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THE COGNITIVELY ILLIBERAL STATE

Dan M. Kahan

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Dan M. Kahan*

Ought implies can. This Article investigates whether the central moral directives of liberalism are ones citizens can—as a matter of human cognition—be expected to honor. Liberalism obliges the state to disclaim a moral orthodoxy and instead premise legal obligation on secular grounds accessible to persons of diverse cultural persuasions. Studies of the phenomenon of cultural cognition, however, suggest that individuals naturally impute socially harmful consequences to behavior that defies their moral norms. As a result, they are impelled to repress morally deviant behavior even when they honestly perceive themselves to be motivated only by the secular good of harm prevention. This Article identifies how this dynamic transforms seemingly instrumental debates over environmental regulation, public health, economic policy, and crime control into polarizing forms of illiberal status competition. It also proposes a counterintuitive remedy: rather than attempt to cleanse the law of culturally partisan meanings—the discourse strategy associated with the liberal norm of public reason—lawmakers should endeavor to infuse it with a surfeit of meanings capable of simultaneously affirming a wide range of competing worldviews.

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INTRODUCTION

Liberal ideals figure prominently in American law and political culture. The ban on state endorsement of partisan visions of the good animates dominant understandings of the individual rights provisions of the Constitution.[1] The duty of lawmakers, judges, and citizens to justify their positions on grounds susceptible of affirmation by persons of diverse moral persuasions—paradigmatically, the prevention of harm—is deeply woven into prevailing norms of legal and political discourse.[2] No thoughtful observer would assert that the United States is today a perfectly liberal state, but none could realistically deny the persistent (if uneven and contested) influence the aspiration to become one has had on the development of American institutions.[3]

My goal in this Article is to identify a distinctive ground for questioning the viability of the liberal project. Unlike many well-known critiques of liberalism, the concern I will raise does not question either the normative appeal or the conceptual coherence of the liberal commitment to neutrality.[4] I will suggest instead an important practical barrier to the attainment of this ideal. My objection to liberalism is neither metaphysical nor political[5] but *cognitive*: we

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1. *Cf., e.g.*, Lawrence v. Texas, 539 U.S. 558, 567-72 (2003) (holding that it deprives individuals of "liberty" under the Due Process Clause for the "majority [to] use the power of the State to enforce . . . on the whole society" standards of private conduct that originate in "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family"); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 818-22 (2001).

2. *See, e.g.*, BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11 (1980) (defending norm of "constrain[ed] . . . power talk" that prohibits any "power holder" from offering a justification for law that proclaims "his conception of the good is better than that asserted by any of his fellow citizens"); STEVEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 234 (1995) (defending democratic "gag rules" that constrain appeal to divisive issues of value in order to enable "citizens who differ greatly in outlook on life [to] work together to solve common problems."); JOHN RAWLS, POLITICAL LIBERALISM 175, 217-18 (1993) (articulating norm of "public reason" that prohibits political actors in most contexts from invoking "comprehensive doctrines" that "include[] conceptions of what is of value in human life, as well as ideals of personal virtue and character" and instead "explain . . . how the principles and policies they advocate and vote for can be supported by" considerations consistent with "a diversity of reasonable religious and philosophical doctrines").

3. For attempts to integrate this understanding of liberalism with the development of American law and constitutional law in particular, see DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986); ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1985).

4. *See, e.g.*, GEORGE P. FLETCHER, ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM (2002); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

5. *Cf.* John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB.

lack the psychological capacity, I'll suggest, to make, interpret, and administer law without indulging sensibilities pervaded by our attachments to highly contested visions of the good.

The foundation of my argument is the phenomenon of "cultural cognition."[6] Cultural cognition refers to a collection of psychological mechanisms that moor our perceptions of societal danger to our cultural values. In appraising societal risks, for example, we rely critically on value-pervaded *emotions* such as fear and disgust. To minimize *dissonance*, we more readily notice and recall instances of calamity that appear to be occasioned by behavior we abhor than by behavior we revere. Where members of society disagree about the harmfulness of a particular form of conduct, we instinctively *trust* those who share our values—and whose judgments are likely to be biased in a particular direction by emotion, dissonance avoidance, and related mechanisms.

These dynamics confront the liberal aspiration with a special dilemma. As a result of cultural cognition, we naturally view behavior that denigrates our moral norms as endangering public health, undermining civil order, and impeding the accumulation of societal wealth. Under these circumstances, the promise not to interfere with the liberty of individuals except to prevent harm to others is likely to be rendered meaningless: whenever individuals deviate from dominant understandings of virtue, they will be perceived as sources of harm. Even lawmakers who honestly focus their attention only on promoting secular goods—ones of value to all citizens, irrespective of their worldviews—will be impelled to create a system of repressive regulation that expresses and reinforces a partisan moral orthodoxy.

This condition of *cognitive illiberalism*, I'm convinced, is endemic in our law today. Indeed, we can all readily perceive instances of coercive regulation that rest on empirical claims about harm accepted only because they are congenial to the partisan worldviews of those who favor such regulation. The problem is that we have highly polarized understandings of what those regulations are—criminalization of marijuana, the banning of (or refusal to ban) possession of handguns, exclusion of gays from the military, the moratorium on construction of nuclear power plants—precisely because we subscribe to competing cultural worldviews. The selective apprehension of cognitive illiberalism is part and parcel of the phenomenon itself.

Is there a solution? Although there is (I'm convinced) no effective "debiasing" technique for cognitive illiberalism, I will suggest a strategy to make citizens of diverse outlooks at least conscious of its impact and committed to constructing a regime of mutually agreeable regulation despite it.

AFF. 223 (1985).

6. *See generally* Dan M. Kahan, Paul Slovic, Donald Braman & John Gastil, *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1083-88 (2006) (book review). For materials, including published and unpublished papers, relating to the study of cultural cognition, see The Cultural Cognition Project at Yale Law School, http://research.yale.edu/culturalcognition.

Ironically, this strategy involves dispensing with a feature of our legal and political culture thought to be essential to liberalism: the norm of "public reason," which enjoins legislators, judges, and citizens to justify law in secular terms acceptable to persons of diverse cultural and moral persuasions. The intractability of cognitive illiberalism reveals the practice of public reason to be a conceit—a form of false consciousness that compounds the impulse to enforce a moral orthodoxy by enabling its agents to deny (to *themselves* even more than to others) that this is exactly what they are doing. I advocate in its place an idiom of *expressive overdetermination*, which, far from cleansing legal and political discourse of cultural values, self-consciously multiplies the cultural meanings that laws are susceptible of bearing. In a regime of expressively overdetermined law, there will be fewer occasions for disagreement as citizens of diverse cultural outlooks seek to identify policies that promote their collective interests, and more opportunities for all to find affirmation of their worldviews notwithstanding the conflicts that persist.

I'll develop this argument in three Parts. In Part I, I will examine the phenomenon of cultural cognition and the role it plays in our perception of societal harms. In Part II, I will examine the problem of cognitive illiberalism—the inevitable tendency, as a result of the cultural cognition of harm, for the law to embrace a partisan moral orthodoxy as citizens seek to identify the most efficacious means of achieving putatively secular ends. Finally, in Part III, I will discuss how the impact of cognitive illiberalism can be muted if not eradicated through a discourse norm of expressive overdetermination.

I. THE CULTURAL COGNITION OF HARM

The equation of vice with danger is a familiar characteristic of premodern cosmologies. Emperor Justinian banned sodomy in the sixth century to protect his subjects from pestilence, famine, and earthquake.[7] The ancient Jews observed the commandments of Yahweh lest he "strike [them] with consumption, and with fever and with inflammation and with fiery heat and with the sword and with blight and with mildew."[8] The Cheyenne believed the scent of a tribe member who had murdered a fellow tribe member would drive away the buffalo and thus spoil the hunt.[9] In the primitive world, "the laws of nature are dragged in to sanction the moral code: this kind of disease is caused by adultery, that by incest; this meteorological disaster is the effect of political disloyalty, that the effect of impiety."[10] In this way, "[t]he whole universe is harnessed to men's attempts to force one another into good citizenship."[11]

7. *See* LOUIS CROMPTON, HOMOSEXUALITY AND CIVILIZATION 537 (2003).

8. *Deuteronomy* 28:22 (New American Standard).

9. MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO 88 (1966).

10. *Id.* at 3.

11. *Id.*

We moderns are no less disposed to believe that moral transgressions threaten societal harm.[12] This perception is not, as is conventionally supposed, a product of superstition or unreasoning faith in authority. Rather it is the predictable consequence of the limited state of any individual's experience with natural and social causation, and the role that cultural commitments inevitably play in helping to compensate for this incompleteness in knowledge. What truly distinguishes ours from the premodern condition in this sense is not the advent of modern science; it is the multiplication of cultural worldviews, competition among which has generated historically unprecedented *conflict* over how to protect society from harm at the very same time that science has progressively enlarged our understandings of how our world works.

Start with a puzzle: how do ordinary people figure out what sorts of activities are harmful, either for them individually or for their communities collectively? Personal experience—Did *I* (or my children) contract leukemia from living in the vicinity of a toxic waste dump? Did *I* get shot by a violent criminal because my state failed to adopt a "right to carry" law? Will my planet suffer catastrophic environmental consequences if global warming isn't reversed in the next decade?—provides necessarily inconclusive (not to mention untimely) guidance. Scientists have amassed a wealth of empirical data on many putative dangers. But very few people have the time or inclination to sort through such studies, or the capacity to understand the technical information they contain and to evaluate their relative quality when they reach conflicting results.

We nevertheless manage to form beliefs about harm—usually supremely confident ones—through *heuristics*.[13] Some of these belief-formation strategies are relatively straightforward and deliberate: confronted with competing claims about the hazards of a particular technology or medical procedure, or the efficacy of a disputed policy, we sample the views of those whom we have associated with, or defer to the opinions of experts whose judgment we trust.[14] Others are more complex and less observable. We instinctively impute danger, for ex-

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12. Bernard Harcourt has suggested that "conservatives" have only recently adopted harm prevention as a rationale for restricting conduct traditionally subject to prohibition on moral grounds. *See* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 113-16 (1999). As Douglas's writings help to show, his thesis is incorrect in two respects. First, the equation of deviance with harm has *always* pervaded justifications for prohibiting behavior that defies prevailing norms. And second, the association of deviance with harm is by no means distinctive of conservatism. *See* MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS 8 (1982) (arguing that every mode of social organization selects its own schedule of risks as a means of expressing and reinforcing values).

13. *See generally* DANIEL KAHNEMAN, PAUL SLOVIC & AMOS TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (1982).

14. For classic studies, see S.E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, *in* GROUPS, LEADERSHIP AND MEN 177 (Harold Guetzkow ed., 1951); Carl I. Hovland & Walter Weiss, *The Influence of Source Credibility on Communication Effectiveness*, 15 PUB. OPINION Q. 635 (1951-52); and Irving Lorge, *Prestige, Suggestion, and Attitudes*, 7 J. SOC. PSYCHOL. 386 (1936).

ample, to activities that evoke negative emotions—such as fear, dread, anger, and disgust.[15] We form estimations of the relative magnitude of risks based on how readily we can recall or imagine instances of the harms with which they are associated.[16] While hardly foolproof, such mechanisms allow us to form judgments about hazards that we are unable to investigate in a more systematic and detached fashion.

The theory of cultural cognition posits that the heuristic processing of risk information interacts decisively with individuals' defining group commitments.[17] Whether we regard putatively harmful activities (deviant sexual practices, gun possession, nuclear power) with fear or admiration, with disgust or equanimity, with dread or indifference, expresses the cultural valuations we attach to those activities.[18] Accordingly, to the extent that it is driven by affect, risk perception is necessarily conditioned by culture.[19]

Culture likewise interacts with the contribution that ease of recollection, or "availability," makes to estimations of risk. To avoid cognitive dissonance, we are much more likely to take note of and assign significance to instances of harm associated with behavior we despise than those associated with conduct we revere.[20] We thus end up with culturally skewed inventories of readily recalled and imagined misfortunes, and as a result naturally form culturally biased estimations of the danger of deviant behavior.[21]

Finally, and most importantly, culture interacts with the role that social influence has in formation of perceptions of harm. Individuals generally conform their beliefs to those held by their associates—both because those are the persons from whom they obtain most of their information and because those are

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15. *See* Melissa L. Finucane, Ali Alhakami, Paul Slovic & Stephen M. Johnson, *The Affect Heuristic in Judgments of Risks and Benefits*, 13 J. BEHAV. DECISION MAKING 1 (2000). On the role of disgust in connoting danger, see DOUGLAS, *supra* note 9, at 40, and Valerie Curtis & Adam Biran, *Dirt, Disgust, and Disease: Is Hygiene in Our Genes?*, 44 PERSP. BIOLOGY & MED. 17 (2001).

16. *See, e.g.*, Paul Slovic, Baruch Fischhoff & Sarah Lichtenstein, *Cognitive Processes and Societal Risk Taking*, *in* COGNITION AND SOCIAL BEHAVIOR 165 (John S. Carroll & John W. Payne eds., 1976); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

17. *See generally* Kahan et al., *supra* note 6, at 1084-85.

18. *See* Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. (forthcoming 2008), *available at* http://ssrn.com/abstract=962520. *See generally* MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS (2001).

19. *See, e.g.*, Ellen M. Peters et al., *An Emotion-Based Model of Risk Perception and Stigma Susceptibility*, 24 RISK ANALYSIS 1349, 1358-61 (2004) (showing that valence of affective perceptions of nuclear-material risk is determined by cultural worldviews).

20. *See* DOUGLAS, *supra* note 9, at 39-40.

21. *See* Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1314-15 (2003); Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295, 1298-1300 (2003).

the ones whose respect they most desire.[22] The people we are most inclined to associate with are those who share our cultural outlooks. The predictable result is highly uniform views of societal harms among persons of shared cultural persuasions.[23]

This tendency is reinforced by the link between culture and credibility. We naturally impute credibility—including knowledge and shared interests—to putative experts whose cultural outlooks are congenial to our own.[24] Accordingly, to the extent we defer to credible experts when sorting through competing claims about societal dangers, we are again drawn to beliefs that cohere with our cultural commitments.

The link between perceptions of harm and cultural outlooks, moreover, is unlikely to be severed by disconfirming empirical information. Real-world people tend to be anti-Bayesians: rather than update their prior beliefs based on new information, they tend to evaluate the persuasiveness of new information based on its conformity to their experience.[25] Known as "biased assimilation,"[26] this tendency also has a straightforward cultural explanation: ordinary

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22. *See, e.g.*, Geoffrey L. Cohen, *Party Over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCHOL. 808 (2003); Diane M. MacKie, M. Cecilia Gastardo-Conaco & John J. Skelly, *Knowledge of the Advocated Position and the Processing of In-Group and Out-Group Persuasive Messages*, 18 PERSONALITY & SOC. PSYCHOL. BULL. 145 (1992) (discussing in-group and heuristic information processing); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 88-90 (2001).

23. *See* Donald Braman, Dan M. Kahan & James Grimmelmann, *Modeling Facts, Culture, and Cognition in the Gun Debate*, 18 SOC. JUST. RESEARCH 283, 289-91 (2005).

24. *See* Lorge, *supra* note 14.

25. *See, e.g.*, Jonathan J. Koehler, *The Influence of Prior Beliefs on Scientific Judgments of Evidence Quality*, 56 ORG. BEHAV. & HUM. DECISION PROCESSES 28 (1993) (demonstrating this effect experimentally with a sample of trained statisticians). For an example, consider Nobel Prize economist Gary Becker's explanation for his discounting of recent empirical evidence that purports to refute the conclusion that the death penalty deters murder:

> Even with the limited quantitative evidence available, there are good reasons to believe that capital punishment deters murders. Most people, and murderers in particular, fear death, especially when it follows swiftly and with considerable certainty following the commission of a murder. David Hume said in discussing suicide that "no man ever threw away life, while it was worth living. *For such is our natural horror of death* . . . ." (emphasis added).

Gary S. Becker, *On the Economics of Capital Punishment*, ECONOMISTS' VOICE, Mar. 2006, at 1, *available at* http://www.bepress.com/cgi/viewcontent.cgi?article=1166&context=ev.

26. *See* Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979). Other mechanisms point in the same direction. One is "confirmation bias," which refers to the tendency of persons to seek out and assign more weight to evidence that confirms a prior belief or hypothesis than to evidence disconfirming it. *See, e.g.*, Clifford R. Mynatt et al., *Confirmation Bias in a Simulated Research Environment: An Experimental Study of Scientific Inference*, 29 Q.J. EXPERIMENTAL PSYCHOL. 85 (1977). Another is coherence-based reasoning, which refers to the disposition of persons to conform assessments of subsequently obtained evidence to inferences associated with earlier-obtained evidence in order to avoid uncertainty or ambiguity. *See* Dan Simon, Lien B. Pham, Quang A. Le & Keith J. Holyoak, *The Emergence of Coherence over*

persons aren't in a position to identify *when* new information is credible, and thus a ground for updating their prior beliefs, without recourse to the very same cultural heuristics that have generated their existing beliefs.[27]

Biased assimilation is especially strong when the belief under challenge is one that is predominant within a group—such as a cultural one—that is central to a person's identity. In that situation, acceptance of the new information threatens to drive a wedge between a person and others whose judgment she respects and whose good opinion she values.[28] Accordingly, if the source of the new information is someone perceived to hold cultural commitments *opposed* to one's own, the pressure to reject that information is all the more intense.[29]

This account of how culture contributes to the perception of societal harm is supported by a considerable body of empirical research on risk perception. Much of that work grows out of the "cultural theory of risk."[30]

Studies in this family measure individuals' cultural outlooks with scales patterned on a scheme devised by anthropologist Mary Douglas. Douglas classifies cultural "worldviews," or preferences about how society should be organized, along two cross-cutting dimensions: "group" and "grid."[31] Persons who are "high group" favor a *communitarian* social order in which the needs and interests of individuals are subordinated to the collective, which in turn is assigned responsibility for securing the conditions of individual well-being. Persons who are "low group," in contrast, prefer an *individualist* society, in which individuals are responsible for securing their own well-being without collective assistance or interference.[32] Persons who are "high grid" support a relatively *hierarchical* social order, in which goods, opportunities, offices, and obligations are distributed on the basis of largely fixed social attributes, such as gen-

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the Course of Decision Making, 27 J. EXPERIMENTAL PSYCHOL. 1250 (2001).

27. *See* Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 163 (2006).

28. *See, e.g.*, Serena Chen, Kimberly Duckworth & Shelly Chaiken, *Motivated Heuristic and Systematic Processing*, 10 PSYCHOL. INQUIRY 44, 45 (1999) (reporting that individuals use both heuristic and systematic reasoning in biased fashion to find confirmation of beliefs essential to identity, including "social identities"); Cohen, *supra* note 22 (same). An interesting recent study found that party affiliation predicted confirmation bias in the evaluation of information relating to statements made by George Bush and John Kerry. *See* Michael Shermer, *The Political Brain*, 295 SCI. AM. 36 (2006), *available at* http://www.sciam.com/article.cfm?chanID=sa006&colID=13&articleID=000CE155-1061-1493-906183414B7F0162. Using neuro-imaging, the experiment determined that this effect was mediated by the activation of subjects' emotional or affective responses to the candidates.

29. *See* Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, *in* BARRIERS TO CONFLICT RESOLUTION 27 (Kenneth J. Arrow et al. eds., 1995).

30. *See generally* Steve Rayner, *Cultural Theory and Risk Analysis*, *in* SOCIAL THEORIES OF RISK 83 (Sheldon Krimsky & Dominic Golding eds., 1992) (describing theory and identifying key theoretical contributions to it).

31. *See* MARY DOUGLAS, NATURAL SYMBOLS 54-68 (1970); *see also* Kahan & Braman, *supra* note 27, at 150-51.

32. *See* Rayner, *supra* note 30, at 86-88.

der, ethnicity, lineage, and class. Persons who are "low grid" seek an *egalitarian* society in which attributes of those sort play no role in the distribution of goods, opportunities, offices, obligations, and the like.[33] These divisions are related to but cut across conventional left-right ideological classifications (such as "conservative" and "liberal"), and perform a more basic function than those schemes in orienting individuals' political preferences.[34]

Individuals, this work shows, form perceptions of risk that cohere with their cultural appraisals of putatively dangerous activities. 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.

Hierarchists fret about the societal risks of drug use and promiscuous sex, and the personal risks associated with obtaining an abortion or smoking marijuana—forms of behavior that denigrate traditional, stratifying norms. For similar reasons, they worry that mandatory vaccination of school-age girls against the human papillomavirus (HPV) will induce young people to engage in higher rates of unprotected, premarital sex and thus increase the incidence of other sexually transmitted diseases.[35]

Such associations,[36] which researchers find explain risk perceptions more powerfully than any other individual characteristic,[37] are the statistical smoking

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33. *See* JONATHAN L. GROSS & STEVE RAYNER, MEASURING CULTURE: A PARADIGM FOR THE ANALYSIS OF SOCIAL ORGANIZATION 6 (1985); Rayner, *supra* note 30, at 86-88.

34. *See* GROSS & RAYNER, *supra* note 33; Aaron Wildavsky, *Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation*, 81 AM. POL. SCI. REV. 3, 10-13 (1987); John Gastil, Donald Braman, Dan M. Kahan & Paul Slovic, *The 'Wildavsky Heuristic': The Cultural Orientation of Mass Political Opinion* (Pub. L. & Legal Theory Research Paper Series, Research Paper No. 107, 2005), *available at* http://ssrn.com/abstract=834264.

35. This association, it turns out, is highly sensitive to the perceived cultural identity of the person who presents information about the HPV vaccine. A recent experimental investigation shows that the disposition of hierarchically inclined individuals to view the vaccine as risky can be substantially mitigated when they receive information about the risks and benefits of the vaccine from an expert whom such individuals perceive shares their values. *See* Dan M. Kahan et al., The Second National Risk and Culture Study: Making Sense of—and Making Progress in—the American Culture War of Fact at 10-13 (Sept. 27, 2007) (unpublished manuscript), *available at* http://ssrn.com/abstract=1017189.

36. Many of these risks, of course, are both conspicuous and conspicuously political. But even novel risks, associated with as yet unpoliticized activities, can readily generate these dynamics. *See* Dan M. Kahan et al., *Affect, Values, and Nanotechnology Risk Perceptions: An Experimental Investigation* (Cultural Cognition Project, Working Paper No. 22, 2007), *available at* http://ssrn.com/abstract=968652.

gun of cultural cognition. There is no reason to believe that hierarchs and individualists have better or worse access to information about societal harms than egalitarians or communitarians, or that any one of them is more or less reliant on heuristics in interpreting such information. The only cogent explanation for the clustering of beliefs among persons who share such orientations is that culture is indeed entering into the cognitive processes that determine their perceptions of risk.

A popular theme in the history and philosophy of science treats the advancement of human knowledge as conjoined to the adoption of liberal democratic institutions. It is through incessant exposure to challenge that facts establish themselves as worthy of belief under the scientific method. Liberal institutions secure the climate in which such constant challenging is most likely to take place, both by formally protecting the right of persons to espouse views at odds with dominant systems of belief and by informally habituating us to expect, tolerate, and even reward dissent.[38]

But at the same time that liberalism advances science, it also ironically constrains it. The many truths that science has discovered depend on culture for their dissemination: without culture to identify which information purveyors are worthy of trust, we'd be powerless to avail ourselves of the vast stores of empirical knowledge that we did not personally participate in developing. But thanks to liberalism, we don't all use the same culture to help us figure out what or whom to believe. Our society features a plurality of cultural styles, and hence a plurality of cultural certifiers of credible information.

Again, the belief that science will inevitably pull these cultural authorities into agreement with themselves reflects unwarranted optimism. In accord with its own professional norms and in harmony with the social norms of a liberal regime, the academy tolerates and even encourages competitive dissent.[39] As a

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37. Donald Braman, John Gastil, Paul Slovic, and I found these results in a pair of national studies of risk and culture, the findings of which are reported and discussed in Dan M. Kahan et al., *Culture and Identity-Protective Cognition: Explaining the White Male Effect in Risk Perception*, 4 J. EMPIRICAL L. STUD. 465 (2007); Gastil, *supra* note 34; Kahan et al., *supra* note 35; and generally at http://research.yale.edu/culturalcognition. For studies reaching similar results, see Hank C. Jenkins-Smith, *Modeling Stigma: An Empirical Analysis of Nuclear Images of Nevada*, *in* RISK, MEDIA, AND STIGMA: UNDERSTANDING PUBLIC CHALLENGES TO MODERN SCIENCE AND TECHNOLOGY 107 (James Flynn, Paul Slovic & Howard Kunreuther eds., 2001); Karl Dake, *Orienting Dispositions in the Perception of Risk: An Analysis of Contemporary Worldviews and Cultural Biases*, 22 J. CROSS-CULTURAL PSYCHOL. 61 (1991); and Ellen Peters & Paul Slovic, *The Role of Affect and Worldviews as Orienting Dispositions in the Perception and Acceptance of Nuclear Power*, 26 J. APPLIED SOC. PSYCHOL. 1427, 1445 (1996).

38. This position is associated most famously with the work of Karl Popper. *See* KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (1959) [hereinafter POPPER, SCIENTIFIC DISCOVERY]; KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (5th ed. 1966). But it is also featured prominently in Mill's essay *On Liberty*. *See* JOHN STUART MILL, ON LIBERTY (Penguin Books 1982) (1859).

39. A scientific discovery's constant openness to refutation, according to Popper's

result, cultural advocates will always be able to find support from seemingly qualified experts for their perception that what's ignoble is also dangerous, and what's noble benign.[40] States of persistent group polarization are thus inevitable—almost mathematically so[41]—as beliefs feed on themselves within cultural groups, whose members stubbornly dismiss as unworthy insights originating outside the group.

Because we have the advantage of science, we undoubtedly know more than previous ages about what actions to take to attain our collective well-being. But precisely because we tolerate more cultural diversity than they did, we are also confronted with unprecedented societal dissensus on exactly what to do.

II. THE PROBLEM OF COGNITIVE ILLIBERALISM

This constraint on scientific enlightenment, in turn, constrains the progress of liberalism. The quieting of open and violent sectarian rivalries aimed at aligning the state with partisan cultural orthodoxies is liberalism's great achievement.[42] But those rivalries, cultural cognition suggests, have not been genuinely extinguished, only relocated; they persist, not so much in disputes over the morally sectarian visions to be expressed by the law, but in contestation over the means to be employed to attain society's secular ends.

This is the problem of cognitive illiberalism. I will now explore the two forms it takes in our political life: culturally grounded status conflict over the *facts* on which policies of harm abatement rest, and parallel conflict over *whose* view of the facts is being distorted by an illiberal desire to impose a partisan cultural orthodoxy through law.[43]

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influential account of the scientific method, see POPPER, SCIENTIFIC DISCOVERY, *supra* note 38, is an essential condition of assent to it, a position that sociologists and science have linked to a professional culture of incessant competitive dissent within the scientific academy. *See* ROBERT K. MERTON, *The Normative Structure of Science*, *in* THE SOCIOLOGY OF SCIENCE 276, 277 (Norman W. Storer ed., 1973) (identifying "organized skepticism" as "both a methodological and an institutional mandate"). As Wildavsky points out, "Disagreement over science is normal; the competition of ideas is what keeps it going." AARON WILDAVSKY, BUT IS IT TRUE? A CITIZEN'S GUIDE TO ENVIRONMENTAL HEALTH AND SAFETY ISSUES 246 (1995).

40. *See generally* DOUGLAS & WILDAVSKY, *supra* note 12, at 49-66.

41. *See generally* Braman et al., *supra* note 23, at 294-97.

42. *See* ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH (1977); HOLMES, *supra* note 2, at 42-67.

43. I am addressing primarily the impact of cognitive illiberalism on perceptions of facts relevant to policies adopted by legislatures or administrative tribunals. But certainly one would expect the same dynamics to shape perceptions of facts—whether by judges or juries, or by members of the public reacting to what judges and juries decide—in the judicial arena. *See, e.g.*, Dan M. Kahan, Donald Braman & John Gastil, *A Cultural Critique of Gun Litigation*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSS-ROADS OF GUN CONTROL AND MASS TORTS 105 (Timothy D. Lytton ed., 2005). In an insightful article, Suzanne B. Goldberg has noted that when courts announce new constitutional rights against

A. *"Culture Wars": Facts, Not Values*

Cultural status competition occupies a familiar place in our political life. Laws relating to gay marriage, flag burning, late-term abortion, the teaching of "intelligent design," and the like provoke bitter conflict not so much because of their impact on behavior but because of the messages their adoption (or rejection) sends about the relative status of persons who subscribe to competing cultural styles.[44] There's no disputing the affront to liberal neutrality posed by these sectarian efforts to capture the expressive capital of the law. The only debate concerns the significance of these so-called "culture wars," which political scientists assure us is of much greater concern to fringe political actors and journalists than to the average American voter.[45]

The theory of cultural cognition, however, implies that it is a profound mistake to see cultural status competition as confined to so-called symbolic politics. Even if cultural contestation over values could magically be banished from our political life tomorrow, it would continue in empirical debates over how to make our society prosperous and safe—exactly the matters that "culture war" critics say average citizens *do* care intensely about.[46]

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discrimination they invariably rely on *factual* claims relating either to the nature of the group being discriminated against or the rationale or consequences of the discriminatory policy being challenged. *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006). Goldberg speculates that courts resort to "fact" claims strategically, in order to conceal their reliance on contentious norms. An alternative explanation would be cognitive: as judges' commitment to particular norms shift, so do their perceptions of facts that either support or undermine discriminatory laws. *Cf.* Dan M. Kahan & Donald Braman, The Self-Defensive Cognition of Self-Defense (Aug. 29, 2007) (unpublished manuscript, on file with authors) (presenting empirical evidence that individuals' cultural norms shape their perception of facts in controversial self-defense cases).

44. This theme is a common one in academic and popular writings. *See, e.g.*, DON S. BROWNING ET AL., FROM CULTURE WAR TO COMMON GROUND (2d ed. 2000); JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991); PETER KREEF, HOW TO WIN THE CULTURE WAR: A CHRISTIAN BATTLE PLAN FOR A SOCIETY IN CRISIS (2002). For scholarly accounts of the nature of symbolic status competition in law, see JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (2d ed. 1986) and J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997).

45. *See, e.g.*, MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY C. POPE, CULTURE WAR? THE MYTH OF A POLARIZED AMERICA (2005).

46. In fact, the best explanation for the high profile of symbolic issues in electoral politics is that citizens who care *mainly* about safety and prosperity will, because of the heuristic role of culture, impute competence and shared interests to politicians who share their values on cultural issues. *See generally* Wildavsky, *supra* note 34 (articulating the theory); Gastil et al., *supra* note 34 (presenting empirical support for the theory). In this sense, the journalists who infer that "culture outweighs economics as a matter of public concern," THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS? 6 (2004), and the political scientists who say culture is irrelevant are both wrong. *See* John Gastil, Dan M. Kahan & Don Braman, *Ending Polarization: The Good News About the Culture Wars*, BOSTON REV., Mar.-Apr. 2006, at 18.

Indeed, the theory of cultural cognition helps us to see that debates over seemingly instrumental issues are of a piece with conflicts over so-called symbolic ones. Debates over climate change, economic policy, public health, and crime control pit exactly the same cultural groups—hierarchical and egalitarian, individualistic and communitarian—against each other.[47]

Such debates provoke the same acrimony as ones over symbolic issues. The rhetorically bloodless language of the experts—regression coefficients, GCM grid-box predictions, LARS-WG stochastic algorithms, t-statistics—does nothing to staunch accusations of deceit and bad faith:

> Folks with their eyes even halfway on the ball already know that global warming is quackery gone to town and belongs on the dumb-idea ash-heap with previous enviro-alarms—see Alar, DDT, acid rain, asbestos, African killer bees, holes in the ozone layer, et al.—all whooped up as threats to life as we know it and all, in due course, proven to be either totally harmless or of not much account.[48]

> You know, 15 percent of people believe the moon landing was staged on some movie lot and a somewhat smaller number still believe the Earth is flat. They get together on Saturday night and party with the global-warming deniers.[49]

> These factually challenged bureau-rats in the legislature want to continue punishing the employer by passing new laws to continually raise wages in the private sector. These mental midgets claim this will benefit the worker. Nothing like twisting logic upside down to get more votes.[50]

> So why does the supply-side idea keep on resurfacing? Probably because of two key attributes that it shares with certain other doctrines, like belief in the gold standard: It appeals to the prejudices of extremely rich men, and it offers self-esteem to the intellectually insecure. . . . Because economics touches so much of life, everyone wants to have an opinion. Yet the kind of economics covered in the textbooks is a technical subject that many people find hard to follow. How reassuring, then, to be told that it is all irrelevant—that all you really need to know are a few simple ideas. . . . Supply-side economics, then, is like one of those African viruses that, however often it may be eradicated from the settled areas, is always out there in the bush, waiting for new victims.[51]

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47. *See supra* notes 27-36 and accompanying text.

48. Larry Thornberry, *Hot and Cool*, AM. SPECTATOR ONLINE, Nov. 3, 2005, http://www.spectator.org/dsp_article.asp?art_id=8972 (reviewing MICHAEL CRICHTON, STATE OF FEAR (2004)).

49. Alex Fryer, *Gore Scoffs at Reichert's Stance on Global Warming*, SEATTLE TIMES, Oct. 25, 2006, at B1 (quoting Al Gore).

50. Devvy Kidd, *Solving the Minimum Wage Dilemma*, NEWSWITHVIEWS.COM, Apr. 16, 2003, http://www.newswithviews.com/Devvy/kidd13.htm.

51. Paul Krugman, *Supply Side Virus Strikes Again: Why There Is No Cure for This Virulent Infection*, SLATE, Aug. 16, 1996, http://www.slate.com/id/1910.

> Thanks to [the author of an op-ed discussing] the insanity of concealed gun laws. . . . It was particularly helpful that he exposed Professor John R. Lott Jr. as an intellectually dishonest toady of the bullet manufacturing industry. Gun nuts have been in our faces lately with his alleged study saying that not carrying a gun made our streets unsafe. There's a word for that kind of thinking—Orwellian.[52]

> What is it with these right-wing Christians? Faced with a choice between sex and death, they choose death every time. No sex ed or contraception for teens, no sex for the unwed, no condoms for gays, no abortion for anyone . . . . Ah, Christian compassion! Christian sadism, more likely.[53]

Most important of all, conflicts over instrumental issues convey exactly the same messages about the status of the cultural groups they divide. If a particular activity (owning a gun, participating in commerce) is esteem-conferring for me because of my cultural commitments, I instinctively resent, and hence resist, the claim that the activity is in fact dangerous and worthy of regulation.[54] If a particular activity (say, abortion) symbolically *denigrates* a cultural role that is esteem-conferring for me (motherhood), the conclusion that the activity is *not* dangerous and worthy of regulation provokes the same resentment.[55]

If the government adopts a policy (on, say, climate change) that reflects a view of the facts contrary to the one espoused by my cultural peers and authorities, I naturally view such action as implying that those whom I trust are in fact incompetent or untrustworthy. I am all the more impelled to that inference if the factual presuppositions of the policy are ones espoused by persons of a contrary persuasion (Rush Limbaugh, the editors of *The New York Times*), who tend to make no secret of their low regard for the character of persons who hold mine.

Consider in this regard a YouTube video entitled "Evangelist Mom on Global Warming, Evolution, Creationism" and excerpted from the documentary *Jesus Camp*[56]. The clip shows a mother from rural St. Robert, Missouri, admin-

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52. Kevin Beck, Letter to Editor, *Conceal Carry*, ST. LOUIS POST-DISPATCH, Aug. 12, 1998, at B6.

53. Katha Pollitt, *Virginity or Death!*, THE NATION, May 30, 2005, at 9, *available at* http://www.thenation.com/doc/20050530/pollitt (criticizing the argument that mandatory HPV vaccination will endanger health by leading to teen pregnancies).

54. *See* Kahan, *supra* note 37, at 479-88 (presenting empirical evidence showing that hierarchists and individualists are less likely than others to see commercial activities and guns as risky than others).

55. *See id.* at 489-91 (presenting empirical evidence that women who adhere to hierarchical worldview believe abortion presents a significant health risk to women); *see also* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (documenting political prevalence of the "harm to women" argument in support of new abortion prohibitions).

56. http://www.youtube.com/watch?v=07WX3F7UQWA (last visited, Sept. 25, 2007); JESUS CAMP, (Magnolia Pictures 2006).

istering a home-schooling lesson to her twelve-year-old son on the fallacies of global warming concern:

> Mother (reading): "'One popular thing to do in American politics is to note that the summers in the United States over the past few years have been very warm; as a result, global warming must be real. What's wrong with this reasoning?'"
> Son: "It's only gone up 0.6 degrees."
> Mother: "Yeah, it's not really a big problem, is it?"
> Son: "I don't think that it's going to hurt us."

The son, who earlier was shown reading a textbook entitled *Exploring Creation with Physical Science*, asks whether "creationism" is as important an issue in American politics as global warming, to which the mother replies, "It's becoming one, now." "What if you had to go to a school where the teacher said, 'Creationism is *stupid*, and you're *stupid* if you believe in it,'" the mother asks, eliciting a pained look from the boy. "Or what if you had to go to a school where your teacher said, 'Evolution is *stupid*, and you're *stupid* if you believe in it?" "I wouldn't mind that!" he chuckles. Later the mother asks a younger son, who nods, "Did you get to the part on here where it says science doesn't prove anything? And it's really interesting if you look at things that way." "It is," he replies. "I think, personally, that Galileo made the right choice by giving up science for Christ," the boy says to the mother, over whose shoulder a picture of a smiling George Bush can be seen. The clip fades as the message "75% of homeschooled kids in the United States are Evangelical Christians" appears.

The video succinctly captures the cultural significance of instrumental policy disputes in our political life. The mother clearly understands facts this way. For her, the debate over climate changes is of a piece with the debate over the teaching of evolution in public schools, most likely because of the conspicuous role that natural scientists from elite universities play in both. At stake—in both controversies—is the status of those who hold her values ("What if you had to go to a school where the teacher said, . . . '[Y]ou're *stupid* if you believe in [creationism]'?"). By exposing the supposed logical fallacies of those who fear global warming and by showing that "science" can just as easily be used to support her group's views on factual issues like climate change and the origin of the species, the mother teaches the son that it is the family's *cultural adversaries* who are not merely mistaken but worthy of contempt ("'[*Y*]*ou're* stupid if you believe in [evolution]'").

But more subtly the clip makes a similar point about the attitude of the mother's cultural opponents. As it was no doubt designed to do, the clip provokes both scorn and alarm from online commenters:

> Poor cretins sometimes I wonder if they know that their delusional? BTW creationist[s] are stupid.
> There should be a law against "teaching" ignorance to those who cannot accept scientific fact!
> That women should be shot.
> Those are the kind people who should be neutered.

These kids are our future. Scary.[57]

Someone viewing the *viewers* of the video, then, sees that they, no less than the mother, are as invested in what the global warming debate signifies about the status of competing worldviews as in what it portends for the future of the planet.[58] The commenters treat the factual beliefs espoused by the mother as justifying derision and even hate. The very vehemence of their ridicule, moreover, betrays their own anxiety over what it would signify about their status were the law to come down on *her* side in the global warming debate.

What we believe about facts, cultural cognition tells us, reflects *who we are*, culturally speaking. We are thus impelled to perceive the State's adoption of instrumental policies, no less than its adoption of symbolic ones, as adjudicating the competence and virtue of those who adhere to competing cultural outlooks.

B. *Now You See It, Now You Don't*

Cognitive illiberalism is not invisible to us. But we do perceive it selectively.

Imagine persons forbidden to engage in a species of behavior that is integral to their understanding of the good life but that is widely viewed as morally abhorrent. Such a group is unlikely to be mollified by the explanation that the State enacted the prohibition because a majority of citizens believed the behavior posed grave risks of harm to society. In that case, the dissenting minority will not only perceive a law motivated by fear to be equivalent in its impact to a law motivated by disgust, its members will also suspect that the majority's disgust is what *disposed* it to be fearful. Social psychologists have documented that persons readily, and correctly, discern that individuals who hold factual beliefs different from their own have formed those views to fit their group commitments.[59]

The complaint that their perception of harm is motivated by animus is unlikely to have much impact on members of the majority, however. The same research that shows that people often discern the effect of group commitments on the factual views of others finds that people usually don't discern the distort-

57. *See* http://www.youtube.com/watch?v=07WX3F7UQWA (last visited Sept. 25, 2007) (comments).

58. The YouTube posting is designated as a response to a video entitled "Atheists Attacked in America," which excerpts a news story on persecution of atheists in a small rural town. It therefore seems likely that the poster, far from intending to invite ridicule of the mother, actually meant to make viewers aware of the persecution that evangelicals experience through depictions such as this one, which so predictably evoke ridicule of them. The disturbingly hateful response of the YouTube commentators drives this point home.

59. *See* Robert J. Robinson, Dacher Keltner, Andrew Ward & Lee Ross, *Actual Versus Assumed Differences in Construal: "Naive Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 404-05 (1995).

ing effect of such commitments on their own beliefs. Social psychologists call this dynamic "naïve realism."[60]

This experience—of simultaneously perceiving and not perceiving cognitive illiberalism—is a ubiquitous feature of our political experience. Because our society is genuinely pluralistic, nearly every citizen belongs simultaneously to (potentially shifting) majorities and minorities in moral debates. As a result, we can all identify some species of regulation we object to on the ground that its secular rationale is either a pretext for, or a rationalization of, aversion to disfavored values. And by the same token, we all support regulations the secular justifications for which are perceived by others as pretexts or rationalizations.

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. To illustrate its ubiquity, I will consider how egalitarians and hierarchs, individualists and communitarians, take turns advancing and denying charges of cognitive illiberalism across a diverse set of issues.

1. *Sodomy and drugs*

Both same-sex intimacy and the use of (certain) recreational drugs are deeply woven into visions of the good life that defy traditional, largely hierarchical norms. For that reason, these forms of behavior provoke revulsion among hierarchically inclined persons.[61] Egalitarians and individualists, in turn, have invoked liberal values to attack antisodomy and drug laws, depicting them as the equivalent of cultural alien and sedition acts.[62]

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60. *See id.*

61. On homosexuality and hierarchical norms, see generally Gregory M. Herek, *Heterosexuals' Attitudes Toward Bisexual Men and Women in the United States*, 39 J. SEX RES. 264 (2002); Bernard E. Whitley, Jr. & Sara E. Lee, *The Relationship of Authoritarianism and Related Constructs to Attitudes Toward Homosexuality*, 30 J. APPLIED SOC. PSYCHOL. 144 (2000). On drugs, see DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTICS CONTROL (1973); Douglas Clark Kinder, *Shutting Out the Evil: Nativism and Narcotics Control in the United States*, *in* DRUG CONTROL POLICY: ESSAYS IN HISTORICAL AND COMPARATIVE PERSPECTIVE 117 (William O. Walker III ed., 1992).

62. *See, e.g.*, David A.J. Richards, *Constitutional Privacy and Homosexual Love*, 14 N.Y.U. REV. L. & SOC. CHANGE 895 (1986) [hereinafter Richards, *Privacy*].

> Enforcement of traditional attitudes on society at large is, as I have suggested, the functional equivalent of a heresy prosecution: the grounds for prohibition are highly personal, ideological and/or political. . . .
>
> Homosexuality is today essentially a form of political, social, and moral dissent on a par with the best American traditions of dissent and even subversive advocacy. For this reason, traditional liberal principles must protect this way of life from the worst American impulses of repressive nativism. Those that support criminalization find today in homosexuality what they found before in the family planning of Sanger, the atheism of Darwin, the socialism of Debs, or the Marxist advocacy of the American Communist Party.

Id. at 905; *see also* DAVID A.J. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON

It would be a mistake, though, to infer that moral aversion to the values same-sex sodomy and drugs respectively express has ever been offered as the sole basis for prohibiting them. Instead, consistent with the cultural cognition of harm, proponents of regulation have always rested their case on (or at least amply fortified it with) the contribution such laws make to avoiding secular harms. It is said, for example, that drug use generates crime, leads to mental and physical disorders (which nonusers end up paying to treat), detracts from worker productivity (visiting economic losses on society at large), and interferes with responsible parenting.[63] Before being struck down as unconstitutional in *Lawrence v. Texas*,[64] same-sex sodomy laws were defended on the ground that homosexuality spreads disease, conduces to child molestation, and risks social disorder.[65]

Sodomy and drug law opponents have never simply taken these harm rationales at face value. Instead, they have tested them with a series of argumentative techniques aimed at showing that they are either the product of bad faith or delusion.

One of these is akin to an evidentiary burden of proof. "[M]ost philosophers"—or at least most liberal ones—"begin with a 'presumption of freedom,' or liberty, which places the onus of justification on those who would interfere with what a person wants to do."[66] Dire speculations unsupported by empirical evidence—such as Lord Devlin's "social disintegration thesis,"[67] or the claim

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HUMAN RIGHTS AND OVERCRIMINALIZATION (1982) [hereinafter RICHARDS, OVERCRIMINALIZATION].

> [T]he perfectionist ideal, implicit in America's prohibitory drug laws, is Manichean. Drug users are branded as the Puritans branded their deviants: evil and willful outcasts whose criminal stigma reflects the demarcation between the ideals of the saints and the inexplicable and satanic evils of the sinner. We have disclosed this cruel vision for what it is: not a critical moral judgment, but a remnant of a sectarian ideology secularized into a moral ideal of emotional self-control.

Id. at 194; *cf.* STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 158 (1994).

63. *See generally* MUSTO, *supra* note 61 (cataloging an evolving list of asserted harms over time).

64. 539 U.S. 558 (2003).

65. *See generally* Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 146 (1998) (canvassing such rationales); WILLIAM N. ESKRIDGE, JR., "DISHONORABLE PASSIONS": THE RISE AND FALL OF THE CRIME AGAINST NATURE (forthcoming Feb. 2008).

66. DOUGLAS N. HUSAK, DRUGS AND RIGHTS 59 (1992).

67. *Compare* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 13 (1965) (defending criminalization of homosexuality on ground that society will "disintegrate" without enforcement of core moral norms), *with* Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 992 (1966) ("[Devlin] manages this conclusion without offering evidence that homosexuality presents any danger at all to society's existence, beyond the naked claim that all 'deviations from a society's shared morality . . . are capable in their nature of threatening the existence of society' . . . ."), *and* H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1, 13 (1967) ("Till

that homosexual sodomy leads to child molestation[68]—are clearly inadequate to discharge this justificatory burden. But so too are harm-prevention rationales supported by reasonably *disputed* empirical evidence. In the face of reasonable "scientific doubts" about the public health and safety effects of marijuana use[69] and "volumes [of writings] supporting one hypothesis or another" on the effects of drug laws in combating crime,[70] the presumption of liberty should prevail.

Another technique focuses less on the weight of the evidence supporting the secular rationales for regulation than on the plausibility of them as motivations for regulation. Drug use is less dangerous than a host of other activities, from motorcycle riding to mountain climbing to alcohol consumption. If they were truly motivated by the threat that drugs pose to public health, prohibitionists would be just as intent on banning these other activities.[71] Likewise, if the defenders of same-sex sodomy laws had been genuinely concerned to prevent the spread of AIDS, they'd have been just as intent on regulating heterosexual as homosexual sodomy—and would actually have had no interest in regulating lesbian sex.[72] Indeed, they'd actually *support* homosexual *marriage*, which conduces to monogamy and hence to the reduction of sexually transmitted diseases.[73]

The selectivity with which they are applied, critics conclude, reveals that the harm-prevention rationales for drug and antisodomy laws are nothing more than "post hoc empirical makeweights for . . . moralistic and paternalistic arguments."[74] Because they so plainly lack support and cogency, these rationales, *even if honestly believed* by their deluded sponsors, do nothing, critics maintain, to acquit such laws of the charge that they are the instruments of cultural orthodoxy.[75]

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psychologists and sociologists provide evidence, supporters of the enforcement of morality would do better to rest their case candidly on [the legitimacy of enforcing morality for its own sake] rather than on the disintegration thesis.").

68. *See* THE EDITORS OF THE HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW 19 (1990); Richards, *Privacy*, *supra* note 62, at 901.

69. Ravin v. State, 537 P.2d 494, 511 (Alaska 1975) (citing "scientific doubts" as reason to reject conflicting empirical evidence offered to support state claim that marijuana use in one's home creates public health and safety risks).

70. HUSAK, *supra* note 66, at 196.

71. *See id.* at 94-97; DUKE & GROSS, *supra* note 62, at 147-51.

72. *See* THE EDITORS OF THE HARVARD LAW REVIEW, *supra* note 68, at 19-20; *see also* Gryczan v. Montana, 942 P.2d 112, 124 (Mont. 1997).

73. WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 120 (1996).

74. RICHARDS, OVERCRIMINALIZATION, *supra* note 62, at 168.

75. *See* H.L.A. HART, LAW, LIBERTY AND MORALITY 52 (1963) (concluding that Devlin's social disintegration thesis trades on the "tacit identification of a society with its shared morality"); *cf.* HUSAK, *supra* note 66, at 157, 164-70 (concluding that empirical "harm" arguments offered by drug prohibitionists are not independent—analytically or motivationally—of belief that drug use is immoral).

2. *Guns*

The liberal case against sodomy and drug laws—including the probing of secular rationales for hidden, illiberal motivations—furnishes a template for challenging myriad other regulations aimed at culturally contested forms of behavior. One of these is gun control.

Many of the same persons who oppose drug criminalization and who historically fought antisodomy laws *support* various forms of gun control. Gun control supporters base their case on the abatement of secular harms: firearm accidents, particularly ones involving children, and the use of guns to commit violent crimes. It remains the case, however, that gun possession, like drug use and sodomy, is a form of behavior that defies certain cultural norms, in this case egalitarian and communitarian ones, the holders of which despise guns as symbols of patriarchy and racism, indifference and distrust.[76] Because this is so, gun control critics (many of whom believe that drugs and homosexuality are dangerous) have interrogated the arguments of gun control proponents with the very same techniques used to disclose cognitive illiberalism in the case for regulating sodomy and drug use.

For them, at least, such probing likewise reveals the influence of partisan values on their opponents' beliefs. As with drug prohibition, no form of gun control has been conclusively proven to be effective, despite prodigious empirical investigation.[77] Conveniently (but not surprisingly)[78] for gun control opponents, the array of authorities who've reached this conclusion include many highly credentialed scientists. A review by the Centers for Disease Control, for example, "found insufficient evidence to determine the effectiveness of any of the firearms laws reviewed," which included licensing and registration requirements, waiting periods, lock-box provisions, and outright bans.[79] On the specific impact of "concealed carry" laws—an issue on which there has been extensive empirical study[80]—a National Academy of Sciences review panel concluded that "with the current evidence it is not possible to determine that

76. *See* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 456-58 (1999).

77. *See generally* JAMES B. JACOBS, CAN GUN CONTROL WORK? (2002) (reviewing evidence on various sorts of gun control and finding nothing works).

78. *See supra* note 39 (discussing inevitability of scientific dissensus).

79. ROBERT A. HAHN ET AL., CTRS. FOR DISEASE CONTROL, FIRST REPORTS EVALUATING THE EFFECTIVENESS OF STRATEGIES FOR PREVENTING VIOLENCE: FIREARMS LAWS (2003), *available at* http://www.cdc.gov/MMWR/preview/mmwrhtml/rr5214a2.htm.

80. *Compare, e.g.*, JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (2d ed. 2000) (presenting data that "concealed carry laws" reduce crime), *with* Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1202 (2003) (reexamining and extending Lott data and concluding: "While we do not want to overstate the strength of the conclusions that can be drawn from the extremely variable results emerging from the statistical analysis, if anything, there is stronger evidence for the conclusion that these laws increase crime than there is for the conclusion that they decrease it.").

there is a causal link between the passage of right-to-carry laws and crime rates"—in either direction.[81] If they won't concede that there are at least legitimate "scientific doubts" that gun control promotes pubic safety, or are unwilling to apply "the presumption of liberty" in the face of such uncertainty, gun control supporters, it is said, must be biased by their moral aversion to gun ownership.[82]

The asserted harm-based rationales for restricting guns, like those offered for prohibiting sodomy and recreational drug use, are also underinclusive. Control advocates, for example, prominently emphasize the risk of accidental shootings, particularly of children. Overall, guns rank fifteenth among causes of accidental death in the U.S., accounting for about 800 deaths, or 1% of the nationwide total, per year.[83] Automobile accidents, the leading cause, account for more than 40,000 deaths.[84] But gun control advocates aren't lobbying for lower speed limits or tougher automobile "crashworthiness" standards, policies that would clearly be more effective than gun control in saving lives. Some six times as many children under ten years of age drown in swimming pools every year as are shot by guns; based on the relative number of guns and pools, University of Chicago economist Steven Levitt (an expert scientist, no?) calculated that having a swimming pool in one's backyard is a hundred times more lethal for a child than having a gun somewhere inside one's home.[85] Yet no gun control advocacy group has called for banning swimming pools.

Control advocates also emphasize the public health costs associated with shootings, both intentional and accidental. But those costs (like the costs associated with illegal drug use) are swamped by those associated with alcohol: alcohol appears to be responsible for up to six times as many deaths as guns.[86] Even these figures probably understate the danger of alcohol relative to guns insofar as over half of the individuals who die from shootings are suicide victims,[87] some fraction of whom would presumably have taken their lives by

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81. COMM. TO IMPROVE RESEARCH INFO. AND DATA ON FIREARMS, NAT'L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (Charles F. Wellford et al. eds., 2004).

82. *See* JOHN R. LOTT, JR., THE BIAS AGAINST GUNS: WHY ALMOST EVERYTHING YOU'VE HEARD ABOUT GUN CONTROL IS WRONG (2003) (arguing that most academics and journalists slant their information on guns); HARRY L. WILSON, GUNS, GUN CONTROL, AND ELECTIONS: THE POLITICS AND POLICY OF FIREARMS 244-45 (2006) (presenting evidence of media bias).

83. *See* WILSON, *supra* note 82, at 51.

84. *See id.*

85. STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 149-50 (2005).

86. *Compare* PHILIP J. COOK & JENS LUDWIG, GUN VIOLENCE: THE REAL COSTS 140 (2000) (30,000 gun deaths), *with* HUSAK, *supra* note 66, at 95 (200,000 alcohol deaths).

87. *See* ROBERT N. ANDERSON ET AL., CTRS. FOR DISEASE CONTROL, DEATHS: INJURIES, 2001 at 21 (2004), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_21acc.pdf.

other means had they not had access to a gun.[88] Nevertheless, control advocates aren't proposing prohibition of alcohol.

They might explain their focus on gun rather than alcohol regulation by citing the precedent of Prohibition, which (it is said) not only failed to reduce the incidence of drinking but generated terrifyingly high rates of collateral crime—lessons that are often cited by those who oppose drug criminalization.[89] But in a nation in which there are already more guns than people, there's just as much reason to believe that gun prohibition can't work and will in fact also ignite—indeed, already has ignited—a violent black market.[90] Why do the same people who so readily recite the "perversity" and "futility" of drug or alcohol prohibitions so confidently deny the same for gun prohibitions?[91]

For gun control opponents, the answer is (in effect) cognitive illiberalism. Control advocates selectively accept evidence of the need and feasibility of gun control because gun ownership, unlike swimming in backyard pools and drinking beer, offends their values. "[T]he impetus to banning firearms comes less from a belief that it will reduce crime than from a cultural and moral opposition to them. . . . In this view prohibition is desirable even though ineffective, because it brands the banned conduct . . . as loathsome and immoral."[92]

3. *Smoking*

The regulation of smoking also excites charges of cognitive illiberalism. Defenders of hefty sales taxes, public smoking bans, and other restrictions (many arising from settlement of the historic governmental lawsuit against the tobacco industry) invoke secular rationales: reducing the public health costs of treating lung cancer victims, and abating the risk of disease or the simple annoyance associated with ingesting "second-hand smoke."[93] But behind these

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88. *See* WILSON, *supra* note 82, at 58-59.

89. *See, e.g.*, DOUGLAS HUSAK, LEGALIZE THIS! THE CASE FOR DECRIMINALIZING DRUGS 159-60 (2002).

90. *See generally* JACOBS, *supra* note 77, at viii-ix ("Interestingly, many gun control believers are atheists when it comes to government regulation of mood- and mind-altering drugs. They insist that drugs cannot be kept out of the hands of those who want to use them. . . . As we shall see, the challenge of regulating firearms is much greater than the challenge of regulating marijuana, cocaine, [and] heroin . . . .").

91. *Compare* Philip J. Cook & James A. Leitzel, *"Perversity, Futility, Jeopardy": An Economic Analysis of the Attack on Gun Control*, 59 L. & CONTEMP. PROBS. 91 (1996) (concluding that stricter gun control can work), *with* Philip J. Cook, Book Revew, 21 J. POL'Y ANALYSIS & MGMT. 303, 303 (2002) (describing the "war on drugs" as "costly, damaging, and ultimately absurd").

92. Don B. Kates, Jr., *Public Opinion: The Effects of Extremist Discourse on the Gun Debate*, *in* THE GREAT AMERICAN GUN DEBATE 93, 95 (Don B. Kates, Jr. & Gary Kleck eds., 1997).

93. *See generally* Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163 (1998).

rationales opponents detect the unmistakable signature of animus toward the cultural values that smoking expresses.

The social meaning of smoking has undergone immense transformation in the last three decades. The broad appeal of smoking for the much of the twentieth century was underwritten by a mélange of symbolic connotations—"the independent Marlboro Man" and "liberated Virginia Slim,"[94] "'continental' sophistication" and "outright rebelliousness"[95]—that made cigarettes congenial to a diverse array of cultural styles. Today, however, cigarettes bear a more univocal, individualistic connotation. That meaning continues to resonate for a cultural style that prizes the "authenticity of impulse and risk."[96] But for others, the individualistic aura of the cigarette denotes a constellation of negative values, such as weakness, crudeness, and irrationality, along with a culpable heedlessness of social obligation.[97]

Changing the meaning of smoking was an essential element of the public campaign to reduce cigarette use in the United States. In the aftermath of the Surgeon General's Report in 1964, public health officials focused mainly on disseminating information on the deleterious effect of cigarettes for smokers. Progress was slow. Cigarette consumption actually continued to climb through the end of the 1970s; efforts to push regulation beyond the requirement of warnings and the ban on television advertising stalled, as did a series of consumer lawsuits against tobacco companies. But then public health officials and anti-cigarette activists adopted a new strategy: "to make smoking so unpopular that smokers would be forced to quit."[98] "The stigmatization of the cigarette" proved a breath of fresh air to the anti-tobacco movement.[99] Not only did cigarette consumption and lung cancer rates begin to drop precipitously, but the nation witnessed a new wave of regulation. Localities and businesses began to adopt progressively more expansive public smoking bans, and Congress codified the terms of the governmental lawsuit filed to hold tobacco companies responsible for the public health cost of treating smoking illnesses.[100]

The career of smoking in the United States powerfully confirms the dynamics of cultural cognition. As a later Surgeon General recognized in retrospect, "the diffusion of new knowledge [embodied in the 1964 Surgeon General's Report] was impeded by the entrenched norm of smoking, a widespread

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94. Allan M. Brandt, *The Cigarette, Risk, and American Culture*, 119 DAEDALUS 155, 169 (1990).

95. Joseph R. Gusfield, *The Social Symbolism of Smoking and Health*, *in* SMOKING POLICY: LAW, POLITICS, AND CULTURE 49, 52 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

96. *Id*. at 66.

97. *Id*. at 61, 62-63; Brandt, *supra* note 94, at 169.

98. Constance A. Nathanson, *Social Movements as Catalysts for Policy Change: The Case of Smoking and Guns*, 24 J. HEALTH POL. POL'Y & L. 421, 436 (1999).

99. Brandt, *supra* note 94, at 168-69.

100. *See* Nathanson, *supra* note 98, at 432-37.

practice fueled by the persistent and pervasive marketing of cigarettes."[101] A broad majority of citizens (including doctors, who also initially remained skeptical)[102] did ultimately come to believe the empirical information synthesized in the Report, but only *after* a shift in social meaning—one that stamped "smoking . . . as undesirable, deviant behavior, and smokers as social misfits"—made acceptance of that information compatible with a diverse array of cultural outlooks.[103] Characteristic of the cultural cognition of harm, moreover, once smoking came to be seen as morally noxious, the public quickly came to believe that cigarettes were dangerous not only to smokers but to society at large.[104]

It is exactly this historical connection between moral aversion to smoking and the regulation of it that has moved critics to hunt for evidence of bias. Like the opponents of drug laws, antisodomy laws, and gun control, moreover, they've had little trouble raising reasonable doubts about the substance and genuineness of proponents' perceptions of third-party harms.

One study published in the *New England Journal of Medicine*, for example, concluded that smokers actually *decrease* public health costs.[105] The health-care expenditures externalized by smokers, the researchers concluded, are more than offset by those externalized by nonsmokers, who tend to live longer and ultimately die from diseases that consume more resources to treat. At a minimum, "inevitable arbitrariness concerning what costs to include, which discount rate to apply, and what duration of follow-up to use" render any "economic method of evaluation" indeterminate.[106] Applying the presumption of liberty, then, one might conclude that this secular rationale for regulation—the lynchpin of the governmental lawsuit against the tobacco industry—is insufficiently supported to justify high consumer taxes and other coercive restrictions.

In addition, like the secular rationales for regulating drugs, same-sex sodomy, and guns, the rationales for public smoking bans are over-inclusive. There are (of course) scientifically credible grounds for doubting the claims of harm attributed to passive smoke ingestion in enclosed, not to mention open-air, public facilities.[107] But however sound, no study suggests that allowing smoking

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101. CTRS. FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH AND HUMAN SERVS., REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL 40 (2000) [hereinafter 2000 SURGEON GENERAL REPORT].

102. *See id.* at 42.

103. Gerald E. Markle & Ronald J. Troyer, *Smoke Gets in Your Eyes: Cigarette Smoking as Deviant Behavior*, 26 SOC. PROBS. 611, 617 (1979).

104. *See* 2000 SURGEON GENERAL REPORT, *supra* note 101, at 45-50; Nathanson, *supra* note 98, at 448-50.

105. *See* Jan J. Barendregt, Luc Bonneux & Paul J. van der Maas, *The Health Care Costs of Smoking*, 337 NEW ENG. J. MED. 1052 (1997).

106. *Id.* at 1057.

107. *See generally* Thomas A. Lambert, *The Case Against Smoking Bans*, 13 MO. ENVTL. L. & POL'Y REV. 94, 109-11 (2005).

patrons of a bar to light up creates nearly as much danger for nonsmoking patrons as permitting both to *drink* at such an establishment does for members of the public, who as a result face an increased risk of being killed by intoxicated drivers. Why so much less solicitude for the latter, who have so much less control over the risk they are being exposed to than do consumers who want to avoid smoky restaurants and bars? If smoking weren't banned at the workplace, employees could still choose not to work at firms that don't have privately enforced bans; why so much more solicitude for these risk-averse individuals than for persons who work in jobs that expose them to obviously greater hazards and whom we expect to protect themselves through market self-help?[108] Why consider banning drivers from smoking but not from listening to music when studies show that the distraction associated with adjusting a radio or CD player results in twelve times as many accidents as lighting up on the road?[109]

For critics of smoking regulation, the answer to these questions is again the unstated, and maybe even unappreciated influence, of regulators' moral aversion to smoking. Antismokers, one such critic writes, bridle at the style of "the entrepreneurial businessman and others . . . who promote, celebrate, engage in, reward, and profit from daring and passionate risk-courting (or gambling) and bold and creative individualism."[110] They "find the choice to smoke, its array of sensual and social pleasures, and its deliberate courting of death to be perverse, incomprehensible, and alien."[111] "It is one of the peculiarities of paternalism in the modern liberal state that its charges of perversion are described in rationalist, consequentialist terms, with scientific evidence adduced for its conclusions."[112]

4. *Nuclear energy & global warming*

Environmentalism has been a prime target for charges of cognitive illiberalism since the publication of Douglas and Wildavsky's classic, *Culture and Risk*. Their main example was nuclear power. Atomic energy, they observed, excited impassioned opposition not just as a potentially hazardous "technology

108. *See id*. at 111-12.

109. *Compare* Patrick McGeehan, *A Politician Opposed to Smoke-Filled Rooms*, N.Y. TIMES, Aug. 21, 2005, at 14NJ4 (reporting pending legislation to ban smoking in cars to reduce distraction-related accidents), *with* Jane C. Stutts, Testimony for Presentation at the Subcommittee on Highways and Transit Hearing on Driver Distractions: Electronic Devices in the Automobile, *available at* http://www.hsrc.unc.edu/safety_info/distracted_drowsy/congressional_testimony.cfm (reporting study results showing that 11.4% of distraction-related accidents involve use of CD or cassette player while 0.9% involve smoking).

110. Ken I. Kersch, *Smoking, Progressive Liberalism, and the Law*, 16 CRITICAL REV. 405, 410 (2004).

111. *Id*.; *see also* Wendy Koch, *Smoking Bans Going from Inside Out*, USA TODAY, July 13, at 1A (quoting an opponent of outdoor smoking bans as saying, "What's driving outdoor bans . . . is 'public hate of anything smoking or smoker-related.'").

112. Kersch, *supra* note 110, at 407.

[but] as the manifestation of undemocratic unresponsiveness to individual needs within American society."[113] The industry had been borne of an incestuous coupling of industry and governmental elites; it portended centralized private control over a vital resource; it was stigmatized by the association of splitting atoms with an unprecedented threat to the future of human civilization.[114] These conditions made it possible for egalitarian activists to "concentrate[] all social, economic and political issues into the nuclear debate," from disparities in wealth, to discrimination against minorities, to global imperialism and the superpower arms race.[115]

The book chronicled, too, nuclear critics' selective and casual use of scientific data.[116] Despite their professed concern with the environment, the critics remained studiously oblivious to the evidence, advanced by credible scientific sources as early as the 1970s, that nuclear power was *less* damaging to the environment than the fossil fuel energy sources to which it was an alternative.[117] Putting two and two together, it became obvious, at least to Douglas and Wildavsky, that the perception of nuclear risks was a product of "cultural bias" on the part of egalitarian collectivists whose "sectarian" worldview would be affirmed by the gutting of the nuclear industry.[118]

For understandable reasons the book was denounced as a polemic by environmentalists.[119] But to any discerning reader, it should have been clear that *Risk and Culture*'s account of "cultural bias" in risk perceptions supplied the materials for just as devastating an indictment of nuclear power's defenders. In the same way that environmental risk-sensitivity was congenial to an egalitarian and collectivist cultural style, so risk dismissiveness suited the needs of the "market individualist," whose reverence for private orderings predisposed him to a belief in the resilience of nature and the evolutionary wisdom of markets.[120]

What nuclear power was to egalitarian collectivists of the 1970s and 1980s, global warming is to contemporary hierarchical individualists. Just as opposition to nuclear power permitted the former to take a "global stand against evil

113. DOUGLAS & WILDAVSKY, *supra* note 12, at 149.

114. *See id*. at 61, 149-50.

115. *Id*. at 150.

116. *See id*. at 59-61.

117. *See* Gerald Steinberg, Book Review, 46 J. POL. 313, 313-14 (1984) (noting argument to this effect, made in 1979, by Nobel physicist Hans Bethe).

118. *See* DOUGLAS & WILDAVSKY, *supra* note 12, at 150.

119. *See* Langdon Winner, *Pollution as Delusion*, N.Y. TIMES, Aug. 8, 1982, at BR8 (book review) (describing the reviewed book as an "ill-conceived polemic" and a "shabby political critique"); *see also* E. Donald Elliott, *Anthropologizing Environmentalism*, 92 YALE L.J. 888 (1983) (book review) ("The attempt to 'explain' environmentalism makes a few good points, but on the whole this part of the book is crude, shortsighted, and snide.").

120. *See* DOUGLAS & WILDAVSKY, *supra* note 12, at 99; *see also* MICHAEL THOMPSON, RICHARD ELLIS & AARON WILDAVSKY, CULTURAL THEORY 28 (1990) ("For individualism to be a viable way of life, nature must be a skill-controlled cornucopia.").

in all its forms,"[121] so skepticism toward global warming supplies a symbolic focal point for a wide range of positions advocated by the latter. Because policies like the Kyoto Protocol would impose disproportionate burdens on the U.S. economy, global warming concern is attacked as a ploy to effect "wealth redistribution."[122] U.N. sponsorship of initiatives to address global warming forms a rhetorical bridge between climate-change skepticism and a hawkish stance on issues of foreign policy.[123] The prominence of scientific elites in such initiatives makes dismissal of this risk dovetail with resentment toward the secularization of public school education, including the teaching of evolution.[124] Insofar as many political action groups concerned with global warming also support women's rights and planned-parenting policies, the assault on "global warming hysteria" even ties into opposition to abortion.[125] Douglas and Wildavsky questioned whether the popular critics of nuclear power could really understand the science involved; does anyone think Michael Crichton and the admirers of his novel, *State of Fear*, can decipher the models and equations of the scientists who dispute the dangers of global warming?[126] It's obvious, at least to persons of an egalitarian or communitarian sensibility, that those who oppose policies to abate global warming risks are motivated to do so by their desire to visit an expressive defeat on their cultural adversaries.

But were it not for the dynamic of naïve realism, it would be just as obvious to egalitarians and communitarians that their support for such policies reflects exactly the same motivations. Precisely because global warming skepti-

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121. DOUGLAS & WILDAVSKY, *supra* note 12, at 150.

122. *See, e.g.*, Joseph Klein, *Hot Air from the UN*, FRONTPAGEMAGAZINE.COM, Nov. 20, 2006, http://www.frontpagemagazine.com/Articles/ReadArticle.asp?ID=25574 ("[T]he UN's idea of a 'truly global response' to the problem of global warming follows its same old self-righteous paths—extending the Kyoto Protocol's mandatory emission quotas beyond 2012, instituting global taxes to distribute wealth from the industrialized West to developing countries, and scaring our kids with misleading information about the terrible ills inflicted on the sacred Earth by us rich greedy Westerners.")

123. *See, e.g.*, Senator James Inhofe, Chairman, Senate Env't & Pub. Works Comm., Senate Floor Speech: Hot and Cold Media Spin: A Challenge to Journalists Who Cover Global Warming (Sept. 25, 2006), *available at* http://epw.senate.gov/speechitem.cfm?party=rep&id=263759 ("French President Jacques Chirac provided the key clue as to why so many in the international community still revere the Kyoto Protocol, who in 2000 said Kyoto represents 'the first component of an authentic global governance.'").

124. *See* Susan Paynter, *Glare of Global-Warming Attention Creates a Hot Seat in Federal Way*, SEATTLE POST-INTELLIGENCER, Jan. 22, 2007, at E1 (reporting opposition of parents who favor teaching of creationism to showing of Al Gore's global warming documentary in public school).

125. *See* INST. ON RELIGION & DEMOCRACY & ACTON INST. FOR THE STUDY OF RELIGION & LIBERTY, FROM CLIMATE CONTROL TO POPULATION CONTROL: TROUBLING BACKGROUND ON THE "EVANGELICAL CLIMATE INITIATIVE" 1 (2006), *available at* http://www.acton.org/pdf/fcctpc.pdf ("Why would a pro-abortion foundation want to fund an *evangelical* effort to fight global warming? Is there a connection between these efforts? There is. And that connection should trouble all evangelicals, especially those who endorsed the Evangelical Climate Initiative.").

126. *See* MICHAEL CRICHTON, STATE OF FEAR (2004).

cism synthesizes so broad an array of individualistic and hierarchical themes, the campaign to elevate climate change into an issue of paramount public concern furnishes a uniquely potent vehicle for demonizing greedy individualists and ridiculing unenlightened, reactionary hierarchs.[127] Even assuming they are right, those who applaud Al Gore's movie don't have any better an understanding of the science involved than those who celebrate Crichton's novel; they, too, are relying on cultural affinity to decide *whom* to believe.

Properly understood, Douglas and Wildavsky's account of environmental politics is not a critique of any one cultural outlook. It is an indictment of an entire mode of political discourse that makes citizens of *all* persuasions oblivious to the impact of cultural values on their perceptions of harm and thus to the barrier that cultural cognition poses to realization of a genuinely liberal state.

III. A DISCOURSE NORM SOLUTION

For a quarter century the use of discourse norms has figured conspicuously in liberal political theory. Constraining what political actors *say* about law, on this view, is as critical as constraining what they actually *do* with it.[128] In order for us to experience law as respectful of moral autonomy, legislators, judges, and ordinary citizens must avoid publicly justifying their policy preferences on grounds distinctive of any particular view of the good life.[129]

Liberal theorists are right, I will argue, to focus on discourse norms but wrong, as a psychological matter, to think that denuding the law of cultural resonances is the best way to assure citizens that the law respects their identities. On the contrary, a discourse norm that enjoins precisely the opposite—that citizens strive to infuse law with as many diverse and competing cultural meanings as it can possibly bear—is the best way to mitigate (if not solve) the problem of cognitive illiberalism.

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127. *See, e.g.*, Eric Bates & Jeff Goodell, *"The Revolution is Beginning,"* ROLLING STONE, June 28, 2007, at 50, 51 ("Bush . . . does what Exxon-Mobil wants, every single time. . . . Who would [Cheney and Bush] choose to rely on as the source of the best information about global warming? Exxon-Mobil, of course." (quoting Al Gore)). Wildavsky, for example, is reported to have called global warming "the mother of all environmental scares." Richard S. Lindzen, *Global Warming: The Origin and Nature of the Alleged Scientific Consensus*, 15 REG. 87 (1992), *available at* http://www.cato.org/pubs/regulation/regv15n2/reg15n2g.html. Wildavsky stated:

> Warming (and warming alone), through its primary antidote of withdrawing carbon from production and consumption, is capable of realizing the environmentalist's dream of an egalitarian society based on rejection of economic growth in favor of a smaller population's eating lower on the food chain, consuming a lot less, and sharing a much lower level of resources much more equally.

Id. (quotation marks omitted).

128. *See* ACKERMAN, *supra* note 2, at 6 ("[*W*]*e must learn to think of liberalism as a way of talking about power, a form of political culture*.").

129. *See id*. at 8-12.

A. *Against Public Reason*

Arguably the most systematic and influential account of liberal discourse norms is Rawls's principle of "public reason." To conform their advocacy to "public reason," those debating social policy must refrain from appealing to "comprehensive views"—moral systems that "include[] conceptions of what is of value in human life, as well as ideals of personal virtue and character."[130] Citizens, on this view, have "a moral, not a legal, duty—the duty of civility—to . . . explain to one another . . . how the . . . policies they advocate and vote for can be supported" within the "overlapping consensus" comprising values common to all (reasonable) comprehensive views and distinctive of none of them.[131]

The norm of public reason is said to implement liberalism in two ways. First, it disciplines those who prevail in political process. Because they are constrained to offer a conforming rationale that they *honestly* believe, the norm of public reason puts a check on their impulse to impose a partisan view of the good on others.[132] Second, public reason protects the autonomy of those who are prevailed upon. By assuring that all laws are attended by public justifications that come within the overlapping consensus, public reason enables even those who disagree with such laws to assent to them without feeling that doing so forces them to renounce the values central to their identities.[133]

Norms designed to conform advocacy to the dictates of "public reason" pervade our legal and political practices. Stephen Holmes describes them as democratic "gag rules," which treat appeals to contentious theories of the good as out of order, thereby enabling "citizens who differ greatly in outlook on life [to] work together to solve common problems."[134] In the legal arena, they include devices like formalism and minimalism, which enable judges to defend outcomes and elaborate the law without resort to more contentious moral claims.[135]

In politics, they feature the prominence of broadly utilitarian or consequentialist modes of justification. "Optimal deterrence," "cost-benefit analysis," "contingent valuation," and like techniques and devices direct the attention of policy advocates to societal welfare economically defined, a good firmly within the overlapping consensus of reasonable views. Just as important, by providing apparently "objective procedures and criteria" for policymaking—ones "decid-

130. RAWLS, *supra* note 2, at 175.

131. *Id*. at 217-18.

132. *See id*. at 217-19.

133. *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 41 (1996).

134. HOLMES, *supra* note 2, at 234.

135. *See generally* SUNSTEIN, *supra* note 133; David A. Strauss, Legal Argument and the Overlapping Consensus 20-21 (July 12, 1998) (unpublished manuscript, on file with author).

edly divorced from statements about morality"[136]—consequentialist modes of justification offer an alternative to contentious expressive rationales for controversial policy positions in areas from crime control to environmental regulation.[137]

Despite its prominence, public reason has failed as a discourse strategy. The problem isn't that a small but conspicuous constituency in our political life has stubbornly refused to purge their rhetoric of divisive cultural appeals. It's that even the agreement of the vast majority of moderate citizens to do exactly that has *not* dispelled pervasive illiberal status competition in our society. Because our beliefs about which policies promote welfare-enhancing consequences are decisively shaped by our cultural values, a political discourse focused on secular justifications continues to supply fertile ground for conflict over whose worldview the law will affirm.

Indeed, far from muting this distinctively cognitive form of illiberalism, the norm of public reason has amplified its divisive effects. Proponents of public reason imagine that the exercise of formulating a secular justification for our policy preferences will inhibit us, when we are in a position to exercise political power, from indulging the temptation to impose our cultural values on others. But as the theory of cultural cognition teaches us, we can't help but draw on our cultural values to evaluate the impact policies will have on the attainment of society's secular ends. By telling those in power that they are in fact satisfying the duty of impartiality when they *sincerely* articulate a secular justification for the laws they enact, public reason can't make those persons genuinely impartial. It can only make them less *aware* of the influence that our cultural commitments exert on their policy preferences—a form of self-misunderstanding to which persons in general are already vulnerable.[138]

At the same time that public reason lulls winners in the political process into unselfconscious cultural partisanship, it only accentuates the experience of domination for the losers. People are not blind to the influence of cultural commitments on the beliefs of those who disagree with them about contentious policy issues; on the contrary, they readily perceive this relationship, and for that reason to attribute to their adversaries either bad faith or subconscious rationalization.[139] By constraining those in power to justify their policies in secular terms, then, public reason doesn't spare dissenters the perception that they are being forced to abide by laws that reflect antipathy toward their ways of life. It only enrages them by forcing them to endure the smug insistence of their

136. Martin Rein & Christopher Winship, *The Dangers of "Strong" Causal Reasoning in Social Policy*, SOCIETY, July-Aug. 1999, at 38, 39.

137. *See, e.g.*, Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999); Kahan et al., *supra* note 6, at 1107-08; Note, *The CITES Fort Lauderdale Criteria: The Uses and Limits of Science in International Conservation Decisionmaking*, 114 HARV. L. REV. 1769 (2001).

138. *See* Robinson et al., *supra* note 59.

139. *See id.*

adversaries that such policies reflect a neutral and objective commitment to the good of all citizens. It is exactly this dynamic that makes policy issues as diverse as global warming, gun control, and the minimum wage, such potent fonts of cultural recrimination.

B. *For Expressive Overdetermination*

If eschewing appeals to sectarian visions of the good provokes cognitive illiberalism, does it follow that an idiom that multiplies such appeals will help to contain it? Logically no, but psychologically perhaps. I want to defend a new discourse norm, expressive overdetermination, that seeks to contain cognitive illiberalism not by stripping it of partisan social meanings but by infusing it with so many that every cultural group can find affirmation of its worldviews within it.

Writing with others, I've defended expressive overdetermination previously on instrumental grounds as a device for counteracting the deleterious effects of cultural cognition on risk regulation and other forms of policymaking.[140] Now I intend to offer a broader normative defense of it as a style of discourse that fits our aspirations to realize liberal goals in our political life.

1. *What expressive overdetermination is*

Expressive overdetermination would oblige political actors—legislators as well as ordinary citizens—to integrate appeals to cultural values into their justifications for law in two distinct ways. First, the imperative of *expressive candor* would oblige such actors to acknowledge, and not conceal, how they understand a law or policy proposal to express meanings *distinctive* of their own worldviews. They would of course be free to advance instrumental justifications for law, too; what they couldn't do was insist that the promotion of secular aims—such as avoidance of harm or the production of societal wealth—motivates their advocacy independently of any understanding of how a law or policy coheres with their visions of an ideal society.

Second, the imperative of *cooperative overdetermination* would oblige political actors to help create conditions under which all citizens can conform to the imperative of expressive candor. They would be bound to support efforts to craft features of such laws, or alternative ways of framing them, that permit persons who hold cultural outlooks opposed to their own to defend the law as expressing meanings distinctive of their worldviews as well. And by the same token, they would be strictly forbidden to engage in forms of advocacy calculated to render laws and policies univocal in their meanings.

The norm of expressive overdetermination effectively stands public reason on its head. Under public reason, political actors discharge the duty of civility

140. *See* Kahan et al., *supra* note 6, at 1096-1100.

by appealing to the "overlapping consensus" of justifications common to all comprehensive views. Under expressive overdetermination, in contrast, they discharge that duty by self-consciously constructing a discourse of overlapping *dissensus* comprising a plurality of justifications *distinctive* of the plural and opposing worldviews held by society's members.

Mary Ann Glendon's well-known account of France's national abortion law is an example of expressive overdetermination in action.[141] That law made abortion legal not "on demand," but "for a reason." A woman seeking to terminate her pregnancy was obliged to certify that doing so was necessitated by a condition of "emergency" sufficient to justify overriding the fetus's "right to life." This provision affirmed the worldview of religious traditionalists, who had opposed abortion on demand as expressively denigrating the sanctity of life. At the same time, the law made the individual woman's certification of "emergency" dispositive; it provided for no legal review of the basis or adequacy of it. As a result, abortion-rights advocates were able to see the law as affirming the autonomy of individual women. Precisely because it bore a plurality of meanings—admittedly themselves not fully consistent—the law, according to Glendon, relieved both sides of the anxiety that the state was taking sides on in a cultural dispute.

There are many other examples of laws forging pluralistic accommodation through expressive overdetermination. American social welfare laws, according to Steven Teles, generated a sustained period of political consensus because they simultaneously expressed to egalitarians a societal commitment to correcting misdistribution of wealth and to hierarchs a commitment to combating economic pressures that threatened to wreck traditional families by forcing women into the labor market.[142] Tradable emissions laws generated political consensus in the early 1990s because they simultaneously affirmed egalitarians' commitment to environmental protection and individualists' commitment to markets as a means of attaining societal ends.[143] The Native American Grave Protection and Repatriation Act (NAGPRA) simultaneously affirmed traditional religious and sovereignty values, on the one hand, and humanist and enlightenment values, on the other, by giving Native Americans property rights in tribal artifacts while authorizing museums to hold such remains in a form of trusteeship.[144]

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141. *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987).

142. *See* STEVEN M. TELES, WHOSE WELFARE? AFDC AND ELITE POLITICS (1996).

143. *See* Kahan et al., *supra* note 6, at 1096-97. Individualists also show more willingness to accept factual information about the risks of global warming when they are told that nuclear power, a value-affirming policy for them, rather than anti-pollution measures, a value-threatening one, is an effective way to combat these risks. *See* Kahan et al., *supra* note 35, at 4-6.

144. *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, 588-95 (2006).

The enactment of these laws followed a common pattern. In all cases, "cultural vouchers"—individuals bearing authority and credibility within their cultural groups—negotiated the content of the law and then defended it to their individual constituencies on grounds that expressed their own groups' worldviews.[145] Ordinary citizens thereafter embraced the meaning congenial to their cultural orientation without either objecting to or interfering with the efforts of citizens of opposing persuasions to embrace the meaning congenial to theirs. At all stages, then, participants in these deliberations complied with the imperatives of expressive candor and cooperative overdetermination.

Illiberal status conflict predictably ensues from the breach of such duties. Pluralistic accommodation never gets a foothold when political actors fail to be expressively candid. To proclaim that one's position on an issue like gun control or global warming rests on a culturally impartial view of the facts impugns the intelligence and character of those who hold competing positions and thus invariably triggers animosity.

Breaches of cooperative overdetermination, in turn, cause expressive accommodation to unravel. Teles, for example, argues that the consensus over social welfare in the United States broke down because egalitarian elites insisted that welfare policies bear a univocal, egalitarian meaning: by identifying welfare as an instrument for liberating single mothers from dependence on male wage earners, these groups made it impossible for hierarchs to support welfare as affirming the legitimacy of the traditional family.[146] The expressive overdetermination of "restorative justice"—a scheme in which community groups designate reparative public services as a sanction for serious but nonviolent crime—is being similarly threatened by a demand for expressive univocality. Certain egalitarian and individualist theorists, who support restorative justice as more compatible with dignity and individual accountability than imprisonment, nevertheless want to purge this form of punishment of the stigmatizing elements that make it an acceptable alternative to jail for hierarchists and communitarians.[147]

The norm of expressive overdetermination envisions deliberations taking place neither in the public square nor in acoustically separated chambers[148] but

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145. *See id.* at 586-88; *see also supra* note 35 (describing experiment in which "cultural vouchers" were used to minimize cultural conflict over risks of HPV vaccine). Appropriately credentialed vouchers are critical, since an advocate who is strongly aligned with one cultural perspective is unlikely to enjoy the credibility necessary to convince persons of another to see the law as embodying their values. *See generally* BRYAN GARSTEN, SAVING PERSUASION: A DEFENSE OF RHETORIC AND JUDGMENT (2006) (describing suspicion toward manipulative advocacy).

146. *See* TELES, *supra* note 142.

147. *See* Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143 (2006); Dan M. Kahan, *What's* Really *Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2090-94 (2006).

148. *Cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

rather in a building with thin walls. Accepting that individuals are bound to be culturally partial in their reasoning, expressive overdetermination doesn't imagine a common idiom—instrumental, expressive, or otherwise—that would enable citizens to deliberate and persuade one another across cultural boundaries. On the contrary, its strategy for dissipating conflict attempts to exploit the relative insularity of political discourse by infusing law with multiple, culture-specific meanings. At the same time, nothing in expressive overdetermination assumes that cultural groups deliberate outside the earshot of one another. Accordingly, it obliges citizens to avoid the types of advocacy—akin to behaving raucously in a room that abuts one's neighbor's bedroom—that foreclose or impede the efforts of other groups to form understandings of law affirming to them.

2. *How expressive overdetermination works*

I've suggested that expressive overdetermination has at least in some instances quieted the illiberal status conflict that is distinctive of cognitive illiberalism. But what exactly accounts for its power to do that, and why should we believe that such a strategy can realistically be generalized? I'll supply three interrelated answers: one relating to the psychological mechanism behind expressive overdetermination, another to the preferences of ordinary citizens for expressive affirmation of their worldviews in law, and a third to the incentives of politicians and opinionmakers to engage in pluralistic discourse.

The psychological mechanism that accounts for the power of expressive overdetermination to quiet illiberal status competition is *identity affirmation*. Cultural cognition posits that individuals process information in a manner that protects their group-based identity.[149] When they perceive that adoption of a policy will impugn the status of their group, they resist information about the utility of that policy as a form of psychological self-defense. It follows that one way to make individuals more receptive to such policies is to ease any sense of identity threat that they might experience. Social psychologist Geoffrey Cohen, for example, has shown that supplying individuals with information that boosts their esteem—for example, a high score on an exam, or having a desirable personal trait—makes them more willing to assume a position at odds with that held by members of their group.[150] Expressively overdetermined policies work

149. *See generally* Roger Giner-Sorolla & Shelly Chaiken, *Selective Use of Heuristic and Systematic Processing Under Defense Motivation*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 84 (1997).

150. *See* Geoffrey L. Cohen, Joshua Aronson & Claude M. Steele, *When Beliefs Yield to Evidence: Reducing Biased Evaluation by Affirming the Self*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1151 (2000); Geoffrey L. Cohen, David K. Sherman, Michelle McGoey, Lillian Hsu, Anthony Bastardi & Lee Ross, Bridging the Partisan Divide: Self-Affirmation Reduces Ideological Closed-Mindedness and Inflexibility (unpublished manuscript), *available at* http://research.yale.edu/culturalcognition/documents/cohen_self_affirmation_draft.pdf. *See generally* David K. Sherman & Geoffrey L. Cohen, *Accepting Threatening*

because they have a similar effect: by infusing a law with meanings that affirm a person's worldview, they diminish the status anxiety that might otherwise have caused that person to resist its adoption.[151]

This explanation for how expressive overdetermination works makes an important but defensible assumption about individuals' preference for expressive affirmation in law: that most persons are *expressive moderates*. They react defiantly when they perceive that adoption of a law would denigrate their cultural worldview. But so long as they can see evidence that the law in fact affirms their outlooks, they do not demand that the law be framed in a way that denies persons of an opposing cultural persuasion the opportunity to experience the same sense of affirmation. This account is supported by the finding of political scientists that most voters care more about practical issues than moral, symbolic ones.[152] It is vindicated, too, by the various examples—such as the abortion compromise in France, NAGPRA, and the historical consensus behind welfare policies in the United States—of expressive overdetermination enabling persons of diverse cultural orientations to converge on mutually acceptable policies that promoted their common welfare.[153] If it's true that most persons' preferences for cultural affirmation are largely defensive in nature, then expressive politics need not be a zero-sum game. At least in an environment in which expressive zealots—those who would defy the duty of cooperative overdetermination—are held in check, it is possible to fashion laws with meanings that are satisfactory simultaneously to hierarchs and egalitarians, individualists and communitarians.

But is it realistic to imagine that the expressive zealots can be held in check? The answer requires investigating the *political economy* of pluralistic discourse.

Cultural accommodation in law is in fact supported by a small, well-organized, intensely interested, and highly influential constituency: mainstream politicians. Obviously, some politicians thrive by occupying an extremist niche.

Information: Self-Affirmation and the Reduction of Defensive Biases, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 119 (2002).

151. *See* Kahan et al., *supra* note 6, at 1097.

152. *See generally* FIORINA ET AL., *supra* note 45. Even in the national election of 2004, in which many in the media credited President Bush's re-election to his exploitation of gay marriage and other symbolic issues, *see, e.g.*, Adam Nagourney, *'Moral Values' Carried Bush, Rove Says*, N.Y. TIMES, Nov. 10, 2004, at A20, "moral values" took a back seat to more practical concerns. According to a Pew Research Center poll of 2004 voters, 57% of voters identified either "Iraq" (22%), "Economy/Jobs" (21%), or "Terrorism" (14%) as the most important issue when those choices were offered as alternatives to "moral values" (27%). *See* PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, MORAL VALUES: HOW IMPORTANT? VOTERS LIKED CAMPAIGN 2004, BUT TOO MUCH 'MUD-SLINGING,' *available at* http://people-press.org/reports/display.php3?ReportID=233. Symbolic issues helped Bush win not because of their role in cognitively orienting voters concerned with practical issues, but because they motivated voters bent on expressive domination. *See* Kahan & Braman, *supra* note 27, at 162; Gastil et al., *supra* note 46.

153. *See* Braman & Kahan, *supra* note 144, at 597.

But for the vast majority of democratically accountable officials, a highly polarized environment is hazardous. On highly charged issues that lack a middle ground, any move a politician makes subjects her to a high a risk of electoral retaliation. Elected officials who want to maximize their professional lifespans, then, prefer forms of discourse that minimize the likelihood that they will strongly displease anyone. Indeed, it is precisely this instinct that motivates politicians to latch onto consequentialist modes of analysis, which at least appear to elide more contentious issues of value, when discussing culturally charged issues.[154]

The problem is that purging their talk of values on such issues *doesn't* create a discourse environment in which politicians can easily avoid giving offense. Again, because citizens' factual beliefs as well as their values reflect their cultural identities, just cloaking one's advocacy in empirical arguments does nothing to blunt the impression that one is a cultural partisan. What's more, in the resulting climate of recrimination and distrust, many otherwise moderate citizens will feel constrained to support *openly* partisan politicians. Expressive zealots will readily fill the vacuum in culturally meaningful discourse associated with general conformity to the muted idiom of public reason, thus putting all the more pressure on mainstream politicians to cast their lot in with one side or the other in the culture wars.

The norm of expressive overdetermination provides mainstream politicians with a much more promising strategy for securing their interest in avoiding cultural polarization. By transforming expressive politics into a positive-sum game, cooperative overdetermination dispels the hazards that attend cultural polarization. Moreover, when they engage in expressive candor, moderate politicians can *marginalize* expressive zealots, who are deprived of both their monopoly on culturally meaningful rhetoric and the support they garner when citizens are buffeted with empirical claims that are themselves culturally partisan in their derivation and status threatening in their effect.

Expressive overdetermination can also help to dispel the condition of self-reinforcing distrust associated with public reason. Because the duty of expressive candor obliges political actors to acknowledge that their policy positions are motivated by our cultural values, it avoids provoking the resentment of those who hold differing beliefs, and who can see (often more clearly than those making such arguments) that those who disclaim reliance on their values are not being forthright. At the same time, because cooperative overdetermination obliges political actors to support the formulation of policies that citizens of opposing cultural outlooks can also candidly affirm as expressing their fundamental values, it furnishes a much more *believable* sign of policy advocates' intentions not to impose a moral orthodoxy in law.

The successful communication of this intention is the behavioral lynchpin of pluralistic discourse, in legislative chambers and in society at large. Cultural

154. *See* Kahan, *supra* note 76, at 474-76, 479-80.

pluralism is a public good: a cultural group benefits from the willingness of opposing groups to refrain from attempting to impose an orthodoxy, whether that group contributes to a political culture of tolerance or not.[155] Because opposing groups lack the means to coerce each other to contribute, they can be expected to settle into an equilibrium of mutual respect only if the example of each one's voluntary willingness to refrain from trying to monopolize the expressive power of the law triggers a reciprocal motivation in the members of the others.[156] The norm of expressive overdetermination has the potential to generate this self-reinforcing condition because it continually evidences the disposition of all to share the affirming power of the law. The norm of public reason does not, because it systematically blinds political winners to their own partisanship and predictably triggers resentment in losers for exactly that reason.

3. *Why expressive overdetermination is morally desirable*

A central concern of liberalism is to reconcile law with the respect individuals are due as beings capable of autonomously forming and pursuing their own visions of the good life.[157] The state disrespects individual autonomy, according to liberal theory, when it predicates the law on a moral or cultural orthodoxy, because in that situation it grounds individuals' legal obligations in a conception of the good that they did not choose for themselves.[158] Public reason is advanced as a strategy for implementing this goal of neutrality. Individuals will experience the law as compatible with their autonomy, advocates of public reason argue, only when political actors refrain from *invoking* particular conceptions of the good and instead justify their policy preferences on secular grounds that appeal to all.[159]

It should be clear that my objection to public reason is over means and not ends.[160] Public reason is psychologically naïve. Because of the cultural cogni-

155. *See id.* at 488-89.

156. *See generally* Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 73-80 (2003) (summarizing empirical research on reciprocity and cooperative solution to collective action problems).

157. For a classic statement, see IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor ed. & trans., Cambridge Univ. Press 1997) (1785).

158. *See, e.g.*, Ronald Dworkin, *Liberalism*, *in* LIBERALISM AND ITS CRITICS 60, 63-64 (Michael J. Sandel ed., 1984).

159. *See* RAWLS, *supra* note 2, at 216-18.

160. It should also be clear that the dispute is not over the content of particular policies. I have elsewhere argued that a policy discourse informed by expressive overdetermination is more likely to move culturally diverse citizens to converge on policies that effectively advance their common welfare. *See* Kahan et al., *supra* note 6, at 1096-100. But even if one assumed that a political community whose discourse was guided by expressive overdetermination ended up with exactly the same policies as one whose discourse was shaped by public reason and like norms, citizens of the former community would be more likely to experience the law as respectful of their identities than would citizens of the latter.

tion of harm, individuals perceive the law as denigrating their visions of the good not merely when political actors justify it on culturally partisan grounds but also when they justify it on the basis of perceptions of harm distinctive of their worldviews. The question, then, is how persons dedicated to making law compatible with liberal ideals, including respect for autonomy, would choose to speak to each other instead knowing this feature of their own psychology. Those persons, I'm arguing, would choose to adopt the norm of expressive overdetermination.

They would opt for expressive overdetermination, first, because of its power to promote their common welfare. Reasonable persons of all cultural persuasions *would* desire that they be able to converge, notwithstanding their cultural differences, on the best empirical knowledge available on how to use law to promote their safety, health, and economic well-being. Expressive overdetermination creates the conditions in which this is most likely to occur. Knowledge always travels along cultural pathways. But once persons of diverse cultural persuasions are relieved of the apprehension that any particular resolution of a policy dispute will denigrate their worldviews, there is no systemic reason for the pathways distinctive of one cultural group to diverge from those of any other. In particular, if *none* of them have any reason to reject empirically sound information, individuals of diverse cultural orientations are much more likely to converge on factual beliefs supportive of policies that *do in fact* promote their collective well-being. Indeed, in most of the examples of expressive overdetermination I discussed—including the French abortion law, tradable emissions, and NAGPRA—this was in fact the outcome.[161]

Second, individuals who appreciate the constraints of cultural cognition would opt for a norm of expressive overdetermination in order to contain illiberal status competition. They'd recognize that expressive overdetermination can't "debias" them, at least not in the sense of liberating them (if it would indeed be liberating) from their cultural identities as they make sense of the world. But by reducing the sheer number of policy disputes that they perceive as fitting only one group's view of how the world works, this style of discourse would reduce the frequency with which they find themselves impelled into status-protective cultural conflict.

And finally, psychologically realistic persons committed to liberal values would opt for the norm of expressive overdetermination in order to minimize the risk that any of them would experience persistent alienation. Expressive overdetermination, I've argued, can reduce the incidence of culturally grounded disagreement over policy, but it certainly won't eliminate it. In the give and take of democratic politics, there will inevitably be winners and losers—on crime control, on environmental protection, on economic policies, and all other modes of instrumental regulation. But as liberal theorists correctly recognize,

161. *See* Braman & Kahan, *supra* note 144, at 594-95, 598; Kahan et al., *supra* note 6, at 1097-98.

the *meaning* of losing, and its significance for our experience of autonomy, are profoundly affected by how we talk to each other in our deliberations. A climate in which we are always honest (to ourselves as much as to others) about the connection between what we believe and who we are, and in which we make it constantly evident to one another that we are committed to enabling those with values different from our own to find affirmation of their identities in law, will make our apologies for sometimes failing to succeed credible to those who on whom we ultimately must impose our will.[162]

CONCLUSION

The nature of political conflict in our society is deeply paradoxical. Despite our unprecedented knowledge of the workings of the natural and social world, we remain bitterly divided over the dangers we face and the efficacy of policies for abating them. The basis of our disagreement, moreover, is not differences in our material interests (that would make perfect sense) but divergences in our cultural worldviews. By virtue of the moderating effects of liberal market institutions, we no longer organize ourselves into sectarian factions for the purpose of imposing our opposing visions of the good on one another. Yet when we deliberate over how to secure our collective secular ends, we end up split along exactly those lines.

The explanation, I've argued, is the phenomenon of cultural cognition. Individual access to collective knowledge depends just as much today as it ever did on cultural cues. As a result, even as we become increasingly committed to confining law to attainment of goods accessible to persons of morally diverse persuasions, we remain prone to cultural polarization over the means of doing so. Indeed, the prospect of agreement on the consequences of law has diminished, not grown, with advancement in collective knowledge, precisely because we enjoy an unprecedented degree of cultural pluralism and hence an unprecedented number of competing cultural certifiers of truth.

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162. Also taking issue with public reason, Jeremy Waldron argues that legislation arising from deliberation in which citizens openly appeal to, rather than conceal, their values can generate legal obligation consistent with individual dignity because of the neutrality associated with majority rule. *See* JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999). I agree with Waldron but believe that he is insufficiently attentive to the psychological preconditions necessary for citizens to identify with law under these circumstances. Obviously, discourse—value-laden or not—that reflects denigration of the political losers' worldviews makes it impossible for those persons to reconcile their cultural and civic identities. Even in political defeat, such a reconciliation is possible, however, if the losers understand the winners to have been genuinely committed to making it possible for the losers to find affirmation of their values even in legislation they object to. A norm of expressive overdetermination makes the "dignity of legislation" psychologically realistic. I owe thanks to Heather Gerkin for helping me to see the relationship between my position and Waldron's in this respect.

If there's a way to mitigate this condition of cognitive illiberalism, it is by reforming our political discourse. Liberal discourse norms enjoin us to suppress reference to partisan visions of the good when we engage in political advocacy. But this injunction does little to mitigate illiberal forms of status competition: because what we believe reflects who we are (culturally speaking), citizens readily perceive even value-denuded instrumental justifications for law as partisan affirmations of certain worldviews over others.

Rather than implausibly deny our cultural partiality, we should embrace it. The norm of expressive overdetermination would oblige political actors not just to seek affirmation of their worldviews in law, but to cooperate in forming policies that allow persons of opposing worldviews to do so at the same time. Under these circumstances, citizens of diverse cultural orientations are more likely to agree on the facts—and to get them right—because expressive overdetermination erases the status threats that make individuals resist accurate information. But even more importantly, participation in the framing of policies that bear diverse meanings can be expected to excite self-reinforcing, reciprocal motivations that make a culture of political pluralism sustainable.

Ought, it is said, implies can. Contrary to the central injunction of liberalism, we cannot, as a cognitive matter, justify laws on grounds that are genuinely free of our attachments to competing understandings of the good life. But through a more sophisticated understanding of social psychology, it remains possible to construct a form of political discourse that conveys genuine respect for our cultural diversity.