

CHAPTER 4

A Cultural Critique of Gun Litigation

DAN M. KAHAN, DONALD BRAMAN,
& JOHN GASTIL



Like nearly all contentious political issues in our society, gun control has made its way to court. Is the new wave of lawsuits against the firearms industry a positive development? We don't think so. But our opposition to America's gun litigation isn't based on conventional grounds. We don't have an opinion on whether the plaintiffs' claims are well grounded in tort law. We aren't sure whether the remedies the plaintiffs seek would promote or impede public safety. We don't care whether the lawsuits are antidemocratic, disrespectful of federalism, or inconsistent with the Second Amendment. And we are passionately unmoved by the question of whether courts are as fit as legislatures or administrative agencies to craft efficient regulatory standards.

We oppose gun litigation because we think it's culturally obtuse. In courts of law, the gun debate is reduced to a set of contested factual claims about the consequences of firearms design and marketing. But in the court of public opinion, the gun debate inevitably broadens into a dispute over conflicting worldviews and the social status of those who adhere to them. Because Americans care just as much about what guns and the regulation of them say—about what we value and who we identify with, about what sort of society we live in, about whose stock is up and whose is down in the market for social prestige—any mode of decision making that focuses only on what guns do is bound to miss the point.

It turns out that this deficiency isn't unique to gun litigation. On the contrary, it's characteristic of mainstream gun control discourse wher-

ever it takes place. Academics, criminal justice bureaucrats, and even elected representatives focus obsessively on consequences—“more guns, more crime” or “more guns, less crime”?—and stand mute on the broader cultural significance of gun control. And as the persistence and persistent acrimony of the gun debate in America attest, this “just the facts, please” approach hasn’t gotten us very far.

It won’t get us any further in the gun litigation, where consequentialist discourse will misfire for the same reasons it has in the political domain. One problem with emphasizing consequences to the exclusion of culture is logical. If citizens care, and care intensely, about the social meanings that guns express, then even indisputable empirical proof of the public safety consequences of a particular gun law won’t give citizens sufficient reason to favor or oppose it. No matter what the outcome of the gun litigation, then, the political dispute over guns and gun control can be expected to continue—as the spate of recent statutory immunity provisions illustrates.

Another and even more potent objection to obsessive gun consequentialism is psychological. By virtue of a host of cognitive and social mechanisms, what individuals believe about the effects of gun control can’t be disentangled from how they feel about them. For this reason, the factual debate inevitably reproduces the cultural—not just in result but in tone as well, since those on both sides inevitably conclude that those who disagree with them on the facts are motivated to do so by bad faith. Thus, however fact focused the gun litigation might look, its results will conform to the cultural priors of those who decide them.

The only way to resolve the American gun debate is to make its cultural underpinnings explicit. Policy analysts, elected officials, advocacy groups, and ordinary citizens must focus their attention on constructing procedures and framing policies that dispel the common anxiety that the outcome of the gun debate will necessarily elevate one understanding of what America stands for and denigrate all the others. The emergence of this form of constructive cultural deliberation is singularly unlikely to arise from gun litigation.

We will develop these claims in three steps. In section I, we will examine the cultural underpinnings of the American gun debate. To this end, we will analyze the debate within a framework derived from the cultural theory of risk perception, which furnishes a powerful explanation of the

mechanisms by which culture shapes factual beliefs about guns and constrains the power of consequentialist arguments to quiet political conflict over them. In section II, we present a critique of the gun litigation, which lacks the power to resolve the American gun debate precisely because it misapprehends the psychological and social dynamics that figure in the cultural theory of risk perception. We conclude with a call for expressive deliberation, a mode of policy-making that we believe holds the key to fashioning gun laws that appeal to Americans of all cultural persuasions.

I. The Cultural Theory of Gun-Risk Perceptions

The “Great American Gun Debate”¹ isn’t really one debate but two. The first, conducted primarily in social science journals and in legislative chambers, is empirical. Gun control supporters argue that pervasive gun ownership makes society more dangerous by facilitating violent crimes and accidental shootings. Opponents respond that it’s gun control that undermines safety by making it more difficult for potential crime victims to ward off violent predation. The currency of this debate is factual data in the form of opposing econometric regression analyses, contingent valuation studies, public health risk-factor analyses, and the like.

The second gun debate is cultural. Carried out (often heatedly) in letters to the editor and in town square rallies, gun politics consists in a struggle to define what America stands for and who has standing in America. Control opponents tend to be rural, southern or western, Protestant, male, and white. For them guns symbolize a cluster of positive values, from honor to respect for legitimate authority to individual self-sufficiency. Control proponents, in contrast, are disproportionately urban, eastern, Catholic or Jewish, female, and African American. To them, guns bear a host of negative connotations, from the perpetuation of illicit social hierarchies to the elevation of force over reason to collective indifference to the well-being of strangers. The latter support gun control as a way to repudiate these values and to affirm society’s commitment to equality and solidarity; the former oppose it—with immense energy and passion—precisely because they see it as intended to denigrate their cultural identities.²

The obvious question is how these two gun debates relate to each

other. What matters more to ordinary citizens—consequences or values? Does it even make sense to suppose that the two are genuinely independent of one another?

The attention that mainstream policymakers and commentators afford to the consequences of gun control reflects their assumption that the empirical debate is autonomous and at least potentially decisive. Eventually, they reason, social scientists will reach consensus on whether “shall issue” laws, mandatory waiting periods, lock-box provisions, and the like make society more safe or less. When they do, moreover, we should expect the gun debate to come to a rapid and harmonious end. For as divided as they are on the nature of the good society and the place of guns within it, at least both agree that protecting innocent persons from harm is of paramount importance.

We, in contrast, think that the empirical side of the debate is derivative and hence impotent. Culture not only matters to citizens in the gun debate, but it determines how they evaluate and even what they believe about the consequences of gun control. Accordingly, it’s futile to try to resolve the gun debate by bracketing culture and focusing on facts. This is the lesson we draw from the cultural theory of risk perception, the application of which to the American gun debate we will now examine.

Risk and Culture

Public evaluations of risk bear a notoriously uneven correspondence to the objectively measured dangers associated with various activities. Thus many individuals appear relatively tolerant of risk in their recreational activities but averse to it in their financial and workplace decisions.³ They also tend to identify as extremely grave, and thus worthy of intensive regulation, many types of risks—from nuclear accidents to industrial pollution of waterways—that environmental experts view as relatively low, while essentially disregarding other risks—for example, accidental drownings in swimming pools—that experts rate much more highly.⁴ Finally, risk perception has been shown to vary dramatically across different groups: ordinary citizens disagree not only with the experts but also with one another about how seriously to take various forms of environmental and industrial risk, not to mention risks relating to foreign aggression or economic collapse.⁵

Experts have traditionally advocated basing risk regulation on nar-

rowly consequentialist measures of environmental and industrial hazards. Techniques such as cost-benefit analysis and comparative risk assessment rank hazards according to a uniform expected-utility metric. The policies they generate are defended as superior to any based directly on public risk perceptions, the unruly character of which is attributed to the public's lack of information about the hazards posed by various technologies and to cognitive limitations that distort laypersons' processing of such information.⁶

The inadequacy of this approach to risk regulation, however, is well known and, by this point, largely accepted even by many expert regulators.⁷ The gap between various objective measures of risk and public perceptions of the same is not entirely (or even largely) a consequence of imperfect information or cognitive defects but rather a reflection of the diverse social meanings that ordinary citizens attach to risk. Individuals (a host of disciplines have taught us) don't have generic attitudes toward risky activities; rather, they evaluate them according to context-specific norms that determine what risk taking connotes about their values and attitudes.⁸ Nowadays smoking, at least for some, conveys an irresponsible disregard for the future and a contemptible weakness of will, whereas mountain climbing (which is in fact much more hazardous) conveys for many a laudable attainment of physical discipline and courage.⁹ It would be morally obtuse to expect individuals to evaluate the desirability of these activities solely according to their respective health risks without taking into account the value that they attach to their distinctive social meanings.

The same holds true for public risk regulation. Many citizens tend to view nuclear waste disposal and global warming with alarm not just because they pose risks of a particular magnitude but because running these risks (however small) conveys a host of undesirable meanings—of collective hubris, of generational selfishness, of disrespect for the sacredness of nature.¹⁰ It would thus be morally obtuse for regulators to attempt to evaluate these risks relative to those associated with, say, recreational swimming (which regulators tend to view as much more serious)¹¹ without taking account of what citizens think the acceptance of the former says about their society's values and attitudes.¹²

Of course, what societal attitudes the law should express is often a matter of dispute. And that's exactly why risk regulation so often becomes the site of intense political conflict.

The best account of such conflict is supplied by the cultural theory of

risk.¹³ This theory relates variance in risk perception to individuals' allegiance to competing clusters of values, which construct alternative visions—egalitarian, individualist, and hierarchist ones, for example—of how political life should be organized. The selection of certain risks for attention and the disregard of others reflect and reinforce these worldviews. Thus, by virtue of their commitment to fair distribution of resources, egalitarians are predictably sensitive to environmental and industrial risks, the minimization of which reinforces their demand for the regulation of commercial activities productive of disparities in wealth and status. In contrast, individualists, precisely because they are dedicated to the autonomy of markets and other private orderings, tend to see environmental risks as low—as do hierarchists, in line with their confidence in the competence of authorities to solve society's problems. Hierarchists and individualists have their own distinctive anxieties—of the dangers of social deviance, the risks of foreign invasion, or the fragility of economic institutions—which egalitarians predictably dismiss.¹⁴ Empirical testing suggests that cultural orientations so characterized more powerfully predict individual attitudes toward risk than myriad other influences, including education, personality type, and political orientation.

The cultural theory not only explains why risk regulation so often generates political disputes but also why consequentialist modes of decision making are powerless to solve them. No amount of expected utility analysis can tell us whose vision of the good society—that of the egalitarian, the hierarchist, or the individualist—to prefer. When commitments to ways of life figure explicitly into appraisals of societal dangers—“better dead than red!”—culture-effacing modes of risk assessment and decision making will simply miss the normative point.

To the extent that individuals treat social meanings as explicitly trumping consequentialist measures of danger, risk perceptions can be said to be morally derivative of cultural orientations. But perceptions of risk are likely to be cognitively derivative of culture orientations as well. By virtue of a collection of overlapping psychological and social mechanisms, individuals are likely to be relying on (and propagating) their worldviews even when they think that consequences are all that matter.

One mechanism that tends toward this result is cognitive dissonance avoidance.¹⁵ It's comforting to believe that what's noble is also benign and what's base is dangerous rather than vice versa.¹⁶ It's not comfort-

ing—indeed, it’s psychically disabling—to entertain beliefs about what’s harmless and what’s harmful that pit one against commitments and affiliations essential to one’s sense of self.¹⁷

Another mechanism is the contributions that affect makes to risk perception. Emotion is one of the basic faculties by which we discern risk; our judgments of how dangerous activities are track the visceral reactions that those activities trigger. Whether those reactions are positive or negative is determined largely by cultural influences.¹⁸

Finally and most important, cultural orientations condition individuals’ beliefs about risk through culturally partisan forms of trust. When faced with conflicting claims and data, individuals usually aren’t in a position to determine for themselves how large particular risks—for example, leukemia from contaminated groundwater, domestic attacks by terrorists, transmission of AIDS from casual contact with infected gay men—really are. Instead, they must rely on those whom they trust to tell them which risk claims are serious and which are specious. The people they trust, naturally enough, tend to be the ones who share their worldviews.¹⁹

The tendency of individuals to adopt views shared by others of their cultural orientation is self-reinforcing. If as a result of cognitive dissonance, affect, trust, or even simple accident the distribution of opposing beliefs about a risk starts out even slightly skewed across cultural groups, the propensity of individuals to defer to those who share their cultural allegiances will cause those beliefs to feed on themselves within groups, ultimately producing a highly polarized state of public opinion.²⁰

Because for all these reasons individuals inevitably conform their appraisals of risk to their worldviews, only modes of analysis that explicitly address culture can meaningfully guide risk decision making. “Instead of being distracted by dubious calculations,” to determine what sorts of dangers we are willing to face we must openly address the question of what “kind of society . . . we prefer to live in.”²¹

Gun Risks and Culture

The consequentialist version of the gun debate is naturally framed as one between two competing risk claims: that insufficient gun control will expose too many innocent persons to deliberate or accidental shootings

and that excessive gun control will render too many law-abiding citizens vulnerable to violent predation. Insofar as the worldviews featured in the cultural theory explain who fears what sorts of societal risks in general, it stands to reason that they would explain who takes which of these gun risks more seriously as well.

Various forms of public opinion data along with ethnographic, historical, and journalist accounts of the gun debate all support this hypothesis. Celebrated for their contributions to securing American independence and taming the American frontier, guns (at least for some) resonate as symbols of freedom and self-reliance, associations that make opposition to gun control cohere with an individualist orientation. Guns are also pieces of equipment integral to traditional male roles—father, hunter, protector—and badges of authority for institutions like the military and the police. These social functions imbue guns with connotations of honor, courage, obedience to authority, and patriotism, virtues distinctive of a hierarchic outlook.²²

Aversion to guns and support for control, in contrast, cohere naturally with more egalitarian and communitarian (or anti-individualistic) worldviews. Precisely because they help to construct traditionally male roles and virtues, guns are often equated with a hypermasculine or “macho” personal style that many individuals, male as well as female, resent.²³ This egalitarian aversion is reinforced by the association of guns with the assassination of Martin Luther King Jr. and resistance to civil rights generally in the modern era²⁴ and with social and legal controls that made the possession of guns “an important symbol of white male status”²⁵ in earlier times. And while control opponents see guns as celebrating individual self-sufficiency, control supporters see them as denigrating solidarity: “Every handgun owned in America is an implicit declaration of war on one’s neighbor. When the chips are down, its owner says, he will not trust any other arbiter but force personally wielded.”²⁶

We’ve confirmed the fit between the cultural theory of risk and gun control attitudes with independent research.²⁷ Using data from the General Social Survey (GSS) and the National Election Survey (NES)—the premier social science surveys of American public opinion—we constructed scales for measuring individual worldviews along two dimensions corresponding to hierarchy and egalitarianism, on the one hand, and individualism and solidarism, on the other. We then constructed

regression models for each data set to test the influence of these cultural orientations on individuals' attitudes toward gun control. The relationship between cultural orientations and gun control attitudes was statistically significant and consistent with our prediction in both studies: that is, the more hierarchical and individualistic individuals were in their orientations, the more they opposed control; and the more egalitarian and solidaristic they were, the more they supported it.

Even more impressive, the cultural orientation measures, when combined, had a bigger impact on gun control attitudes than did any other individual characteristic. Indeed, in the GSS regression, cultural orientations subsumed many of the strongest demographic predictors of gun control attitudes altogether: after controlling for cultural orientations, there was no longer any difference in the attitudes of whites and blacks, southerners and northerners, or urbanites and country dwellers within the GSS model. The results in the NES model were similarly striking.

As it does for other risk-regulation conflicts, the cultural theory implies that consequentialist modes of analysis are bound to be politically inert in the gun debate. To begin, individuals' beliefs about the significance of competing gun risks, like their beliefs about other societal hazards, will be cognitively derivative of their cultural orientations. To avoid cognitive dissonance, egalitarians and communitarians will more readily take note of and credit evidence that insufficient gun control diminishes public safety; hierarchists and individualists will do the same for evidence that excessive gun control makes society less safe. Following the lead of socially constructed emotions, egalitarians and communitarians will instinctively recoil from guns in fear (as well as disgust), while feelings of security and confident self-sufficiency will impel hierarchists and individualists to reach out for them. And looking to those they trust to tell them whom to believe—the analysts and policymakers who say “more guns, less crime” or the ones who say “more guns, more crime”—individuals gravitate toward and become ever more firmly entrenched in the opinions dominant within their respective cultural group.²⁸

Culture theory tells us that individuals' beliefs about gun risks will be morally derivative of their cultural orientations as well. Their preferred visions of the good society will figure explicitly in their evaluations of the competing risks that the gun debate comprises. When confronted with social science evidence purporting to show that shall-issue laws

reduce crime, control supporters can be expected to spurn mass private weapons possession anyway as denigrating solidarity: better “a world with slightly higher crime levels . . . than one in which we routinely wave guns at each other.”²⁹ No matter what the evidence shows, control proponents likewise will bridle at the idea that collective interests in security justify restricting the right of law-abiding citizens to own guns, which they see as a fundamental individual right.³⁰ Because of the influence that cultural orientations have in shaping perceptions of consequences, it’s unlikely that many individuals would ever accept social science data that purports to contradict their priors on gun risks, but even those who can imagine being persuaded by such evidence would likely refuse to change their position on gun control as a result of it.³¹

These dynamics help to explain the persistent ineffectiveness of empirical data in the American gun debate. Using econometrics, contingent valuation surveys, public health risk-factor analyses, and the like, criminologists generate study after study on the consequences of various forms of gun control. But in the face of them, public opinion remains stubbornly immobile. Members of the public are either choosing to credit only the studies that confirm their priors or simply ignoring the empirics debate altogether. At least politically speaking, the lesson of the recent outpouring of high-quality empirical studies is neither “more guns, less crime” nor “more guns, more crime” but rather “more statistics, less persuasion.”

The contribution of cultural orientations to the perception of gun risks also explains the remarkable stridency of the consequentialist debate. Commentators debating the “facts” engage in no less recrimination and name calling than do activists who explicitly see gun control as part of a “culture war.”³² This equivalence isn’t surprising because, as culture theory makes clear, the fact and culture debates aren’t genuinely independent. We know what to believe because our cultural orientations tell us what institutions and persons (for example, the Vatican or the National Academy of Sciences; Rush Limbaugh or the editors of the *New York Times*) we should trust. Those who disagree with us on the facts are thus implicitly (but unmistakably) conveying that they reject the authority of those persons and institutions and by extension the cultural allegiances that underwrite our deference to them. We inevitably conclude as a result that those who contest our version of the facts are not just stupid but evil.

The hope that consequentialist discourse can turn down the heat of cultural conflict turns is an idle one. Because cultural orientations determine what individuals believe and how they evaluate competing gun risks, policymakers and analysts, in this risk-regulation setting as in others, must suspend (at least temporarily) their fixation on consequences and openly address the question of what sort of values the law should express.

II. The Cultural Obtuseness of Gun Litigation

Gun litigation won't accomplish this necessary refocusing of attention. Like the consequentialist modes of analysis that dominate the legislative arena, the tort theories that courts employ are concerned only with the empirical question of how to promote public safety. The cultural theory of risk suggests that juries will answer this question in the manner most congenial to their worldviews—a conclusion bolstered by existing empirical research on jury decision making generally. And because the litigation process does nothing to ameliorate the conflicting stance that competing worldviews take toward guns, the gun litigation will generate outcomes as divisive as those generated by any other lawmaking process that ignores culture.

The Trial Process: Facts In, Culture Out

Ordinary citizens are likely to find the empirical side of the academic and political gun control debate exceedingly difficult to penetrate. The competing claims made of shall-issue laws—that they undermine public safety by facilitating deliberate and accidental shootings and that they promote safety by enabling self-defense and deterring predation—might be straightforward enough, but the empirical methods used to test them are very complex. Most citizens have no clue how to interpret the basic components of an econometric regression analysis—standardized betas, t -statistics, R^2 s, and the like. Nor are they in a position to evaluate the sorts of defects—missing variable bias, model misspecification, lack of robustness, endogeneity, and so forth—that critics make of their opponents' studies.³³

The same is true in the legal arena. In the new negligent design cases, for example, the standard of “reasonable alternative design” appears straightforward at first: if a manufacturer knowingly fails to manufacture a safer device at comparable cost, then it may be negligent.³⁴ Force manufacturers and retailers to internalize the costs of less than optimally safe firearms, litigants argue, and the market will work its natural wonder. But alongside evidence that safety features save lives is evidence that these same features frustrate defensive gun use.³⁵ This not only has specific effects for those who can’t access their firearms when they want to but also raises the issue of general deterrence effects: if fewer people will be able to use their legally purchased and owned weapons for self-defense, crime becomes less costly for criminals, potentially increasing crimes against persons.³⁶ Whose weighted tobit and weighted least-squared models and whose chi-squareds and log likelihoods will juries find more convincing?

The empirical debates that figure in public nuisance litigation are, if anything, even more difficult for ordinary citizens to understand. Liability in these cases is supposed to give manufacturers an incentive to prevent retailers from supplying guns to criminals. The costs associated with policing retailers in this way, however, will also make guns more expensive for individuals who desire to purchase firearms for lawful self-defense. To sort out the impact of these competing effects on public safety, jurors will have to grapple not only with the basic data relating to whether more guns mean more crime or less but also a host of additional issues relating to the impact of liability on the marketing of firearms.

One is the substitutability of used guns for new gun sales. At least some portion of the retail business with criminals that liability would prevent will simply be replaced by used gun sales, which typically are made by private individuals who face even fewer restrictions on whom they can do business with than do licensed dealers.³⁷ Would such a shift defeat the effect of liability or at least prevent it from diminishing gun sales to criminals enough to justify the impact that manufacturer liability would have in reducing the acquisition of guns for lawful self-defense?

The answer depends, in part, on the relative “elasticity of demand” for guns across criminals and law-abiding individuals. Perhaps law-abiding individuals, because they tend to buy relatively few guns and attach supreme value to them as instruments of self-defense, won’t be discouraged from buying firearms by the increase in prices associated with man-

ufacturer liability.³⁸ In that case, liability should have a greater impact in discouraging purchases by criminals than in discouraging purchases by law-abiding citizens. Or, in contrast, perhaps because personal self-defense competes with a host of other personal needs—such as food, shelter, clothing, transportation, and entertainment—individual citizens' demands for guns will be more sensitive to increases in price than will demands of criminals, who use guns as tools of the trade, and other persons especially intent on engaging in violence.³⁹ In that case, liability-induced price increases will disproportionately affect sales to law-abiding citizens.

This problem is likely to be bigger or smaller depending on how one measures the “positive externalities” associated with private gun possession. Tort law is supposed to promote efficiency by making individuals internalize “negative externalities”—the costs that their risk-taking behavior imposes on others.⁴⁰ But this model assumes that those who are engaging in the behavior are fully internalizing all the benefits of it; if they aren't—if their actions are also gratuitously conferring benefits on others—then making individuals internalize the full cost of their behavior will actually discourage them from engaging in as much of it as a (wealth-maximizing) society would desire.⁴¹ At least in theory, the acquisition of guns by those who intend to use them for self-defense creates a positive externality of this sort, since the widespread possession of firearms makes criminals, who usually can't tell who is armed and who isn't, wary of attacking anyone. How much of a damages “break” should tort law give firearms manufactures to cover the positive externalities associated with private possession of guns?⁴²

Jurors in gun suits will be bombarded with conflicting expert evidence on these and other issues. Since they are incapable of performing an independent investigation of the quality of the parties' competing claims and supporting empirical data, how will they resolve the “factual” disputes on which the gun suits turn? Cultural theory suggests they'll resolve empirical disputes here in the same way that individuals do in other risk decision-making contexts—namely, by conforming their factual beliefs to their cultural orientations.

This hypothesis is corroborated by a wealth of social science research on how individuals in general, and jurors in particular, evaluate ambiguous and conflicting evidence in legal disputes. One such body is the “story model” of juror decision making.⁴³ Devised by psychologists

Reid Hastie and Nancy Pennington, the story model furnishes the best comprehensive account of how jurors decide between competing factual claims and evidence.⁴⁴ Based on experimental studies, Hastie and Pennington show that jurors decide cases by fitting the evidence presented by the parties into one or more “verdict stories” and then selecting the one that appears most coherent to them.⁴⁵

The verdict stories that jurors rely on come from culture, including shared experiences and socially constructed understandings of the natural and social world.⁴⁶ Naturally, then, cultural values exert a profound effect on jury verdicts, determining which types of evidence and which evidentiary inferences jurors find plausible or implausible. Indeed, as a result of their reliance on culturally constructed templates, jurors are unlikely to even *recall* evidence that is inconsistent with their preferred verdict story.⁴⁷ And, of course, to the extent that jurors in a culturally diverse society are likely to enter the jury room with diverse and even antagonistic cultural prototypes, they will sometimes disagree about what the evidence signifies for exactly that reason.⁴⁸

Jurors will disagree about what the evidence in gun litigation signifies precisely because the cultures at war in the gun debate furnish competing stories or scripts about the relationship between guns and violence. Hearing accounts of school shootings, for example, those on both sides of the gun debate predictably assimilate the event to a preexisting account of how the world works: one side reacts with outrage because the assailants had access to a gun in the first place,⁴⁹ and the other side does so because students and teachers were not allowed to arm themselves on school grounds.⁵⁰ No one, significantly, changes their mind about gun control.⁵¹ Conflicting evidence in gun litigation, the storytelling model predicts, will likewise not change jurors’ opinions but rather will be conformed to the gun violence scripts they are already culturally programmed to accept.

Related bodies of jury research bolster this conclusion. The evidence underlying the “total justice” theory, for example, suggests that jurors in tort cases “strive to work their emotions and their judgments into a satisfying totality” even when this directly contradicts jury instructions about how to evaluate evidence.⁵² This dynamic, too, suggests that jurors will conform their understanding of the evidence to their cultural values, which naturally determine *how* jurors morally and emotionally conceive of what “total justice” is in relation to firearms.

Similarly, studies of “commonsense justice” suggest that jurors apply (as they are encouraged to do so by jury instructions) their everyday reasoning ability to the issue before them.⁵³ But based on “adages, images, and rules of thumb,” common sense, too, is deeply cultural in nature.⁵⁴ Jurors’ commonsense understandings of the evidence in gun cases will thus reproduce their cultural scripts on guns—and reproduce as well the cultural cleavages of the larger gun debate the rules of inference and attribution vary dramatically as well.

These influences will be reinforced, most likely, by a process known as coherence-based reasoning.⁵⁵ If after assessing a conflicting body of evidence a decision maker finds one conclusion even slightly more persuasive than another—say, because that conclusion coheres more with culturally shaped prior beliefs—she will then reevaluate the body of evidence in a biased fashion, revising upward her perception of the persuasiveness of evidence that supports the favored conclusion and downgrading the persuasiveness of evidence that refutes it. After reevaluating the evidence in this way, the favored conclusion will appear all the more correct, inducing the decision maker to revise her assessment of the supporting and conflicting evidence all the more dogmatically, and so forth and so on—until she terminates the process without the slightest doubt as to either the correct outcome or the quality of the evidence that supports it.

As in most tort cases, issues of causation loom large in gun litigation. In resolving these issues, culture will loom just as large by virtue of a dynamic referred to by social psychologists as the “culpable causation” principle.⁵⁶ Culpable causation can be described as the tendency to attribute greater causal import to acts and greater responsibility to those who perform them when the acts are more morally blameworthy—even though the morality of the act is, strictly speaking, causally irrelevant. Thus, a driver involved in an accident will be perceived as more causally responsible for the accident if he was speeding on his way home to hide some drugs than if he was speeding on his way home to hide an anniversary present.

Studies of culpable causation tell us that jurors’ moral sensibilities will strongly influence their understanding of how events are causally linked. Extensive empirical research and everyday experience tell us that these moral sensibilities vary and—especially with issues like mass torts against gun manufacturers—vary dramatically. The cultural theory of

risk unites these two insights and articulates how this variation is, in large part, related to competing conceptions of the good society.

Studies of human cognition not only support the premise that culture will guide jury decision making in cases where the acts in question carry strong moral connotations, but they also tell us that, where the evidence is technically difficult, jurors will rely on these kinds of informal intuitions all the more. Because human reasoning is “domain specific,”⁵⁷ when individuals are presented with evidence outside or at the periphery of their normal experience, they are forced to rely less on strict forms of logical inference and more on their own informal heuristics.⁵⁸ As a result, experimental studies have shown, the more complex and controverted the causal evidence becomes, the more jurors turn to their own normatively inflected understandings of who to trust and what to believe.⁵⁹

In the gun litigation cases, jurors will be asked to assess all manner of actions that can be seen in just such a normative light. To determine whether and how corporations should manufacture and market guns, juries will have to resolve complex factual issues about how liability might affect those practices and how any changes in these practices will influence the behavior of different groups of citizens. All the evidence that exists on jury decision making suggests that jurors will inevitably resolve these difficult issues by drawing on their assessment of whether the commercial marketing of guns and the private ownership of them comports or conflicts with their vision of an ideal society—an evaluation grounded in deeply held and widely contested cultural norms.

These conclusions are admittedly extrapolations from existing research, but they are already borne out to at least an extent by the small number of verdicts that gun suits have generated. In *Hamilton v. Accu-Tek*,⁶⁰ both sides relied heavily on expert witnesses to present voluminous, and radically conflicting, statistical analyses of the contribution that the defendant gun manufacturers’ marketing practices were making to violent crime. “The jurors ignored almost all of it.”⁶¹ Almost immediately after deliberations commenced in the case, two jurors (one a statistician employed by Publishers Clearinghouse Sweepstakes and the other an accountant) “dismissed [the expert] testimony, telling their fellow jurors that numbers can be twisted to make almost any point.”⁶² Thereafter, according to one of the jurors, they “didn’t really discuss the statistics for either side.”⁶³ Instead, for six days, the jurors traded competing stories and impassioned speeches about crime and who is respon-

sible for it; and because these were matters on which the jurors themselves were apparently bitterly divided, the deliberations produced, unsurprisingly, a process of recriminatory give-and-take that was just as excruciating and conflictual as the American gun debate itself.⁶⁴

Litigation and Cultural Polarization

The contribution that cultural orientations make to gun risk perceptions not only furnishes reason to doubt that litigation will generate the right answer, empirically speaking, to the public safety question. It also makes it impossible to believe that litigation will resolve the American gun debate. The lesson of the cultural theory of risk is that culture is prior to facts—not only in the risk perceptions of individuals but in the political decision making of communities that want to resolve societal risk disputes. Gun litigation won't work because it doesn't do anything to extricate the gun issue from the conflict between competing cultural styles in American life.

Why might anyone suppose that gun suits could help dispel the cultural tensions that pervade the gun debate? The answer lies in the seemingly deliberative nature, and deliberation-forcing potential, of litigation. The conventional picture of jury decision making, for example, sees it as a process of discursive give-and-take in which individuals of differing points of view reach consensus through considered, and considerate, exchange. Isn't it possible, then, that jury deliberations might enable individuals of hierarchic and individualistic persuasions and those of egalitarian and communitarian ones to find the common ground that has eluded them in the rough and tumble of electoral politics? And even if it doesn't, shouldn't we expect the outcomes of gun suits to make political deliberation more productive? Right now, the advantage that control opponents enjoy in the electoral process by virtue of being small, well organized, and intensely interested makes it possible for them to block significant legislative interventions into the gun debate. But significant damages awards in gun suits—which are likely to be filed in the jurisdictions least supportive of guns—would give the control proponents the leverage, and control opponents the incentive, needed to break up the culture-conflict log jam. Sadly, however, these conjectures turn out to be completely unrealistic.

The hope that jury deliberations might produce cultural respect and accommodation is at odds with a wealth of experimental data. These show that when groups deliberate on a disputed issue of fact or value their members tend to become more extreme in their positions, not more moderate.

This “group polarization” effect rests on a set of interrelated mechanisms. One is informational: if the members of the deliberating group are already leaning in one direction (or if the members with the strongest views are the ones most motivated to speak), arguments in favor of that position will predominate in discussion, thereby reinforcing the impression that that position is correct. Another mechanism is reputational: to gain the approval of others in the group, members who even weakly support what appears to be the dominant view will express unequivocal support for it, while those who disagree will tend to mute their opposition in order to avoid censure. The effect of reputational concerns on individuals’ decisions to speak will in turn reinforce the skewed distribution of arguments, making it even more likely that members of the group will be persuaded that the dominant position is correct—indeed, indisputably so. Although group polarization has been shown to influence deliberations in a variety of contexts, some of the most compelling experimental demonstrations have in fact involved jury decision making.

Indeed, jury deliberations in gun litigation would seem especially vulnerable to this dynamic. Experiments suggest that group polarization is most intense when the issues in dispute are associated with competing social allegiances. In that case, the effect of both the informational and reputational mechanisms is magnified: the former by the credit that individuals naturally give to the views of those they trust and the latter by the desire that individuals naturally have to maintain good standing in their own social groups and to avoid the distinctive reproach afforded those who side with the groups’ detractors. These pressures will predictably come into play in jury deliberations over guns precisely because beliefs about and attitudes toward guns are so conspicuously associated with competing cultural styles.

Accordingly, jury deliberations, far from dissipating the cultural conflict that fuels the gun debate, are much more likely to magnify it. Juries consisting of individuals who are already at least mildly predisposed in one direction will gravitate toward an unequivocal stance in that direction—in strong opposition to the stance taken by juries whose

members consist of individuals who start out inclined, even mildly, in the other direction. And to the extent that particular juries start out with members of genuinely varying positions, deliberations are likely to propel them toward entrenched disagreement as individual jurors scramble to align themselves with their cultural peers and dissociate themselves from their cultural adversaries. Cultural polarization, within and across juries, will be the order of the day.

Although limited in number, verdicts in gun lawsuits bear out this surmise. After quickly concluding that expert “statistics” were irrelevant, the jury in *Hamilton* found itself unable to reach consensus on almost anything else. Beginning their deliberations deadlocked, the jurors remained so over the course of several excruciating days of emotionally assaultive deliberations.⁶⁵ “There was a lot of arguing, yelling and finger-pointing,” one juror explained, as jurors (drawing on personal experience and anecdote) variously assaulted the gun industry as responsible for mass carnage, denied the extent of violent urban crime, and angrily disagreed about whether a finding of liability would open a floodgate of frivolous litigation. “Several jurors complained that the tension caused them physical pain,” and one became violently ill and vomited during the course of the jury’s discussions. After four days, the jurors sent the judge a note: “We are all very upset. We are starting to fight. We cannot reach a decision. We are emotionally drained and some of us feel physically ill!! Please, please give us more direction!!” The judge, Jack Weinstein, did just that, sternly advising the jurors: “Everybody has invested, including yourselves, too much in this case to allow you to throw up your hands prematurely.” Two days later the jurors emerged with what was widely viewed as a nearly incomprehensible compromise verdict (one ultimately vacated as contrary to state law on appeal).⁶⁶ Another “advisory” jury in *NAACP v. AcuSport* likewise experienced a level of disagreement that prevented it from reaching a unanimous verdict.⁶⁷

The hope that litigation outcomes might stimulate cultural dialogue in the legislative process is also idle. Multimillion-dollar verdicts in gun suits do surely invite response, but not of a culturally productive or accommodating kind. As we have emphasized, in the politics of risk regulation, factual dispute is simply cultural dispute by other means. What we believe depends on whom we trust, which in turn depends on what we care about. Thus, when others stubbornly resist our view of the facts,

we naturally see them as attacking our worldviews and feel impelled to resist in cultural self-defense. That's why the gun control legislation (and, in the case of shall-issue laws, gun decontrol legislation) generates such impassioned conflict even when it is debated in purely empirical terms. There's no reason to think that verdicts against gun manufacturers, even when premised on a public safety rationale, will be seen as any less culturally threatening to those who attach positive social meanings to guns. Indeed, the rapid move to enact manufacturer immunity confirms that those individuals will aggressively respond with legislation that, no matter how seemingly instrumental in purpose, is ultimately motivated by (and opposed because of) its symbolic vindication of their values.⁶⁸

Litigation, whether over guns or other culturally sensitive issues, systematically enhances cultural conflict in politics. This is in part an artifact of the way in which issues are framed in lawsuits, in which the winner inevitably takes all and the loser is saddled with a demoralizing loss of face.⁶⁹ But it is also a product of the preemptive-strike quality of litigation. By resorting to litigation, a party to a culturally charged politically charged dispute seeks to free itself of the constraints of a democratic process that might have forced it to listen and accommodate those who disagree and signals an intention to dictate its vision regardless of its appeal to members of the public. A move this brash and this alarming predictably energizes the other side—and ushers in a heightened state of cultural agitation in the political arena.⁷⁰ Cultural retaliation, not cultural logrolling, is what the new gun suits are likely to trigger.

III. Conclusion

The litigation turn in the gun debate embodies the same two mistakes that pervade American gun politics generally. One is a basic misunderstanding of what the gun controversy is all about. Like most gun control legislation, gun lawsuits assume that what's at issue is what sorts of regulations will best promote public safety. What this view overlooks, however, is social meaning. Guns are at the center of an expressive struggle between the adherents of competing visions of the good society—one egalitarian and communal, the other hierarchic and individualistic. What gun laws *say* about the status of the groups who adhere to these visions

matters at least as much to ordinary citizens as what gun laws will *do* to reduce or increase crime.

The second mistake concerns the process best calculated to resolve the American gun conflict. Consistent with the dominant approach to gun control policy-making, gun litigation assumes that the gun question can be settled by empirical methods. The attention that lawmakers, and now lawyers, pay to measuring the costs and benefits of gun regulation derives in part from the view that the gun debate is only about public safety. But the prominence of empirical methods also reflects a strategic or prudential concern on the part of many who understand full well the cultural underpinnings of the gun controversy. Precisely to *avoid* committing the law to picking sides in the struggle between the egalitarian and solidaristic proponents of control, on the one hand, and the hierarchic and individualistic opponents of it, on the other, some policymakers prefer the seemingly neutral idiom of econometrics.

But whatever motivates it, the preferred position of empirical methods is incapable of bringing the gun debate to a close. No matter how compelling, statistical proofs of the efficacy of gun control don't give citizens who care passionately about the meanings of guns a reason to change their minds. Indeed, precisely because they care so much about the values that guns express, individuals are unlikely to find compelling any statistics that purport to justify a gun policy contrary to the position they already prefer.

It's also idle to hope that empirical methods will reduce the intensity of cultural partisanship in the gun debate. The idea that it might do so reflects a naive understanding of the dynamics of expressive politics. Moderate citizens might find the apparent neutrality of costs and benefits appealing, but immoderate ones—those intent not just on avoiding cultural domination but on conquering their cultural adversaries—obviously won't. Seizing on the gun debate as an opportunity to deride their cultural adversaries and stigmatize them as deviants, they will prefer an unabashedly scornful expressive idiom. Control partisans thus ridicule their adversaries as “hicksville cowboy[s],” members of the “big belt buckle crowd”⁷¹ whose love of guns stems from their “macho Freudian hang ups,”⁷² while NRA president Charlton Heston declares “cultural war” against “blue blooded elitists” who threaten an “America . . . where you [can] . . . be white without feeling guilty, [and] own a gun without shame.”⁷³

But as obnoxious as these cultural extremists might seem, their messages cannot be easily ignored. Their language, however intolerant, resonates much more deeply with the social meanings of guns and gun control than do the statistics and the equations, the graphs and the figures, of the mainstream empirical debate. By assuming a posture of deliberate obtuseness in order to avoid giving offense, moderate commentators, politicians, and citizens cede the rhetorical stage to the expressive zealots. And as long as the zealots are the only ones with anything pertinent to say, the gun debate will remain divisive and unproductive.

The only way to resolve the gun debate is to correct the two mistakes that have deformed it over the course of the last half-century. *Moderate* citizens must openly attend not just to the consequences that gun control laws promote but to the cultural values they express. And they must do so through a deliberative process that makes it possible for individuals of diverse cultural orientations to see their identities affirmed rather than denigrated by the law.

Resolving culturally grounded political conflict isn't easy, but it *is* possible. Armed with a pertinent but pluralistic expressive idiom, those who favor compromise and accommodation will finally stand a fighting chance to defeat those who insist that everyone see only their vision of America.