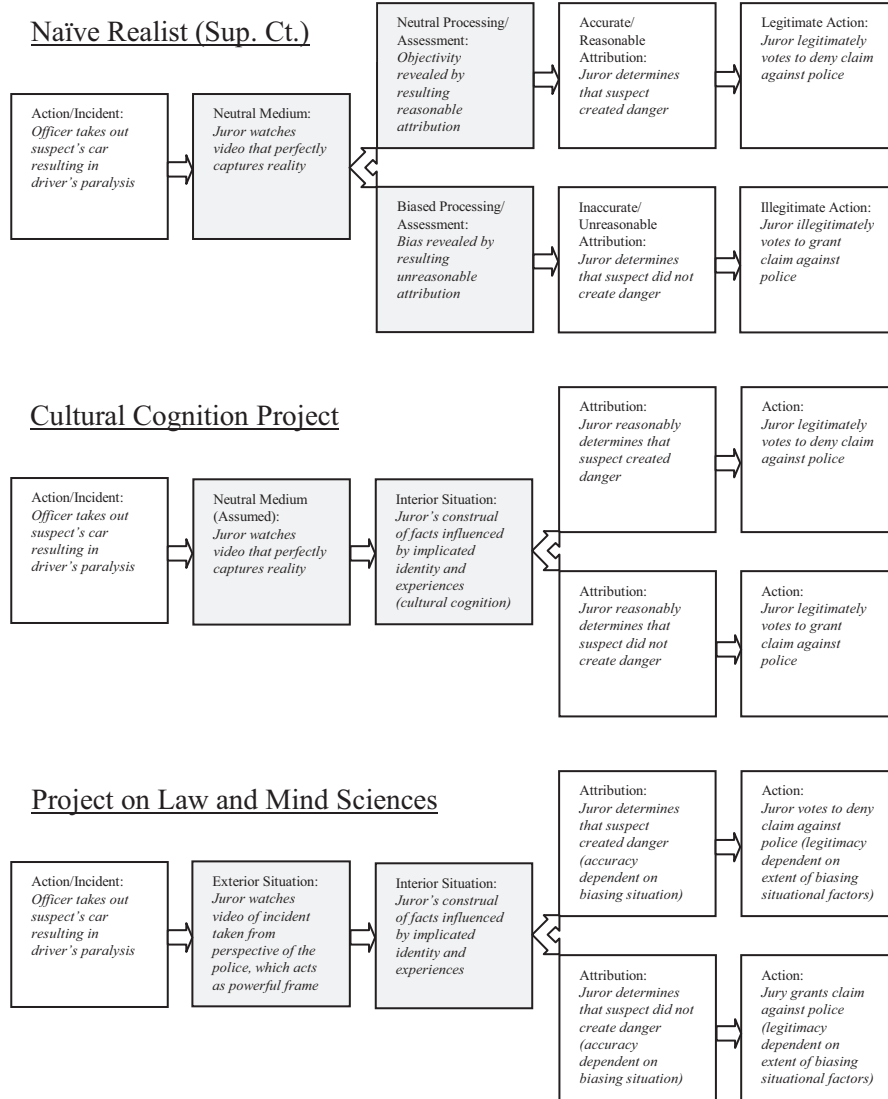
A viewer of the video footage was in a good position to acknowledge the situation of the police officer, but in an exceedingly poor position to appreciate the various influences on the suspect. As Francis J. Flynn and Joel Brockner have explained, under such circumstances, “[t]he actor dominates the visual field of the observer, and this heightened salience of the actor may lead the observer to overattribute the actor’s behavior to dispositions.”¹⁰⁹ The result is exactly as would be predicted by the studies on perspective bias performed over the last four decades by Storms, Lassiter, and other social psychologists. When Lassiter and his colleagues focused the camera on the suspect in a police interrogation, observers were far more dispositional in their attributions—finding that the confession was not influenced by situational factors, such as police coercion—than when the camera provided the visual perspective of the

108. *See id.* at 384 (“Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles.”); *id.* at 389 (the chase took place on a “lightly traveled road in Georgia where no pedestrians or other ‘bystanders’ were present”); I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 IND. L.J. 835, 846 (2008) (“[P]olls indicate that minorities consider police brutality more of a problem than whites.”). In addition, it is worth noting that “Scott issued absolutely no warning (e.g., over the loudspeaker or otherwise) prior to using deadly force.” *Scott*, 550 U.S. at 396 (quoting *Harris v. Coweta County*, 433 F.3d 807, 819 n.14 (11th Cir. 2005), *rev’d sub nom.*, *Scott v. Harris*, 550 U.S. 372 (2008) (Stevens, J., dissenting)).

109. Francis J. Flynn & Joel Brockner, *It’s Different To Give than To Receive: Predictors of Givers’ and Receivers’ Reactions To Favor Exchange*, 88 J. APPLIED PSYCHOL. 1034, 1036 (2003).

suspect.¹¹⁰ If we are not literally seeing things through the suspect’s eyes, we will often fail to appreciate the situational influences on their behavior and too quickly judge their actions as originating in their rotten interiors.

Figure 2: Mental Processing Models of Scott v. Harris



3. Implications: Systematic Bias

With its focus on revealing the power of exterior situation on human behavior, the PLMS adds an important missing component to the CCP. In the end, to make sense of

110. See Lassiter et al., *supra* note 94, at 55.

the Supreme Court's reaction to the *Scott* videotape and the data that Kahan, Hoffman, and Braman provide, it is not enough to simply understand and catalogue the web of cultural commitments, experiences, and identities within each observer. It is also critically important to understand the role of exterior situational factors, like camera perspective, in shaping cognition.

Videotapes shot from the viewpoint of the police—whether in an interrogation or during a pursuit—stack the cards against a suspect. The dynamic has been shown to be potent enough to affect us all—judges and potential jury members alike.¹¹¹ In fact, the Storms study suggests that video footage taken from the police's perspective may even alter the interpretation and attributions of the suspect himself.¹¹²

Yet, just like the participants in the experiments detailed earlier, we largely overlook the biasing effect. So powerful is our blindness that alerting individuals “to the potentially prejudicial effect of camera perspective [does] not mitigate the bias.”¹¹³ Thus, research suggests that Kahan, Hoffman, and Braman's instruction to subjects that “[t]he video [was] . . . filmed from inside the pursuing police cruisers,”¹¹⁴ or a similar instruction to members of an actual jury, would have little or no effect on relevant cognition.¹¹⁵ Likewise, Kahan, Hoffman, and Braman's direction to “closely watch the video . . . just as [members of the jury in the case] would”¹¹⁶ is also unlikely to counteract viewpoint bias as Lassiter and his colleagues have provided evidence that encouraging careful deliberation and advising individuals “to be cognizant of reliability and fairness concerns” does not have an appreciable effect.¹¹⁷

It is not just that we are blind to the potential for bias; it is also that we believe that video holds special advantages over other evidence that makes it uniquely unbiased.¹¹⁸

111. See Lassiter et al., *supra* note 91, at 224–25.

112. See Storms, *supra* note 78, at 165 (finding that individuals who viewed a videotape of a conversation that they had participated in, shot from the perspective of their conversation partner, attributed more of their own behavior in the exchange to dispositional causes rather than situational causes); *id.* at 170 (“Under some circumstances actual role as actor or observer is unimportant, and visual orientation is totally determinative of attributions.”).

113. Lassiter et al., *supra* note 86, at 871.

114. Kahan et al., *Whose Eyes?*, *supra* note 8, at 855.

115. See Lassiter et al., *supra* note 86, at 871.

116. Kahan et al., *Whose Eyes?*, *supra* note 8, at 855 (quoting survey) (alteration in original).

117. Lassiter, *supra* note 81, at 206; see Ratcliff et al., *supra* note 83, at 203 (stating that “increasing people's sense of accountability for their judgments” and “explicitly warning” them of potential bias has not been effective in eradicating camera perspective bias).

118. The ever-broadening support for videotape's employment in the courtroom is well documented. See Lassiter et al., *supra* note 94, at 54 (“[I]t is estimated that more than half of law enforcement agencies in the United States now videotape some interrogations.”); Mimi Samuel, *Focus on Batson: Let the Cameras Roll*, 74 BROOK. L. REV. 95, 109 (2008) (noting that “in the past four decades the use of video in trial and appellate courts has exploded” and suggesting “that this trend will only continue and expand”); Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297, 1311–12 (2008) (surveying state data and explaining that “[a] movement is under way in the United States to adopt the practice of recording custodial interviews of felony suspects. It involves legislatures, courts that directly or indirectly compel the practice, and hundreds of individual departments that voluntarily record.”); Erwin Chemerinsky, *A Troubling Take on Excessive-Force Claims*, TRIAL, July 2007,

We celebrate such recordings as offering unfiltered truth.¹¹⁹ Indeed, ironically, one of the most powerful appeals of the camera in the criminal law context comes in its assumed benefits in protecting suspects from police abuse.¹²⁰ To stop coercion in the police station, it makes intuitive sense that we should have a video recording of the interactions between the suspect and police officers.¹²¹ To stop brutality on the roadside, dashboard-mounted cameras seem to provide an obvious answer. In some respects, the coming of the “video age” has promised an end to Arthur McDuffie killings and Rodney King beatings¹²²—a new era in which the antisocial cop holds his fist knowing that he is being monitored. And, while incidents of abuse have continued,¹²³ there is also some evidence to suggest that dashboard cameras have provided protections to certain suspects in certain contexts, helped victims to obtain relief, and resulted in the termination of abusive officers and the review of enforcement policies after the fact.¹²⁴ Had Scott been pulled over, the existence of the camera may

at 74 (“[T]here will be more cases where judges at all levels can watch an incident for themselves and come to their own conclusions about what happened.”).

119. See, e.g., Silbey, *supra* note 82, at 116 (“Recorded custodial interrogations are widely believed to protect defendants from coercive police tactics, promote prosecutions of the truly guilty and preserve public confidence in the criminal justice system.”); Sullivan, *supra* note 118, at 1299–1300 (“I respectfully submit that not a single one of the reasons provided by the federal agencies as a basis to oppose recording is valid.”); *id.* at 1306 (“[C]omplete recordings of custodial interviews save time and expense for all concerned, help to convict the guilty, exonerate the innocent, shield police from false claims of misconduct, and protect suspects from improper police behavior.”).

120. See, e.g., Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 687–88 (1996) (arguing videotaping police-citizen interactions is necessary to reveal objective reality and shed light on police techniques); Wayne T. Westling, *Something Is Rotten in the Interrogation Room: Let’s Try Video Oversight*, 34 J. MARSHALL L. REV. 537, 547–55 (2001) (arguing videotaping suspects would improve reliability in interrogations).

121. As Thomas P. Sullivan explains,

If police have acted outside the boundaries of the law—for example, by failing to give *Miranda* warnings, using coercive or abusive tactics, or making inappropriate promises or threats—defense lawyers may use the tapes with prosecutors to prevent charges from being brought, to persuade judges to dismiss indictments, to pursue motions to suppress evidence of their clients’ statements, and to argue to courts and jurors that their clients should be acquitted. Recordings will also reveal whether or not police employed excessively prolonged questioning, or used other unlawful tactics. Motions to suppress the use of the suspects’ statements as evidence are granted if the tapes reveal that *Miranda* warnings were not properly given, or the suspects stated they wished to remain silent, or requested a lawyer, or were subjected to improper interrogation techniques.

Sullivan, *supra* note 118, at 1308.

122. See Associated Press, *Ex-Officer Tells Court of Role in Miami Cover-Up*, N.Y. TIMES, Dec. 13, 1980, at A11; Seth Mydans, *Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES, Mar. 18, 1991, at A1.

123. See, e.g., Tim Zatariny Jr., *Controversial Arrest Caught, Police Video*, MYCENTRALJERSEY.COM, Jan. 29, 2009, <http://www.mycentraljersey.com/article/20090129/STATE/90129019/0/rss11> (discussing the dashboard camera recording of the beating of Sheila Stevenson by an officer).

124. In a recent Alabama case, Anthony Warren lost control of his vehicle and fell out of his van after being pursued at high speeds by the police. See Nico Hines, *Video: Alabama Police*

well have benefitted him too—potentially protecting him from harsh treatment at the hands of officers angered at his disregard for their authority.¹²⁵ And yet, the social psychology explored in this Article makes clear that it is foolish to consider the relationship between the police camera and the suspect as uniform across contexts. The benefits to certain suspects (e.g., where the suspect and officer are both depicted on tape and the video is shot from a neutral third-party perspective) may well be outweighed by the harm to others (e.g., where the video shows solely an officer’s perspective).

The PLMS perspective offers an essential missing component to the CCP because it demonstrates that systematic bias to suspects ought to be the starting point of discussion, even as we think about the impact of cognitive illiberalism on jury dynamics. By engaging the social psychology concerning perspective bias, it is clear that had the Supreme Court watched a different video of the exact same events taken from inside Harris’s car, this case may never have been taken away from a jury. Indeed, it is worth questioning Kahan, Hoffman, and Braman’s conclusion that the “results [of their study] show that a substantial majority of the American public would likely see the key facts in the manner the Supreme Court majority did.”¹²⁶

Kahan, Hoffman, and Braman found that fifty-six percent of those surveyed disagreed that the police chase was not worth the risk it posed to the public; seventy-four percent of subjects assessed that Harris was more at fault for the risk; and seventy-five percent believed that the use of deadly force was ultimately warranted.¹²⁷ However, the evidence presented in this Article suggests that these percentages may be highly contingent on the viewpoint of the video. The American public may not have a natural and unchanging “way” of perceiving this tragic accident. With a different tape, modest-income African American women from the Northeast might not be an isolated, marginalized subgroup who sees things differently from the majority.¹²⁸ With a different camera perspective, important lines of division might disappear. In such a scenario, the minority who see things differently from the Court after watching the tape might, in fact, be idiosyncratic statistical outliers rather than members of groups who share a distinctive understanding of social reality that informs their view of the facts.¹²⁹

This possibility, of course, has powerful implications for Kahan, Hoffman, and Braman’s conclusion that the Court’s “decision to privilege its view of a set of facts on which even a minority of persons who share a set of defining commitments would disagree stigmatizes those citizens as outsiders and in so doing delegitimizes the

Officers Sacked over Car Chase Beating, TIMES ONLINE, May 21, 2009, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6335801.ece. While he lay unconscious on the ground, officers approached and began severely beating him. *Id.* The incident was recorded by a dashboard camera in one of the squad cars and led to the firing of five police officers and a review of police policies and supervisory actions in Jefferson County. *Id.* With the videotape as evidence, Warren also filed a compensation claim. *Id.*

125. *But see* Hines, *supra* note 124 (discussing suspect who fled from police and was brutally beaten by officers after chase ended despite existence of dashboard camera).

126. Kahan et al., *Whose Eyes?*, *supra* note 8, at 881.

127. *Id.* at 865–66.

128. *See id.* at 872–79.

129. *Cf. id.* at 886 (arguing the opposite: “Our data suggest that the minority who would see things differently from the Court after watching the tape are *not* idiosyncratic statistical outliers; they are members of groups who share a distinctive understanding of social reality that informs their view of the facts” (emphasis in original)).

law.”¹³⁰ From the perspective of the PLMS, the first order legitimacy question—in both the descriptive and normative sense¹³¹—is whether the court has approved a type of evidence that is both powerfully influential, as to the outcome of a case, and biased in a predictable direction. As this Article explores, the answer, based on the best science available, is “yes.” Ironically, the Supreme Court believed that by allowing the videotape to be determinative, it was choosing an objective approach over a subjective one, but instead, the Court was simply substituting a subjective approach favoring the movant in the case for one designed to favor the nonmovant.¹³²

The necessary implication of such a finding of systematic bias is that our justice system ought to develop strategies to eliminate—or at least minimize—the impact of camera perspective effects on those who come before our courts. There are numerous potentially promising approaches that might be adopted: for example, in the future, courts might avoid employing videotape evidence in the conclusive fashion that the Supreme Court uses it, allow only certain parties (e.g., the defendant in a criminal trial) to introduce footage, or permit only video shot from a viewpoint that does not prejudice the accused to be viewed by a jury. In the context of videotaped interrogations, Lassiter and his colleagues have advocated the last approach. As they explain, “the surest way to prevent the camera perspective bias from happening is to implement a policy that would preclude the possibility of judges or jurors ever seeing a videotaped confession that focused exclusively on the suspect.”¹³³ The same reasoning seems applicable in the case of dashboard cameras.¹³⁴

By addressing this first order legitimacy question, it is likely that the second order question that Kahan, Hoffman, and Braman address need not be reached. For example, if courts only permitted neutral perspective videotape, the studies outlined in this Article imply that a significant number of observers would make different attributions for the depicted behavior. Because the bar for keeping the evidence away from the jury is so low—simply whether the case presents a “genuine issue as to any material fact”¹³⁵—even a slight change in cognition would result in a denial of summary judgment. Thus, addressing perspective bias would eliminate the concerns that Kahan, Hoffman, and Braman articulate relating to (1) denying jurors of different perspectives the opportunity to persuade others to see things in a different way and (2) encouraging a perception that members of certain subcommunities are to have no part in the judicial process.¹³⁶

One potential response to the critique that camera perspective bias is distorting outcomes in the courtroom is that such bias is unproblematic in cases like *Scott v.*

130. *Id.* at 887.

131. The authors define descriptive “legitimacy” as “the political acceptability of law—its power to command voluntary compliance.” *Id.* at 884. They define normative “legitimacy” with respect to the “qualities that make the law morally *worthy* of assent.” *Id.* (emphasis in original).

132. *See infra* text accompanying note 8.

133. Ratcliff et al., *supra* note 83, at 203; *see also* Lassiter et al., *supra* note 91, at 225 (noting that “New Zealand has already adopted such a policy”).

134. As discussed later in this Article, in deciding how best to address the problem of camera perspective bias, it is crucial to consider both the costs and benefits of any proposed reform. *See infra* text accompanying note 221.

135. FED. R. CIV. P. 56(c).

136. Kahan et al., *Whose Eyes?*, *supra* note 8, at 904.

Harris because the question presented is whether the implicated police officer acted reasonably under the circumstances (i.e., was Officer Scott's use of deadly force to end the chase reasonable?).¹³⁷ According to this argument, it is therefore appropriate that the evidence presents events from the officer's perspective. Although seemingly compelling, this response misses two critical factors. First, it is vital to remember the standard of review in *Scott*: the case was at summary judgment, so a court was required to consider the facts and draw any inferences "in the light most favorable to the party opposing the [summary judgment] motion."¹³⁸ Given such a requirement, it seems inappropriate to view the facts from the visual perspective of the police officer since this clearly favors his position (to the detriment of the nonmovant). Second, in deciding whether Scott acted reasonably, it does not follow that the best and most accurate way to answer that question is to view a videotape shot from inside his police cruiser. As discussed later in this Article,¹³⁹ the videotape leaves many potentially relevant visual elements out—because they occurred before the camera was turned on or after it was shut off, or because they occurred beyond the width of the screen, or because the camera was not sensitive enough to capture details in low-light conditions. Scott may have both seen and missed important things that are not captured on the tape. Moreover, in determining whether Scott acted reasonably, it is erroneous to assume that his visual perspective is the only one that matters, and it may be important to take into consideration things that Scott *could not* have seen. For example, the perspective of a news helicopter circling above might reveal that the road ahead had been sealed off by other police cruisers, which may be standard practice in that jurisdiction and thus something that Officer Scott should have expected. This reality may significantly alter how we feel about the danger posed by Harris and the reasonableness of the decision to ram his vehicle at high speed.

B. Toward a More Complete Model

The previous subsection suggested that to fully understand the processes at work in *Scott v. Harris* it is important to look beyond cultural cognition and recognize the additional importance of exterior situation in shaping the interpretation of behavior. The Subpart, however, focused solely on camera perspective bias, and there are numerous additional frames, primes, and other situational factors that may affect cognition of significant facts in *Scott*. The discussion that follows examines the potential impact of some of those additional exterior elements before considering how camera perspective bias operates and interacts with those situational elements—particularly implicit racial bias—to influence thought and action in systematic ways.

1. Other Exterior Situational Factors

As suggested in the discussion of situational framing, features in our physical and social environment can influence, among other things, our beliefs, perceptions, emotions, and behaviors. One of those features—with strong relevance to *Scott*—

137. See *Scott v. Harris*, 550 U.S. 372, 383 (2007).

138. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

139. See *infra* text accompanying notes 141–44.

concerns our physical perspective on events, but there are many others as well. When we interpret stimuli, we are creatures of exterior situation: we “perceive things as [we] have been led by experience or suggestion to expect them to be, and [our] perceptions are further biased by [our] hopes, fears, needs, and immediate emotional state,” all of which are subject to framing and priming.¹⁴⁰

Consider the *Scott* videotape. The tape constrained cognition because the sole viewpoint offered was that of observing Scott’s actions from Harris’s position. However, that perspective on events was itself limited temporally and spatially: in fact, viewers did not see *everything* that the police officer saw or might have seen. Part of this viewpoint limitation was a result of technological and physical limitations and part of it was the result of decisions made by the police, the Supreme Court, and the experimenters.¹⁴¹ The camera does not show us what is offscreen, blocked in the frame, too far away, or too dim to pick up. It does not show us what happened before or after the tape: “It starts when the police activate their sirens and terminates with a scene of Harris’s flipped-over vehicle engulfed in thick smoke.”¹⁴² Thus, at points, we, as viewers, observe actions without seeing what spawned them—and yet we are called upon to make attributions for those actions as if we have all of the relevant information.¹⁴³ What if we were presented with the initial speeding incident, instead of only after the sirens were turned on? If the video showed Harris driving in a seemingly normal manner (albeit speeding) prior to the chase, might we feel differently about causation and responsibility? How much might it matter if we were prevented from seeing the accident itself or the aftermath? Or what if we saw more or less of it?¹⁴⁴ It is

140. Emily Pronin, Carolyn Puccio & Lee Ross, *Understanding Misunderstanding: Social Psychological Perspectives*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 636 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

141. The police department, for example, set its cameras to record only at the moment that the siren was engaged. See Kahan et al., *Whose Eyes?*, *supra* note 8, at 855. And, although the Supreme Court only offered two black-and-white videos on its website, there were four color tapes that were included in the case record. See *id.* at 856; *Scott*, 550 U.S. at 395 n.7 (Stevens, J., dissenting). Kahan, Hoffman, and Braman then edited down the video footage still further to fit the needs of their experiment, explaining that “[b]ecause only the footage shot from inside the lead vehicle permits observation of Harris, the study video nevertheless contained all portions of both tapes that bear on the factual disagreements between the *Scott* majority and dissent.” Kahan et al., *Whose Eyes?*, *supra* note 8, at 856. These alterations and omissions might, indeed, have been innocuous, but previous experience suggests the opposite. Perhaps no better example is the surprising acquittal of Los Angeles Police Department officers involved in the Rodney King beating. As Elizabeth Loftus and Laura Rosenwald explain, “While videotape may be the most potent evidentiary tool since wiretapping, the Rodney King trial proved that a skillful defense attorney can overcome its impact.” Elizabeth F. Loftus & Laura A. Rosenwald, *The Rodney King Videotape: Why the Case Was Not Black and White*, 66 S. CAL. L. REV. 1637, 1638 (1993). In the case, the defense managed to win an acquittal by reframing the events on the tape—playing it “again and again on a big-screen television, often in slow motion” so that it eventually was experienced as “a disembodied video in a department store.” *Id.* at 1644–45 (quoting Tony Mauro, *Anatomy of a Trial*, USA TODAY, May 6, 1992, at A8).

142. Kahan et al., *Whose Eyes?*, *supra* note 8, at 855.

143. Again, the relevant questions for the Supreme Court and Kahan, Hoffman, and Braman are about risk and blame. See *id.* at 855–56.

144. While the original video on the Court website showed several minutes of the aftermath,

naïve to think that viewing the plumes of smoke rising from the overturned car and the frantic actions of the police to rescue the suspect did not frame the inquiry into the blameworthiness of the police in creating the harm or the riskiness of the chase itself. Seeing the horrible wreck may compel us to view the actions that led up to it as dangerous and seeing the officers trying to help the suspect may influence our interpretation of their characters as good (that is, not the type of people who would endanger others). Likewise, if at the completion of the video we could make out Harris's bloodied, broken body being removed from the burning car, our understanding of the preceding events might very well be altered.¹⁴⁵

The format of the videotape may also be biasing in another respect. It does not just offer any perspective; it offers a perspective with which millions of Americans are extremely familiar, in large part due to the first reality show on television, *COPS*.¹⁴⁶ For more than twenty years, *COPS* has taken members of the public along for rides in squad cars, often in hot pursuit of suspects.¹⁴⁷ And, inevitably, when the police catch up to the suspect, the pursued individual turns out to be violent, dangerous, drunk, a liar, a drug addict, a parole violator, or a wanted criminal. The message, hammered into our heads week in and week out, is clear: people who are being chased by the police are "bad boys," just like the *COPS* theme song says.¹⁴⁸ When we are provided with a *COPS* perspective, a particular narrative is engaged, and we immediately know what to expect.¹⁴⁹

Even beyond the videotape itself, we may be subject to subtle cues that shape our cognition of the depicted events. All of those watching the *Scott* video were aware that they were to act in a certain role-differentiated manner, as a judge or juror in a lawsuit.¹⁵⁰ It is possible that being aware that the suspect was suing may have triggered certain stereotypes about the motivations and propensities of tort claimants (i.e., they are greedy people who are responsible for the harms they have suffered but look to

the video used in the study showed only a few seconds. Many of these questions might be investigated experimentally in the future by editing existing police chase footage to create different versions of the same chase and then asking participants to offer their assessments.

145. Cf. Marina Krcmar & Kirstie Farrar, *Retaliatory Aggression and the Effects of Point of View and Blood in Violent Video Games*, 12 MASS COMM. & SOC'Y 115, 120 (2009) (noting research on the effects of blood in television and film stimuli).

146. See *COPS*, <http://www.cops.com/cops-history.html?PHPSESSID=b0aa924099c74bd25e3676551d0e9930>. It is also worth noting that the perspective is very common in video games, in particular in widely popular "first-person shooter" games (e.g., *Doom*, *Halo*, and *Bioshock*). See Krcmar & Farrar, *supra* note 145, at 119–20.

147. See *COPS*, *supra* note 146.

148. The song, "Bad Boys," by the reggae band Inner Circle, became a sensation in its own right, selling more than seven million copies worldwide. See Ben Grossman, *Bad Boys = Big Money: Cops Has No Stars, No Plot and No Contests, and It's a Killer on T.V.*, BROADCASTING & CABLE, July 31, 2005, http://www.broadcastingcable.com/article/159548-Bad_Boys_Big_Money.php.

149. Cf. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1539 (2005) (arguing that sensationalistic local news reports repeatedly featuring racial minorities as violent criminals exacerbate implicit biases against minorities with real world impacts).

150. The participants in the experiment, for example, were told "that the point of the survey was to determine how they 'would decide a real-life lawsuit if [they] were on the jury.'" Kahan et al., *Whose Eyes?*, *supra* note 8, at 854.

blame others).¹⁵¹ All of those watching the video were also aware that the driver was paralyzed as a result of the accident.¹⁵² This knowledge might be expected to frame things in a sympathetic light and lead to an attribution favorable to the driver, but “just world” experiments conducted by social psychologists over the last decades suggest a potential opposite effect: a tendency to blame the victim in similar situations.¹⁵³

2. Placing Camera Perspective Bias in Context

Camera perspective bias does not operate in a vacuum, nor do any of the other exterior situational factors just discussed. These factors interact with each other in complex ways, just as they interact with interior situational elements. To unpack a case like *Scott*, cultural cognition must be situated in the context of powerful situational frames and, likewise, viewpoint bias must be placed within the broader set of psychological dynamics governing interactions between suspects, police officers, judges, and jurors. As the next Subpart illustrates, camera perspective bias may engrain and accentuate the effects and prevalence of other biases.

a. Implicit Bias

One of the psychological dynamics that has enjoyed significant recent attention from both scientists and legal scholars is implicit bias.¹⁵⁴ Implicit biases are automatic associations held by individuals often beyond their conscious awareness or control.¹⁵⁵ In the intergroup context, such biases may reflect beliefs about typical group attributes (that is, stereotypes) and affective responses to group members (that is, prejudice).¹⁵⁶ Although psychologists have employed a number of different methods to study implicit bias,¹⁵⁷ the Implicit Association Test (IAT), developed by social psychologists Tony

151. See David A. Wenner, *Juror Bias*, in 3 ATLA’S LITIGATING TORT CASES § 35:10 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2009).

152. See Kahan et al., *Whose Eyes?*, *supra* note 8, at 855.

153. See Benforado et al., *Broken Scales*, *supra* note 28, at 1664–69 (summarizing various experiments that reveal the “just world” phenomena).

154. Although they do not focus specifically on implicit biases, Kahan, Braman, and Hoffman are interested in “the subconscious influence of . . . cultural predispositions,” which would appear to include the impact of implicit biases. Kahan et al., *Whose Eyes?*, *supra* note 8, at 899.

155. See John T. Jost, Laurie A. Rudman, Irene V. Blair, Dana R. Carney, Nilanjana Dasgupta, Jack Glaser & Curtis D. Hardin, *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RESEARCH IN ORGANIZATIONAL BEHAVIOR 39, 43 (2009) (“[T]he contemporary consensus in the brain and behavioral sciences [is] that an enormous amount of cognition occurs automatically, effortlessly, and outside of conscious awareness.”). For another good, recent overview of the field see Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427 (2007).

156. Charles M. Judd, Irene V. Blaire & Kristine M. Chapleau, *Automatic Stereotypes vs. Automatic Prejudice: Sorting Out the Possibilities in the Payne (2001) Weapon Paradigm*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 75, 76 (2004).

157. See Jost et al., *supra* note 155, at 46 (“The variety of methods used to study implicit attitudes about a wide range of stimuli—including Stroop and lexical decision tasks,

Greenwald, Mahzarin Banaji, and Brian Nosek, has been the most widely employed in the “hundreds (if not thousands) of studies on implicit bias.”¹⁵⁸ Since 1998, more than 4.5 million IATs have been taken.¹⁵⁹ As John Jost and his coauthors summarize,

The IAT gauges differences in how easy or difficult it is for people to associate individual exemplars of various social categories (whites vs. blacks, rich vs. poor, gay vs. straight, and so on) with abstract words and categories that have evaluative implications (e.g., good vs. bad, pleasant vs. unpleasant). Thus, people who are faster to categorize the faces or names of whites when they are paired with positive (vs. negative) stimuli and, conversely, the faces or names of blacks when they are paired with negative (vs. positive) stimuli, are theorized to have internalized a stronger preference for whites relative to blacks, compared to people who respond more equivalently across different category-valence pairings (or in the opposite direction).¹⁶⁰

Overall, “about 70% of those who took a version of the test that measures racial attitudes have an unconscious, or implicit, preference for white people compared to

supraliminal and subliminal priming procedures, and linguistic bias coding techniques—are rooted in several decades’ worth of research in cognitive and social psychology and are rigorously empirical”); *see also, e.g.*, Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 487–88 (2004) (priming); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 950–53 (2006) (reaction time); Elizabeth A. Phelps, Devin J. O’Connor, William A. Cunningham, E. Sumie Funayama, J. Christopher Gatenby, John C. Gore & Mahzarin R. Banaji, *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 729–30 (2000) (brain scan).

158. Jost et al., *supra* note 155, at 64.

159. Project Implicit, General Information, <http://www.projectimplicit.net/generalinfo.php>. On the website, readers can take a variety of different IATs.

160. Jost et al., *supra* note 155, at 45. More specifically,

The IAT assesses strengths of associations between concepts by observing response latencies in computer-administered categorization tasks. In an initial block of trials, exemplars of two contrasted concepts (e.g., face images for the races Black and White) appear on a screen and subjects rapidly classify them by pressing one of two keys (for example, an *e* key for Black and *i* for White). Next, exemplars of another pair of contrasted concepts (for example, words representing positive and negative valence) are also classified using the same two keys. In a *first combined task*, exemplars of all four categories are classified, with each assigned to the same key as in the initial two blocks (e.g., *e* for Black or positive and *i* for White or negative). In a *second combined task*, a complementary pairing is used (i.e., *e* for White or positive and *i* for Black or negative). In most implementations, respondents are obliged to correct errors before proceeding, and latencies are measured to the occurrence of the correct response. The difference in average latency between the two combined tasks provides the basis for the IAT measure. For example, faster responses for the {Black + positive/White + negative} task than for the {White + positive/Black + negative} task indicate a stronger association of Black than of White with positive valence.

Anthony G. Greenwald, T. Andrew Peohman, Eric L. Uhlmann & Mahzarin R. Banaji, *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 18 (2009).

blacks.”¹⁶¹ As an automatic process, the tendency to associate positive concepts with whites more easily than blacks “can exist even in those who espouse egalitarian values”¹⁶² and is shown by both whites and blacks, although, on average, blacks show only a slight white preference as compared to the strong average white preference of white participants.¹⁶³

It is not only “prevailing wisdom . . . that IAT scores reveal implicit or unconscious bias,”¹⁶⁴ it is also that “participants’ implicit associations . . . predict socially and organizationally significant behaviors, including employment, medical, and voting decisions.”¹⁶⁵ Unconscious racial prejudice and stereotyping impact the judgments and actions of police officers, just as they do with respect to students, doctors, and employers.¹⁶⁶ Physicians with a white preference on the IAT, for example, provided less effective treatments to hypothetical black coronary artery disease patients than to white patients.¹⁶⁷ Likewise, individuals who demonstrated a strong implicit association between blacks and crime, violence, and dangerousness¹⁶⁸ were more likely to shoot a

161. Posting of projectimplicit to Project Implicit Blog, <http://projectimplicit.wordpress.com/2009/06/19/predictive-validity-meta-analysis-of-the-implicit-association-test-is-published> (June 19, 2009, 13:13 EST).

162. Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations 2* (2009) (unpublished manuscript on file with the *Indiana Law Journal*); see also Brian A. Nosek, Frederick L. Smyth, Jeffrey J. Hansen, Thierry Devos, Nicole M. Lindner, Kate A. Ranganath, Colin T. Smith, Kristina R. Olson, Dolly Chugh, Anthony G. Greenwald & Mahzarin R. Banaji, *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36 (2007).

163. See Brian A. Nosek, Mahzarin Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101, 105 (2002).

164. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1201 (2009); see also Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477, 477 (2007).

165. Jost et. al., *supra* note 155, at 39.

166. *Id.* at 50.

167. See Alexander R. Green, Dana R. Carney, Daniel J. Pallin, Long H. Ngo, Kristal L. Raymond, Lisa L. Lezzoni & Mahzarin R. Banaji, *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1235 (2007).

168. The association has been shown to be bidirectional: “Black faces and Black bodies can trigger thoughts of crime, thinking of crime can trigger thoughts of Black people.” Jennifer L. Eberhardt, Valerie J. Purdie, Phillip Atiba Goff & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004). As Jennifer Eberhardt and her colleagues summarize,

The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years. Researchers have highlighted the robustness and frequency of this stereotypic association by demonstrating its effects on numerous outcome variables, including people’s memory for who was holding a deadly razor in a subway scene, people’s evaluation of ambiguously aggressive behavior, people’s decision to categorize nonweapons as weapons, the speed at which people decide to shoot someone holding a weapon, and the probability that they will shoot at all.

black target in a simulation than a white target engaging in identical behavior.¹⁶⁹ As Joshua Correll and his fellow researchers explain,

When ambiguous behavior is performed by an African American, it seems more hostile, more mean, and more threatening than when it is performed by a White person

. . . [because we] use the stereotypic association between the social category, African American, and concepts like violence or danger as a schema to help interpret ambiguous behavior on the part of any given African American target.¹⁷⁰

In a 2009 review of 122 research reports considering the predictive validity of IAT measurements for behavior, judgment, and physiological manifestations, Anthony G. Greenwald and his coauthors considered thirty-two reports involving interracial behavior between whites and blacks and found that for racial intergroup behavior, “the predictive validity of IAT measures significantly exceeded the predictive validity of self-report measures.”¹⁷¹ As Jeffrey J. Rachlinski and his colleagues concluded after completing a study of implicit bias and judicial behavior supporting the conclusion that judges, “just like the rest of us, carry implicit biases concerning race” and that “these implicit biases can affect judges’ judgment,”¹⁷² this disparity in behavior based on race could be having

an enormous impact on outcomes in the criminal justice system. . . . Throughout the processing of . . . cases, judges make many judgments concerning bail, pretrial motions, evidentiary issues, witness credibility, and so forth. Each of these judgments could be influenced by implicit biases, so the cumulative effect on bottom-line statistics like incarceration rates and sentence length is much larger than one might imagine.¹⁷³

And, it is worth emphasizing that judges are only one of the many actors within the criminal justice system. Every day, jurors, witnesses, defense attorneys, prosecutors, police officers, parole officers, and prison guards, among others, are also making vital judgments that may be influenced by implicit racial bias.

Id. (citations omitted).

169. See Joshua Correll, Bernadette Park, Charles M. Judd & Bernd Wittenbrink, *The Police Officer’s Dilemma: Using Ethnicity To Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1320–22 (2002); Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 168–69 (2008).

170. Correll et al., *supra* note 169, at 1320 (“It is important to recognize that the proposed process does not require a participant to dislike African Americans, or to hold any explicit prejudice against them, nor does it require that the participant endorse the stereotype; it simply requires that, at some level, the participant associates the two concepts ‘African American’ and ‘violent.’”).

171. Greenwald et al., *supra* note 160, at 17, 32; see also Jost et al., *supra* note 155, at 46 (“[T]he evidence for the predictive validity (or behavioral significance) of implicit bias . . . is already strong, and it continues to grow in depth and breadth.”).

172. Rachlinski et al., *supra* note 164, at 1221.

173. *Id.* at 1201–02.

Thus, it should not be surprising to learn that in the criminal justice system there are extreme disparities with respect to racial outcomes. Studies have consistently documented that officers employ “greater force, including lethal force, with minority suspects than with White suspects.”¹⁷⁴ Forty percent of felony defendants are black,¹⁷⁵ and a black male is over five times more likely to serve time in prison during his lifetime than a white male.¹⁷⁶ Blacks also receive significantly higher bail amounts,¹⁷⁷ are given longer sentences,¹⁷⁸ and are more likely to be sentenced to death than their white counterparts.¹⁷⁹ In fact, the more stereotypically black your features are, the more likely you are to receive the death penalty.¹⁸⁰ Particularly relevant to this Article, in one study of Ohio court records, blacks were found to be “about twice as likely to get [traffic] tickets as those who are not black.”¹⁸¹ And, since twenty-one percent of black households do not have an automobile, the impact is actually starker.¹⁸² Other studies suggest that similar disparities exist around the United States.¹⁸³

The potentially uplifting news is that there is some evidence that implicit biases and resulting behavior are not set in stone: as Rachlinski and his coauthors summarize, if people “are internally driven or otherwise motivated to suppress their own biases, people can make judgments free from biases, even implicit ones.”¹⁸⁴ There have been a number of approaches for overcoming implicit bias that have been put forward including “cultivating egalitarian motives, exposing people to favorable, counterstereotypical exemplars, providing opportunities for emotional reconditioning, increasing vigilance about one’s subtle behavior during interactions with disadvantaged

174. Joshua Correll, Bernadette Park, Charles M. Judd, Melody S. Sadler, Bernd Wittenbrink & Tracie Keese, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision To Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1006 (2007).

175. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004, at 1 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf>.

176. Bureau of Justice Statistics, Prevalence of Imprisonment in the U.S. Population, 1974–2001 (2003), <http://bjs.ojp.usdoj.gov/content/pub/ascii/piusp01.txt>.

177. See Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994).

178. See David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 300 (2001).

179. See David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1651 (1998) (noting that “[w]hile blacks make up only thirteen percent of the nation’s civilian population, blacks make up forty-one percent of the nation’s death row population.”).

180. See, e.g., Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383–84 (2006).

181. David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 267–68 (1999).

182. *Id.* at 267.

183. *Id.* (“Statistics from cases in New Jersey and Maryland are similar. Sophisticated analyses of stops and driving populations in both states showed racial disparities in traffic stops that were literally off the charts.” (citation omitted) (internal quotation marks omitted)).

184. Rachlinski et al., *supra* note 164, at 1202 (citations omitted).

others, and educating people about their implicit biases (i.e., ‘unconsciousness raising’).”¹⁸⁵ In their recent study of implicit racial bias and judges in the criminal justice context, for example, Rachlinski and his colleagues found that “when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.”¹⁸⁶ As they caution, however, “[c]ontrol of implicit bias requires active, conscious control” and “courtrooms can be busy places that do not afford judges the time necessary to engage the corrective cognitive mechanisms that they seem to possess.”¹⁸⁷ In addition, there is a danger that judges might be “overconfident about their ability to avoid the influence of race and hence fail to engage in corrective processes on all occasions.”¹⁸⁸

b. A Vicious Circle

So how might implicit bias affect the operation and impact of perspective bias?

The Article to this point has focused on how interior and exterior situational factors shape how jurors, judges, and others go about construing facts and making attributions with respect to a given act or incident. However, interior situation and exterior situation also play a role in the events that lead up to the act or incident.

Consider the progression illustrated in Figure 3, which models cognition and action in a scenario with facts similar to *Scott v. Harris*.¹⁸⁹ Imagine that an officer sees a black man exceeding the speed limit in a high-crime area or, alternatively, imagine that an officer joins a police chase already in progress involving a black driver not knowing what prompted the chase.¹⁹⁰ The naïve assumption is that the officer, equipped with 20/20 vision and a clean windshield in his cruiser, sees the unfolding scene in a neutral and objective way—that is, he receives unfiltered reality.

However, in fact, in both instances, the exterior situation provides the officer with a set of blinders that constrain how he sees and interprets the scene. Put differently, the scene comes with a ready frame, and that frame may not only limit what draws the officer’s attention but may also trigger certain interior situational dynamics: in this case, the powerful implicit association of blacks and crime.¹⁹¹

185. Jost et al., *supra* note 155, at 56 (citations omitted).

186. Rachlinski et al., *supra* note 164, at 1221; *see also* Glaser & Knowles, *supra* note 169, at 169–71 (finding that those demonstrating implicit racial bias who were also highly motivated to control racial bias did not exhibit the same biased shooting behavior in a simulation as those individuals who were not so motivated).

187. Rachlinski et al., *supra* note 164, at 1225.

188. *Id.* at 1226.

189. Note that the offered model is highly stylized and is meant to capture cognitive processes in broad strokes. *See infra* notes 197–212 and accompanying text.

190. This latter scenario strongly parallels the facts from *Scott* in which the officer who eventually instigated the crash joined the chase after it had begun and did not know the details that led up to it. *See Harris v. Coweta County*, 433 F.3d 807, 810 (11th Cir. 2005), *rev’d sub nom.* *Scott v. Harris*, 550 U.S. 372 (2008).

191. *See* R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169, 1172 (2006) (“Psychologists have documented and explored the longstanding stereotype of African Americans as violent and prone to criminality. Indeed, this is the stereotype most commonly applied to Blacks—or at least to young Black males.” (citation omitted)).

If the frame matters, what determines the nature of the frame? In general, the frame (or frames) may be influenced by the task we are charged with, the physical location of the actors and events, information we have received just prior to engaging the scene, and countless other factors.¹⁹² When we see a black man wearing an old sweatshirt running down the street, for example, the relevant cultural cognition is determined by just such contextual elements—that is, different stereotypes about blacks may be highlighted depending on how the interaction is framed.¹⁹³ If we are a police officer looking for an unidentified suspect, the implicit association of blacks and crime may be particularly implicated: as a result, we may immediately assume the man is running because he just committed a crime, and we may identify the object in his hand as a gun.¹⁹⁴ Alternatively, if we are aware that there is a popular basketball court down the block, or if we have just finished watching an NBA game, the implicit association of blacks and basketball may be implicated: as a result, we may assume that the man is headed to a pickup game and see the same object in his hand as a small basketball pump.¹⁹⁵ Finally, if we are looking for our dog, which just ran out of the house when we opened the door to carry in groceries, we may not even notice the black man at all.¹⁹⁶ Changing the frame of the action results in a significant shift in what is salient and the triggered interior situation.

In the *Scott* scenario, the responding officer arriving on the scene is subject to cultural cognition—indeed, if he is like most Americans, he carries strong implicit racial associations. The fact that the suspect is black influences his attributions regardless of the context, but the context (i.e., the exterior situational frame, including the fact that the speeding takes place in a high-crime neighborhood or the fact that police officers are already in pursuit with their lights flashing at the time the officer encounters the scene) gives shape and intensity to those attributions.¹⁹⁷ Together, the

192. Again, as Julie Seaman has summarized, “Many studies performed in recent years support the proposition that situational elements—the physical, institutional, social, cultural, and linguistic environment in which a person is situated—affect individual thought and action in measurable and fairly predictable ways.” Seaman, *supra* note 28, at 113.

193. See Eberhardt et al., *supra* note 168, at 877 (“[T]he Black racial category functions as the prototypical associate for a number of ostensibly race-neutral concepts, such as crime, jazz, basketball, and ghetto. These concepts may trigger clear, visual images of Black Americans.”).

194. As Eberhardt and her colleagues suggest, “[S]imply thinking of crime can lead perceivers to conjure up images of Black Americans that ‘ready’ these perceivers to register and selectively attend to Black people who may be present in the actual physical environment.” *Id.* Of course, even without being primed with thoughts of crime, we are liable to interpret ambiguous behavior by a black person as hostile, threatening, and criminal. See Correll et al., *supra* note 169, at 1320.

195. See Eberhardt et al., *supra* note 168, at 890 (providing evidence that the concept of basketball is strongly associated with blacks and may thus produce changes in attentional deployment).

196. See Daniel J. Simons & Christopher F. Chabris, *Gorillas in Our Midst: Sustained Inattention Blindness for Dynamic Events*, 28 PERCEPTION 1059 (1999) (offering evidence that in dynamic scenes we perceive only details that receive our focused attention and referring to this proclivity as “inattention blindness”).

197. See Eberhardt et al., *supra* note 168, at 891 (“Activation of the crime concept not only led police officers to attend to a Black face but also led them to misremember the Black face as more stereotypical (i.e., representative) of the Black racial category than it actually was. Thus,

interior and exterior situations provide a powerful and largely automatic narrative for the officer: the reason that the driver is speeding and refuses to pull over is because he is a dangerous criminal. Other potential explanations (e.g., the person is speeding because he is late, afraid to linger around in a dangerous neighborhood, or just not paying attention; the person is fleeing the police because he is drunk, young and frightened, or mentally ill) are not even cognized because of the race of the suspect and frame of the encounter.¹⁹⁸

The attribution, in turn, drives and justifies behavior: the police officer takes out the suspect's car resulting in the suspect's paralysis. The particular choice of actions is, again, likely impacted by implicit biases. Having made the determination that the fleeing individual is a dangerous criminal, the choice of how to respond is still open: should lethal force be used? It is worth considering whether the officer in the *Scott* scenario would make the same determination if the driver was an elderly white woman rather than a young black male. As noted above, blacks are considerably more likely to die during the course of an interaction with a police officer than whites.¹⁹⁹ And, possessing more stereotypically black features may increase the likelihood of receiving harsh treatment even more.²⁰⁰

At this point, the attributional work shifts to the jury or judge. As with the police officer, the exterior situation provides a frame: as emphasized in this Article, part of that frame is that the juror or judge watches a video of the incident that shows the perspective of the pursuing police officers.²⁰¹ However, as discussed previously, there are many other situational factors that influence cognition in predictable ways as well.²⁰² Neither the Supreme Court nor the test subjects in Kahan, Hoffman, and Braman's experiment viewed the video without previously provided context, some of which related to the suspect's identity. Documents in the record, for example, listed the suspect's race, potentially triggering implicit racial associations in the Justices and their law clerks.²⁰³ In addition, informal cues like the name of the suspect, the type of vehicle (a late model Cadillac), the location of the chase, and the fact that the suspect ignored the police car's flashing lights may have led both the Justices and the participants in the experiment to assume that the suspect was black.²⁰⁴

the association between blackness and criminality was not only triggered, it was magnified.”).

198. One of Harris's lawyers, Andrew Clarke, readily acknowledged the influence of race on the events: “I truly believe his initial police contact was profiled, but did not seek to develop that proof.” Email from Andrew Clarke, Attorney at Law, to Adam Benforado, Assistant Professor, Drexel University Earle Mack School of Law (Aug. 31, 2009, 08:10 EST) (on file with author).

199. See JODI M. BROWN & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, POLICING AND HOMICIDE, 1976-98: JUSTIFIABLE HOMICIDE BY POLICE, POLICE OFFICERS MURDERED BY FELONS 5 (2001); see also Correll et al., *supra* note 174, at 1007 (“[M]inority suspects are disproportionately likely to be shot.”).

200. See Eberhardt et al., *supra* note 180, at 384 (“[D]efendants whose appearance was perceived as more stereotypically Black were more likely to receive a death sentence than defendants whose appearance was perceived as less stereotypically Black.”).

201. See *supra* Part II.A.

202. See *supra* Part II.B.1.

203. Email from Andrew Clarke, *supra* note 198 (noting that race, however, was not a focus of any of the briefs or arguments before the Supreme Court).

204. Again, “simply thinking of crime can lead perceivers to conjure up images of Black Americans.” Eberhardt et al., *supra* note 168, at 877. In my seminar, the students all assumed

Taken together, these exterior situational factors drive certain cultural cognitions, which lead to an attribution, for many, that the suspect created the danger that resulted in his ultimate injury.

We are largely oblivious to the fact that interior or exterior situations are having such a profound impact. Many of us know that we are not “racist”—indeed, we are committed to equal treatment for all people—and therefore it seems absurd to suggest that we could carry implicit biases against blacks. It is equally ridiculous to suggest that when we are watching events unfold with our own eyes something as small as the camera angle could influence our attributions. And, as naïve realists confident in our objectivity, it is clear that our backgrounds and experiences are put to the side when we get down to the matter of “judging.”²⁰⁵ Our blindness to these biasing factors means that attributions that ought to be questioned and contested are left unconsidered. And, our confidence in our neutrality and clear-sightedness in the judging process lends legitimacy to potentially illegitimate outcomes, not only in the sense that the police may have created the dangerous situation of the chase, but also because the initial chase and perhaps even the decision to use lethal force may have been influenced by the suspect’s race.

The added twist here is the presence of a videotape of the central events, which both biases perception in a predictable way and largely eliminates concerns about the existence or impact of bias on the outcomes. As discussed previously, there is evidence that implicit biases can be suppressed when individuals “are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias.”²⁰⁶ But therein is the key danger with respect to the videotape: it lets judges and jurors off the hook. With the videotape seeming to so clearly capture reality exactly as it happens, judges and jurors come away with the mistaken impression that whatever biases they might have had in interpreting ambiguous testimony or other evidence, they could not possibly have brought any bias to watching the videotape because there is no room for “interpretation.” With the videotape for any doubters to view with their own eyes:²⁰⁷ judges no longer “face clear cues that risk a charge of bias.”²⁰⁸ There is no longer “a need to monitor their decisions for racial bias.”²⁰⁹ And, this cleansing of doubt facilitated by the videotape absolves the police officers as well: knowing the data on racially disparate outcomes with respect to interactions with the police, it might be easy for a judge or juror to imagine that bias played a role in the police chase, but not when there is a videotape that seems, so clearly and objectively, to show reasonable actions. The videotape allows a judge to say, “I’ve heard about the implicit bias research and I know that in general more blacks are being subjected to police stops and police chases, and injured by police officers—and those things would give me pause—but in this case, I can rest assured that bias had nothing to do with the

the suspect was black, although I pointed out that his race is not mentioned in the Supreme Court opinion or the Kahan, Hoffman, and Braman study. See Kahan et al., *Whose Eyes?*, *supra* note 8, at 854–55.

205. See *supra* text accompanying notes 41–57 (discussing naïve realism).

206. Rachlinski et al., *supra* note 164, at 1221.

207. As noted previously, in *Scott*, the Supreme Court made the video available for public viewing on its website and encouraged the public to watch. *Scott v. Harris*, 550 U.S. 372, 378 n.5 (2008); *id.* at 387 (Breyer, J., concurring).

208. Rachlinski et al., *supra* note 164, at 1225.

209. *Id.* at 1221.

accident or my denial of a claim because I have the videotape to show me exactly what actually happened.”

This purification effect, eliminating any concerns about bias, is particularly damaging because the potentially illegitimate outcome in this case—finding that a black suspect was, indeed, a menace, a lethal threat, and at fault—helps to further engrain an implicit association between blacks and crime, violence, and danger. As Rachlinski and his colleagues have explained in a related context, “Frequent exposure to black criminal defendants is apt to perpetuate negative associations with black Americans.”²¹⁰ This exposure, in turn, may result in further—or even *increased*—discriminatory treatment by police officers already exhibiting the effects of implicit bias.²¹¹ The legitimating frame of the videotape—along with what Timothy Wilson has referred to as our “default response . . . to assume that [our] judgments are uncontaminated”²¹²—protects the status quo and means that officers are never confronted by others telling them that they may be acting based on implicit biases. Officers—and just as important, police departments—therefore have no reason to attempt to control for such biases.

A final concern is that while, for many viewers, the videotape may reinforce a sense of legitimacy regarding the determinations and actions of police officers, judges, and jurors that have a disparate impact on African Americans, that may not be the case for black viewers. Blacks may be less influenced by the situational frame—or, at least, may perceive things differently enough as a result of cultural cognition that they remain skeptical of the police’s role.²¹³ The result may be further racial division, with majority members certain that blacks are illegitimately playing “the race card” given the clarity and objectivity of the videotape and blacks sensing that the judicial system (and its employees) must be biased in the explicit, conscious sense. As Joshua Correll and his coauthors have described, “In response, Black people may engage in more belligerent behavior, including ‘talking back’ to police officers, and—in a vicious cycle—this

210. *Id.* at 1227 (“This exposure perhaps explains why capital defense attorneys harbor negative associations with blacks, and might explain why we found slightly greater negative associations among the white judges than the population as a whole.”); *see also id.* at 1222 (“[O]verrepresentation of black Americans among the criminal defendants who appear in front of judges might produce invidious associations that overwhelm their professional commitment.”); *cf.* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1540 (2004).

211. *See* Correll et al., *supra* note 174, at 1014.

Officers serving in districts characterized by a large population, a high rate of violent crime, and a greater concentration of Black people and other minorities showed increased bias in their reaction times [in shooter studies]. We tentatively suggest that these environments may reinforce cultural stereotypes, linking Black people to the concept of violence. The fact that officers from these urban, violent areas show more pronounced bias in their latencies suggests that stereotypic associations may indeed influence police on some level.

Id.

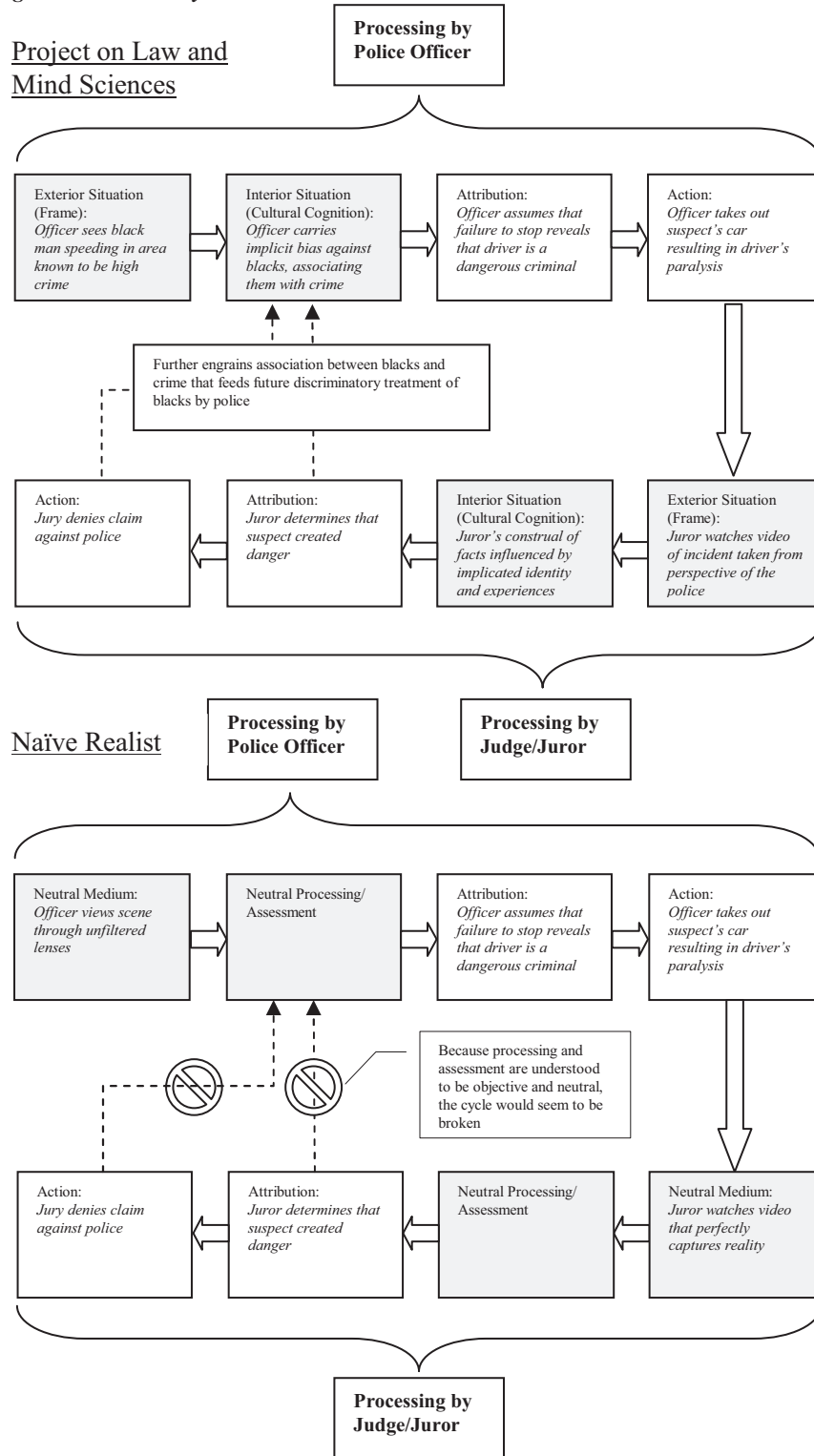
212. Timothy D. Wilson, David B. Centerbar & Nancy Brekke, *Mental Contamination and the Debiasing Problem*, in HEURISTICS AND BIASES, *supra* note 140, at 185, 190.

213. Indeed, Kahan, Hoffman, and Braman found “that being African American (as opposed to white) exert[ed] the largest effect across various response measures [concerning assessments of the *Scott* videotape].” Kahan et al., *Whose Eyes?*, *supra* note 8 at 867.

belligerence may prompt more severe use of force by police.”²¹⁴ Indeed, this dynamic may help unpack one of the mysteries of the *Scott v. Harris* case: why the suspect, Harris, who seemingly had no reason to run (other than avoiding getting a speeding ticket) chose to evade the police in the first place. With truly objective forms of evidence and a vigorous appreciation of the potential for bias, the disparate impact on minority suspects that engenders a sense of mistrust and victimization would ease, and black men and women like Harris would be less inclined to flee.

214. Correll et al., *supra* note 166, at 1006–07.

Figure 3: The Bias Cycle



II. THE BROADER OUTLOOK

In this Article, the focus has been on exploring the influence of exterior and interior situations on cognition in a particular context—a videotaped police chase—but the same dynamics are implicated in countless other interactions. And, while situational frames are having an impact on how we make sense of events and construe behavior in a wide variety of circumstances, we remain largely oblivious to their power both as legal actors and as legal scholars.

A. The Many Cameras of Criminal Law

Considering just criminal law, perspective bias may be having a more expansive distorting effect than suggested in the previous pages, in part, because patrol-car cameras are not the only source of potentially biasing videotape recorded by the state.²¹⁵ As already discussed, perspective bias appears to influence the interpretation of taped police interrogations and suspect confessions.²¹⁶ In addition, the placement and use of surveillance cameras may implicate viewpoint framing. In several countries, most notably Great Britain, closed-circuit television cameras have become ubiquitous and have taken a central role in law enforcement and counterterrorism activities.²¹⁷ Major U.S. cities have shown an increasing affinity for such monitoring in deterring, solving, and prosecuting crimes. Chicago, for example, has a network of 2200 surveillance cameras,²¹⁸ and Philadelphia has recently installed about a tenth of that number.²¹⁹ Certain jurisdictions also use handheld or officer-mounted cameras to record the actions of members of the public, and may occasionally use hidden video recorders for sting operations or undercover work.²²⁰ Moreover, law enforcement and prosecutors sometimes rely on private video footage taken by business surveillance cameras, news programs, and citizens capturing events with cameras and cell phones. Finally, videoconference technology is occasionally used for witnesses during trial. All of these formats potentially involve camera perspective bias.

Consequently, the concerns raised in this Article may be more pervasive and damaging than previously suggested. Going forward, it is critical to weigh the potential benefits of employing these cameras—with respect to preventing and prosecuting crime—against the potentially significant costs to fairness, justice, and judicial

215. Concerning squad-car recordings, camera perspective may be important with respect to police stops, as well as pursuits.

216. See *supra* notes 79–91 and accompanying text.

217. It is estimated that there are 4.8 million cameras in operation in the country. Paul Lewis, *Every Step You Take: UK Underground Centre That Is Spy Capital of the World*, *GUARDIAN*, Mar. 2, 2009, at 13.

218. See Fran Spielman, *Is Chicago Safe from a Terrorist Attack?*, *CHI. SUN-TIMES*, Jan. 8, 2007, at 08.

219. See *Philadelphia Police Eyes in the Sky*, *CBS3.COM*, Mar. 11, 2009, <http://cbs3.com/technology/Philadelphia.Police.Cameras.2.957006.html>. The Philadelphia cameras can pan, tilt, and zoom, and will soon be able to automatically turn towards loud sounds, like gunshots. *Id.*

220. See, e.g., Ian Noble, *It's the Long Lens of the Law*, *N. ECHO (U.K.)*, Mar. 19, 2008, at 31 (discussing a police helmet-mounted camera).

legitimacy suggested in the previous pages.²²¹ Not all types of video recording present the same challenges, and it is important to be cognizant of when viewpoint bias may cause significant distortions and when it may not. On a similar note, video footage may be utilized in one context without controversy (for example, to identify a witness), but be deeply problematic when employed in another (for example, to establish facts at summary judgment in a determinate manner).

While this Article has addressed the impact of exterior situational cues and frames on videotape evidence, the deeper purpose has been to raise awareness of the potential that all evidence has to subtly bias judicial proceedings beyond our conscious awareness. There are reasons to think that video evidence is uniquely potent, but a written police report or witness statement on the stand may contain powerful frames that shape outcomes as well.²²² As we move forward, we must not shy away from confronting the possibility that the basic tools of our legal system are less objective and neutral than we always hoped and expected.

B. Overlooking Relevant Frames in Other CCP Work

Although only one article in the CCP was explored in this Article, the critique of the approach is more broadly applicable. Indeed, overlooking the role of situational framing appears to be a recurring limitation to this otherwise extremely valuable scholarly endeavor.

For example, in a recent solo article exploring cultural cognition in the context of the debate over rape law reform, Kahan showed that a hierarchical worldview encouraged subjects to perceive that the defendant in an “acquaintance rape” scenario modeled on *Commonwealth v. Berkowitz*²²³ reasonably concluded that the plaintiff consented to intercourse despite her verbal objections, whereas an egalitarian worldview did not.²²⁴ Moreover, “[t]he effect of hierarchy in inclining subjects to favor acquittal was greatest among women.”²²⁵ As in *Scott v. Harris*, “cultural differences in outcome judgments [appeared to] reflect cultural differences in perceptions of the

221. In Great Britain, for example, it was estimated that just three percent of crimes were solved with the aid of closed-circuit television. See *Lewis, supra* note 217. Philadelphia, by contrast, has touted their relatively small new network of cameras as an extremely effective crime fighting tool, which has aided in solving over one hundred crimes in just five months. See *Philadelphia Police Eyes in the Sky, supra* note 219.

222. Even the simple wording of a lawyer’s question can act as a significant frame, shaping cognition. In a classic study conducted over thirty-five years ago, researchers showed participants a video of a car accident. Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585 (1974). They then asked the participants to estimate how fast the cars were moving at the moment of impact, varying only how the impact was described. *Id.* at 585–86. The simple word choice—“contacted,” “hit,” “bumped,” “collided,” or “smashed”—turned out to matter greatly: when the word “smashed” was used, participants estimated that the cars were traveling nine miles per hour faster than when participants were told that the cars “contacted.” *Id.* at 586 (emphasis omitted).

223. 641 A.2d 1161 (Pa. 1994).

224. Kahan, *supra* note 21, at 3–4.

225. *Id.* at 1 (emphasis in original).

facts.”²²⁶ And, more affirmatively than in *Scott v. Harris*, Kahan actively disregarded the possibility that the exterior situation might be playing an important role in cognition.²²⁷

The problem, however, was that Kahan only focused on a small aspect of that exterior situation: the legal definition of rape, which his study showed only had a “minimal influence on the judgment that rape either did or did not occur.”²²⁸ There are many factors beyond cultural predispositions and legal definitions that may play a role in how facts are perceived in a rape case. The inclusion of seemingly irrelevant details may powerfully frame matters and alter attributions. In an experiment some thirty-five years ago, for example, Cathaleene Jones and Elliot Aronson discovered that they could change the way subjects assessed the culpability of a victim in a rape scenario simply by changing how she was identified.²²⁹ Keeping all other details the same, when the victim was described as “a virgin,” participants in the experiment deemed her to be more responsible for the rape than when she was described as “a married woman.”²³⁰ And, when she was described as a “divorcee,” the woman was deemed to be the least responsible of all.

The vignette that Kahan used in the experiment is treated, similarly to the videotape in *Scott v. Harris*, as if it presents a neutral picture of the key events, but it contains countless cues and frames that may determine what relevant cultural cognition is triggered. Once again, “different people, with different experiences, can [perceive] different things”;²³¹ yet, just as crucial, the same person can also perceive different

226. *Id.* at 55.

227. *Id.* at 56.

228. *Id.* One might, in fact, quibble with the “minimal” label, as, in the study, “a definition that treats proof of the complainant said ‘no’ as sufficient to establish lack of consent and (when the defendant heard her) the requisite *mens rea* did increase the proportion of subjects who agreed the defendant had raped the complainant . . . [by] around 10%.” *Id.* at 57; see also *id.* at 58 (“That even a small but meaningful number of subjects would feel constrained to adapt their moral views to their outcome judgments was contrary to the study hypothesis, and marks an important qualification on the cultural cognition thesis, which in its strongest form predicts that individuals will conform their *perceptions of the facts* and resulting outcome judgments to their cultural predispositions as a means of avoiding dissonance.” (emphasis in original)); *id.* at 60 (“It’s conceivable, the study results suggest, that the more radical form of treating the word ‘no’ as dispositive proof of the complainant’s lack of consent and the defendant’s *mens rea* would increase the willingness of even hierarchs to convict in such a case. But the effect of this formulation remains weak compared to the strength of cultural styles.”).

229. Cathaleene Jones & Elliot Aronson, *Attribution of Fault to a Rape Victim as a Function of Respectability of the Victim*, 26 J. PERSONALITY & SOC. PSYCHOL. 415, 416–17 (1973).

230. *Id.* The experiment offered a powerful confirmation of the human motive to see the world as “just” even if that means dispositionalizing the victim. See Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030, 1035 (1978) (“[T]he knowledge that innocent, highly respectable females can be raped was particularly threatening to the subjects’ belief that the world is just, and to avoid the threat posed by this type of admission, it was necessary to find fault with the actions of the victim. Thus, the subjects appear to have tried to convince themselves that the victim was really not innocent and that she must have contributed, at least in some small but significant way, to her fate.”).

231. Kahan et al., *Whose Eyes?*, *supra* note 8, at 848 (emphasis in original). Kahan’s

things depending on how information is presented and the broader context in which it is processed.

CONCLUSION

In the end, for all of the things that Kahan, Hoffman, and Braman get right—and for all that the CCP adds to our understanding of human behavior—the scholars are incorrect that “the only thing that is manifestly wrong about the decision” in *Scott* is the Court’s insistence “that the videotape supported only one ‘reasonable’ view of the facts.”²³² Taking seriously the insights and approach of the PLMS makes that clear. Exterior situational elements and dynamics are not background to be ignored as we focus on actors acting and work to understand what, inside of them, propels their behavior. At every moment, situational influences in our environments are having subtle—and often not-so-subtle—effects on all that we see, think, and do. In the future, one can hope that both projects—with their common tools and common goals—engage each other further. Only then can we make real progress in revealing the realities of cognition necessary to ensure that our legal rules are just and that our system is legitimate.

experiment is of great value in offering evidence for this important dynamic and the suggestion that exterior situation ought not to be left out of the analysis should be understood as an argument in favor of expanding the realm of inquiry, rather than as a criticism.

232. *Id.* at 881.