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Cognitive Illiberalism

By CHRISTOPHER SHEA

Could the Supreme Court be undermining its legitimacy through its ignorance of some basic tenets of social psychology? Three law professors -- Dan M. Kahan of Yale, David A. Hoffman of Temple and Donald Braman of George Washington -- made that case in an article published in January in *The Harvard Law Review*. They charged the justices with the sin of "cognitive illiberalism."

The article centered on a 2007 case, *Scott v. Harris*. Victor Harris was rendered quadriplegic after the police rammed his car, ending a nine-mile high-speed chase outside Atlanta. The issue was whether a suit by Harris against the officer who rammed him should be allowed to proceed to a jury trial. Lower courts were inclined to give Harris his day in court, because he had committed no crime except speeding before he fled, and while he topped 85 miles per hour during the chase, he was in theory in control of his car.

The Supreme Court disagreed and defended its position in an unprecedented way: by posting a video of the chase, taken by the police, on its Web site. "No reasonable jury," Antonin Scalia wrote for the majority, could watch the video without agreeing that the chase had to be stopped, even if it meant killing Harris. John Paul Stevens was the lone dissenter. Scalia wrote that Stevens's argument that Harris was not necessarily driving with life-threatening recklessness was so plainly false that anyone with eyes could see so. "We are happy to allow the videotape to speak for itself," Scalia wrote.

Did it? Kahan, Hoffman and Braman showed it to a diverse group of 1,350 Americans. Most of the test subjects saw things as the Supreme Court did: 75 percent concurred that deadly force was justified. The dissenters, however, were not randomly distributed: they reflected distinct subcategories of Americans, like liberal African-American women from cities in the Northeast.

The law professors argued that the justices in the majority were in the grip of a common psychological fallacy: that other people's perceptions might be shaped by socioeconomic position or political commitment, but they themselves perceived the objective truth.

The authors recommend that, before summarily deciding a case, "a judge engage in a sort of mental double-check." If he or she can picture a discrete group of Americans who would

disagree that a decision is self-evident, go with a jury. To imply that minority groups are flatly unreasonable sends a "denigrating and exclusionary message" and will diminish support for the law.

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DRAWING: JUSTICE JOHN PAUL STEVENS (DRAWING BY CATH RILEY)

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