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Articles

The Situational Character: A Critical Realist Perspective on the Human Animal

JON HANSON* & DAVID YOSIFON**

This Article is dedicated to retiring the now-dominant “rational actor” model of human agency, together with its numerous “dispositionist” cohorts, and replacing them with a new conception of human agency that the authors call the “situational character.” This is a key installment of a larger project recently introduced in an article titled The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture.¹ That introductory article adumbrated, often in broad stroke, the central premises and some basic conclusions of a new approach to legal theory and policy analysis. This Article provides a more complete version of one of those central premises by elucidating a more realistic conception of the human animal than is currently embraced in legal theory. The Article begins with a short introduction to the larger project, and describes the central place that a realist conception of the human actor plays in that project. It then explores several bodies of literature within the fields of social, cognitive, behavioral, and neural psychology in pursuit of a vision of the human actor that is grounded in social science. Having explicated that conception, the Article then outlines some of the basic implications of it for law, legal theory, and social policy. It then analyzes conventional legal scholars’, particularly legal economists’, arguments for ignoring the lessons of social science in their treatment of human agency. As part of that analysis, this Article describes why recent efforts to incorporate some psychological findings—the sort of work that is often labeled “behavioralist”—have been inadequate. Finally, the authors briefly look beyond the human actor itself to consider some of the fairly obvious—but generally ignored—realities of our present social situation, and some of their implications for common policy presumptions.

As subsequent work will make clear, this new, situationist conception of the human animal is as important to a realist account of law and legal theory as the dispositionist conception has been to now-dominant accounts.

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1. 152 U. PA. L. REV. 129 (2003).

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“What is a human being? Legal theorists must, perforce, answer this question: jurisprudence, after all, is about human beings.”

~ Robin West²

“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”

~ Oliver Wendell Holmes, Jr.³

“[T]he implicit modern liberal conception of the average person [is that he is] good, but inept, and for both reasons not very responsive to incentives, though perhaps rather plastic. The implicit conservative view of the average person, in contrast, is that he is competent but bad; hence conservatives place emphasis on incentives and constraints.”

~ Richard Posner⁴

2. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 1 (1988).

3. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897), reprinted in 78 B.U. L. REV. 699, 701 (1998).

4. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1559 n.15 (1998).

I. INTRODUCTION

A. BRINGING THE READER UP TO SPEED

In a companion article we introduced the concept of “critical realism,” our name for an analytic posture that strives to begin with as *real* an account of the human animal—the ultimate subject of legal inquiry—as can be mustered. That version of realism is *critical* in that it is suspicious of, and willing to scrutinize, even our most basic lay and legal-theoretic assumptions about ourselves and society.⁵ In that first article—titled *The Situation*—we began to develop our critical realist project by bringing together in a new way a few of the core insights of social psychology and economics. With respect to the former, we focused particularly on a central and recurring finding that humans tend to overstate the role of individual disposition and under-appreciate the role of situation in accounting for human behavior.⁶ As a general matter, lay theories of human behavior, as well as legal theories, recognize the role of situation only when it is palpable or when theorists are particularly motivated to do so. And even then, only the most salient or satisfying elements of the situation are considered. Otherwise, disposition is presumed to govern.

Particularly in Western cultures, as we will explore, a person’s behavior is generally understood to manifest, not simply her disposition, but a particular dispositionist causal schema that presumes that behavior reflects freely willed (often consciously made) “choices,” which in turn reflect a stable set of “preferences.” This Article thoroughly fleshes out that widely held conception of human behavior which we call *dispositionism*. In so doing, we provide a more realistic depiction of the human animal, and a more promising starting place for theorizing about humans and their institutions, including laws and legal theory. We call that depiction the *situational character*.

B. INTRODUCTION TO DISPOSITIONISM

In *The Situation*, we highlighted several foundational studies illustrating both the strength of dispositionism and the extent to which our dispositionism is

5. Jon Hanson & David Yosifon, *The Situation: An Introduction to The Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003) [hereinafter Hanson & Yosifon, *The Situation*].

6. See LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION* 4 (1983) (“People’s inflated belief in the importance of personality traits and dispositions, together with their failure to recognize the importance of situational factors in affecting behavior, has been termed the ‘fundamental attribution error.’”); see also Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21, 21 (1995) (“Three decades of research in social psychology have shown that many of the mistakes people make are of a kind: When people observe behavior, they often conclude that the person who performed the behavior was predisposed to do so—that the person’s behavior corresponds to the person’s unique dispositions—and they draw such conclusion even when a logical analysis suggests they should not.”). Some more recent writings in social psychology use the term “correspondence bias” instead of “fundamental attribution error.” See ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 430 (1999).

wrong.⁷ Our exposition centered on the path-breaking work of Yale psychologist Stanley Milgram, who cracked the dispositionist nut wide open in a dramatic series of experiments in the 1960s.

Milgram arranged an experimental situation in which subjects—compensated volunteers—were led to believe that they were participating in a study on memory.⁸ In the basic design of the experiment, the subject first met another “subject”—who was actually one of Milgram’s confederates—and the two drew straws to determine what part in the experiment they would take. The confederate was inevitably assigned the role of the “student,” and promptly strapped into a chair with electrodes affixed to his body. The true subject was (seemingly randomly) assigned the role of the “teacher,” and was instructed to administer an electric shock—by flipping a switch on a shock box—each time the “student” incorrectly answered a question posed by the experimenter. The “teacher” was led to believe that the shocks would be painful, and that their intensity would increase in fifteen-volt increments with each wrong answer—from 15 volts all the way up to 450 volts, which was labeled “Danger! XXX!” on the shock box.⁹

Before the experiment was undertaken, Milgram described the protocol to lay people and psychologists and then asked both groups to estimate how far most “teachers” would go with the shocking before refusing to continue. Those surveyed believed, as might the reader, that most would refuse early on. College students predicted that just 1 in 100 subjects would shock all the way to 450 volts, and professional psychologists predicted that only 1 in 1000 —“the sadists”—would go that far.¹⁰

But we humans do not—and this is a central theme of critical realism—understand ourselves well.¹¹ In the basic design of the experiment, 100% of the subjects continued with the shocking at least to 350 volts, and 65% went all the way to 450 volts (“Danger! XXX!”).¹² The dispositionist assumption, that people would never freely choose to knowingly inflict pain like that on an innocent subject in the absence of a highly salient situational force—such as a gun to their heads—is robust. But it is often wrong. In our dispositionism we

7. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 157–79.

8. See generally STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* (1974) (describing and analyzing these experiments); Hanson & Yosifon, *The Situation*, *supra* note 5, at 150–53 (discussing Milgram’s studies).

9. See MILGRAM, *supra* note 8, at 13–26 (describing the experimental design). Two other variations on the basic experimental design are worth noting. First, a clipboard-toting “experimenter” was to implore the subject to continue shocking as the experiment continued. Second, the “learner” could be heard yelping, then screaming and kicking, then complaining of heart irregularities, and, finally, at 300 volts, falling silent. See *id.* at 55–72 (describing variations and controls on the basic experiment).

10. See *id.* at 28–29.

11. Although this generalization is less true of some individuals and cultures than others, it is nonetheless the case that few people (particularly in the West) come close to appreciating accurately the role that disposition and situation, as we define those terms, play in moving us. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 250–59.

12. See MILGRAM, *supra* note 8, at 60 tbl.3.

fail to appreciate the powerful, but unseen, situational influences over the subjects' behavior in Milgram's lab. Milgram performed his study in numerous settings on hundreds of subjects who were, in all respects, typical people. They were not sadists; they were simply, like all of us, situational characters who were subject to unappreciated but profound influences in the situation. Indeed, Milgram was able to alter his subjects' behavior by altering the situational influences. By varying the proximity of the "teacher" to the "student," or the "teacher" to the "experimenter," or by altering the prestige of the experimental setting (by moving the location of the experiment from Yale to Bridgeport, Connecticut), Milgram discovered he could increase or decrease the level of shocking that subjects would be willing to administer.¹³

Experiments like Milgram's, and there are literally hundreds of others,¹⁴ have demonstrated that we place far too much emphasis on disposition—on an individual's perceived motivations, preferences, choices, and will—in accounting for her conduct. In so doing we fail to appreciate the very potent, though often unnoticed, influences of situation.

C. THE UBIQUITY OF DISPOSITIONISM

Before we further describe the situational character, it is essential that we make clear just how central and vital dispositionism is to virtually all of our conventional legal theories, laws, social policies, and common sense self-conceptions. At almost every turn, dispositionism defines or biases what we see and how we construe what we see: behavior is strongly presumed to reflect freely willed, preference-satisfying individual choice. But as dispositionists, we are both consistent and consistently wrong.

1. Dispositionism in (Law and) Economics

Dispositionism is very familiar to scholars and students who have studied the "rational actor" model of law and economics, the now-dominant legal-theoretic paradigm.¹⁵ Many complaints have already been leveled about the lack of realism in that model, most of which focus on the apparent limits of "rationality" in human decisionmaking.¹⁶ We will review that literature below, but we want to highlight at the start that even as they now vigorously debate the degree or kind of "rationality" that human agents display, economists seem virtually unanimous in assuming that people are preference-driven choosers (that is, dispositionists).¹⁷

Richard Posner, a standard-bearer of the law and economics movement, insists that law and economics does not depend on people thinking "rationally"

13. *See id.* at 32–43.

14. *See* Hanson & Yosifon, *The Situation*, *supra* note 5, at 152 n.2.

15. *See id.* at 139–49 (describing dominance of law and economics in legal scholarship).

16. *See id.* at 140–41 (reviewing early critiques of the lack of realism in law and economics).

17. *See id.* at 159–65 (describing the dispositionism of the rational actor model of humanity that is typically employed by legal economists).

in the sense of being logical, calculating, and accurate; but it does depend upon their being dispositional in the sense of choosing their own ends: "Rationality means little more to an economist than a disposition to choose, consciously or unconsciously, an apt means to whatever ends the chooser happens to have."¹⁸

For the legal economist, the ultimate line of defense for the rational actor is dispositionism. Whether a person actually "rationally" thinks through his or her decisions, or even whether people make decisions "consciously or unconsciously" is not, according to Posner, pivotal. To be sure, most legal economists have presumed that their model agents are far more than mere choosers, but the rational actor model itself need not be premised on more than the proposition that choices are just that, the chooser's *choices*.¹⁹ As Milton Friedman, the Nobel Prize-winning economist and intellectual forerunner of the law and economics movement put it: "[E]very individual serves his own private interest The great Saints of history have served their 'private interest' just as the most money-grubbing miser has served his private interest. The *private interest* is whatever it is that drives an individual."²⁰

Economically oriented analysts, in the words of Gary Becker (another Nobel Prize winner), have applied the "combined assumptions of maximizing behavior, market equilibrium, and stable preferences, . . . relentlessly and unflinchingly."²¹ Despite their claim to social science, economists in general and legal economists in particular have indeed applied dispositionist assumptions *unflinchingly*—that is, without the self-suspicion and rigorous inspection that social science would demand. This is no doubt because their dispositionist assumptions seem so intuitively plausible, and so fundamental to our sense of ourselves, that they are beyond question.²² And perhaps this may also help explain

18. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 17 (5th ed. 1998).

19. *See id.*; *see also* ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 16–17 (2d. ed. 1997) ("The construction of the economic model of consumer choice begins with an account of the preferences of consumers. Consumers are assumed to know the things they like and dislike and to be able to rank the available alternative combinations of goods and services according to their ability to satisfy the consumer's preferences. This involves no more than ranking the alternatives as better than, worse than, or equally as good as one another.").

20. Milton Friedman, *The Line We Dare Not Cross: The Fragility of Freedom at "60%"*, *ENCOUNTER*, Nov. 1976, at 8, 11. This strong dispositionism enjoys a long pedigree in economics. John Stuart Mill, for example, had the same starting place: "The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it." JOHN STUART MILL, *ON LIBERTY* 72 (Penguin Classics 1975) (1859).

21. GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 5 (1976). Becker and fellow Nobel Prize-winning economist George Stigler famously defended these basic assumptions of the economic approach in George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 *AM. ECON. REV.* 76 (1977). The Latin title summarizes well the basic dispositionist perspective of economics. Its translation is: "There's no accounting for taste."

22. *See infra* text accompanying notes 664–675 (summarizing Kreps's and Sens's arguments that the dispositionism of economics is based on a leap of faith that itself is justified, not by the evidence, but by intuitive plausibility).

why Stanley Milgram never won the Nobel Prize.²³

2. Dispositionism in Classic Liberal Political Theory

As we emphasized in our previous article, the sweep of dispositionism extends far beyond the whipping post of law and economics and the rational actor model. Indeed, the dispositionism of law and economics should be seen as a kind of juiced-up version of the dispositionism that has been at the core of every one of our society's most influential legal and social theories. Far from being simply an artifact of a highly stylized and, to some, easily dismissed legal theory, dispositionism of various forms has long been emblazoned on the banner of classic liberal political theory itself.

John Locke's conception of the human animal, as expressed in his famous *Second Treatise on Government*, for example, starts here:

[W]e must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature; without asking leave or depending upon the will of any other man. A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another Man in that state has an uncontrollable liberty to dispose of his person or possessions²⁴

Such dispositionist assumptions—that by their very nature humans enjoy the freedom to order their actions as they see fit—are the heart of Locke's contractual theory of society, much as they are the heart of legal economists' familiar calls for the expansion of, and deference to, contracts and markets and, more generally, the cornerstone of classic liberal political theory.

A generation after Locke, the French philosopher Jean Jacques Rousseau, in his signature work *The Social Contract*, relied on dispositionism to make his claim that freedom was the natural condition of humanity:

This common liberty results from the nature of man. His first law is to provide for his own preservation, his first cares are those which he owes to himself; and as soon as he reaches years of discretion, he is the sole judge of the proper means of preserving himself, and consequently becomes his own master.²⁵

23. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 341–42 (discussing how Milgram's findings may, in fact, have hurt his career); see also *infra* notes 381–87 and accompanying text (describing how Daniel Kahneman's work may have earned him a Nobel Prize in part because it is dispositionist).

24. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 101–02 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

25. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 2 (Charles Frankel ed., Hafner Library of Classics 1947) (1762).

The human animal, in this classic liberal picture, is its “own master,” “the sole judge of the proper means”—the “apt” means, to use Posner’s term—of pursuing its own interests. It is of particular importance that both Locke and Rousseau, like the legal economists of today, *begin* their famous political tracts with initial claims about the sources or nature of human behavior. Those foundational axioms are presumed self-evident, and their truth is taken for granted throughout. The assumptions are not, in other words, the demonstrated conclusion of a philosophical or scientific inquiry.

Now is as good a time as any to pause and emphasize, as we did in our previous article and will again, that dispositionists do not assume that human beings are immutable or complete in their self-possession. Indeed, it was Rousseau’s view that, while humans were by nature all equal, some could become severely twisted by extreme situational disadvantage. Inverting what he took to be the classic view that slaves were by their very essence slave-like, for example, Rousseau asserts that the dispositionist attribution is wrong for missing the situation—that slavery wrought slave-like behavior and not the other way around:

Aristotle [who held the essentialist view of slaves] was right; but he took the effect for the cause. Nothing can be more certain than that every man born in slavery is born for slavery. Slaves lose everything in their chains, even the desire of escaping from them: they love their servitude If then there are slaves by nature, it is because there have been slaves against nature. Force made the first slaves, and their cowardice perpetuated the condition.²⁶

Rousseau sees situation, as dispositionists tend to, where it is highly salient—such as in the institution of slavery, or in the modern dispositionist cliché, when there is “a gun to the head.” That situation is recognized where it is highly visible is the exception that proves the rule: situation, unless obvious, is irrelevant, leaving only disposition.²⁷

In the same generation as Rousseau, on the other side of the Atlantic, Thomas

26. *Id.* at 3.

27. Even in the condition of slavery, however, where Rousseau seems to recognize the influence of situation, his recognition still takes the form of a kind of dispositionism, for although he claims that the qualities of slaves have been produced by the institution of slavery, he considers those qualities to have grown stable and part of the slaves’ own self-conception. As we outlined in *The Situation*, there were several dispositionist justifications of slavery—for example, some assumed that Africans were a different species and others assumed that they were at a different developmental stage. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 308–27. Also, Rousseau’s recognition of the situational forces of slavery was widespread in Europe, particularly in France, where there was strong opposition to the international slave trade. It was partially in response to that opposition that Thomas Jefferson sought to defend slavery by dispositionalizing slaves as naturally inferior to whites and therefore appropriate for slavery. See *id.* at 312–17 (reviewing Thomas Jefferson’s writings on the topic). The tendency to dispositionalize is often exacerbated by the motive to legitimate one’s own social system in response to perceived threats to the system. See *infra* text accompanying notes 479–503 (summarizing the influence of “system threat” and the widely held motive of system affirmation).

Jefferson embraced a similarly dispositionist view of humanity, and acted on it. Jefferson, by any standard a leading proponent of classic liberal political theory, opened the American Declaration of Independence with a statement of human nature that echoed Rousseau's. It was "self-evident," Jefferson wrote, that "all men are created equal . . . are endowed by their Creator with certain unalienable rights, [and] that among these are Life, Liberty and the pursuit of Happiness."²⁸ Individual liberty is not just a political goal, but also a self-evident self-conception. That such liberty would be exercised to pursue happiness was, for Jefferson, also self-evidently grounded in a dispositionist presumption. When Jefferson took the reins of the government he helped to fashion, dispositionism remained integral to his vision of the state and the citizen. In his first inaugural address, he stated that

[A] wise and frugal government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government²⁹

Though Jefferson was directing his comments to his Federalist political opponents, his words nonetheless reflected a widely shared vision of humanity. Those words have echoed off of that shared vision through successive generations. Jefferson's ideas, according to the historian Richard Hofstadter, were rooted not so much in a particular "system of economics or politics, *but an imperishable faith expressed in imperishable rhetoric*."³⁰ That faith is a faith in dispositional man, and it is a faith that has reverberated in our political discourse throughout this country's history. While our political tradition has been laced with conflict, there has also been, a shared "ideology of self-help, free enterprise, competition, and beneficent cupidity However much at odds on specific issues, the major political traditions have shared a belief in the rights of property, [and] the philosophy of economic individualism . . . as necessary qualities of man."³¹

And that ideology is at least as strongly shared in our day. Ronald Reagan, for example, made statements in his farewell address that echoed precisely the sentiments Jefferson expressed in his inaugural address nearly two-hundred years before: "And I hope we have once again reminded the people that man is

28. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

29. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *reprinted in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 13, 15–16 (Gov't Prtg. Office 1989).

30. RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 42 (2d ed. 1973).

31. *Id.* Hofstadter's views about "consensus" in the American political tradition have been heavily debated by generations of American historians. *See, e.g.,* SAMUEL HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY (1981) (describing some of the limitations of the consensus theory). Our only interest here is in highlighting the basic dispositionist view of humanity in the American political tradition, a view that is not seriously at stake in that historiographical debate.

not free unless government is limited. There's a clear cause and effect here that is as neat and predictable as a law of physics: as government expands, liberty contracts."³²

Dispositionism does indeed promise "neat and predictable" causal attributions. So long as we see our behavior as reflecting free, preference-satisfying choices, social policymaking becomes as clear as a law of physics—just as one should get out of the way of a falling apple if one wants to avoid being hit on the head, one need only remove all obvious situational constraints from consumer and citizen choice to ensure human liberty (and humanity's best hope for happiness).³³ Such a neat and predictable theory may be as attractive as it is common, but as we hope to show in this Article, dispositionist presumptions are no more laws of human reality than the presumption that the sun revolves around the earth is a law of astronomy.³⁴

3. Dispositionism in the Law

a. Contract Law

As surely as apples don't fall far from their trees, the fruit of dispositionism defines, not only our common sense and our legal and political theories, but also our laws. While this may not be surprising, it should be troubling. As if we are trapped in a kind of self-conception fun house, this false image of ourselves infects almost all of our institutions and systems, including our system of justice.

Consider the law of contract, on which so much of our legal apparatus rests. For the most part, the law of contract mirrors our basic dispositionist self-conceptions. It is concerned with the enforcement of promises.³⁵ When promises are perceived as freely made, they are generally enforceable.³⁶ And when

32. Ronald Reagan, Farewell Address to the Nation (January 11, 1989), in 2 PUB. PAPERS 1718, 1721. See generally Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004) [hereinafter Chen & Hanson, *The Illusion of Law*] (describing the emergence of today's similarly dispositionist, pro-market, and anti-regulatory meta schemas to policymaking).

33. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 288–92 (describing the relationship between dispositionism and policies advocating laissez-faire social policies).

34. See our discussion of geocentrism, dispositionism, Galileo, and deep capture in Hanson & Yosifon, *The Situation*, *supra* note 5, at 202–30.

35. See RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (defining contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.") There are of course many theories of what contract law is. The discussion here is a simple positive one that makes no pretense to nuance, except insofar as we think a more nuanced exposition would further bear out our point. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 285–97 (examining the dispositionism of contract law and contract theory, with special reference to Professors Llewellyn, Fried, and Rakoff).

36. Enforcement may take many forms (e.g., the required payment of the promisee's expected benefit of the promise, or the requirement of specific performance of the promised conduct). See E. ALLAN FARNSWORTH, CONTRACTS § 12 (3d ed. 1999) (discussing different kinds of contract remedies). Of course, some promises, though freely made in the eyes of the law, are nevertheless unenforceable (such

contract law sees behavior manifesting a promise—such as signatures or other affirmative expressions of assent—it usually sees them as having been freely made. This follows from dispositionism—human conduct is presumptively understood as the free expression of individuals' preferences and will. Only very narrow doctrines, such as "duress" or "undue influence," are available for those rare instances when that presumption might be rebutted. The narrow exceptions arise, predictably, only where the most palpable and powerful situational forces are in play. The First Restatement of Contracts defined the kind of duress that could make a contract voidable as a "wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment."³⁷

The starting place is the dispositionist will, which is presumed to be the usual and proper cause of a person's behavior. The concept of duress does not depart from the dispositionist view. It is only a particular kind of experience that will excuse a promise under the doctrine: dispositionally experienced fear.

[D]uress consists of threats that cause such fear as to induce the exercise of volition, so that an undesired act is done. . . . The question is . . . did it put one entering into the transaction in such fear as to preclude the exercise by him of free will and judgment. Age, sex, capacity, relation of the parties, attendant circumstances, must all be considered. Persons of a weak or cowardly nature are the very ones that need protection. The courageous can usually protect themselves; timid persons are generally the ones influenced by threats, and the unscrupulous are not allowed to impose upon them because they are so unfortunately constituted.³⁸

Even in the exceptional, backwater doctrine of duress, the focus of contract law remains resolutely dispositionist—the *will* of the victim must be overcome in order for the doctrine to be implicated. And because we see most behavior as resulting from individual will, it is only the very palpable situational force of an unscrupulous person making a fear-inducing threat that can trump the presumption that it is an individual's will in charge. Even then, it is primarily the "unfortunately constituted" "[p]ersons of a weak . . . nature" who are vulnerable to such obvious situational threats. There is little or no recognition in this doctrine of the power of less conspicuous situation over virtually all of us,

as a promise to sell oneself into slavery, which is forbidden by the Thirteenth Amendment to the Constitution); others are actually illegal to make (such as a promise to sell heroin, which is forbidden by statute). See generally *id.* § 5 (discussing unenforceable contracts). There are many areas of social life that are removed from the realm of contract altogether (for example, minimum wages for labor, the adoption of children, the transfer of body parts from one person to another, etc.). The relative place of disposition and situation in our self and social conception can be observed quite clearly in the contours of contract in our social systems.

37. RESTATEMENT (FIRST) OF CONTRACTS § 492(b) (1932).

38. RESTATEMENT (FIRST) OF CONTRACTS § 492 cmt. a (1932).

though this would seem to be the first place, if any, where situation should be taken into account.³⁹ Under this approach, the situational pressures created in Stanley Milgram's laboratory would surely not be seen as duress.

b. Tort Law

A similar conception of human beings pervades the law governing noncontractual harms—tort law. Long before the rational actor began making the rounds of the law reviews, tort law's *reasonable person* was a dispositionist mainstay.⁴⁰ Just as contract holds people accountable for their promises, tort law holds them responsible for their wrongful harms. Under the basic negligence standard, a person is liable for the harms that a reasonable person would have prevented in similar circumstances.⁴¹ The standard speaks to the disposition of the tortfeasor, as well as to the disposition of the reasonable person against whom the tortfeasor is to be judged:

The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising

39. The Second Restatement alters the definition of duress to the following: "If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim." RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981). The revised section attempts to eliminate any mention of will because of the confusion it induces, but it nevertheless seems clearly to rely on the notion without naming it:

It is sometimes said that the threat must arouse such fear as precludes a party from exercising free will and judgment or that it must be such as would induce assent on the part of a brave man or a man of ordinary firmness. The rule stated in this Section omits any such requirement because of its vagueness and impracticability. It is enough if the threat actually induces assent on the part of one who has no reasonable alternative. . . .

In order to constitute duress, the improper threat must induce the making of the contract. . . . No special rule for causation in cases of duress is stated here because of the infrequency with which the problem arises. A party's manifestation of assent is induced by duress if the duress substantially contributes to his decision to manifest his assent. . . . All attendant circumstances must be considered, including such matters as the age, background and relationship of the parties. Persons of a weak or cowardly nature are the very ones that need protection; the courageous can usually protect themselves.

RESTATEMENT (SECOND) OF CONTRACTS § 175 cmts. b, c (1981) (internal cross-references omitted). In any event, it appears that many jurisdictions continue to employ the explicit overbearing of the will language reflected in the First Restatement. *See, e.g.,* Ruane v. Jancsics, 2001 Mass. App. Div. 103, 105 (2001) ("To avoid a contract on the basis of duress, a party must show that conduct by the other party caused him to enter into the contract 'under the influence of such fear as precludes him from exercising free will and judgment.'") (quoting Convey v. President & Tr., Coll. of the Holy Cross, 445 N.E.2d 136, 140 (Mass. 1983)).

40. The classic statement of the reasonable person standard is contained in OLIVER WENDELL HOLMES, JR., THE COMMON LAW 108 (Little, Brown & Co. 1990) (1881) ("The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that.").

41. The tort of negligence involves four elements: duty, breach, causation, and damages. RESTATEMENT (SECOND) OF TORTS § 282 (1981). The reasonable person standard is generally seen as an aspect of the second element, though it plays a part in the other elements as well.

(a) such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have; and

(b) such superior attention, perception, memory, knowledge, intelligence, and judgment as the actor himself has.⁴²

The person conceived in the reasonable person standard here is a dispositional actor. The law is concerned primarily with the tortfeasor's—or the reasonable person's—dispositional qualities: her conscious thoughts (her “attention”), her perceptions, her memories, her intelligence, and, finally, the culmination of all of those features, her judgment. Situational influences are not entirely ignored. In fact, more so than with contract and many other areas of law, situational forces can be important to the outcomes in tort litigation. When applying the reasonable person standard, for instance, juries are asked to determine if a litigant's behavior was reasonable in the actor's *situation*. And, to be sure, a fair amount of the litigation process can be devoted to framing and debating causal attributions. It is not unusual, therefore, for at least one side to emphasize certain salient situational considerations. Insofar as that occurs, however, the anchor of dispositionism still significantly biases the factual and legal assessments of wrongfulness and liability.⁴³

Relatedly, tort law doctrine recognizes situational influences only where they are so palpable as to make themselves clear to the reasonable *dispositionist*. As in contract law, there are exceptional doctrines in tort law that can rebut the basic dispositionist presumption, but they are only the most palpable situational forces. A sudden tempest, for example, may excuse a wayward sailor's use and damage of a stranger's dock, under the doctrine of necessity.⁴⁴ Even there, however, the law focuses less on the situation itself, and more on the reasonableness of the actor's choice given that palpable situation. And, as the Restatement indicates, such situations are rare.⁴⁵ Circumstances that would warrant the

42. RESTATEMENT (SECOND) OF TORTS § 289 (1981).

43. Dispositionism influences tort doctrines, the parties considered relevant in any given case, and the attributions of the factfinders. That claim and evidence for it are more fully fleshed out in other work. See, e.g., Jon Hanson, Ana Reyes & Daniel Schlanger, *Attributional Positivism: The Naïve Psychology Behind Our Laws* (2004) (unpublished manuscript, on file with authors) [hereinafter Hanson, Reyes & Schlanger, *Attributional Positivism*] (examining how people make attributions of causation, responsibility, and blame, and describing how attribution theory influences law and legal theory); Adam Benforado & Jon Hanson, *The Costs of Dispositionism: The Premature Demise of Situationist Law and Economics*, 64 U. MD. L. REV. (forthcoming 2005) [hereinafter Benforado & Hanson, *Costs of Dispositionism*] (examining history of efficiency-based tort theory and comparing the relatively situationist approach of Guido Calabresi to the relatively dispositionist approach of Richard Posner and the influence of the two approaches).

44. “One is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if the act is or is reasonably believed to be necessary for the purpose of avoiding a public disaster.” RESTATEMENT (SECOND) OF TORTS § 262 (1981).

45. Most state courts' leading statements on excuse doctrines in tort law, such as duress or necessity, are voiced in cases where the doctrines are found to be inapplicable. Cf. Hanson & Yosifon, *The Situation*, *supra* note 5, at 300–01 (discussing cases).

application of the doctrine of necessity, for instance, include those in which a defendant wanted “to protect against a public enemy, or to prevent or mitigate the effect of conflagration, flood, earthquake, or pestilence.”⁴⁶ Consider another exceptional tort doctrine: incapacitation. Tort law holds that if “an actor” causes some harm because of a sudden incapacitation—such as an unexpected epileptic fit or a heart attack while driving a car, the actor will be considered negligent only if the incapacity was reasonably foreseeable to them.⁴⁷ The first draft of the Third Restatement notes that “the modern cases are impressively unanimous in accepting” the principle that an unexpected incapacity is a defense to negligence.⁴⁸ And this is not surprising—an epileptic fit or a heart attack makes a stunning case that the defendant had not dispositionally willed his allegedly tortious behavior. But making this showing of “incapacitation” is the defendant’s burden; the presumption is that the actor’s conduct was an expression of dispositional free will.⁴⁹ And the burden is a high one.

The situational clarity of an epileptic fit or a heart attack yields again to situational invisibility just as soon as disposition can once more plausibly account for behavior. Within its discussion of incapacity, the Third Restatement compares the condition of incapacity to that of “mental illness,” which generally does not provide an excuse to negligence or otherwise alter the standard of conduct.⁵⁰ That is because, according to the Second Restatement, “limited or moderate mental disorders . . . ordinarily are not especially important as an explanation for conduct.”⁵¹ Without sudden incapacity, the most important explanation for conduct is expected to be, and in the eyes of tort law almost irrebutably is, dispositional choice. On the outside, only a calamitous situation such as a fire or a storm is seen to trump the presumption that people behave dispositionally. On the inside only total incapacitation is. Tort law’s reasonable person is, no less than the rational actor or classical liberal theory’s natural man is, a dispositional actor.

This basic dispositionist perspective in tort law was succinctly stated recently in a federal judge’s order dismissing a claim seeking to hold McDonald’s liable in some measure for the obesity (and concomitant health problems), of some of its customers:

46. RESTATEMENT (SECOND) OF TORTS § 262 cmt. b (1981).

47. See RESTATEMENT (THIRD) OF TORTS § 11(b) (Tentative Draft No. 1, 2001) (“If an actor engages in substandard conduct because of sudden incapacitation or loss of consciousness brought about by physical illness, this conduct constitutes negligence only if the sudden incapacitation or loss of consciousness was reasonably foreseeable to the actor”). “Sudden incapacitation can be caused by a heart attack, a stroke, an epileptic seizure, diabetes, or other medical conditions.” *Id.* cmt. d. The epileptic fit is a favorite trope of the torts restatement, and excuse for conduct performed under such an occurrence shows up in many settings.

48. *Id.* cmt. d.

49. See *id.* (noting that the cases are agreed that the incapacitation is an affirmative defense to negligence which must be pled and proved by the defendant).

50. See *id.* § 11(b).

51. RESTATEMENT (SECOND) OF TORTS § 262 cmt. b.

As long as a consumer exercises free choice with appropriate knowledge, liability for negligence will not attach to a manufacturer. It is only when that free choice becomes but a chimera—for instance, by the masking of information necessary to make the choice, such as the knowledge that eating McDonalds with a certain frequency would irrefragably cause harm—that manufacturers should be held accountable.⁵²

The presumption is that human behavior reflects dispositional choice and, more specifically, that those eating frequently at a fast-food establishment “irrefragably” (that is, indisputably) have “appropriate knowledge” of the harms they will encounter by so doing. No liability will attach “as long as” this presumption holds out. And it holds out a long time. Instances where behavior will not be seen as evidencing free choice—such as where a manufacturer has “mask[ed]” information necessary to the choice—are the rare exception. Such instances, in fact, are “chimeras” of the expected experience of free will.⁵³ The world of humans, the real world that we think we perceive correctly, is the world of free choice. Tort law is as certain of this as was Rousseau or Jefferson.⁵⁴ It leaves little room for the possibility that our dispositionism may itself be the chimera.

c. Criminal Law

In criminal law too, dispositionism dominates. Again, it is not that situational considerations play no role. They do. Indeed, they may play as great a role here as they do in any area of law. The law does not look just to outcomes and behavior, it also attempts to assess a defendant’s state of mind when engaging in a particular act.⁵⁵ In that quite dispositionist inquiry, situational considerations are often brought to light by defense counsel in an effort to limit the defendant’s

52. *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512, 533 (S.D.N.Y. 2003). The court continued with the punchline: “Plaintiffs have failed to allege in the Complaint that their decisions to eat at McDonalds several times a week were anything but a choice freely made and which now may not be pinned on McDonalds.” *Id.*

53. See *infra* text accompanying notes 620–634 (discussing the illusion of conscious will and the human tendency to dispositionalize even inanimate objects).

54. For a more extended discussion of the role of dispositionism in the fast-food cases and in tort law, see Adam Benforado, Jon Hanson, & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645 (forthcoming Fall 2004) [hereinafter Benforado, Hanson & Yosifon, *Broken Scales*].

55. Reflecting the law’s dispositionism are the principles of voluntary action, and *mens rea*, the guilty mind. Just as with tort law, there are areas of criminal law where liability is strict and *mens rea* is not particularly relevant. In those areas, deterrence or other regulatory goals overshadow the significance of individual guilt, as for example with statutory rape laws (which in many states are *per se*, meaning that the perpetrator’s perception of the victim’s age, no matter how reasonable, is irrelevant). See generally Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960). Such cases are not the norm, however, nor do they necessarily represent a more situationist approach to criminal law (though, depending upon the justification offered, they do). It is also true that the state of mind that will satisfy the guilty mind requirement is not always intent. Often it is recklessness, and sometimes, negligence. As we suggest just above with respect to tort law, however, all of these liability standards are committed to a more or less dispositionist view of the human actor

apparent culpability. Still, the process is closely tethered to the situational insensitivity of the doctrine and the dispositionist presumptions of the factfinders.⁵⁶ The Model Penal Code states: "A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable."⁵⁷ The depth of the Code's dispositionism is illustrated by how broadly it construes volition.

The following are not voluntary acts within the meaning of [the standard set forth above]:

- (a) a reflex or convulsion;
- (b) a bodily movement during unconsciousness or sleep;
- (c) conduct during hypnosis or resulting from hypnotic suggestion;
- (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.⁵⁸

In other words, a person's behavior will only rarely be understood as the result of some force other than voluntary choice.

The doctrines of duress, heat of passion, mental disorder, and diminished capacity are as impoverished in criminal law as are their cousin doctrines in contract and tort law. The Model Penal Code's basic approach to excuse doctrines is summarized well in its formulation of duress:

It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.⁵⁹

Again, the only kind of situation that is recognized is a threat of force, a highly palpable situational influence. An actor will be excused only for those situational forces that a reasonable person, that is, a dispositional person, would see as overtaking free will. As one court cited by the Code put it: "Duress consists in [sic] forcing a person to act against his or her own will. It does not exist when a person can choose whether he or she will perform the act said to have been done under duress."⁶⁰

The excuse of mental illness is similarly narrow:

(recklessness, for example, involves a knowing disregard of a high probability that one will cause harm).

56. For an excellent, and more complete, discussion of dispositionism in criminal law, see Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges To Legal Theory and Practice*, 97 Nw. U. L. REV. 1081 (2003).

57. MODEL PENAL CODE § 2.01 (1962).

58. *Id.*

59. MODEL PENAL CODE § 2.09(1) (1962).

60. *State v. Fogarty*, 607 A.2d 624 (N.J. 1992) (citations omitted).

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.⁶¹

The strong presumption is that people, absent highly conspicuous situational constraints, enjoy substantial capacity to conform their conduct to law. Determining conduct, after all, is what the will is all about. As a practical matter, defenses of mental incapacity are almost never successful—a verdict of not guilty by reason of insanity, for example, succeeds in only one-tenth of one percent of all felony cases.⁶² The dispositionist presumption that pervades our common sense, and which is at the heart of the criminal law, is nearly irrebuttable.⁶³

D. THE HIGH STAKES OF DISPOSITIONISM—AND OF OUR ARGUMENT

Our point should by now be clear: dispositionism is more than just a fundamental axiom of law and economics; dispositionism lies at the heart of our self-conceptions, our political and legal theories, and our laws. None of what we have said thus far should be surprising. Dispositionism is, as we have emphasized, the stuff of common sense. Our purpose in reviewing a parade of dispositionism is to raise the stakes of what probably *will* come as a surprise: the dominant attributional schema informing our self-conceptions, our lay and social theories, and our laws, is, in important ways and to significant degrees,

61. MODEL PENAL CODE § 4.01(1) (1962).

62. See Michael L. Perlin, *"The Borderline Which Separated You From Me": The Insanity Defense, The Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1377 (1997). Professor Perlin recounts that in response to public outrage after President Ronald Reagan's would-be assassin John Hinckley was found not guilty by reason of insanity, Congress and many states passed legislation imposing some version of the traditional M'Naghten rule for insanity defenses, which is even more unforgiving than the Model Penal Code's approach. *Id.* at 1380–83. The M'Naghten rule exonerates a defendant on the basis of mental illness only if he did not know the nature of his act, or whether the act was right or wrong. *See id.* at 1376. The Model Penal Code's approach accepts that one might know his act is wrong but still be unable to stop himself from doing it. The distinction is not directly relevant to our argument here.

63. Professor Perlin quotes a Florida judge's revealingly dispositionist explanation of his resistance to allowing social psychological testimony in a case before him (here concerning evidence of the unreliability of witness identifications):

[I] am no blind partisan of the academic discipline concerned. Indeed, I should admit to a certain quarrel with the social "sciences" in general and psychology in particular. They are, it seems to me, founded on an almost indefensible premise: that one can fairly deduce some truths about an individual by what classes of human beings do in the aggregate. *That seems to me so at odds with the human free will that any conclusions founded on the premise are intrinsically unreliable.*

Id. at 1424 (quoting *McMullen v. State*, 660 So. 2d 340, 342–43 (Fla. Dist. Ct. App. 1995) (Farmer, J., concurring) (emphasis added)). Notice that the judge is himself relying on the even more "indefensible premise" that one can ignore what social science teaches about human beings' behavior "on the aggregate" and that from the unsubstantiated presumption of "free will" "one can fairly deduce some truths about an individual."

wrong. We look in the mirrors all around us and we see ourselves pursuing preferred ends as rational actors or reasonable persons or, at the very least, agents with determinative control over our cognitions and behaviors. We see reflections and affirmations of our dispositionist selves, but those mirrors are distorting.

The stakes of dispositionism are huge—and they are, in our view, stakes we are losing and will continue to lose if we persist in ignoring the extent of our self-deception. Our sense of ourselves is wrong not just in the details or on average, or in some bounded way.⁶⁴ Rather, it is monumentally wrong, or so suggests the best available social science.

Our critical realist purpose in what follows will be to explore a sample of evidence indicating the flaws and illusions of dispositionism, and to offer the best alternative conception of the human animal that social science (rather than intuition, common sense, faith, or tradition) can provide. We ask our readers to move back with us several steps to a decisive, though unseen, analytic moment that takes place before most legal scholarship begins, to the basic assumptions concerning the nature of the human agent. We ask our readers to focus on the very question that most legal scholarship—indeed, most people—generally treat as beyond question. Usually, when sound science is applied in legal-academic writing, it is applied only after dispositionism is already firmly, implicitly, in place. Our readers should therefore brace for the kind of elaborate analysis typical of any law and economics text or other social scientific legal study, but the analysis in this instance will begin where we believe it always should begin—at the beginning.

Many of the studies and findings we report below are as fun as they are fascinating. Often, though, they can also be quite threatening. The theories and evidence that we highlight defy our dispositionist presumptions and thus challenge our most basic expectations and beliefs about our systems and institutions, about the groups to which we do and don't belong, and about ourselves.

There is still more at stake. In *The Situation*, we sketched the basic outlines of a theory that we call “deep capture.”⁶⁵ There and elsewhere we have argued that a dispositionist conception of the human animal is generally extremely valuable to large commercial enterprises, which share an interest in expanding free markets, private property, and contract, in inhibiting profit-reducing regulation, and in justifying a normative conception of business enterprises as profit-maximizers. Where behavior is presumed to be a manifestation of free choice, and where choices are presumed to reveal dispositional preferences, then mar-

64. See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (explicating the conception of “bounded rationality,” which endeavors to employ some insights of behavioral economics in a manner which can improve upon but not fundamentally challenge the conventional law and economics paradigm). But see *infra* Part V.C.4 (describing limitations of Jolls, Sunstein and Thaler’s approach).

65. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 202–30 (explicating the deep capture hypothesis).

kets and free contracting appear to be a far more reliable means of increasing personal and social welfare than are the best guesses of regulators, and profit maximization (or shareholder primacy) seems to be similarly desirable because of its tendency to maximize consumer choice, and thus social welfare.⁶⁶ If the depth of our dispositionism can be influenced by situation—and social psychology demonstrates that it can be—then profit-maximizing firms will exercise their power over situation to promote it. Just as conventional capture theory predicts that profit-maximizing enterprises will work to capture the political and regulatory system, “deep capture” theory predicts that they will endeavor to influence the much broader situation that encourages a dispositionist outlook. We will not review the arguments concerning “deep capture” in any depth here, though we encourage readers to review our outline of it in *The Situation*⁶⁷ and to anticipate further elaboration of it in other work.⁶⁸ The purpose of this Article is to substantiate and elaborate a central premise of critical realism, that although we think we are dispositional actors, we are better understood as situational characters. Evidence that human animals are situational characters implicates and threatens to deligitimate, not only our favored self-conception, but also our laws, legal theories, and indeed, most of our social systems. So brace yourself.⁶⁹

II. MISSING THE SITUATION AND SEEING DISPOSITION

Much of the rest of this Article is dedicated to fleshing out the situational character, who we believe should retire the “rational actor” and its dispositionist brethren in our other conventional legal theories, social policies, and common

66. See Chen & Hanson, *The Illusion of Law*, *supra* note 32; see also Jon Hanson & Adam Wright, In the Driver's Seat: Why Promoting Dispositionism Is Good Business (unpublished manuscript, on file with authors) [hereinafter Hanson & Wright, In the Driver's Seat] (providing a more complete description of the connection between dispositionism and pro-market and anti-regulation policy presumptions).

67. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 225–68 (briefly describing incentives of commercial interests to promote dispositionism and providing some examples).

68. See, e.g., Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 54 (revealing how dispositionism has been employed by food, diet, and fitness industries); Chen & Hanson, *The Illusion of Law*, *supra* note 32 (describing how macro script of corporate law and meta scripts of policymaking both reflect and reinforce deep capture); Hanson & Wright, In the Driver's Seat, *supra* note 66 (describing in more detail the value of dispositionism to business interests generally).

69. Although we believe that the implications of what follows are dramatic, it is important that we not be misunderstood as claiming more than we are. We will underscore this point several times, because some previous readers have mistakenly placed our arguments into familiar—though inapposite—categories. We are not arguing that there is no such thing as free will. And we are not taking a firm position on the age-old determinism debate or embracing a new form of behaviorism. Our claim is that widely held, Western lay conceptions of the human animal or attributions regarding human behavior—as well as the related legal-theoretic conceptions, including that of law and economics—are, in particular ways, largely incorrect. We are moved far more by forces that we do not appreciate than we realize and far less by forces to which we attribute behavior than we realize.

sense.⁷⁰

A. TWO SOURCES OF DISPOSITIONISM

1. A Basic Source of Dispositionism

"[C]ompare the effect of education and the lack of it upon our human nature to a situation like this: imagine men [and women] to be living in an underground cave-like dwelling place The [women and] men have been there from childhood, with their neck and legs in fetters, so their bonds remain in the same place and they can only see ahead of them, as their bonds prevent them from turning their heads. . . . Do you think, in the first place, that such men [and women] could see anything of themselves and each other except the shadows which the fire casts upon the wall of the cave in front of them?—How could they, if they have to keep their heads still throughout life?"

~ PLATO⁷¹

In a sense, we are living in Plato's cave. We perceive in our world people acting, and we presume that we are seeing the whole of what's happening. In fact, we are looking at merely a shadow of the vast world of situational influence occurring outside our narrow purview. A basic explanation of the fundamental pattern that is at the root of dispositionism is that we are, so to speak, only human—we have limited perceptual and cognitive capacity, and a limited time in which to do our thinking. Because of those human limitations we are "cognitive misers," getting by on the conceptual cheap—making use, in most contexts, of that which is palpable, focused, and easy to understand. We see disposition in part because it is salient and easy. Conversely, we miss situation because it is neither.⁷² In short, seeing and not appreciating unseen situation is dispositionist believing.

70. There may be some circumstances in which the rational actor model remains an illuminating tool. For instance, when an actor's situation creates robust pressure for the actor to behave as if rational, the model may prove useful as a means of predicting and influencing that actor's behavior. As will become clear below, however, those circumstances are less common than dispositionists tend to suppose. Moreover, even in such circumstances the model lacks normative significance.

71. PLATO, *THE REPUBLIC* *514–15 (G.M.A. Grube trans., 1974) (c. 380 B.C.E.).

72. The "cognitive miser" explanatory starting place has been an influential one in social psychology. See, e.g., *HEURISTICS AND BIASES* (Daniel Kahneman & Amos Tversky eds., 1977); KUNDA, *supra* note 6; SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* (2d ed. 1991); PHILIP ZIMBARDO & MICHAEL LEIPPE, *THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE* (1991). The metaphor itself embraces a kind of dispositionism, one is left almost with the impression, right from the start, of the rational actor all over again, wily making efficient allocations of resources in the individual interest. But this impression is mistaken—as we will describe, the miserliness of our cognitions is a situational condition, an interior situational reality, the dynamics of which are not usually seen in our narrow conscious conception of our own thought processes. Moreover, interior situation is subject to exterior situational manipulation; what efficiency there is in our cognitive poverty may not always yield benefits to ourselves. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 225–32.

The cognitive limitations explanation of the fundamental attribution error is evidenced also by the fact that it is true of people across cultures. And yet, the depth of its grasp on our imagination of ourselves—the extent of the tendency to emphasize disposition and overlook situation—varies across situations. In some ways, it is more pronounced in the West than it is in the East.⁷³ Moreover, dispositionism deepens intergenerationally among immigrants to a new, more dispositionist culture.⁷⁴ Our dispositionism is thus, to a significant degree, culturally contingent.⁷⁵ It is, in our terms, highly situational.⁷⁶ Those variations notwithstanding, the fundamental attribution error appears to wield significant influence across all cultures.⁷⁷ We are all, in some sense, in the same cave.

2. A Deeper Source of Dispositionism

Beyond our perceptions of the world, there is another, deeper source of dispositionism that helps to explain its power within us.⁷⁸ To see it, we would like to distinguish between two types of fundamental attribution errors. The first is the sort that we have focused on thus far and is what social psychologists have meant by the term. We will call that the *exterior fundamental attribution*

73. See RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* 40–45 (2003).

74. See *id.*

75. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 250–60.

76. Indeed, the fact that dispositionism can be influenced—promoted—by situation is an important premise and piece of evidence for our deep capture thesis, which was one of the central conclusions of our introductory article and an important piece of this project. See *id.* at 157–78.

77. See *id.* There is considerable debate within social psychology about the variable patterns of dispositionism across cultures; it has been a lively area of research and debate. See NISBETT, *supra* note 73, at 10–13. Nevertheless, we feel the claims we make here occupy the heartland of social psychological thinking, and that our case rests on mostly noncontroversial propositions about humanity within social psychology. We want to make clear that the situational character, as we conceive of it through critical realism, must be subject to constant revision, both because new evidence will continue to come in from social psychology and related fields about who we are and because who we are will continue to change as our situations change over time. There is a vast literature in not only social and cultural history, but also in cultural anthropology, addressing how basic ideas of what it means to be human differ across cultures and over time. See, e.g., Clifford Geertz, *On the Nature of Anthropological Understanding*, 63 AM. SCI. 47 (1975); Hazel Rose Markus & Shinobu Kitayama, *Culture and the Self: Implications of Cognition, Emotion, and Motivation*, 98 PSYCHOL. REV. 224 (1991). These are valuable and robust findings from sophisticated social sciences, and a complete conception of the situational character—that is, of ourselves—should make use of them. While this situational contingency in the quality of our dispositionism is, again, absolutely central to our broader thesis, through much of what follows we will emphasize the deeply wired nature of our dispositionism, and the basics of its operation in all humans.

78. In that, there are numerous explanations, all of which contribute to the overall effect. Several interior situational sources of dispositionism are described below. See, e.g., *infra* text accompanying notes 523–29 (naïve realism); 444–71 (self-affirming motive); 472–78 (group-affirming motive); 479–503 (system-affirming motive); see also Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 54 (describing numerous sources of dispositionism); Adam Benforado & Jon Hanson, *Naïve Cynicism: Some Mechanisms of Dispositionism and Other Persistent Attributional Errors in Policy Debates* (unpublished manuscript, on file with authors) [hereinafter Benforado & Hanson, *Naïve Cynicism*] (summarizing those situational sources and describing some seemingly dispositional sources of dispositionism).

error. When humans look at any external setting and make causal attributions, certain key features of that setting—most importantly the observable actions of individuals—exert disproportionate influence over their evaluations. We see what “pops out” at us and tend to miss most everything else. The second fundamental attribution error concerns what we see of ourselves or, more precisely, what we see of our interiors. This *interior fundamental attribution error* is subtler, but, as we have suggested, is often true and no less important than the first.

B. THE INTERIOR FUNDAMENTAL ATTRIBUTION ERROR

“The inner world cannot be observed with the aid of our sensory organs. Our thoughts, wishes, feelings, and fantasies cannot be seen, smelled, heard, or touched. They have no existence in physical space, and yet they are real, and we can observe them as they occur in time: through introspection in ourselves, and through empathy (i.e., vicarious introspection) in others.”

~ Heinz Kohut⁷⁹

“There’s an old story about two men on a train. One of them, seeing some naked-looking sheep in a field, said, ‘Those sheep have just been sheared.’ The other looked a moment longer, and then said, ‘They seem to be—on this side.’ It is in such a cautious spirit that we should say whatever we have to say about the workings of the mind”

~ John Holt⁸⁰

The primacy of dispositionism reflects what we call the “interior”⁸¹ fundamental attribution error. That error, which is analogous to its exterior counterpart, is the tendency to “see,” and to attribute a powerful causal role to certain salient features of our interior lives that actually wield little or no causal influence over our behavior, while simultaneously failing to see those features of our interiors that are in fact highly influential. Those elements of our interior experience that are clearly felt help to make possible, if not likely, a theory of ourselves in which dispositions play the dominant role in our behavior. We are primed by our felt interior experience and the resultant pre-theoretic axioms to see disposi-

79. Heinz Kohut, *Introspection, Empathy, and Psychoanalysis: An Examination of the Relationship Between Mode of Observation and Theory*, 7 J. AM. PSYCHOANALYTIC ASS’N 459 (1959), reprinted in *THE SEARCH FOR THE SELF: SELECTED WRITINGS OF HEINZ KOHUT, 1950–1978*, at 205, 205–06 (Paul H. Ornstein ed., 1978).

80. JOHN HOLT, *HOW CHILDREN LEARN*, at x (1967).

81. Our definition for this term will become clearer below when we look more closely at some of the interior situational forces. For now, it is sufficient to understand “interior” as “inside of us.” Cf. JOHN SABINI, *SOCIAL PSYCHOLOGY* 210 (2d ed. 1995) (“Behaviors that psychologists are interested in are caused by the interplay of things outside the skin (stimuli) and things inside the skin (the central nervous system). So all behavior . . . has sources both inside the skin and outside it.”).

tions and to overlook potentially more significant influences. In other words, the interior fundamental attribution error contributes significantly to the exterior fundamental attribution error. Below, we will summarize some of the unappreciated, but highly influential, interior forces that social psychologists have identified. But the remainder of this section will describe those familiar aspects of our interiors that, while ultimately a woefully incomplete picture, are the most readily “observed” aspects of our interiors.

When we seek—consciously or not—to understand what we are or why we behave as we do, we tend to attribute a vast majority of the causal weight to certain key mechanisms. As with the exterior, we see—or, as Heinz Kohut describes it, introspect—only a small part of what moves us.⁸² Only a fraction of our interior setting seems vivid and abiding, while the greater portion is pallid and evanescent. Indeed, there are facets of our perceived interior experience that are so prominent that our sense of ourselves is completely dominated by them, and our existence apart from them is difficult to conceive. These basic features can be roughly described in four categories of felt inner experience: *thinking* (that is, self-conscious, articulable evaluation); *preferring* (which includes a variety of perceived interior sources of choice proclivities, such as our dispositions, wishes, goals, values, feelings, attitudes, and tastes); *willing* (the experience of consciously choosing or intending); and, the most visible of all, *acting* (our sense of the culmination of our thoughts, preferences and will, in our behavior).⁸³

That basic schema, which, if we are right, should be more or less familiar to readers from their own experience of their own inner lives, is loosely depicted in Figure 1:

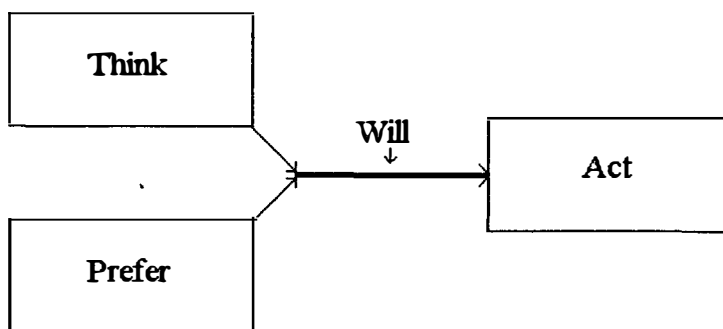


Figure 1.

Social psychologists who have studied self-conceptions across cultures summarize this Western person schema as follows:

82. See *supra* text accompanying note 79.

83. One might add one or more of a number of other features, such as talents or abilities, without altering the thrust of our point.

The person is believed to consist of a set of “internal,” “personal” attributes such as . . . personality traits, preferences, subjective feeling states, beliefs, and attitudes. These attributes are thought to be internal and personal in the sense that they come from within and characterize the person *regardless of the situation* (that is, a person’s attributes are not generated by or relative to current social context). Taken together, these attributes define each person as an autonomous, freely choosing, special individual. Within this social system, a human being is a person by virtue of being distinguishable from others on the basis of these attributes, which collectively constitute the person’s social identity.

The independent cultural model that prevails in North America and in much of Europe emphasizes certain features of the person as natural, necessary, “healthy,” and good. The person

- is a bounded, coherent, stable, autonomous, “free” entity.
- “possesses” a set of characteristic identifying attributes—preferences, motives, goals, attitudes, beliefs, and abilities—that are the primary forces that enable, guide, or constrain actions.⁸⁴

And, as Daniel Wegner writes, “[w]e each have a profound sense that we consciously will much of what we do, and we experience ourselves willing our actions many times a day.”⁸⁵

The four basic, salient elements of our interior—thinking, preferring, willing, and choosing (or acting) —significantly shape the parameters, the building blocks, and the pre-theoretic axioms of our self-conceptions and our theories and, in turn, shape how we construe and evaluate our environs.⁸⁶ Those features

84. Alan Page Fiske, Shinobu Kitayama, Hazel Rose Markus & Richard E. Nisbett, *The Cultural Matrix of Social Psychology*, in *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 915, 920 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998) (emphasis added). As that quotation indicates, our description of our perceived interiors is informed by, and largely consistent with, social psychological evidence on the “conceptual self.” See also Chie Kanagawa, Susan E. Cross, & Hazel Rose Markus, “Who am I?” *The Cultural Psychology of the Conceptual Self*, 27 *PERSONALITY & SOC. PSYCHOL. BULL.* 90, 91 (2001) (summarizing the Western view of the self “as a more-or-less integrated whole composed of abilities, values, personality attributes, preferences, feeling states, and attitudes”); NISBETT, *supra* note 73, at 47–78 (contrasting schemas of the human animal in “Western” and “Eastern” cultures); DANIEL M. WEGNER, *THE ILLUSION OF CONSCIOUS WILL* 2 (1992) (describing our perception of “will”). But our assertions are also based in part on our own observations of what others seem to find obvious and incontestable as well as on our own naïve introspection. As will be detailed throughout this Article, others have similarly found many of the features we mention to be obvious and incontestable.

It is important to emphasize that we are—our thesis is—not wed to the details of this already rather stylized description of the interior fundamental attribution error, but we do stand by our claim that a process analogous to the exterior fundamental attribution error is occurring in our interiors (and probably for similar reasons). Our goal here is simply to sketch a simple account of our oversimplified perceived interiors. As will become clear in Part V, even if the description provided in this section oversimplifies the widely held, oversimplified self-conceptions, there is no disputing that our interiors remain uncharted mysteries to most of us even as we maintain the belief that our interiors are well understood.

85. WEGNER, *supra* note 84, at 2.

86. Cf. Claude M. Steele, *The Psychology of Self-Affirmation: Sustaining the Integrity of the Self*, in 21 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 261, 295 (Leonard Berkowitz ed., 1988) (explaining

are especially “visible” and influential, because they themselves can be, and typically are, understood as causally connected.⁸⁷ We “know” that we have preferences, which we “know” are revealed and informed through our thinking and acting; we “know” that we *think* about our options and decide according to our *preferences* and *will* our *acts* accordingly.⁸⁸ Those known features and their connections are, we suspect, too common, too self-evident, too salient, and too widely shared to be discounted in favor of the many interior features, explored below, that are less easily seen or experienced.

1. Thinking and Being

Take thinking. Most of us understand thinking—that is, the thinking that we are conscious of—as one of the primary occupations of life. As a species, we have designated ourselves “*homo sapiens*” (Latin for “thinking beings”) for a reason. The story of Adam and Eve’s eating of the apple from the forbidden Tree of Knowledge can be understood as a story about how we humans gained our characteristic ability (or curse) of reflective thinking. When Descartes announced the seemingly incontestable “I think therefore I am” as the foundation of human understanding, he was beginning the modern philosophical project with our most basic experience of ourselves. He was articulating, among other things, a widely shared sense of what it means to be alive (as a human, at least):

From this I knew that I was a substance whose whole essence or nature is solely to think, and which does not require any place, or depend on any

that the idea “that the ‘self is a concept about oneself’ . . . has taken firm hold in social psychology, along with the tendency to explain self-phenomena as stemming from the operations of this knowledge structure. These structures heighten subjects’ sensitivity to self-relevant stimuli . . . , facilitate the processing and memory of these stimuli . . . , foster resistance to information that is incongruent with the structure . . . , and foster assimilation of congruent information . . .”).

87. People tend to embrace plausible “causal” theories even when wrong precisely because they are plausible causal theories. See generally Timothy De Camp Wilson & Richard E. Nisbett, *The Accuracy of Verbal Reports About the Effects of Stimuli on Evaluations and Behavior*, 41 SOC. PSYCHOL. 118 (1978). For a more recent and thorough treatment of this tendency and its causes, see Timothy Wilson’s fascinating book, *Strangers to Ourselves: Discovering the Adaptive Unconscious* (2002).

88. Cf. Philip N. Johnson-Laird & Eldar Shafir, *The Interaction between Reasoning and Decision Making: An Introduction*, 49 COGNITION 1, 1–2 (1993) (describing the “folk” psychology of reasoning and decision making—“the view that most individuals in our culture accept about mental life”—as follows: “Human beings have desires and needs, and they use their knowledge to decide what to do and to infer how best to achieve their goals. They reason in order to make decisions and to justify them both to themselves and others; they reason in order to determine the consequences of their beliefs and of their hypothetical actions; they reason to work out plans of action. They make decisions about what values to treat as paramount; they make decisions about what actions to take; and they make decisions about what information to base their reasoning on.”); Arthur Lupia, Mathew D. McCubbins & Samuel L. Popkin, *Beyond Rationality: Reason and the Study of Politics*, in ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY 1, 1 (Arthur Lupia et al. eds., 2000) (“[C]hoice is the product of reason, where reason is the human process of seeking, processing, and drawing inferences from information.”).

material thing, in order to exist. Accordingly, this “I”—that is, the soul, by which I am what I am—is entirely distinct from the body⁸⁹

The Cartesian insight is so powerful because, at some level, it seems obviously right. Thinking seems pretty good evidence of being. Thinking about thinking seems better still. And there is little meaning in (human) being without thinking. Everyone reading this article knows what it means to be and to think, and probably understands each as a key, perhaps necessary, feature of the other.

2. Preferences and Identity

Similarly, most of us know what it means to prefer oranges to apples (or, perhaps, apples and self-awareness to a heavenly garden of ignorance) and to choose one or the other, even if we have trouble comparing them. Much of our thinking experience pertains to being struck by, and reacting to, the things, people, and experiences that we like and those that we do not. While our Cartesian experience of thought assures us of our existence, our perceived preferences help inform us about our particular identity in the broader backdrop of being. That which we like and do not like, or value and disvalue, and our relative rankings of the particulars among them, go far, it seems, in creating our identities. Our perceived similarities to, and dissimilarities from, those people around us are based significantly, though by no means solely, on our perceptions of our shared and distinct tastes, values, preferences,⁹⁰ and dispositions. And those identities are commonly, perhaps increasingly, “expressed” through our choices—work choices, if such are available, and particularly these days our consumption choices.⁹¹

89. RENE DESCARTES, DISCOURSE ON THE METHOD Pt. IV (1637), *reprinted in* DESCARTES: SELECTED PHILOSOPHICAL WRITINGS 20, 36 (John Cottingham et al. trans., Cambridge Univ. Press 1988).

90. As indicated earlier, our identities depend importantly on all the features of our perceived interiors, and not just our preferences. And, of course, they depend as well on aspects of ourselves that have little to do with our perceived interiors. As William James wrote in 1890:

In its widest possible sense . . . a man's Self is the sum total of all that he can call his, not only his body and his psychic powers, but his clothes and his house, his wife [or husband, or partner] and children, his ancestors and friends, his reputation and works. . . . If they wax and prosper, he feels triumphant, if they dwindle and die away he feels cast down.

WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 291–92 (Encyclopaedia Britannica 1952) (1890). The naïve account of our interiors, it should be clear now if it wasn't before, strongly reflects the cultural (and, thus, sometimes patriarchal) lens through which we view our interiors. In addition, our identities turn importantly on features of ourselves that are often perceived as fixed or given by nature or some larger external influence: abilities, talents, genetics, race, gender, age, appearance, health, ethnicity, language, social class, and so on.

91. *See generally* MARYE C. THARP, MARKETING AND CONSUMER IDENTITY IN MULTICULTURAL AMERICA (2001) (describing the disintegration of the “mass market” and the construction of individual identities through distinctive consumption choices). This vision, like the others, is likely more or less culturally contingent. *See, e.g., id.* at 1 (“In multicultural America, your age, address, language and accent, skin color, or shape of eyes, as well as the music you listen to, whom you have sex with, and where you work, are the tools with which American consumers construct, communicate, and change social identity. Rather than lifetime, fixed definitions of ourselves, these self-made, chosen identities are built

3. Willing, Acting, and Freedom

We “see” ourselves thinking, we “see” our preferences, and perhaps most decisively to our dispositionist sense of ourselves, we experience ourselves intentionally *willing* the tangible result of the whole process, our resultant *actions*. As Harvard psychologist Daniel Wegner puts it, the “conscious will explanation” of our own conduct has a “deep[] grip on our imagination.”⁹²

We can’t possibly know (let alone keep track of) the tremendous number of mechanical influences on our behavior because we inhabit an extraordinarily complicated machine. So we develop a shorthand, a belief in the causal efficacy of our conscious thoughts. We believe in the magic of our own causal agency.⁹³

Thus, “[w]e have a profound sense that we consciously will much of what we do, and we experience ourselves willing our actions many times a day.”⁹⁴

Saying much more about this sense of our own *will* is especially hard, and the challenge of its fuller elaboration has occupied artists and writers for generations.⁹⁵ In the interest of making explicit our common-sense experience of the human interior, it suffices to say that we feel within ourselves, associated with our own behaviors, “a kind of internal ‘oomph’ that somehow certifies authentically that one has done the action.”⁹⁶ And so it is that “most people believe that their conscious feelings and judgments control their actions.”⁹⁷ We see ourselves making choices among options, and the choices reflect our particular identity as against the rest of the world and the options not taken. Thus our actions, to the extent that they are perceived as freely taken, are seen as manifestations of our thinking, preferring, and willing. We often experience such actions as exercised freedom, our ability actually to manifest in the world the being and identity that we otherwise know makes us who we are in our

upon a constantly changing foundation of personal characteristics and behaviors. It is a lifetime project, always in flux, never finalized, but *frequently expressed by how we spend our money and time.*” (emphasis added)); see also Douglas A. Kysar, *Kids & Cul-de-Sacs: Census 2000 and the Reproduction of Consumer Culture*, 87 CORNELL L. REV. 853, 890–94 (discussing the role that consumption plays in our self-definition in a culture that provides few alternatives); *id.* at 891 (“Individuals no longer receive their place in the world from authoritarian dictate or historical happenstance; instead, they must fashion it themselves from some combination of available cultural and material resources. The claim of consumer culture theorists is that individuals in the modern world (and particularly in the United States) have sought to satisfy this obligation of self-definition through the medium of consumption.”); J. McManus, *Tapped In, Tapped Out*, AM. DEMOGRAPHICS, Dec. 1988, at 6 (“The brand is merely a beacon for a set of values in the broad spectrum of choices.”).

92. WEGNER, *supra* note 84, at 2.

93. *Id.*

94. *Id.*

95. For a great overview of generations of grappling with the question of will, see DANIEL DENNETT, *CONSCIOUSNESS EXPLAINED* (1991).

96. WEGNER, *supra* note 84, at 4.

97. Johnson-Laird & Shafir, *supra* note 88, at 2; cf. *id.* (adding that the “claim is a legacy of the Cartesian identification of the mind with consciousness”).

minds.

4. Summary of the Interior Fundamental Attribution Error

"A man need not, it is true, do this or that act,—the term act implies a choice,—but he must act somehow."

~ Oliver Wendell Holmes, Jr.⁹⁸

Just as the availability of human activity tends to overwhelm our causal understandings of our exteriors, the availability of thinking, preferring, willing, and acting (and perhaps some other similarly salient, conscious features) overwhelms our causal understandings of our interiors. We perceive ourselves thinking, we perceive our own dispositions or preferences, and we perceive ourselves acting freely in accordance with our cognitions, tastes, and free will. So it is that certain assumptions about our psychological processes are said to be "axiomatic, though generally implicit, in many modern Western cultures".⁹⁹

- Actions are freely chosen.
- Choices imply a preference.
- Preferences are stable over time.
- Preferences implicate the identity of the self.
- Outcomes are mostly controllable.
- People are responsible for (and hence the self is implicated in) the choices they make and the resultant outcomes.
- Smart (good) people make good choices, whose outcomes they are happy with.¹⁰⁰

We assume, then, that actions reflect something within us—our choices. Those choices reflect a stable set of preferences, which themselves determine and reflect our "personality" or identity. Because our behavior reflects such choices, most of what happens is controllable—simply a matter of choice. And because outcomes are subject to a person's control, each person is responsible for the outcomes that define her circumstances. Furthermore, outcomes reflect something about the person making the choices: Good people enjoy good outcomes, and bad outcomes tend to happen to bad people.

With that schema of the human animal in place, we are easily convinced that we are who we claim ourselves to be—free, autonomous, thinking, preferring actors—and there is very little cognitive space for considering the role of

98. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 80 (Little, Brown & Co. 1990) (1881).

99. Fiske, Kitayama, Markus & Nisbett, *supra* note 84, at 939.

100. *Id.*; see also Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, ATLANTIC MONTHLY, Aug. 1999, at 44, 47 ("Ours is an individualistic culture; forward movement is seen to come from within.").

influences within us and around us.¹⁰¹ In other words, what we “see” gives rise to fundamental attribution errors both externally and internally.¹⁰²

These are the clichés of our self-understanding: seeing is believing, and out of sight, out of mind.

5. The Situation of Our Interiors

“The more we examine the mechanism of thought, the more we shall see that the automatic, unconscious action of the mind enters largely into all its processes. Our definite ideas are stepping-stones; how we get from one to the other, we do not know: something carries us; we do not take the step.”

~ Oliver Wendell Holmes, Sr.¹⁰³

Our concern here is less with what so many of us, laypeople and theorists alike, find self-evident and more with what we do not. As was true exteriorly, it is the unavailable or less salient features of our interiors that often wield the most influence over us. It is, in the words of the elder Holmes, something “we do not know” that “carries us.” Even Descartes’ terse proposition about the unity of thinking and being is flawed in an illustrative way. The Cartesian insight imagines thinking as that cognitive process that we are *aware of* and that is independent from all else, including even the body in which that thinking occurs. That is the flaw that neuroscientist Antonio Damasio has dubbed “Descartes’ Error” in his book of the same title.¹⁰⁴ Human cognitive processing is not simply the stuff of conscious thinking. Our thinking is situational, and is influenced outside of our awareness and control by everything from our bodies to our social environments: “Consciousness, the feature at the center of what makes humans unique, is the culprit [of our dispositionism], for it permits a view of who we are and what we are capable of that is independent of the knowledge and feelings that may drive beliefs, attitudes, and behavior.”¹⁰⁵ But,

101. As we described in *The Situation*, the self-conceptions of many people in Eastern cultures render them less subject to some aspects of the fundamental attribution error. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 250–60.

102. It is worth noting that what we perceive about ourselves may depend on the perspective that we have of ourselves. Robert Wicklund, building on the work of George Mead, argues that we have two selves: the “I,” which is the acting, behaving feature of ourselves that engages our environs according to our desires, values, and beliefs; and the “me,” which is the self-reflective, self-aware feature of ourselves. The “me” emerges, for instance, when we see ourselves as others might. And “I” behavior can change to a “me” experience by placing ourselves in front of a mirror or a video camera. See Robert A. Wicklund, *Objective Self-Awareness*, in 8 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 223 (L. Berkowitz ed., 1975).

103. Oliver Wendell Holmes, Sr., *Mechanism in Thought and Morals: An Address Delivered Before the Phi Beta Kappa Society of Harvard University* (June 29, 1870).

104. ANTONIO R. DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* 249 (1994).

105. Mahzarin R. Banaji, *Ordinary Prejudice*, *PSYCHOL. SCI. AGENDA*, Jan.–Feb. 2001, at 8, 8 [hereinafter Banaji, *Ordinary Prejudice*]; see also Mahzarin R. Banaji, *Implicit Attitudes Can Be Measured* [hereinafter Banaji, *Implicit Attitudes*], in *THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF*

as Damasio states:

[T]he comprehensive understanding of the human mind requires an organismic perspective; that not only must the mind move from a nonphysical cogitum to the realm of biological tissue, but it must also be related to a whole organism possessed of integrated body proper and brain and fully interactive with a physical and social environment.¹⁰⁶

Thinking may imply being, but our thinking is not what we experience it to be. The problem is, again, one of perceiving disposition and overlooking situation. That partial vision is, as we've argued, a key feature of being human and may be part of what Augustine was suggesting when he wrote: "Fallor ergo sum" (I am deceived, therefore I am)¹⁰⁷ or, in any event, it is what we mean when we write "I think dispositionally, therefore I am deceived."

Our point in this discussion has been that there is more to the "situation" than what occurs outside of the human actor. Just as there is an unseen exterior situation that gives rise to the exterior fundamental attribution error, there is an interior situation—undetected but incredibly powerful—that gives rise to the interior fundamental attribution error. Our experiences are wrapped in two layers of situational influences. To better understand what moves us requires understanding them both; and to better understand the power of either requires understanding its relationship with the other.

6. Situation Defined

The bulk of this Article is dedicated to providing a more thorough examination of interior situation. Before proceeding with that, however, it may be helpful to offer a slightly more encompassing definition of situation. Situation, as we mean it, includes anything that influences our attitudes, memories, cognitions, emotions, behaviors, and the like in ways that we tend not fully to appreciate or control. The situation, then, is part of the human predicament: it is in and around us, it is influencing us, and it is doing so in ways that we do not appreciate, do not understand, do not have a place for in our theories, and do not

ROBERT G. CROWDER 117, 129 (H.L. Roediger, III et al. eds., 2001) (describing the problem earlier noted by William James in creating psychological constructs "that the knower and known are one and the same. For many constructs like memory, attitude, or consciousness, the knower and known have a close relationship, a condition ripe for delusions that derive from intuitive notion of what memory, attitude, or consciousness ought to be. Among the most invidious of traps when investigating mental constructs with which one's own thinking apparatus has intimate familiarity is the demand that the constructs ought to feel 'real,' even to the scientist.").

106. DAMASIO, *supra* note 104, at 252.

107. *Id.* at 249. Damasio quotes St. Augustine but does not make the same point we are making. Interestingly, Damasio himself, and other neuroscientists, have recently been criticized for, in effect, replicating the Cartesian error. See M.R. BENNETT & P.M.S. HACKER, *PHILOSOPHICAL FOUNDATIONS OF NEUROSCIENCE* (2003); Dennis Patterson, Book Review, *NOTRE DAME PHIL. REVIEWS* (Sept. 10, 2003) (reviewing BENNETT & HACKER, *supra*), at http://ndpr.icaap.org/content/archives/2003/9/patterson_bennett_hacker.html.

individually or dispositionally control. Although that may strike many as an unorthodox understanding of situation,¹⁰⁸ it is designed to upend the unexamined orthodoxy by emphasizing not just that we humans are blind, but that we are blind to our blindness.¹⁰⁹

III. GETTING TO KNOW THE SITUATIONAL CHARACTER

A. INSIDE THE SITUATIONAL CHARACTER

"Consciousness of the mind is precisely the same as consciousness of kidney function. Both the brain and the kidney are organs that result in bodily processes. . . . For both, we can observe the states that result from activity in the system, but we have no special access to how either works. We have only the evident products of each to consider and from which to fabricate models of process. Naïve theoretical models result from observations of the products of the system and scientific models (right or wrong) result from scientific methods."

~ Robert Crowder¹¹⁰

1. Flies, Rats, and Science

Where do flies come from? What about rats? Fish? Microorganisms? "From the time of the ancient Greeks until well into the 19th century, it was common 'knowledge' that life could arise from nonliving matter."¹¹¹ This was the idea of "spontaneous generation." Flies were born of rotting meat, rats from stinking rubbish, fish from water-covered mud, and microorganisms from almost anything. The theory was intuitive and seemed consistent with the evidence. Get rid of the rotting meat, the flies disappear. Clean up the trash, no more rats.

There was really no reason to reject what seemed so obvious. Then, in the late Renaissance, Italian scientist Francesco Redi noted a connection between

108. Webster's defines situation as "the way in which something is placed in relation to its surroundings." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1098 (10th ed. 1998). That is only part of what we mean by the term.

109. To be clear, our definitions of related concepts are similarly unorthodox. Social psychologists traditionally use the term "disposition" to indicate something internal, like personality, preferences, desires, moods, and so on, as opposed to "situation," by which social psychologists often mean something external, like environmental cues, time constraints, social pressures, and the like. The "fundamental attribution error," as social psychologists typically use the term, refers to the tendency to over-attribute to disposition, thus defined, and under-attribute to situation, thus defined. When we write of "dispositionism" in this Article, we are mostly referring to the particular causal schema generally employed by Westerners to explain behavior: that is, stable (person-specific) preferences combined with some thinking and will. The "fundamental attribution error," as we use the term, is therefore more profound (indicating a failure to appreciate the role of both the exterior situation and the interior situation in explaining behavior) than that imagined when the phrase is conventionally used. We will refine that terminology in future work, but those definitions should be adequate for present purposes.

110. Robert Crowder, *The Brain, the Kidney, and Consciousness* (unpublished manuscript, c. 1990), in Banaji, *Implicit Attitudes*, *supra* note 105, at 130.

111. NEIL A. CAMPBELL & JANE B. REECE, *BIOLOGY* 516 (6th ed. 2002).

squirming white maggots and flies and decided to try to test the theory of spontaneous generation. He cleverly placed meat in two jars in the open air with a mesh cover over one to allow air in, but not flies. We can skip the particulars of the “discovery,” because, today, spontaneous generation is so obviously wrong, so inconsistent with our intuitions and the evidence, that there is no need to review them. Redi’s findings put a fly in the ointment of spontaneous generation, but still the idea persisted—indeed, thrived—among scientists and lay people well into the 1800s. At last, in the midst of intense scientific controversy, Louis Pasteur settled the matter in an award winning set of experiments, which, again, we needn’t review for *our* audience.¹¹²

But little of what Redi and Pasteur showed reduces the predictive power of spontaneous generation. It remained, one might say, a powerful positive theory of fly genesis: flies act *as if* they spontaneously generate from old meat. If you don’t believe us, leave some out. And the hold of spontaneous generation as an explanatory theory comes from the fact that it is *true* that we find flies where we find rotting animals, it is *true* that we find fish where we find mud, and it is *true* that we find rats where we find garbage. The associations are accurate. It is just that those associations do not explain the phenomena. There is more to the situation.

The point is a general one. In attempting to understand our worlds, we commonly create theories from the features of our environment that we observe or to which we have comparatively easy access. Good science allows (sometimes forces) us to look again and more closely at that environment. It permits us to see illusion where we once saw truth and inspires a search for a new truth (and, if possible, a broader truth that also explains the associations underlying the illusion).

The purpose of this section—and the bulk of this Article—is to demonstrate how social psychology, social cognition theory, cognitive psychology, and cognitive neuroscience have shattered the illusions that most of us experience as truths about ourselves and what moves us. This science has been necessary to pierce our self-illusions precisely because while it is *true* that we experience ourselves thinking, *true* that we experience ourselves preferring, *true* that we

112. See EVELYN FOX KELLER, MAKING SENSE OF LIFE: EXPLAINING BIOLOGICAL DEVELOPMENT WITH MODELS, METAPHORS, AND MACHINES 22–49 (2002); Russell Levine & Chris Evers, *The Slow Death of Spontaneous Generation (1668–1859)*, at http://www.accessexcellence.org/RC/AB/BC/Spontaneous_Generation.html (last visited Dec. 27, 2004) (“The theory of spontaneous generation was finally laid to rest in 1859 by the young French chemist, Louis Pasteur. The French Academy of Sciences sponsored a contest for the best experiment either proving or disproving spontaneous generation. Pasteur’s winning experiment . . . boiled meat broth in a flask, heated the neck of the flask in a flame until it became pliable, and bent it into the shape of an S. Air could enter the flask, but airborne microorganisms could not—they would settle by gravity in the neck. As Pasteur had expected, no microorganisms grew. When Pasteur tilted the flask so that the broth reached the lowest point in the neck, where any airborne particles would have settled, the broth rapidly became cloudy with life. Pasteur had both refuted the theory of spontaneous generation and convincingly demonstrated that microorganisms are everywhere—even in the air.”).

experience ourselves willing, and *true* that we experience ourselves choosing, there is, in fact, more to the situation.

2. A Closer Look at the Interior Situation

What many people describe as “thinking,” social psychologists would call “cognitions.” Cognitions, succinctly defined, are the mental activities associated with acquiring and processing information and are associated with some forms of perceiving, conceiving, reasoning, judging, remembering, and imagining. What we experience as “preferences,” social psychologists would label “attitudes”¹¹³—“a categorization of a stimulus along an evaluative dimension”¹¹⁴ or “[a] learned predisposition to react to a given situation, person, or other set of cues in a consistent way.”¹¹⁵ Social psychologists would label what we commonly see as choices as “behavior.” *Behavior* refers to actions that individuals take, such as voting, buying, shocking, and doing legal theory. It also refers, less obviously, to actions that individuals do not take.¹¹⁶

Social psychology thus recognizes the self-evident features of our interiors, though it uses slightly different terms to represent them.¹¹⁷ But social psychology and its sister disciplines have not been satisfied with our intuitive self-understandings. Social psychology has attempted to understand the nature of our interior situations—the aspects of our experience that elude our conscious awareness.¹¹⁸ And it has discovered a great deal about our interior situations that is both surprising and troubling.¹¹⁹ Among other things, it has found that “[o]ur minds contain knowledge of which we are unaware. Our feelings can be impervious to the assertion of conscious will. Our behaviors subsume acts that are unintended, even opposed to those that are intended or consciously desired.”¹²⁰

113. Preferences might also be labeled “affective responses,” a concept we discuss below. *See infra* Part III.C.3.

114. FISKE & TAYLOR, *supra* note 72, at 463.

115. RAY CORSINI, *THE DICTIONARY OF PSYCHOLOGY* 76 (2002).

116. ZIMBARDO & LEIPPE, *supra* note 72, at 32.

117. Social psychology has had somewhat less to say about the felt experience of “the will,” but what work there has been is, we think, incredibly revealing, and we will turn to it towards the end of this Article. *See infra* Part III.E.2 (discussing the illusion of conscious will).

118. The distinction between situational and dispositional is sometimes a difference in degree rather than a difference in kind. Some interior situational factors, like those on the exterior, can often be seen—with some effort. They are situational because we humans *tend not* to see them. They are typically nonreflective and automatic.

119. It is revealing, we believe, that the assumptions now made by economists resemble those once made by early social psychologists. *See infra* Part III.B.2.b (summarizing early attributionists); *infra* Part III.C.1.a (discussing traditional view that attitudes were stable); *see also* FISKE & TAYLOR, *supra* note 72, at 465. It was only through testing those assumptions that social psychologists came to discover the flaws in their intuitively appealing theories. The point here is not to criticize economists for failing to test their pre-theoretic axioms (we will make that criticism below, *see infra* Part V.A–B), but to provide more evidentiary support for our claim about the naïve view of our interiors that most of us, including those who set out to study our interiors, tend to hold, at least initially.

120. Banaji, *Ordinary Prejudice*, *supra* note 105, at 8.

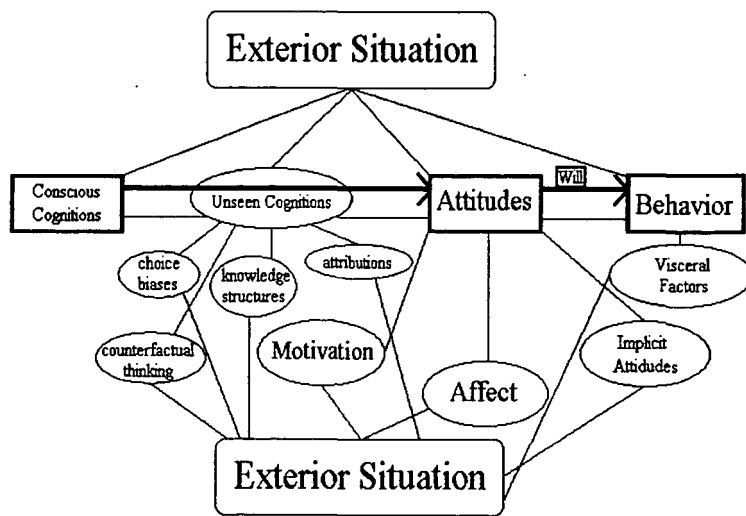


Figure 2.

Although we may find intuitive the bold boxes and bold causal connections depicted in Figure 2, it is the effect of less salient features of our interiors (the ovals in Figure 2) on our interiors and the effect of our largely unseen exterior on those interior attributes that are more responsible for our behavior.

The balance of this Part will employ the lessons of social psychology to turn dispositionism on its head. To do so, it will highlight some of the many ways in which we are moved by what we do not see and in which what we do see is illusion. Section B summarizes what social science has revealed about the unseen features of our “thinking” or cognitions. Section C reviews key unseen aspects of our “preferences” or attitudes. Section D examines some surprising evidence of how our “choices” do not always follow from our thinking, preferring, and willing. And Section E reviews evidence that our “will” can itself be illusion. Not only does each section demonstrate the fallacies of our self-schemas,¹²¹ it also helps to make clear how each element of our interior situation renders us vulnerable to exterior situational manipulation.

B. UNSEEN COGNITIONS (VS. “THINKING”)

Take thinking. There is an immense gulf between the way we think and the way we think we think.¹²² Our cognitions are often not conscious, and, of

121. See *supra* text accompanying notes 84–88 (reviewing the conventional Western schemas for human behavior).

122. See Johnson-Laird & Shafir, *supra* note 88, at 2 (“Individuals are often not aware of how they reason, having at best only glimpses of the process. They are aware of the results, not the mechanism. What they say about their reasoning does not tally with its real nature . . .”); *id.* at 3 (“[I]ntrospection is not a direct route to understanding mental processes, and, as far as we know, there is no direct

course, we tend to have very little sense of what we are thinking when it is not conscious. Just as we are at any given moment in tune with none or, with the help of some electronic device, just a tiny fraction of the broadcast signals and electromagnetic frequencies enveloping our exteriors, so it is with the cognitive signals enveloping our interiors. And often even our attempts to tune in one single wavelength are likely to meet with some crossed signals and iffy reception.

Do you doubt this? If so, can you avoid thinking of a *chocolate chip cookie* right now?¹²³ And if you are not thinking of a chocolate chip cookie, what devices are you using to avoid it?¹²⁴ How strong are those devices? How do you explain your occasional inability to rid your mind of a song or advertising jingle? And, when that happens, do you ever remember the moment in which that hard-to-shake ditty quits playing in your head or does it just fade away without your knowing? Has your mind snagged on something you have read in this article so far? Did it blanch, for instance, when it came to the phrase “squirming white maggots?” If so, were you aware of it as it happened, or did it take our question now to “remind” you that, yes, it had happened. Have you ever arrived at work not remembering anything about your trip to get there—even when you were driving? More seriously, consider the thoughts about the desires, images, or worries moving in your mind that you try to silence but sometimes cannot, the thoughts that distract you, occupy you, or leave you restless. Conversely, consider the times when you want to focus on a topic or idea, perhaps our argument here, or something about your life, but find it difficult or impossible to do so.

In short, a little casual empiricism, in the form of introspection, makes fairly obvious something of which most of us tend usually to be unaware. Even the most central features of our interior seem at times recalcitrant and at other times uncontrollable. Regardless of whether we are cognizant of or whether we can control our cognitions, social psychologists have identified a plethora of interior situational features that bias or influence those cognitions and, in turn, our attitudes. We will focus on two general types of cognitive biases: *choice biases* and *process biases*.

route.”); Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977); J. St. B. T. Evans, D.E. Over & K.I. Mantonlow, *Reasoning, Decision Making and Rationality*, 49 COGNITION 165 (1993).

123. In other words, can you prevent the image or idea of a chocolate chip cookie still warm from the baking pan, perhaps next to a glass of cold milk, from coming to mind? There is evidence that our attempts to suppress a thought often backfire, making the thought more prominent in our consciousness. Daniel Wegner has labeled this effect the “ironic reversal.” WEGNER, *supra* note 84, at 4; *see also* KUNDA, *supra* note 6, at 299. Kunda refers to that effect as the “hyperaccessibility of suppressed thoughts.” *Id.* at 300–01.

124. According to Fiske and Taylor, “[t]he only way out, as successful dieters and practiced meditators know, is to find a substitute thought,” a solution that is harder than it sounds. *See* FISKE & TAYLOR, *supra* note 72, at 279–80; *see also* KUNDA, *supra* note 6, at 300.

1. Choice Biases

We begin with “choice biases” because, of the innumerable interior situational features that social psychologists have discovered, these have received the most attention from economists and legal theorists. As we will explain below, the reason for this situational foot in the door of economics stems from the fact that these biases most clearly influence (and challenge economists’ typical assumptions regarding) people’s *choices*; and to economists and legal economists, choices are the most significant of dispositional interior features.¹²⁵ Thus, by “choice biases,” we are referring to the growing body of evidence of “heuristics” and “biases” that, according to economic behavioralists, lead to systematic anomalies to the basic “rational actor model.” Partially because they are now quite fashionable in academic policy literatures, we can spare the reader a substantial review of choice biases.¹²⁶ We briefly describe a sample of two types of choice biases: intra-temporal biases (of which we will highlight three) and inter-temporal biases.

a. Intratemporal Effects

Most of the best-known choice biases occur within a precise time period and largely without relation to temporal considerations. In this subsection, we briefly consider three of them: heuristics, endowment effects, and framing effects.

i. Heuristics

People, for good reason, are cognitively frugal. Some say, as we noted earlier, that humans are cognitive misers.¹²⁷ Because cognitive capacity is scarce, corner cutting is not just useful, it is necessary. People engaging in inferential tasks “virtually always” rely on judgmental strategies—termed *heuristics*—that help them reduce complex problems into manageable ones.¹²⁸ Such strategies “probably produce vastly more correct or partially correct inferences than erroneous ones, and they do so with great speed and little effort.”¹²⁹ Still, there are significant problems with such mental rules of thumb. First, “[a]lthough these heuristics often lead to effective reasoning, they also

125. See *infra* text accompanying notes 658–87.

126. For a more comprehensive review, see Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 632, 646–67 (1999) [hereinafter Hanson & Kysar, *Taking Behavioralism Seriously I*]; Jolls, Sunstein, & Thaler, *supra* note 64, at 1476–79; Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LIT. 11 (1998). For examples of scholars using choice biases to enhance policy analysis, see BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000). For useful overviews of choice biases by social psychologists, see JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) [hereinafter JUDGMENT UNDER UNCERTAINTY] and SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING (1993).

127. See *supra* text accompanying notes 72–77 (noting cognitive limitations as one cause of the fundamental attribution error).

128. FISKE & TAYLOR, *supra* note 72, at 391.

129. RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 18 (1980).

lead to systematic biases and errors.”¹³⁰ Second, we normally do not realize we have these biases, leaving us undefended against their harmful effects.¹³¹ And, third, for the same reasons, our cognitive shortcuts leave us susceptible to exterior situational manipulation.¹³²

Availability, for example, “is a heuristic that is used to evaluate the frequency or likelihood of an event on the basis of how quickly instances or associations come to mind.”¹³³ This shortcut may not mislead us, but it often does. “There are many factors uncorrelated with frequency . . . [that] can influence an event’s immediate perceptual salience, the vividness or completeness with which it is recalled, or the ease with which it is imagined.”¹³⁴ So it is that in experimental surveys people have evaluated the risk of homicide as greater than the risk of death by stomach cancer, when, in fact, the reverse is true. Indeed, the latter is “17 times more common.”¹³⁵ This heuristic can thus have tragic social consequences. And so, “[b]ecause members of minority groups who perform unusual behaviors are especially distinctive, people may form *illusory correlations* between group membership and the unusual behavior”¹³⁶—that is, incorrect stereotypes.

Mentioning or asking about an event can itself increase its availability—just as mentioning “chocolate chip cookie” can increase the extent to which people visualize such a delight.¹³⁷ And like the jingle that has overstayed its welcome, when something is on our mind, it can be hard to get it off. For instance, “random and irrelevant starting points can have a dramatic impact on judgment.”¹³⁸ Tversky and Kahneman, seminal authorities on heuristics, identified what they term the *anchoring* bias based on a series of experiments demonstrating that “[i]nitial starting points, even totally irrelevant ones, seem to serve as

130. KUNDA, *supra* note 6, at 56.

131. See NISBETT & ROSS, *supra* note 129, at 18.

132. See Hanson & Kysar, *Taking Behavioralism Seriously I*, *supra* note 126, at 672–87; see also Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1425–27 (1999) [hereinafter Hanson & Kysar, *Taking Behavioralism Seriously II*].

133. FISKE & TAYLOR, *supra* note 72, at 384.

134. NISBETT & ROSS, *supra* note 129, at 19.

135. KUNDA, *supra* note 6, at 91 (citing P. Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 126, at 436).

136. KUNDA, *supra* note 6, at 159 (emphasis added); see also *id.* at 130–33 (explaining that we “see” illusory correlations when “rare and distinctive individuals,” who therefore “capture our attention” engage in certain behaviors); *infra* Part III.B.2.a.i (discussing this and other sources of stereotypes). See generally Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1106 (2004) [hereinafter Chen & Hanson, *Categorically Biased*] (describing in detail the process by which stereotypes are created and activated).

137. For a review of the evidence, see Hanson & Kysar, *Taking Behavioralism Seriously II*, *supra* note 132, at 1532–34; see also KUNDA, *supra* note 6, at 123 (“Merely asking participants to analyze the reasons for their behavioral predictions made them view the behaviors as more likely.”).

138. KUNDA, *supra* note 6, at 102.

anchors.”¹³⁹ “[O]nce we have made an intuitive estimate, even if we are told that we are wrong, we *still* keep the initial rough estimate as an implicit baseline. We are anchored to it. We are unwilling to neglect it completely and start afresh.”¹⁴⁰

Similarly, we cannot seem to shake what we know did happen when estimating what we would have predicted would happen. As Baruch Fischhoff discovered, “[r]eporting an outcome’s occurrence increases its perceived probability of occurrence; and . . . people who have received outcome knowledge are largely unaware of its having changed their perceptions”¹⁴¹ And on top of this, people even overestimate the accuracy of predictions that they actually made.¹⁴² This *hindsight bias*, which has been demonstrated for a wide range of events, is one of the interior situational influences that we observe in others (but not in ourselves) often enough to give rise to the common phrase “hindsight is 20/20.”

ii. Endowment Effects

Another interior situational influence that profoundly affects our thinking outside our awareness is a phenomenon social psychologists have dubbed the *endowment effect*.¹⁴³ This term stands for the well-documented tendency of humans to value things they have (or believe they have) already, over that which they do not have (or do not believe they have). An early study demonstrating this pattern has become somewhat familiar in legal-theoretic references to the lessons of “behavioralism”—the Cornell coffee mug study.¹⁴⁴ In that study, subjects, who were given a coffee mug, valued the mug more than did students who were not given the mug. The subjects’ willingness to pay and willingness to accept money for the same item was influenced significantly by the initial endowments.

Beyond demonstrating the basic contours of the endowment effect, the coffee mug studies also nicely show how this bias operates in a seemingly automatic fashion; subjects valued what they had more than what they did not have even when the item was relatively meaningless and had only been “theirs” for a very

139. *Id.* (citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974)). See generally Hanson & Kysar, *Taking Behavioralism Seriously I*, *supra* note 126, at 667–69 (reviewing some of the experiments).

140. MASSIMO PIATELLI-PALMARINI, *INEVITABLE ILLUSIONS: HOW MISTAKES OF REASON RULE OUR MINDS* 71–72 (1994).

141. Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288, 288 (1975).

142. See KUNDA, *supra* note 6, at 184; Hanson & Kysar, *Taking Behavioralism Seriously I*, *supra* note 126, at 660.

143. See Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 197–201 (1991); see also Hanson & Kysar, *Taking Behavioralism Seriously I*, *supra* note 126, at 673–76 (summarizing social psychological findings concerning the endowment effect).

144. See Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1330 (1990) (describing the Cornell coffee mug study, and several variations of it, in detail).

short time. Other variations of the coffee mug experiment highlight the unconscious nature of the effect by showing that subjects in an *ex ante* perspective underestimate the effect that a hypothetical endowment would have on their valuation of an item.¹⁴⁵ Still other studies have demonstrated the presence of the endowment effect in more important areas of social life, such as in the patterns of workers' valuation of health care benefits. Research indicates that workers will value particular health benefits more when they are mandated, and thus presented as an endowment, than they do when the same benefits are not presumptively endowed.¹⁴⁶

The robust findings concerning the influence of the endowment effect thus should undermine our confidence in the reality of the thinking-preferring-choosing model of human thinking. What is perhaps even more troubling about this cognitive pattern, however, is not just that it happens, but that like other *interior* situational influences, the operation of the endowment effect is subject to *exterior* situational influences that can frame our sense of what we presently have and do not have. Cues in the environment can, without anyone noticing, orient the burdens of proof, persuasion, and negotiation.

iii. *Framing Effects*

And more generally, the way in which an issue is presented to us significantly influences how we perceive it. Psychologists have dubbed this the *framing effect*. Even minor alterations in the presentation of options that are substantively identical seem to influence our perceptions and attitudes regarding the options.¹⁴⁷ Kahneman and Tversky, the cognitive psychologists who identified and named the phenomenon, describe it as "both pervasive and robust." It is "as common among sophisticated respondents as among naïve ones In their stubborn appeal, framing effects resemble perceptual illusions more than compu-

145. See George Loewenstein & Daniel Adler, *A Bias in the Prediction of Tastes*, 105 *ECON. J.* 929, 931 (1995).

146. See Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, 84 *AM. ECON. REV.* 622 (1994). Gruber's study found that the imposition of mandatory maternity benefits caused the wages of workers to fall by at least the cost of providing the insurance, but that the hours worked and the probability of the workers' being employed did not change or was only slightly lower with the endowment in place. According to Gruber, "[t]he findings consistently suggest shifting of the costs of the mandates on the order of 100 percent, with little effect on net labor input." *Id.* at 623; see also Jolls, Sunstein & Thaler, *supra* note 64, at 1506-07 (discussing Gruber's findings as inconsistent with conventional economic analysis but consistent with social psychological studies concerning the endowment effect). For other "real world" findings concerning the endowment effect that sweep beyond coffee mugs, see Ward Farnsworth, *Do Parties to Nuisance Lawsuits Bargain After Judgment? A Glimpse Inside the Cathedral*, in *BEHAVIORAL LAW AND ECONOMICS*, *supra* note 126, at 302; Kahneman, Knetsch & Thaler, *supra* note 143.

147. See Hanson & Kysar, *Taking Behavioralism Seriously I*, *supra* note 126, at 644, 684-87 (reviewing several key studies). Consider, for example, the very different response supermarkets are likely to elicit from their customers when they label their beef as being "eighty-five percent fat free," rather than "fifteen percent fat," or that filling stations are likely to inspire when they frame their cash-based prices as "discounts" rather than advertising that they charge a premium for purchases on credit.

tational errors.”¹⁴⁸ As another decision theorist has explained, the power of the phenomenon results from our “tendency to accept problem formulations *as they are given* . . . [to] remain, so to speak, mental prisoners of the frame provided to us by the experimentalist, or by the ‘expert,’ or by a certain situation.”¹⁴⁹ More succinctly, “framing” is one identified piece of the manipulable situation.

iv. Summary

There is something familiar about the source of these well-documented heuristics. They are different ways of talking about the same basic phenomenon. They are all just manifestations in different contexts of what we have been describing throughout this Article and its companion: we see the vivid and we miss the pallid. Small pieces of the picture tend to dominate our assessment of the whole image. We readily see what is available, anchored, and presently normal, all according to how it had been framed, and we find it difficult to see much else. As Ziva Kunda puts it, these choice biases “may be viewed as a kind of mental contamination Even though we do not want our judgments to be contaminated in this manner, it is very difficult to eliminate the contamination.”¹⁵⁰

That difficulty, we believe, is largely the consequence of our interior situations. We do not see these biases at work. We do not see, in other words, that we do not see. This inability to see our interior situation is the source of the interior fundamental attribution error. And our interior myopia helps give rise to the exterior fundamental attribution error. People’s behavior, like news of a homicide, is available. Their situation, like statistics on stomach cancer, generally is not. We are dispositionists because of what comes to mind most easily—and, once in our minds, anchors our attributions.¹⁵¹ Interiorly and exteriorly, we humans miss the situational forest for the dispositional trees.

In part because our exterior dispositionism is causally related to our interior dispositionism, our interior situation can be easily exploited through the manipulation of our exterior situation. Each study demonstrating a choice bias is itself indirect proof of that fact. Scientists were able to manipulate cognitions by manipulating the exterior situation. And the interior situation leaves open and unguarded the gates through which the Trojan horse of exterior situation freely enters, not as a trophy of our dispositional triumph, but as a hidden means of influencing our behavior.¹⁵²

148. Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOL. 341, 343 (1984).

149. PIATELLI-PALMARINI, *supra* note 140, at 30.

150. KUNDA, *supra* note 6, at 106.

151. See KUNDA, *supra* note 6, at 104 (discussing George Quattrone’s work suggesting that “anchoring may play a role in producing the [exterior] fundamental attribution error”) (citing George Quattrone, *Overattribution and Unit Formation: When Behavior Engulfs the Person*, 42 J. PERSONALITY & SOC. PSYCHOL. 593 (1982)).

152. For a related discussion of “the problem of manipulation,” see Hanson & Kysar, *Taking Behavioralism Seriously I*, *supra* note 126.

b. Intertemporal Effects

Psychologists and economic behavioralists have discerned a general category of choice bias that results from the effect of time. Consider the following thought experiment. Would you rather receive a prize of \$100 today or a prize of \$200 two years from now? If you are like most people, you opted for the smaller amount of money today. And even those who choose to wait for the bigger prize find the choice a tough one.¹⁵³

Now, which would you choose if the options were \$100 in six years or \$200 in eight years? That's an easy one, even for people who have just answered the first question. Almost everyone we ask unhesitatingly opts for the larger, delayed prize. Some are struck (even embarrassed) to realize that the choices are exactly the same, except for the time frame. The second pair of options is just the first pair, six years later.¹⁵⁴ So, are you willing to wait two years for an extra \$100 or not? Somehow the choices in the two proposals *seem* different. There is considerable evidence that people find it difficult to delay gratification and very easy to delay displeasure.¹⁵⁵ More generally, people attach greater significance to outcomes—good or bad—that are close by than those that are far away.¹⁵⁶

If you want \$100 today instead of \$200 in two years, but would prefer \$200 in eight years to \$100 in six, you are probably responding to the exterior situational salience of money today, in your pocket, ready to spend on all the items that likewise are comparatively available. Any of the other sums at future times are far less immediate, as are the items you might purchase. Thus, when faced with the second pair of options, the options are fungible in availability terms, making the larger sum more attractive. In other words, money is *not* fungible where the situational frame is not.¹⁵⁷ That people do not anticipate those differences and that theorists have difficulty explaining that tendency

153. We have ourselves conducted this experiment in a number of different settings, and each time we have seen that the formal renditions of the experiment predicted the results. For the formal versions of the hyperbolic discounting experiments, see George Ainslie & Nick Haslam, *Hyperbolic Discounting*, in CHOICE OVER TIME 57, 69 (George Loewenstein & Jon Elster eds., 1992); see also Shane Frederick, George Loewenstein & Ted O'Donoghue, *Time Discounting and Time Preference: A Critical Review*, J. ECON. LIT. 351, 360–61 (2002) (summarizing similar studies including some done on pigeons).

154. If you didn't experience the apparent reversal in attitudes, try reducing the sums to, say, \$10 and \$20.

155. See, e.g., Frederick, Loewenstein & O'Donoghue, *supra* note 153, at 361; see also Ted O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103, 103 (1999) ("People are impatient—they like to experience rewards soon and to delay costs until later."). But see Dan Ariely & George Loewenstein, *When Does Duration Matter in Judgment and Decision Making?*, 129 J. EXPERIMENTAL PSYCHOL. 508 (2000) (describing some exceptions); Drazen Prelec & George Loewenstein, *The Red and the Black: Mental Accounting of Savings and Debt*, 17 MARKETING SCI. 4 (1998) (same).

156. This evidence contradicts the conventional discounted utility model of neoclassical economics that has long been the dominant normative and positive model of intertemporal decision-making. See *infra* text accompanying notes 339–80.

157. See generally VIVIANA ZELIZER, *THE SOCIAL MEANING OF MONEY* (1997).

illustrates the power of our interior situation.¹⁵⁸ And that we humans are unaware of this power renders us especially vulnerable to manipulation through external situation.

Although social psychologists have not recently focused closely on this particular choice bias, their general findings about our cognitive processes predict and explain it. Time variations are really just variations on the theme that we have been developing and that social psychologists discovered decades ago—situation matters. And temporal proximity is part of the situation.¹⁵⁹

One does not need to be terribly well-versed in social psychology to find examples of broader phenomena that would include the time effects that economic behavioralists have highlighted. In addition to the many studies discussed elsewhere in this Article, consider, for example, a Wilson and Nisbett experiment in which subjects were asked in a bargain store to judge which one of four nylon stocking pantyhose was the best quality.¹⁶⁰ The subjects were not told that the stockings were in fact identical. Wilson and Nisbett presented the stockings to the subjects hanging on racks spaced equal distances apart. As situation would have it, the position of the stockings had a significant effect on the subjects' quality judgments. In particular, moving from left to right, 12% of the subjects judged the first stockings as being the best quality, 17% of the subjects chose the second pair of stockings, 31% of the subjects chose the third pair of stockings, and 40% of the subjects chose the fourth—the most recently viewed pair of stockings.¹⁶¹ When asked about their respective judgments, most of the subjects attributed their decision to the knit, weave, sheerness, elasticity, or workmanship of the stockings that they chose to be of the best quality.¹⁶² Dispositional qualities of the stocking, if you will. Subjects provided a total of eighty different reasons for their choices.¹⁶³ Not one, however, mentioned the position of the stockings, or the relative recency with which the pairs were viewed.¹⁶⁴ None, that is, saw the situation. In fact, when asked whether the position of the stockings could have influenced their judgments, only one subject admitted that position could have been influential.¹⁶⁵ Thus, Wilson and Nisbett conclude that “[w]hat matters . . . is not why the [position] effect occurs but *that* it occurs and that subjects do not report it or recognize it when it is

158. Even the more creative explanations that economic behavioralists provide, such as “mental accounts,” are actually just somewhat ad hoc and narrow versions of highly developed and expansive theories that social psychologists have long been refining, but the lessons of which go far beyond what economists recognize in their provisional categories. See, e.g., *infra* Part III.B.2.a. (discussing role of knowledge structures).

159. Cf. TODD RAKOFF, TIME (2002) (analyzing the role of law in structuring people's conception and experience of time).

160. See Wilson & Nisbett, *supra* note 87, at 123.

161. *Id.*

162. *Id.* at 124.

163. *Id.*

164. *Id.*

165. *Id.*

pointed out to them.”¹⁶⁶

Consider, again, Stanley Milgram’s classic studies. Social psychologist Roger Brown reanalyzed the twenty-one variations of Milgram’s studies in terms of the concept of *immediacy*, which he defines as “proximity in space or time and presence or absence of barriers.”¹⁶⁷ Brown appreciated that there were two people exerting a situational force on the subject (the “teacher”): the “experimenter” and the “learner.” Brown then ranked the experiments according to the “net immediacy” of those two forces and identified seven variations along a spectrum of immediacy.¹⁶⁸

At one extreme, the experimenter was present as described in our summary above,¹⁶⁹ but the “learner” was in another room and could neither be seen nor heard. Thus the experimenter was, relative to the “learner,” very immediate to the subject. Under that design, *one hundred percent* of the subjects shocked to the limit of 450 volts. At the other extreme, the “learner” pounded the wall and screamed as we described earlier but the experimenter gave no orders at all, leaving the teacher free to choose shocking levels. In that variation, then, the suffering “learner” was, relative to the experimenter, very immediate. There, only one of forty teachers shocked to the limit and the mean maximum shock was only forty-five volts.

In between those extremes, Brown analyzed the immediacy effects of bring-

166. *Id.* For more examples of the powerful role of the situational influence of proximity, see Nisbett & Wilson, *supra* note 122. Wilson and Nisbett’s analysis was, particularly initially, met with considerable criticism. See, e.g., Eliot R. Smith & Frederick D. Miller, *Limits on Perception of Cognitive Processes: A Reply to Nisbett and Wilson*, 85 PSYCHOL. BULL. 355 (1978) (asserting that Nisbett and Wilson’s claim that people have no direct access to their mental processes is overstated); Peter White, *Limitations on Verbal Reports of Internal Events: A Refutation of Nisbett and Wilson and of Bem*, 87 PSYCHOL. REV. 105–12 (1980) (criticizing Nisbett and Wilson’s interpretations and methodologies); Peter Wright & Peter D. Rip, *Retrospective Reports on the Causes of Decisions*, 40 J. PERSONALITY & SOC. PSYCHOL. 601 (1981) (claiming that Wilson and Nisbett’s conclusion that people have no awareness or retrieval abilities of their mental processes is overstated); Robert E. Kraut & Steven H. Lewis, *Person Perception and Self-Awareness: Knowledge of Influences on One’s Own Judgments*, 42 J. PERSONALITY & SOC. PSYCHOL. 448 (1982) (finding that judges’ self-reports about what influences their judgments are moderately accurate at estimating the actual influences on their judgments); George A. Quattrone, *On the Congruity Between Internal States and Action*, 98 PSYCHOL. BULL. 3 (1985) (arguing that self-report effects are significant and congruent with behavior more frequently than indicated by Wilson and Nisbett). More recently, however, Nisbett and Wilson’s arguments and conclusions are enjoying greater support. See, e.g., Mirjam Sprangers et al., *A Constructive Replication of White’s Alleged Refutation of Nisbett and Wilson and of Bem: Limitations on Verbal Reports of Internal Events*, 23 J. EXPERIMENTAL SOC. PSYCHOL. 302 (1987) (finding that observers’ causal reports are no more accurate than actors’ causal reports on judgment processes); Charles K. Turner, *Don’t Blame Memory for People’s Faulty Reports on What Influences Their Judgments*, 14 PERSONALITY & SOC. PSYCHOL. BULL. 622 (1988) (finding that memory decay is not attributable to people’s inability to accurately report on judgment processes); Banaji, *Implicit Attitudes*, *supra* note 105.

167. ROGER BROWN, *SOCIAL PSYCHOLOGY* 20 (2d. ed. 1986). The following summary of Brown’s work comes from *id.* at 20–24.

168. Milgram himself adjusted the experimental setting to examine the effect of the “closeness of the victim” and “closeness of authority.” See BROWN, *supra* note 167, at 21. Brown was therefore just building on Milgram’s intended design.

169. See *supra* text accompanying notes 8–13.

ing the “learner” into the same room with the teacher and even of requiring the teacher to force the victim’s hand down onto a shock plate. He found that the net immediacy of the various manipulations perfectly explained the variance in the percentage of teachers who shocked to the limit. The “willingness to shock a victim, though always the same in its supposed ultimate effect, declines . . . as the person administering the shock becomes more immediately and intimately acquainted with the suffering he believes he is producing.”¹⁷⁰

Thus, the Milgram experiments reveal the same tendency—more broadly understood as immediacy—that economic behavioralists have struggled to explain under the heading of intertemporal dynamics. But even that description understates the narrowness of economic behavioralists’ theorizing. Immediacy is thus another manifestation of the far more general phenomenon that we have been describing: the human tendency to see the accessible, vivid, and immediate, and to miss all else, the situation.¹⁷¹ Often, the obvious eclipses the influential.

Consider another dramatic demonstration of the power of “recency” in the situational character’s perception of its experience. Many individuals have experienced the discomfort of routine colonoscopy examinations. Social psychologists Donald Redelmeier and Daniel Kahneman conspired with doctors to perform a variation of that routine to help better understand human memory and perceptions of pain. During and just after a basic colonoscopy, patients were surveyed about the quality of the “unpleasantness.”¹⁷² In the control group, the exam was performed in the usual way, under routine conditions in which the doctor left the examining instrument, the source of the discomfort, inside of the body for only as much time as was needed to safely perform the colonoscopy. With a second group of subjects, the same routine examination was performed, except that after the examination was otherwise complete, the doctors left the spectroscopy in the anal sphincter for a short time, without moving it around, before finally pulling it out.¹⁷³

170. BROWN, *supra* note 167, at 22.

171. Cf. *id.* (“[I]t seems reasonable to extend immediacy so as to give it psychological sense such as salience in consciousness”); NISBETT & ROSS, *supra* note 129, at 62 (“People give inferential weight to information in proportion to its vividness. Vividness is defined as the emotional interest of the information, the concreteness and imaginability of information, and the sensory, spatial, and temporal proximity of information.”).

172. Donald A. Redelmeier & Daniel Kahneman, *Patients’ Memories of Painful Medical Treatments: Real-Time and Retrospective Evaluations of Two Minimally Invasive Procedures*, 66 PAIN 3 (1996). Redelmeier and Kahneman’s study fits into an extensive body (no pun intended) of social psychological study of memory. See, e.g., D. Thomas & E. Diener, *Memory Accuracy in the Recall of Emotions*, 59 J. PERSONALITY & SOC. PSYCHOL. 1091 (1998) (finding that people’s memories of emotional experiences are often inaccurate).

173. At some level this study was more invasive than even Stanley Milgram’s, in that the experimenters actually inflicted pain for experimental purposes on the second group of patients. Without elaboration, Redelmeier and Kahneman noted that “[n]o colonoscopy . . . was performed solely for research purposes and all patients gave informed consent.” Redelmeier & Kahneman, *supra* note 172, at 4. There is no word on the situation within which the consent was given. We have already seen from

Both groups of patients rated the different periods of the examination the same in terms of the degree of “unpleasantness” they were experiencing when asked—both rated the height of the examination, when the spectroscope was moving, as the most painful. Both groups also rated moments in which the scope was inside the body but not moving as painful, but far less painful than the moments when the instrument was moving. Common sense would hold that the second group experienced more total pain or displeasure than did the control group.¹⁷⁴

But common sense tends to miss the situation: just after the examination was completed, when the subjects were asked to evaluate the overall experience on a scale of unpleasantness, the second group rated the experience as *less* unpleasant overall than did the first group.¹⁷⁵ The additional, but more *recent* lower amounts of pain that the experimental group endured apparently overshadowed their memory of the intense pain (that, again, they experienced in equal measure with the control group) and altered their perception of the whole experience.¹⁷⁶

Studies like this one¹⁷⁷ demonstrate the situational power of recency in our evaluative process. What is most recent to us is, other things being equal, closest to us and most prominent in our minds. While the study seems to contradict common sense, it resonates easily with the tenets of social psychology. As the authors point out, “[t]he discrepancy between people’s real-time and retrospective evaluations is not surprising given the limitations of human memory and judgment.”¹⁷⁸

Like many such studies, the colonoscopy findings can have both particular and parabolic implications. With respect to medical-care concerns, Redelmeier and Kahneman explain that their findings do not counsel a clear policy:

If the objective is to reduce patients’ memory of pain[,] . . . [g]radual relief may be preferable to abrupt relief if patients retain a less aversive memory [through the delayed relief approach] In contrast, if the objective is to reduce the amount of pain actually experienced, conducting the procedure

Milgram’s work that the question of “informed consent” is perhaps just that, a question, and not one that can be answered in the form of a simple waiver like the one indicated here. In a later publication in which he discussed this experiment, Kahneman drops a footnote and writes: “The ethical justification for the experiment was the observation of poor compliance among patients who have had a painful colonoscopy and are instructed to schedule another.” See Daniel Kahneman, *Experienced Utility and Objective Happiness: A Moment-Based Approach*, in CHOICES, VALUES AND FRAMES 673, 676 n.2 (Daniel Kahneman & Amos Tversky eds., 2000).

174. Redelmeier & Kahneman, *supra* note 172, at 4–5.

175. *Id.* at 6.

176. *Id.* at 6–7.

177. See, e.g., Daniel Kahneman, *Evaluation By Moments*, in CHOICES, VALUES AND FRAMES, *supra* note 173, at 693, 694–99 & fig.38.1(B) (reporting similar patterns in overall evaluations by control subjects who hear a sharp unpleasant sound as compared to the evaluations of a group of subjects who heard the same sharp unpleasant sound followed by several other somewhat less sharp but still unpleasant sounds; the latter group rated the overall experience as less unpleasant than did the first).

178. Redelmeier & Kahneman, *supra* note 172, at 7.

swiftly may be appropriate even if doing so increases the peak pain intensity and leaves patients with a particularly aversive memory.¹⁷⁹

Their findings nevertheless counsel a clear theoretic prescription to consider the profound role that situation plays in how humans perceive their own experience, both immediately and retrospectively. Such findings present “complex ethical issue[s],”¹⁸⁰ not only for medicine, but for any enterprise that purports to be devoted to human welfare.¹⁸¹ The “natural limitations of human memory”¹⁸² are likely always in play in our assessments. Thus, as another team of social psychologists noted, Redelmeier and Kahneman’s “results have both humane and Orwellian implications and suggest enormous possibilities for decision engineering.”¹⁸³

Encouraging lawmakers and legal theorists to confront those possibilities is, of course, a primary goal of this Article. Before evaluating the “Orwellian implications” of our predicament, however, legal theorists must first be willing to distrust their own perceptions and common sense.

2. Process Biases

While the previous section focused on several choice biases, this section focuses on a pair of *process biases* that similarly operate out of sight within our interiors. The distinction between the two general types of biases is not in their situational source but in the scope of their influence over our thinking and behavior. Choice biases are treated as having only task-specific implications related to instances of judgment or decisionmaking. Process biases, in contrast, are more systemic tendencies of human cognition that influence individuals across a vast range of cognitive experience.

So what are “process biases”? Social psychologists have taken to construing and portraying people as intuitive scientists.¹⁸⁴ And for with good reason: All people, not just those who occupy academic and scientific institutions, have a deep urge to understand and make sense of themselves and their worlds.¹⁸⁵ Indeed, those institutions reflect a more general human urge and set of pro-

179. *Id.*

180. *Id.*

181. Kahneman has recently delved more deeply into providing a utility analysis model that comports with his and others’ findings about pain and memory. See Kahneman, *supra* note 173.

182. Redelmeier & Kahneman, *supra* note 172, at 7.

183. See B.A. Mellers, A. Schwartz & A.D.J. Cooke, *Judgment and Decision Making*, 49 ANN. REV. PSYCHOL. 447, 455 (1998).

184. See, e.g., BROWN, *supra* note 167, at 133–68; FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* (1958); KUNDA, *supra* note 6, at 111–60 (examining how “we test particular hypotheses about the world”); ROSS & NISBETT, *supra* note 6, at 2; Harold H. Kelley, *Attribution Theory in Social Psychology*, in 15 NEBRASKA SYMPOSIUM ON MOTIVATION 192 (David Levine ed., 1967).

185. See *infra* Part III.C.2.a (describing the motive to understand).

cesses.¹⁸⁶ And for now-familiar reasons, those general processes are often biasing for lay and professional scientists alike. This section summarizes three systems of information processing and their biasing effects: knowledge structures, causal attributions, and counterfactual thinking. Because those systems are being described in detail in contiguous work,¹⁸⁷ we can again spare our readers an extended review.

a. Knowledge Structures

"Out of time we cut 'days' and 'nights,' 'summers' and 'winters.' We say what each part of the sensible continuum is, and all these abstract whats are concepts.

The intellectual life of man consists almost wholly in his substitution of a conceptual order for the perceptual order in which his experience originally comes."

~ William James¹⁸⁸

"By such mental operations we simplify the world of phenomena, but we cannot avoid falsifying it in doing so"

~ Sigmund Freud¹⁸⁹

Richard Nisbett and Lee Ross define *knowledge structures* as the "intuitive implements" that "allow the individual to define and interpret the data of physical and social life."¹⁹⁰ Ziva Kunda has more recently explained, similarly, that our knowledge structures or *concepts*¹⁹¹ "help[] us make sense of our social worlds and guide our social judgments."¹⁹² They are "the building blocks of cognition,"¹⁹³ or the "tools of construal"¹⁹⁴ whose many crucial functions "include classification, inferring additional attributes, guiding attention and

186. Cf. Harold H. Kelley, *The Process of Causal Attribution*, 28 AM. PSYCHOLOGIST 107 (1973); Leslie Ann McArthur, *The How and What of Why: Some Determinants and Consequences of Causal Attribution*, 22 J. PERSONALITY & SOC. PSYCHOL. 171 (1972).

187. See Chen & Hanson, *Categorically Biased*, *supra* note 136; Hanson, Reyes & Schlanger, *Attributional Positivism*, *supra* note 43 (examining how people make attributions of causation, responsibility, and blame, and describing the relevance of attribution theory for law and legal theory).

188. WILLIAM JAMES, *SOME PROBLEMS OF PHILOSOPHY: A BEGINNING OF AN INTRODUCTION TO PHILOSOPHY* (1911), *reprinted in* WILLIAM JAMES, *WRITINGS 1902-1910*, at 1008-09 (Bruce Kucklick ed., 1987).

189. SIGMUND FREUD, *ANALYSIS TERMINABLE AND INTERMINABLE* (1937), *reprinted in* 23 *THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 209, 228 (James Strachey ed., 1986).

190. NISBETT & ROSS, *supra* note 129, at 6-7.

191. Terminology here is a little up for grabs and somewhat context dependent. What Kunda refers to as concepts are sometimes referred to as "mental representations," "schemas," "theories," or "categories," among other names. See Chen & Hanson, *Categorically Biased*, *supra* note 136, at 1131 & n.111.

192. KUNDA, *supra* note 6, at 15.

193. *Id.* at 16.

194. ROSS & NISBETT, *supra* note 6, at 12.

interpretation, communication, and reasoning.”¹⁹⁵

When we encounter objects or experiences or ideas or people or behavior, we classify them, as best we can, within our existing concepts, which then allow us to obtain understandings that go well beyond those we would obtain were we forced to rely solely on a present instance alone. And when we enter any exterior situation, the concepts in our interior situation—and the “wealth of causal information” they contain¹⁹⁶—give us a filtering system for narrowing our focus to the information we will use to make sense of what we encounter.

By way of analogy, imagine searching for a particular definition in a dictionary with the sole strategy of reading random sections or of reading from beginning to end until you encounter the target word. Knowing to pick up a dictionary is an important start, but more is needed to make processing the information contained in the dictionary feasible. The alphabetical arrangement of words in dictionaries is a schema, and one that is a huge time-saving device. Similarly, imagine searching web pages for particular information without the aid of search engines or links . . . or even a shared language.

Those exterior schemas, which we tend to take for granted and rarely, if ever, clearly examine, are analogous to (and sometimes reflect and influence) our interior schemas, of which we are even less aware and which we are therefore less likely to scrutinize. We process stimuli “through preexisting systems of schematized and abstracted knowledge—beliefs, theories, propositions, and schemas. These knowledge structures label and categorize objects and events quickly and, for the most part, accurately. They also define a set of expectations about objects and events and suggest appropriate responses to them.”¹⁹⁷

Thus, the benefit of such knowledge structures is that they provide us, often automatically, with a way of understanding our world so that we can operate reasonably well within it, at the same time that they free up cognitive capacity to cope with other pressing issues.¹⁹⁸ Similarly, the concepts, insofar as they are shared, allow us to communicate efficiently with those around us.¹⁹⁹ In short, without the knowledge structures “[w]e would be unable to extract meaning from the huge amount of information that surrounds us, unable to generalize from one experience to another, and unable to communicate effectively with each other.”²⁰⁰

But those benefits are not without costs: “A price is paid for this mental economy.”²⁰¹ The alphabetical arrangement of a dictionary is little help when

195. KUNDA, *supra* note 6, at 17.

196. *Id.* at 52; *see also id.* at 36–41.

197. NISBETT & ROSS, *supra* note 129, at 7.

198. *See* Chen & Hanson, *Categorically Biased*, *supra* note 136, at 1139–77.

199. KUNDA, *supra* note 6, at 20. The field of cognitive linguistics demonstrates a similar role for metaphor. *See generally* GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (2d ed. 2002); GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980).

200. KUNDA, *supra* note 6, at 17.

201. NISBETT & ROSS, *supra* note 129, at 7.

you want to know, precisely, how to spell the word that sounds like “siekol-lojee.” “The knowledge structures themselves are not infallible guides to the nature of physical or social reality.”²⁰²

Some beliefs, theories, and schemas are relatively poor and inaccurate representations of the external world. Furthermore, objects and events are not always labeled accurately and sometimes are processed through entirely inappropriate knowledge structures.²⁰³ “Without these structures stored in memory, life would be a buzzing confusion, but the clarity they offer is helpful only in proportion to their validity and to the accuracy with which they are applied to the data at hand.”²⁰⁴ And when that is not the case, they can be misleading and harmful. Indeed, that is the main point that this Article is making about the dominant self-schema: dispositionism. We are not who our knowledge structures tell us we are.

i. The Stereotypical Knowledge Structure

At a time when the world as a whole suffers from panic induced by the rival ideologies of the east and west, each corner of the earth has its own special burdens of animosity. Moslems distrust non-Moslems. Jews who escaped extermination in Central Europe find themselves in the new state of Israel surrounded by anti-Semitism. Refugees roam in inhospitable lands. Many of the colored people of the world suffer indignities at the hand of whites who invent a fanciful racist doctrine to justify their condescension. The checker-board of prejudice in the United States is perhaps the most intricate of all. While some of this endless antagonism seems based upon a realistic conflict of interests, most of it, we suspect, is a product of the fears of the imagination.

~Gordon W. Allport²⁰⁵

Gordon Allport’s now-classic description of group stereotypes was an important step toward explaining the cognitive mechanisms behind the senseless hatred and prejudice that have reverberated throughout human history. Although the consequences of such ethnic- and race-based knowledge structures seem as evident today as they were fifty years ago when Allport wrote, parts of his message seem to have taken root.

Indeed, the best known—indeed, for many, the only known—example of the operation of interior schemas is the group-based *stereotype*.²⁰⁶ “[S]tereotypes

202. *Id.*

203. See Chen & Hanson, *Categorically Biased*, *supra* note 136, at 1155–1218 (detailing the often distorting effects of our categories and schemas).

204. See Nisbett & Ross, *supra* note 129, at 7.

205. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE*, at xiii (1954).

206. It is to avoid the pejorative associations of “stereotyping” with racism that some social psychologists have adopted different names for the broader tendency to categorize people in the same way as we categorize all things. See, e.g., Nisbett & Ross, *supra* note 129, at 35 (explaining why they

are typically viewed as cognitive structures that contain our knowledge, beliefs, and expectations about a social group”²⁰⁷ They are described as “culturally shared, indeed hackneyed, notions”²⁰⁸ about those groups. Here is where the human tendency to rely on knowledge structures has come to be understood as an inherently pernicious process, instead of as a necessary and often helpful one.²⁰⁹ Stereotypes, in other words, are the stereotype of what we are calling “knowledge structures.”

To see more clearly the role of stereotypes and, more generally, schemas, consider this classic experiment. White subjects were shown a videotape of a purportedly unscripted conversation between two men. At several points during the video a beep sounded, prompting the subjects to characterize the conduct of the men they were watching into one of several possible categories (for example, “dramatizes,” “gives information,” “asks for opinion,” “playing around,” “aggressive behavior,” and “violent behavior”).²¹⁰ The videotaped conversation becomes increasingly heated and the men begin to say things like “you must be crazy,” and “you’re just too damned conservative.” Finally, one man pushes the other, at which point subjects were beeped again and asked to characterize the push.²¹¹

Different versions of the video were shown to different subjects, using different combinations of black and white men in the conversation. Where a black man pushes a white man, seventy-five percent of the subjects characterized the push as “violent behavior.”²¹² Where a white man pushes a black man, only seventeen percent of the subjects categorized the push as “violent behavior.”²¹³ Another forty-two percent of the subjects characterized the white man’s behavior simply as “dramatiz[ing]” or “playing around.”²¹⁴

prefer the “concept of persona” to the concept of stereotype even though the two are “not essentially different”). In other words, social psychologists are understandably concerned about the influence of schemas on our understanding of schemas.

207. KUNDA, *supra* note 6, at 315.

208. NISBET & ROSS, *supra* note 129, at 35.

209. Through our knowledge structures, we automatically process new information into familiar groupings, categories or schemas. Stereotypes are just one of the many consequences of that interior situational process. See Chen & Hanson, *Categorically Biased*, *supra* note 136, Part II. People form stereotypes of social groups at a very young age and have difficulty suppressing their automatic schemas when they encounter a member of the stereotyped group, even when they do not desire to see that person in a prejudicial way. See Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 126–27 (1994). Indeed, actively trying to suppress stereotypic responses can increase the frequency of such responses. See *id.* at 127. Those automatic prejudices and stereotypes, therefore, constitute a form of “mental contamination” that affects how people come to understand and view certain social groups. *Id.*

210. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 593–94 (1976).

211. *Id.* at 593.

212. *Id.* at 595.

213. *Id.*

214. *Id.*

The same subjects were also asked to indicate the extent to which the action of the pusher should be attributable to situational forces, to the pusher personally, to the issue discussed in the conversation between the two men, or to some combination of those factors. Subjects tended to attribute the black pusher's behavior to his disposition, and the white pusher's conduct to his situation, revealing how *motivation* can sometimes overcome our dispositionist presumption.²¹⁵

The dynamics of our stereotypical thinking are driven by the interaction of our interior and exterior situation. Stereotypes that are prominent in our culture meet with a cognitive situation within us that is poised to confirm them. We tend to test a hypothesis by asking questions about whether there is evidence to confirm it and forgetting to ask whether there is evidence that would disconfirm it. That unbalanced *positive-test strategy* and the resultant *confirmatory bias*²¹⁶ occurs, not only for hypotheses that we generate ourselves, but also for any hypotheses or schemas that occupy our interiors. Thus our minds automatically search for, and disproportionately emphasize, evidence in the world that will tend to confirm our racial or sexual stereotypes (be they negative or positive, conscious or implicit).²¹⁷

The tendency is heightened by the fact that as a consequence of this bias in our mental processing, social psychologists have suggested that encouraging reflection about stereotypes, without more, may perversely result in the search and location of further confirmatory evidence for the stereotype under review.²¹⁸ More attention, in other words, may not counteract the confirmation bias; it may simply give it more to work with.²¹⁹ That pattern, troublingly, suggests other opportunities for the situational manipulation of our mental process. For instance, those who can influence what theories are readily available in our cultural situation can influence what theories we tend to test and seek to confirm.²²⁰

ii. Cognitive Groupism

These findings about the operation of stereotyping have been replicated for other group schemas, including those for gender, age, professions, and social

215. See *id.* at 596; see also *infra* Part III.C.2 (summarizing interior situational motivations and their influence). See generally Hanson, Reyes & Schlanger, Attributional Positivism, *supra* note 43 (summarizing numerous situational sources of situationism); Benforado & Hanson, Naïve Cynicism, *supra* note 78 (same).

216. See KUNDA, *supra* note 6, at 111–15, 123–30.

217. See *id.*

218. See *id.*

219. See *id.* This is an example of why it is not enough to reduce our calculus of mental processes simply to the amount of energy or time that is allocated to an inferential task. There is not a singular correspondence between the amount of energy given to a question and the accuracy or reliability of our answer.

220. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 202–31 (describing the problem of deep capture).

class.²²¹ In one experiment, a group of subjects viewed one of two videotapes of a fourth-grade girl and then were asked to evaluate her academic ability. One videotape showed the girl in an urban, low-income setting, and the other showed her in a middle-class, suburban area. Next, a portion of the subjects seeing one of those videos was shown another—this time of the girl responding to achievement-test problems. The girl's performance on those problems was intentionally ambiguous.

Subjects who saw that last video, but neither of the first two, tended to rate the child's academic ability roughly on a par with her known school grade level.²²² However, those subjects who had viewed the child in either the low or high socioeconomic setting rated her abilities as appearing to be either below or well above her grade level, respectively.²²³ Thus, as Ziva Kunda summarizes, "[i]t appears that when behaviors are somewhat ambiguous, the identical behavior will be understood quite differently when performed by individuals who belong to differently stereotyped groups."²²⁴ So it is that our knowledge structures "color our reality."²²⁵ As we will review below, they also can change our reality by coloring the experience and altering the performance of those being stereotyped, and by reassuring us that inequalities and outcomes that might otherwise appear illegitimate are, in fact, just.²²⁶

The operation of group schemas need not be related to cultural stereotypes. Indeed, "any given 'us' category is liked better than any given 'them' category, under most circumstances."²²⁷ Muzafer Sherif, in a classic set of experiments in the 1950s and 1960s, discovered some of the ways that group schemas are generally created, as well as some of their basic effects.²²⁸ Sherif and his collaborators ran a summer camp²²⁹ in which boys, at the beginning of the summer, were divided into two groups: the Rattlers and the Eagles. Throughout the summer, the boys were subtly asked to rank friendships and to make other "sociometric" designations about each other.²³⁰

In the first stage of the experiment, the groups were kept apart and behaved as

221. See FISKE & TAYLOR, *supra* note 72, at 124; KUNDA, *supra* note 6, at 347.

222. John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 25 (1983).

223. *Id.* at 24–25.

224. KUNDA, *supra* note 6, at 347.

225. *Id.* at 19.

226. See *infra* text accompanying notes 253–65 (summarizing evidence of stereotype threat and disidentification).

227. FISKE & TAYLOR, *supra* note 72, at 133.

228. See ROSS & NISBETT, *supra* note 6, at 39.

229. Yes, they actually ran a summer camp, and did so for several years, to conduct their experiments—these were the Milgram days of social psychology, before human subjects committees regulated social psychological studies. See MUZAHER SHERIF ET AL., INTERGROUP CONFLICT AND COOPERATION: THE ROBBERS CAVE EXPERIMENT 27–68 (1961). Today the federal government has promulgated extensive regulations governing the use of human subjects in psychology experiments. See *generally* Protection of Human Subjects, 45 C.F.R. pt. 46 (2003).

230. See BROWN, *supra* note 167, at 611 (revisiting Sherif's study).

typical campers might behave, with only weak out-group aversion or in-group solidarity.²³¹ In the second stage, the groups were pitted against each other in various competitions for prizes.²³² In that situation, each group posed a realistic threat to the other's advantage,²³³ and members of each group wanted nothing to do with members of the other group. More specifically, both out-group animosity and in-group solidarity increased dramatically as the competitions continued, and the resultant stereotyping, prejudice, and discrimination that followed were robust.²³⁴

[M]ere informational campaigns, even those couched in appeals in moral values, were universally unsuccessful in reducing enmity. Sunday religious services that interrupted the period of competition with especially pointed appeals for brotherly love, forgiveness of enemies, and cooperation had no impact. The campers solemnly departed from the services and then, within minutes, returned to their preoccupation with defeating or harassing the detested out-group.²³⁵

Put differently, appeals to dispositional change came up empty. Similarly, placing the groups in various noncompetitive settings together—taking meals, filling out surveys, shooting off fireworks, and so on²³⁶—did little to ameliorate the two groups' out-group animosity, as subsequent food fights demonstrated.²³⁷

Only after the experimenters placed the campers in numerous situations of mutual dependence and cooperation did the groups begin to alter their “us versus them” schema. For example, a bus transporting both groups to dinner “broke down,” forcing the hungry campers to cooperate. With a rope that had once been used in the tug-of-war competition, the groups worked to jointly push and pull the bus to restart it.²³⁸ Operating under such cooperative (“common enemy”) conditions over time, the campers changed their group-based views of one another and intergroup friendships emerged “between erstwhile rivals and even former enemies.”²³⁹

By the end of the summer, “the twenty boys themselves proposed that they return to Oklahoma City in a single bus, and the self-chosen seating did not reflect the Eagles['] and the Rattlers[']” group identities.²⁴⁰ By that time the old stereotypes between the two groups had dissipated significantly, as measured by

231. See SHERIF ET AL., *supra* note 229, at 74–83.

232. See *id.* at 96–113.

233. Sherif's famous experiments became a favorite example in an early, significant theory of stereotyping known as realistic group conflict theory. See SUSAN T. FISKE, *SOCIAL BEINGS: A CORE MOTIVES APPROACH TO SOCIAL PSYCHOLOGY* 436 (2004).

234. See *id.* at 117–49.

235. ROSS & NISBETT, *supra* note 6, at 40.

236. SHERIF ET AL., *supra* note 229, at 151–58.

237. *Id.* at 158.

238. *Id.* at 170–71.

239. ROSS & NISBETT, *supra* note 6, at 39.

240. BROWN, *supra* note 167, at 611; see also SHERIF ET AL., *supra* note 229, at 182.

Sherif's surveys:

Rattlers now thought that almost all Eagles had become like the Rattlers themselves: *brave, tough, and friendly*. The Eagles said as much for the Rattlers. There were no more *sneaky, smart-aleck stinkers*. . . . [T]he boys as observers of one another saw personality change as the cause of the new order, but Sherif, of course, knew better. He knew that the boys had changed their thoughts and feelings because of a succession of situations designed to require cooperative effort.²⁴¹

What caused the Rattlers to be “sneaky, smart-aleck stinkers” was not disposition, as prevalent schemas and attributions would have it, but forces hidden in the situation. Sherif, by manipulating the situation, was the real “sneaky . . . stinker.”

Much has been learned since Sherif's important work to confirm, refine, and expand upon what the campers taught about the operation of group schemas.²⁴² For example, more recent studies have shown that the actual threat that one group poses to another is unimportant. It is the *perception* of threat that generates the intergroup hostility.²⁴³ Even merely random group designations, without any intergroup competition or other distinguishing features, can elicit in-group and out-group sentiments. “In other words, even the most arbitrary and seemingly inconsequential group classifications can provide a basis for discriminatory behavior.”²⁴⁴

We will not review any more of the studies here.²⁴⁵ They prove a point that all of us, upon reflection, should already see as central and deep-seated in the human experience. The influences—good, bad, and otherwise—of the “us and them” schema, or what we will call *groupism*, are all around us. One needn't look beyond the loyalty of sports fans to their favorite teams and their derision of rival teams to find these influences in many people's daily lives. A favorite player—a Roger Clemens—becomes a hated turncoat (itself a telling expression) by changing his uniform and moving 250 miles southward. A ridiculed rival, for those on the other side of the move, becomes a local hero by so changing his uniform and address. Similarly, a World Series sweep (Red Sox over Cardinals) is less meaningful and rewarding than the preceding conference

241. BROWN, *supra* note 167, at 613.

242. For reviews of the more recent work, see *id.* at 543–61; FISKE & TAYLOR, *supra* note 72, at 133–34.

243. Thus, Susan Fiske has proposed renaming realistic group conflict theory as *perceived* group conflict theory. FISKE, *supra* note 233, at 437.

244. See, e.g., ROSS & NISBETT, *supra* note 6, at 40; see also BROWN, *supra* note 167, at 543–51 (reviewing some of the studies); FISKE, *supra* note 233, at 437 (same). For an interesting recent study of how Jewish and Arab subjects reacted to the acts of Jewish and Arab groups, see Raanan Lipshitz, Ziv Gilad & Ramzi Suleiman, *The One-of-Us Effect in Decision Evaluation*, 108 ACTA PSYCHOLOGICA 53 (2001).

245. See *infra* Part III.C.2.b.ii–iii (discussing further various group-serving motivations and biases).

series comeback victory over a long-term and much-despised rival (Red Sox over Yankees).

The "us and them" process, and, just as revealingly, its situational malleability, characterizes all levels of competitive activity. The phenomenon is not limited in the least to campers and athletes. Cross-town high-school rivals graduate and end up cheering for the same college mascot. College rivals move on to become close business associates, and business competitors merge to become a bigger "us" to out-compete a newly defined "them." And the dynamics and their effects can be far more serious. As we write this, Boston is experiencing a re-ignition of neighborhood gang battles. Although the dynamics of the situation are complex, the group affiliations are strikingly schematic: "us" and "them" is defined largely by the happenstance of residence.²⁴⁶ The schema is evident, too, in the way some groups refer to America as "Satan" and the way that many Americans refer to those groups as "evil." Those labels dispositionalize the enemies, contributing to and justifying the anger and desire for retribution that both seem to feel. More generally still, the in-group and out-group situation is felt in ethnic and national wars throughout the world and throughout history.²⁴⁷ Every reliance on this cursory us-them cognitive structure operates to excuse ourselves from the burden of exploring the much more complex, though more significant, situational influences behind the circumstances we despise. Put differently, groupism provides a motive for dispositionism, and dispositionism encourages groupism.

Finally, the group dynamic can be seen in the legal-theoretic debate we are joining here. For example, groupism very clearly seems to be behind Milton Friedman's claim, reviewed below, that people who question markets are all in the same out-group of anti-freedom stinkers as "a Galbraith . . . , a Nader . . . , a Marx or an Engels or a Lenin,"²⁴⁸ and behind Richard Posner's claim that the "sociology of law is . . . *entirely* dominated by scholars of left-liberal bent" whose politics are "[s]o uniform . . . that they may unconsciously regard liberalism (in its modern, 'welfare state' sense) as part of the definition of their field."²⁴⁹ And it similarly lies behind the stereotype of legal economists as right-wing conservatives.²⁵⁰ And then, of course, there is the "mushy middle."²⁵¹

246. See generally Fox Butterfield, *Killing of Girl, 10, and Increase in Homicides Challenge Boston's Crime-Fighting Model*, N.Y. TIMES, July 14, 2002, at A 14.

247. See generally SAM KEEN, *FACES OF THE ENEMY: REFLECTIONS OF THE HOSTILE IMAGINATION* (1986) (collecting hundreds of political cartoons, posters, and artwork showing how enemies have been depicted in twentieth century war propaganda).

248. See MILTON FRIEDMAN, *BRIGHT PROMISES, DISMAL PERFORMANCE: AN ECONOMIST'S PROTEST* 89 (William R. Allen ed., 1972).

249. Richard A. Posner, *The Sociology of the Sociology of Law: A View from Economics*, 2 EUR. J.L. & ECON. 265, 274 (1995) (emphasis added).

250. See, e.g., Alex M. Johnson, Jr., *An Appeal for the "Liberal" Use of Law and Economics: The Liberals Fight Back*, 67 TEX. L. REV. 659, 661 (1989) (reviewing ALAN S. BLINDER, *HARD HEADS, SOFT HEARTS: TOUGH-MINDED ECONOMICS FOR A JUST SOCIETY* (1987)); Posner, *supra* note 2499, at 274.

(iii) Stereotype Threat and Some Exterior Situational Consequences of Knowledge Structures

Our attention, thus far, has been on how knowledge structures make up part of our interior situations without our knowing it. Yet its influence on our lives is powerful. Consider the issue of standardized testing—a subject that provides a vantage from which to view several of the topics that we have already touched on in this section: stereotypes, groupism, and interpretation of academic performance.

For several decades, scholars, educators, policymakers, and commentators have debated the significance, meaning, and possible biases of the standardized tests that our society routinely and increasingly relies upon to help determine educational and career opportunities. As a sorting device, the implications of these exams are undeniably immense—and their use only seems to be increasing as politicians push for inexpensive ways to compare educational curricula and pedagogical techniques.

One attraction of such tests is that, as their name underscores, they are *standardized*—and thus appear to be objective and fair. Everyone has to take the same test, which is graded anonymously by computer. That seems pretty fair. Such a view appears to underlie a general public acceptance of the exams as the primary, sometimes the sole, means of measuring intelligence or aptitude.²⁵² The exams and their widespread use provides some evidence of our dispositionism—for the exams are implicitly premised on the notion that we each are born with or acquire through our academic choices and efforts a stable dispositional quality called “intelligence” which, like the wattage of a light bulb or the horsepower of an engine, is measurable through simple tests yielding hard numbers.

Some controversy has emerged over the tests, however, in response to the fact that the results have tended to vary significantly across different social groups. Numerous explanations have been offered. The easiest conclusion—and the one that many conservative groups tend to reach—is that the variation is attributable to dispositional or essentialist influences, including both genetics and acculturated dispositions.²⁵³ But critics of the exams (or of the weight given to the exams) have attributed the variations to harder-to-see exterior situational factors, including social, economic, and environmental conditions and opportuni-

251. For a more complete discussion of the influence of groupism in academia and across groups that identify with certain ideas or worldviews, see generally Benforado & Hanson, *Naïve Cynicism*, *supra* note 78.

252. For the best history of intelligence testing and its cultural, scientific, and political context, see STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (1981).

253. *See, e.g.*, RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

ties.²⁵⁴ Yet even those variables cannot fully explain the disparate performance of different groups. As Claude Steele recently summarized, “virtually all aspects of underperformance—lower standardized-test scores, lower college grades, lower graduation rates—persist among students from the African-American middle class. This situation forces on us an uncomfortable recognition: that beyond class, something racial is depressing the academic performance of these students.”²⁵⁵

Professor Steele and numerous other social psychologists have thus begun looking where we dispositionists have been least apt to look (indeed, have not, because of our knowledge structures, thought to look): to the interactive and reinforcing roles of interior and exterior situations. According to Steele’s basic thesis, when a person belonging to a stereotyped group suspects that her performance at some task could confirm a negative stereotype about that social group, that person experiences *stereotype threat*.²⁵⁶ Such a threat is posed to anyone whose identity is connected to one or another social category or group (whether that group be defined by age, race, ethnicity, profession, ideological or political affiliations, religion, sexual preference, looks, gender, income bracket or whatever).

Put differently, no one—not even groups or individuals that we tend to think of as powerful—is immune to the risk of being negatively stereotyped or to the behavioral consequences that such a threat poses. For example, Catholic priests, under the threat of a newly salient stereotype, have gone to some lengths to avoid providing any indication that they are pedophiles. Republicans, in the wake of Senator Trent Lott’s remarks valorizing the segregationist efforts of the late Senator Strom Thurmond, went out of their way to avoid being seen as racist or as supportive of racism.²⁵⁷ And legal scholars, under the threat of being

254. Another criticism, of course, is that the exams measure intelligence and aptitude along, at best, an extremely narrow dimension—as a free-throw competition would measure aptitude for basketball. See Steele, *supra* note 100, at 54.

255. Steele, *supra* note 100, at 46.

256. See *id.* at 47.

257. See Adam Clymer, *Bush Rebukes Lott Over Remarks on Thurmond: G.O.P.’s 40 Years of Juggling on Race*, N.Y. TIMES, Dec. 13, 2002, at A1; Adam Nagourney & Carl Hulse, *Bush Rebukes Lott Over Remarks on Thurmond: Sharp Shift in Strategy by the White House*, N.Y. TIMES, Dec. 13, 2002, at A1.

The strong negative reaction to Trent Lott’s barely ambiguous and deeply troubling endorsement of Senator Strom Thurmond’s (pro-segregationist) presidential platform is pretty unusual and, we suspect, the consequence of numerous factors, including the fact that this was by no means the first time that Lott made such comments. See *A Closer Look: A Primer of Senator Lott’s Quotations*, N.Y. TIMES, Dec. 13, 2002, at A22. More typically, in our view, calling someone a “racist” or alleging that they support “racist” policies is viewed as more damaging and inappropriate than doing or saying something that is ambiguously racist. Though we will not defend this claim here, we believe that a major force behind the “politically incorrect” movement and the recent widespread use of what we call the “race card-card” is an attempt by individuals and groups attempting to weaken the felt threat of being stereotyped as racist. Cf. James Boyle, *The PC Harangue*, 45 STAN. L. REV. 1457 (1993) (reviewing *DEBATING P.C.: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES* (Paul Berman ed., 1992)). They have done so by, for instance, reinforcing definitions of racism that ensure that only the most egregious,

viewed as “advocates” or polemicists, rather than as “neutral, objective social scientists,” often avoid evocative issues or conclusions and seem often to steer for a compromise or a moderate position, even as their logic would seem to push them toward a more extreme position.

Now suppose that the stereotype involves not pedophilia, racism, or polemicism, but intelligence. Few of us want to be perceived as unintelligent. And many of us know the frustration of being in a situation in which we want desperately not to “look dumb” and of feeling the resultant anxiety that itself seems to turn us into babbling fools. Interviewing for that “perfect job,” or making conversation with a celebrity are two scenarios where desire to do well can be counterproductive. Similarly, calling someone to whom we feel attracted to ask out on a first date is, stereotypically, an immense hurdle—we feel intensely the threat that by our behavior we may confirm what we fear the recipient suspected all along: that we belong to that class of those with whom no one in their right mind would want a date.

Social psychologists have shown that when people care about appearing intelligent and are at risk of being stereotyped as unintelligent, they tend to react in very much that way.²⁵⁸ A significant and still growing body of evidence reveals that stereotype threat heightens a person’s performance anxiety and, when the task or test is sufficiently challenging, the presence of stereotype threat causes the person to perform less well—thereby confirming the stereotype.

In one of the seminal experiments revealing that tendency, black and white Stanford students took a challenging, thirty-minute verbal exam that should have been equally difficult for each group, based on their common experiences and knowledge bases.²⁵⁹ However, the groups’ performance turned significantly upon how the test was framed. When the test was presented to the subjects as a test of ability, white students performed far better than black students. Yet when the test was presented as a means of understanding how people solve certain sorts of problems, and subjects were told that the test was *not* a measure of a person’s intellectual ability, the two groups performed almost identically.²⁶⁰

This study and many like it reveal how stereotypes—a feature of our *interior*

intentional, and hate-inspired acts count and by making the mere mention of “race” as a causal factor in social outcomes a violation of appropriate norms of discourse (except, perhaps, when “reverse racism” is said to be involved).

258. That is, as unintelligent. The more we care about it the greater the threat. See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in *BLACK-WHITE TEST SCORE GAP* 401 (Christopher Jencks & Meredith Phillips eds., 1998); cf. KUNDA, *supra* note 6, at 470–71 (explaining how individuals with greater numbers of identifying characteristics—that is, great “self-complexity”—are less threatened by failures in one area of the self, because the failure tends to be confined to that one area, while the other areas of the self, like eggs in other baskets, remain intact).

259. Steele & Aronson, *supra* note 258, at 402.

260. More specifically, the black students performance improved significantly (reflecting stereotype threat) and the white students’ performance actually worsened (reflecting the absence of their previously enjoyed stereotype lift), such that both groups performed at the same level. See *id.* at 410 fig. 11-2.

situations—exist “in the atmosphere” and thus influence us as part of the unseen *exterior* situation. Unlike the nervous and tongue-tied date-seeker, struggling to find the right words and to adopt the proper demeanor, neither the anxiety created by stereotype threat nor its source is likely to register consciously on the part of the test taker. But stereotype threat does indeed create the performance-harming anxiety.²⁶¹

Black students taking the test under stereotype threat seemed to be trying too hard rather than not hard enough. They reread the questions, reread the multiple choices, rechecked their answers, more than when they were not under stereotype threat. The threat made them inefficient on a test that, like most standardized tests is set up so that thinking long often means thinking wrong, especially on difficult items²⁶²

Researchers have also discovered that black students engaging in a challenging task have significantly higher blood pressure when under stereotype threat than when not under stereotype threat (and have higher blood pressure under both conditions than do white students).²⁶³

It is important to recognize that this phenomenon is not occurring because of a person's overall level of self-esteem or some other stable dispositional quality. When mathematically inclined white male students, a group thought to enjoy high levels of self-esteem, were given a challenging math test, they performed significantly less well on it when they were told that Asians generally scored better than whites on the exam, than they did when not met with such a stereotype threat.²⁶⁴ The phenomenon occurs, not because of the dispositional qualities of the test-takers, but rather because of exterior *situational* influences—that is, the threat of being stereotyped.

So it is that we can perceive (and to some extent measure) dispositional features that may themselves both reflect and obscure the already hard-to-see situational features that permeate and largely define our existence. And so it is

261. See, e.g., *id.* at 415 & fig.11-3 (reporting that black subjects about to take the test in the “ability frame” condition were more likely to fill out blanks in word fragments to create race-related words and to eschew preferences for sports and music associated with African-Americans than were black subjects in the “unrelated to ability” frame condition).

262. Steele, *supra* note 100, at 51.

263. See J. Blascovich et al., *Racism and Racial Categorization*, 72 J. PERSONALITY & SOC. PSYCHOL. 1364 (2003); see also Jim Blascovich & Wendy Berry Mendes, *Challenge and Threat Appraisals: The Role of Affective Cues*, in FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION 59, 67 (Joseph P. Forgas ed., 2000) (summarizing studies on physiological responses to threats); Joe Tomaka et al., *Cognitive and Physiological Antecedents of Threat and Challenge Appraisal*, 73 PERSONALITY & SOC. PSYCHOL. 63 (1997).

264. See David M. Marx et al., *Allport's Legacy and the Situational Press of Stereotypes*, 55 J. SOC. ISSUES 491, 496 (1999) (citing Joshua Aronson et al., *When White Men Can't Do Math: Necessary and Sufficient Factors in Stereotype Threat*, 35 J. EXPERIMENTAL SOC. PSYCH. 29 (1999)).

that stereotypes are, in that way among others, often self-fulfilling.²⁶⁵

b. Attributional Processes

i. Causation, Responsibility, and Blame

There is a second “fundamental process underlying much of social perception and action” that has long been understood by social psychologists, but not by the rest of us: namely, the process of making *causal* attributions.²⁶⁶ People are eager to understand the causes of salient outcomes and actions in their environs and have fairly deeply ingrained schemas (using the term broadly²⁶⁷) for identifying those causes. Fritz Heider introduced the concept of attributions in the middle of the last century, and since then probably no feature of cognitive process has received more attention from social and cognitive psychologists.²⁶⁸

In the late 1960s, Harold Kelley hypothesized that lay scientists rely on the same inferential mechanisms as professional scientists do for understanding causation.²⁶⁹ Kelley’s theory was both normative, regarding how people should make causal attributions, and descriptive, regarding how people actually do make causal attributions.²⁷⁰ Particularly early on, the evidence seemed to confirm the theory as a descriptive matter.²⁷¹ From those ambitious and promising origins, several important literatures have since developed.²⁷²

First, social psychologists went on to discover a number of systematic biases in people’s attributional processes—including the actor-observer bias,²⁷³ the false consensus effect,²⁷⁴ the self-centered bias,²⁷⁵ attributional schemas,²⁷⁶

265. See generally FISKE, *supra* note 233, at 421–22 (briefly reviewing studies on “self-fulfilling prophecies,” “expectancy confirmation,” and “behavioral confirmation”).

266. See NISBETT & ROSS, *supra* note 129, at 5. For a much more extensive discussion of the relevance of attributional process to law and legal theory, see Hanson, Reyes, & Schlanger, *Attributional Positivism*, *supra* note 43.

267. Social psychologists sometimes indicate that knowledge structures and schematic processes are inconsistent with attributional processes. But that point is typically directed at the statistically based normative version of attribution theory proposed by its early proponents. See, e.g., Edward E. Jones & Keith E. Davis, *From Acts to Dispositions: The Attribution Process in Person Perception*, in 2 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 219 (Leonard Berkowitz ed., 1965); Kelley, *supra* note 186. It does not apply to much of the more recent attributional work; indeed, it only stretches the concept of “knowledge structures” a little to claim, as we do, that common attributional processes reflect a widely held knowledge structure. The discussion below will help make that clear.

268. See FISKE & TAYLOR, *supra* note 72, at 57; Eliot R. Smith, *Social Cognition Contributions to Attribution Theory and Research*, in *SOCIAL COGNITION: IMPACT ON SOCIAL PSYCHOLOGY* 77, 77–80 (Patricia G. Devine et al. eds., 1994).

269. See generally FISKE & TAYLOR, *supra* note 72, at 23–95 (summarizing the origins and evolutions of attribution theory); Hanson, Reyes & Schlanger, *Attributional Positivism*, *supra* note 43 (same).

270. See PLOUS, *supra* note 124, at 174.

271. See FISKE & TAYLOR, *supra* note 72, at 23–95.

272. See sources cited in *supra* note 269.

273. See *supra* note 188.

274. See *infra* notes 536–39.

275. See Hanson, Reyes & Schlanger, *Attributional Positivism*, *supra* note 43.

276. See *id.*; see also FISKE & TAYLOR, *supra* note 72, at 60 (noting the role of knowledge structures in people’s causal inferences).

and, most important, the fundamental attribution error.²⁷⁷ There is little need, in light of our discussion above (and below), to further describe those sorts of biases or their sources. They are all manifestations of the more general phenomena that we are highlighting in this Article: our perceptions and construals are skewed by what we tend to see, which tends to be only a small piece of the whole picture. For example, instead of relying on covariation principles of the sort that Kelley imagined, people too readily rely more on temporal and spatial contiguity and salience in making causal attributions.²⁷⁸

For those sorts of reasons, Kelley's preliminary hypothesis is now understood to have significant shortcomings, at least as a descriptive model. This leads to the second significant development in attribution theory. Numerous scholars have worked to develop more successful descriptive models of people's attributional processes.²⁷⁹ For example, Bernard Weiner, with some of his colleagues, has shown that people tend to focus on three (or four) causal dimensions: locus, stability, control, (and, in some models, intent).²⁸⁰ In his early work, which focused on how people made attributions in terms of these categories with respect to achievement efforts, he focused on three dimensions: whether the cause was stable or temporary, whether the locus of the cause was internal or external to the individual, and whether the person had control over the cause.²⁸¹

A little introspection—or a careful read through the newspaper headlines—should confirm that we humans are indeed focused on those dimensions when examining causation for all sorts of surprising outcomes that we encounter. Furthermore, as this line of research shows, our *reactions* (affective and behavioral) vary significantly depending on how we perceive a cause along those dimensions. Thus, the destruction caused by a forest fire seems different to us when it was caused by a person, rather than a bolt of lightening (locus). Likewise, it matters if the person had control over the outcome (controllability), whether the person has created several such fires in the past (stability), and whether the person was a careless camper or a profiteering arsonist (intent). Weiner's basic attributional model has enjoyed considerable empirical support and has been expanded to apply in numerous settings.²⁸²

And that leads to the third major development in attribution theory since Kelley's initial effort. Social psychologists, including Weiner, have constructed more refined theories to capture not just how people make causal attributions, but also how they assign responsibility and blame based on those causal

277. See *supra* text accompanying notes 81–106. For useful summaries of those and other attributional biases, see BROWN, *supra* note 167, at 169–94; Hanson, Reyes & Schlanger, Attributional Positivism, *supra* note 43.

278. See FISKE & TAYLOR, *supra* note 72, at 58–59.

279. See *id.* at 57–66 (reviewing some examples).

280. See, e.g., Bernard Weiner, *Attribution, Emotion, and Action*, in HANDBOOK OF MOTIVATION AND COGNITION 281 (Richard M. Sorrentino & E. Tory Higgins eds., 1986).

281. See Hanson, Reyes & Schlanger, Attributional Positivism, *supra* note 43; see also FISKE & TAYLOR, *supra* note 72, at 52–53 (summarizing Weiner's work).

282. See FISKE & TAYLOR, *supra* note 72, at 53–54.

attributions. Kelly Shaver has argued that people tend to assign responsibility for harmful outcomes when, roughly, the harm was foreseeable and when the person acted volitionally and without justification.²⁸³ And people assign blame, a more punitive designation, when the harmful outcome was intended.²⁸⁴ In Shaver's words, "An assignment of blame is . . . a particular sort of social explanation. It is the outcome of a process that begins with an event having negative consequences, involves judgments about causality, personal responsibility, and possible mitigation."²⁸⁵ Again, there is considerable evidence to support those attributional theories.²⁸⁶

ii. *Lay Judges*

That leads to the most recent development in attribution theory. There is significant evidence that many of our legal institutions reflect people's attributional impulses (and not, for example, a means of promoting efficiency or wealth maximization). Put most simply, just as people want to identify causation, they likewise want to, when attributionally appropriate, assign responsibility and blame. Moving from causal attributions to attributions of responsibility or blame, the lay scientist turns in her lab coat for a judicial robe. As Bernard Weiner explains:

In [such] situations, an appropriate metaphor to capture the reactions of the involved observer is that he or she is a judge presiding in a courtroom. The judge determines whether others are innocent or guilty and then passes sentences based on these beliefs and experienced emotions. Indeed, life may be considered a courtroom where dramas related to transgression are played out. The observer is a scientist in determining causal judgments, but then acts in a Godlike manner by reaching moral conclusions regarding right and wrong, good and evil.²⁸⁷

We would go further. Just as the habits of the professional scientist reflect the same urges and biases as the habits of the lay scientist,²⁸⁸ so do the judgments and sentences of the courtroom judge reflect those of the lay judge. And our legal system appears to reflect and, to a significant degree, satisfy our impulses to establish causation, assign responsibility, and lay blame.²⁸⁹

283. See KELLY SHAVER, *THE ATTRIBUTION OF BLAME: CAUSALITY, RESPONSIBILITY, AND BLAMEWORTHINESS* *passim* (1985).

284. *Id.*

285. *Id.* at 4.

286. *See id.*

287. Weiner, *supra* note 280, at 336–38; *see also* SABINI, *supra* note 81, at 174 (discussing “man the lawyer”).

288. *See supra* text accompanying notes 265–74.

289. *See* Hanson, Reyes & Schlanger, *Attributional Positivism*, *supra* note 43. For a superbly executed analysis of the attributional tendencies of jurors in tort cases, *see* Neal Feigenson's important book, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* (2000).

iii. *The Situation of Attributions*

Although attributional processes are situational, when pointed out they are easier for people to see (or accept) than many of the other interior situational processes. For example, we are not surprised to learn that “control” and “foreseeability” tend to influence our attributions of causation, responsibility, and blame. In some ways, such insights are commonsensical.²⁹⁰

But, if they are not pointed out to us, our attributional processes begin and remain largely automatic and unconscious²⁹¹; they are experienced, if at all, as obvious and natural. In that way, our attributions manifest themselves more as conclusions than as a process or analysis that yields a conclusion. Like thinking, preferring and choosing, our attributional ascriptions appear to us as self-evident and, in a sense, dispositional. We miss much of the situation out of which they emerge.²⁹² Social psychologist Roger Brown attempted to capture something of the situational flavor of causal attributions this way:

It appears to be the case that the rules of the causal [attributional] calculus are known and regularly used by all adults and also by very young children, by you and me That is to say that you already know the causal calculus, but you know it tacitly or implicitly rather than explicitly. You know how to use it but not yet how to conceptualize it, think about it, and talk about it.²⁹³

A major contribution of attribution theorists has been to make explicit what Brown describes as tacit and what we call situational.²⁹⁴ That we can see our attributional conclusions does not mean that understanding their sources is easy, any more than seeing the effects of gravity implies that understanding precisely how it works or interacts with other forces is easy.²⁹⁵ As Brown writes: “Creating explicit knowledge where there was only tacit knowledge is far from

290. See G. WEARY ET AL., *ATTRIBUTION* 6 (1989).

291. See generally Peter A. White, *Causal Processing: Origins and Development*, 104 *PSYCHOL. BULL.* 36 (1988) (reviewing research on the origins of causal processing and describing the function as “probably automatic”).

292. There may be another reason why “seeing” our attributional process seems fairly easy. We tend to accept theories about ourselves that resonate with our institutions and values—as attribution theory tends to (not merely as a matter of coincidence). Many aspects of our interior and exterior situations do not share that advantage, and we are, in some sense, motivated to remain blind to them. See, e.g., *supra* text accompanying notes 227–35 (implicit attitudes) & 258–60 (system justification).

293. BROWN, *supra* note 167, at 136; see also *id.* (“Explicit knowledge exists when someone can formulate a rule as well as act in accordance with it. Explicit knowledge brings new powers—the power to think and talk about rules. In the domain of language it is the difference between an untutored fluent native speaker (tacit knowledge only) and a linguist, a student of the structure of language; in attribution it is the difference between any layman and social psychologist who studies every day attribution.”).

294. Cf. BERNARD WEINER, *AN ATTRIBUTIONAL THEORY OF MOTIVATION AND EMOTION*, at xi (1986) (“I now identify myself simply as someone who arranges, classifies, and systematizes common sense. In doing so, I attempt to develop as broad and as parsimonious a conceptual system as possible to explain everyday social conduct.”).

295. See *infra* Part VI.B.

an effortless process. There is something pleasurable in it but also something difficult.”²⁹⁶ But social psychologists help us see, not just the process, but also the biasing influence of that process—including, for instance, the fact that our attributions are often altered by the severity of the harm.²⁹⁷

Like all interior situational influences, our attributions can be, and commonly are, influenced by exterior situation. Whether we perceive a person to be in “control” or to have acted “intentionally” are matters that can be framed and promoted.²⁹⁸ Is sexual preference within the control of gays and lesbians? Do guns kill people or do people kill people? What did the hierarchical authorities within the Catholic Church know about the pedophilic conduct of the priests serving its archdiocese, when did they know it, and what did they do about it when they knew? Are welfare recipients dispositionally lazy or situationally disadvantaged? Attributional stereotypes are part of our cultural landscape, and at the core of many cultural debates. There is obviously a great deal at stake in attributions. And there are many interests competing to shape our attributional presumptions and stereotypes.

c. *Counterfactual Thinking*

A small plane crashes in a remote northern province. Two of the passengers survive the crash and attempt to walk to safety. One of the two succumbs to the extreme cold seventy-five miles from the nearest town. The second trudges on but dies when she is just a quarter of a mile from the town. Tragic. Is the second more tragic than the first? Many people think so.²⁹⁹ Even though both people died from the cold after a plane crash, we respond more strongly when someone comes so close to safety. This is an example of *counterfactual thinking*, another type of process bias that plays off of our pre-existing schemas.³⁰⁰

Our schemas define what we think is “normal.” When a bad outcome appears to stem from abnormal circumstances the emotional impact is greater than when

296. BROWN, *supra* note 167, at 136; *see also* WEARY ET AL., *supra* note 290, at 6.

297. *See* FISKE, *supra* note 233, at 117 (summarizing evidence regarding “defensive attribution,” which is the tendency to increasingly “perceive the individual actor to be responsible” as the seriousness of a harm or offense increases).

298. For a brief discussion of how the tobacco industry manipulated attributions, *see* Hanson & Kysar, *Taking Behaviorism Seriously II*, *supra* note 132, at 1524–27, and Jon D. Hanson and Douglas A. Kysar, *The Joint Failure of Economic Theory and Legal Regulation* [hereinafter Hanson & Kysar, *The Joint Failure*], in SMOKING: RISK, PERCEPTION, AND POLICY 229 (Paul Slovic ed., 2001). For a discussion of how our “policy scripts” tend to be influenced by outside sources, *see* generally Chen & Hanson, *The Illusion of Law*, *supra* note 32, and Hanson & Yosifon, *The Situation*, *supra* note 5, at 230–84.

299. *See* Dale T. Miller & Cathy McFarland, *Counterfactual Thinking and Victim Compensation: A Test of Norm Theory*, 12 PERSONALITY & SOC. PSYCHOL. BULL. 513, 516–17 (1986) (finding that subjects recommended greater compensation for the family of the victim who died one quarter of a mile from town than for the survivors of the victim who died seventy-five miles away).

300. *See generally* NEAL J. ROESE & JAMES N. OLSON, WHAT MIGHT HAVE BEEN: THE SOCIAL PSYCHOLOGY OF COUNTERFACTUAL THINKING (1995) (bringing together recent research and theory on counterfactual thinking).

the same outcome results from a familiar situation. A number of factors can lead us to think an outcome is abnormal. For example, the closer the distance between the actual outcome and a potential "normal" outcome, the less abnormal an outcome seems.³⁰¹ Thus, a soldier's accidental death a few days after a war ends, but before news of it reaches the front lines, seems more regrettable than a combat death two days before the war ended. Outcomes that follow unusual actions also stand out as abnormal in our minds.³⁰² So the plight of a plane crash victim who switched flights minutes before takeoff seems particularly poignant. When a bad outcome results from events or behavior that is contrary to our schemas, scripts, or routines, it is easy for us to imagine a different outcome. The more available our expectations are, the more salient will be any deviation from them, and the more painful will be any harm that results from that deviation.³⁰³ Indeed, social psychologists have found that people tend to award greater compensation to victims of accidents in contexts where the victims' behavior prior to the injury had deviated from their normal behavior. Again, the availability of the easily imagined counterfactual appears to increase the sense of tragedy in the occurrence.³⁰⁴

Our counterfactual patterns of thought are related to the same basic internal situation that drives the fundamental attribution error.³⁰⁵ For instance, both reflect the more general tendency to focus on what is easy to see and on what we expect to see.³⁰⁶ Moreover, counterfactual imaginings reflect and further

301. Miller & McFarland, *supra* note 299, at 514.

302. *Id.*

303. *See id.*

304. *See* KUNDA, *supra* note 6, at 149. For a sample of both laboratory and real-world evidence of that tendency, see Robert K. Bothwell & Kermit W. Duhon, *Counterfactual Thinking and Plaintiff Compensation*, 134 J. SOC. PSYCHOL. 705, 705 (1994) (citing Miller & McFarland, *supra* note 299, but finding that the sense of tragedy decreased when blame was attributed to the victim); Patrizia Catellani & Patrizia Milesi, *Counterfactuals and Roles: Mock Victims' and Perpetrators' Accounts of Judicial Cases*, 31 EUR. J. SOC. PSYCHOL. 247 (2001); Barbara A. Spellman & Alexandra Kincannon, *The Relation Between Counterfactual ("But For") And Causal Reasoning: Experimental Findings and Implications for Jurors' Decisions*, 64 L. & CONTEMP. PROBS. 241 (2001); Richard L. Wiener et. al., *Counterfactual Thinking in Mock Juror Assessments of Negligence: A Preliminary Investigation*, 12 BEHAV. SCI. & L. 89 (1994).

305. Individual behavior is usually easier to see. It is more readily available to our minds than are the myriad of situational influences that give rise to the behavior, and so we focus on individuals in explaining behavior. *See supra* text accompanying notes 72–102 (discussing the fundamental attribution error).

306. When we encounter an event or an experience we do so through a particular conceptual framework (schema or script), comprised of event and norm expectations. When we encounter an event or an experience, that framework helps provide the meaning. When the new circumstance is seen, it is set against the norm expectation framework. Striving to make sense of a new circumstance, we "see" through the norms that we bring to the circumstance, and are relatively blind to those that we are not expecting. We give a meaning to the new circumstance based on our norms. The closer an experience approximates our schema-based expectations, the more normal it seems to us and, hence, the more difficult it is to imagine that the experience could have come out any other way. Counterfactual thinking is driven by the availability of imagined alternatives. The more abnormal an event is, the easier it is for us to cognitively *undo* what happened. *See* KUNDA, *supra* note 6, at 145. Exceptional situations are more mutable in our imagination than our normal ones, because of the greater availability of the normal

entrench the situational character's dispositionism. When we think of what might have been, we tend to focus on the individual actors and their actions, rather than on the situation in which they were acting. Because of our dispositionism, we are better able to imagine people acting differently than they did than to imagine that the situation could have been different than it was. Thus, because of the fundamental attribution error our counterfactuals tend to be dispositionist. And when we think about something bad that has happened to a person, even when the thought is motivated by sympathy, our counterfactual thoughts tend to be oriented toward undoing or altering actions or choices on the part of the person.³⁰⁷

Counterfactuals guide more than our reactions to recent happenings. This pattern of the mind continues to influence our mental lives long after an event has transpired. Counterfactuals play a lasting role in our own self-conceptions. To understand how, it is helpful to understand another effect of counterfactual thinking—the *omission bias*. “[T]he availability of a close counterfactual”—an alternative and familiar path—“can increase the regret and disappointment that one feels after experiencing a bad outcome.”³⁰⁸ And we alter our behavior in order to avoid such disappointment. For example, when choosing among potentially bad outcomes, people tend to favor the inactive option over the option that requires action. That is true because “action is more regrettable than inaction because it is easier to undo action by mentally erasing it than it is to undo inaction by mentally adding the action not taken.”³⁰⁹

Do not be misled into seeing this as evidence of a stable-preferenced individual, one that consistently prefers inaction over action. Our counterfactuals do not reflect a consistent dispositionist outlook; rather, they change as our situation changes. The basic pattern is this: we begin by thinking that we will regret

situation. *See id.* at 150. Counterfactuals, however, not only guide our approach to our new happening, they linger and take new forms in our mental lives after the event as well. *See infra* text accompanying notes 308–19.

307. *See KUNDA, supra* note 6, at 151 (“A disturbing implication of these findings is that the more one identifies and emphasizes [sic] with a victim, the more likely one is to contemplate how the victim might have behaved otherwise and therefore to blame the victim.”); *see also* Nyla R. Branscombe et al., *Rape and Accident Counterfactuals: Who Might Have Done Otherwise and Would It Have Changed the Outcome?*, 26 J. APPLIED SOC. PSYCHOL. 1042 (1996); Christopher T. Burris & Nyla R. Branscombe, *Racism, Counterfactual Thinking, and Judgment Severity*, 23 J. APPLIED SOC. PSYCHOL. 980 (1993); Christopher G. Davis et al., *Self-Blame Following a Traumatic Event: The Role of Perceived Avoidability*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 557 (1996) (attributing respondents’ self-blame for spinal cord injury to perceptions of avoidability); Michael W. Morris et. al., *Choosing Remedies After Accidents: Counterfactual Thoughts and the Focus on Fixing “Human Error”*, 6 PSYCHONOMIC BULL. & REV. 579 (1999).

308. KUNDA, *supra* note 6, at 145; *see also, e.g.*, Victoria Husted Medvec, Scott F. Madey & Thomas Gilovich, *When Less Is More: Counterfactual Thinking and Satisfaction Among Olympic Athletes*, 69 J. PERSONALITY & SOC. PSYCHOL. 603 (1995).

309. KUNDA, *supra* note 6, at 152 (discussing D. Kahneman & D.T. Miller, *Norm Theory, Comparing Reality to Its Alternatives*, 93 PSYCHOL. REV. 136 (1986)); *see also* Robert A. Baron, *Counterfactual Thinking and Venture Formation: The Potential Effects of Thinking about “What Might Have Been,”* 15 J. BUS. VENTURING 79 (1999) (summarizing some of the causes and effects of omission bias).

action more than inaction. Over time, however, our perceptions and preferences seem to switch. In the realist words of Ziva Kunda, "In the short term our actions seem more regrettable, but in the long run our failures to act cause us the most grief."³¹⁰ And this again can be explained by some of the same tendencies underlying the fundamental attribution error. After a bad outcome, our actions remain cognitively salient in our memories while any situational constraints that might have influenced those actions remain faded (or quickly fade).³¹¹ It becomes harder to counterfactually imagine not acting, so we experience less regret about the outcomes of those actions.³¹² Similarly, when we remember a harmful event resulting from our inaction, what remains starkly available in our minds is our own failure to act. As the situational constraints grow more distant, so do our reasons for inaction, and our self-regret is more severe.³¹³ "In retrospect, we think we could have handled with ease tasks that at the time seemed all but impossible."³¹⁴ We do not, therefore, have a single, stable disposition across our changing evaluation of our own behavior.

Unsurprisingly, social psychologists have found that we are susceptible to manipulation by those who want to situationally stoke the counterfactualizing cognitions that give rise to actions or inactions.³¹⁵ As one social psychologist, introducing a journal issue dedicated to the topic, put it:

Pointing out to individuals that they might have done something in the past that would make their present more desirable may motivate them toward decisions that would bring about more desirable states in the future. Or, pointing out how an action might have resulted in a worse state of affairs might motivate individuals toward a cautious outlook that minimizes the chances of future undesirable states. The manipulation of consumer emotions by marketers has long been a staple of successful advertising. . . . [C]ounterfactual thinking might be an effective tool for manipulating emotions³¹⁶

310. KUNDA, *supra* note 6, at 154; see also JANET LANDMAN, REGRET: THE PERSISTENCE OF THE POSSIBLE (1993); Abigail J. Stewart & Elizabeth A. Vandewater, "If I Had It to Do Over Again . . .": *Midlife Review, Midcourse Corrections, and Women's Well-Being in Midlife*, 76 J. PERSONALITY & SOC. PSYCHOL. 270 (1999).

311. See ROBERT A. BARON & DON BYRNE, SOCIAL PSYCHOLOGY 95 (10th ed. 2004).

312. See *id.*

313. See Thomas Gilovich & Victoria Husted Medvec, *The Experience of Regret: What, When, and Why*, 102 PSYCHOL. REV. 379 (1994); Thomas Gilovich & Victoria Husted Medvec, *The Temporal Pattern to the Experience of Regret*, 67 J. PERSONALITY & SOC. PSYCHOL. 357 (1994).

314. KUNDA, *supra* note 6, at 155. This phenomenon is undoubtedly related to our tendency to generate counterfactuals with respect to other behavioral choices that other people could have made, rather than envisioning alternative situations that they might have faced when choosing.

315. See, e.g., John J. Hetts et al., *The Influence of Anticipated Counterfactual Regret on Behavior*, 17 PSYCHOL. & MARKETING 345 (2000); Janet Landman & Ross Petty, "It Could Have Been You": *How States Exploit Counterfactual Thought to Market Lotteries*, 17 PSYCHOL. & MARKETING 299 (2000); Ann L. McGill, *Counterfactual Reasoning in Causal Judgments: Implications for Marketing*, 17 PSYCHOL. & MARKETING 281 (2000); Michael Tsiras & Vikas Mittal, *Regret: A Model of Its Antecedents and Consequences in Consumer Decision Making*, 26 J. CONSUMER RES. 401 (2000).

316. Neal J. Roese, *Counterfactual Thinking and Marketing: Introduction to the Special Issue*, 17 PSYCHOL. & MARKETING 277, 278-79 (2000) (citations omitted).

Much has been written about counterfactual thinking,³¹⁷ its effects, and even its functionality.³¹⁸ Still, the relentless part that our “what ifs,” “if onlys,” “but fors,” “would’ve,” and “should’ve” play in our consciousness remains in many ways unexplained. Counterfactual imaginings can plague our present choices with fear and our future evaluations of our present choices with regret. Still, they “force themselves upon us with undeniable strength,”³¹⁹ making it difficult to ignore, among other things, how much nicer it would have been if the milk had not spilled. That strength suggests the power of our internal situations over our own seemingly dispositional mental lives, our thinking, and our decisionmaking.

3. Defending our Knowledge Structures

A later section describes in some detail the influence of “motivation” on our attitudes, cognitions, and behavior.³²⁰ This section briefly discusses the phenomenon as it applies to our knowledge structures.

a. *Where Motive Meets Knowledge Structures*

“If a man is offered a fact which goes against his instincts, he will scrutinize it closely, and unless the evidence is overwhelming, he will refuse to believe it. If, on the other hand, he is offered something which affords a reason for acting in accordance to his instincts, he will accept it even on the slenderest evidence.”

~ Bertrand Russell³²¹

Four stages of adopting new ideas: *“The first is, ‘It’s impossible.’ The second is, ‘Maybe it’s possible, but it’s weak and uninteresting.’ The third is, ‘It is true and I told you so.’ The fourth is, ‘I thought of it first.’”*

~ Dean Radin³²²

317. See, e.g., THE CENTER FOR COUNTERFACTUAL STUDIES, at <http://www.sfu.ca/counterfactual/cfbib.htm> (last visited Sept. 30, 2004) (collecting papers on this topic); Dale T. Miller & W. Turnbull, *The Counterfactual Fallacy: Confusing What Might Have Been With What Ought To Have Been*, in LIFE CRISES AND EXPERIENCES OF LOSS IN ADULTHOOD (L. Montada et al. eds., 1992).

318. The commentary ranges from a solidly felt sense of “how immeasurably poorer our mental lives would be if we didn’t have this creative capacity for flipping out of the midst of reality into soft ‘what ifs!,” DOUGLAS HOFSTADTER, *GODEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID* 643 (1979), to a more sober rationalization of this mode of thinking in our lives (anticipatory regret, for example, may lead us to closely scrutinize important choices rather than make decisions willy-nilly). There also appears to be evidence that some mental diseases are associated with an inability to engage in counterfactual thought.

319. KUNDA, *supra* note 6, at 157.

320. See *infra* Part III.C.2 (discussing the assumption in economics that rational actors would ignore sunk costs).

321. BERTRAND RUSSELL, *PROPOSED ROADS TO FREEDOM: SOCIALISM, ANARCHISM AND SYNDICALISM* 147 (1919).

322. Dean Radin is quoted in Chip Brown, *They Laughed at Galileo Too*, N.Y. TIMES, Aug. 11, 1996, § 6 (Magazine), at 16.

This section returns to the topic of knowledge structures to further discuss the human tendency to persistently defend our knowledge structures, even when confronted with significant evidence that calls them into question. The history and evolution of legal economics illustrates the distorting loyalty of even social scientists to favored theories and beliefs. Above, we noted the benefits that result from using knowledge structures to organize new information in a cognitively efficient way.³²³ It is largely because of those benefits that we are motivated to protect our beliefs and our way of understanding the world and to reject alternatives. Thus, one can think of our knowledge structures (and resultant “knowledge”) as valued cognitive gold—which, in a way, they are. An important question is how do we manage to protect our wealth from being replaced or debased with fools’ gold? How do we maintain our knowledge structures and our sense that we have a solid grasp on the “truth,” when the truth is itself so slippery and elusive and when alternative claims to “truth” compete for our allegiance?

We have already indicated one key defense. Because of the unseen or situational nature of our knowledge structures, we tend to experience our beliefs as emerging almost entirely from an unbiased assessment of evidence from reliable sources. Being blind to our interior knowledge structures allows them to influence our cognitive processes undetected. If we do not see them, we do not attempt to monitor them or influence them.³²⁴

But our interior defenses are made stronger still by the very slipperiness of what “is”—the ambiguity of so much of our social realities.³²⁵ Insofar as reality is ungraspable, so too is proof that any one handle on it is illusory. Around our golden knowledge structures are moats that operate to keep out threatening evidence and, with drawbridges selectively lowered, to allow in any evidence

323. See *supra* text accompanying notes 189–203.

324. And that tendency is, again, a symptom of the interior fundamental attribution error: we “consistently fail to make sufficient allowance for the role that construal plays in determining behavior, a failure with profound personal and social consequences.” ROSS & NISBETT, *supra* note 6, at 12. For instance, we do not “recognize the degree to which [our] understanding of stimuli is a result of an active, constructive process, rather than a passive reception and registering of some external reality.” *Id.* Similarly, we tend to underestimate the variability of situational construal across time and across people, and thus tend to be overconfident in our behavioral predictions regarding ourselves and others. See *id.*

When this Article was in press, we came across some fascinating work by Professor Dan Simon and his colleagues on what they call “coherence-based reasoning.” See, e.g., Dan Simon, *The Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 520–49 (2004) (summarizing the automatic cognitive mechanisms that help provide decisionmakers a sense of confidence in their reasoning); Dan Simon, Chadwick J. Snow, & Stephen J. Read, *The Redux of Cognitive Consistency Theories: Evidence Judgments by Constraint Satisfaction*, 86 J. PERSONALITY & SOC. PSYCHOL. 814 (2004) (reviewing experiments indicating the bidirectionality of reasoning between evidence and conclusion).

325. Cf. KUNDA, *supra* note 6, at 159 (“Because information about the social world is typically mixed and inconsistent, we may often be biased toward confirming any hypothesis we entertain about our own or other people’s attributes.”).

that reinforces them.³²⁶ Confirming features of ambiguous evidence can be embraced as further support, and disconfirming elements of that same evidence can be ignored. Given the prevalence of ambiguity (not to mention our ability and that of others to manufacture ambiguity), our knowledge structures are generally well-protected.³²⁷ As Ziva Kunda explains, echoing Bertrand Russell, our knowledge structures

may affect not only which memories, beliefs, and rules we access but also the amount of effort we invest in searching for relevant beliefs and rules in the first place When we come across evidence that supports our desired conclusions, we may accept it at face value. But when we come across comparable evidence that challenges our desired conclusions, we may evaluate it more critically and work hard to refute it.³²⁸

Social psychologists have given a variety of names to this process—for example, confirmatory bias, perseverance bias, hypothesis-based filtering, elastic justification, and, more generally, motivated reasoning.³²⁹ Perhaps unsurprisingly (given the topic), researchers have found a great deal of evidence suggesting that such devices are extremely powerful. Richard Nisbett and Lee Ross summarized the literature in 1980 as follows:

When people already have a theory, before encountering any genuinely probative evidence, exposure to such evidence (whether it supports the theory,

326. See Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differentiated Decision Criteria for Preferred and Non-Preferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568 (1992); Dieter Frey, *Recent Research on Selective Exposure to Information*, in 19 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOL. 41 (Leonard Berkowitz ed., 1986).

327. For studies revealing the important role of ambiguity, see, for example, Darley & Gross, *supra* note 222; Jason Dana, Roberto A. Weber & Jason Xi Kuang, *Exploiting Moral Wiggle Room: Behavior Inconsistent with a Preference for Fair Outcomes* (Working Paper, June 24, 2003), at http://emlab.berkeley.edu/users/webfac/dellavigna/e218_f03/Fair.pdf; Christopher K. Hsee, *Elastic Justification: How Tempting but Task-Irrelevant Factors Influence Decisions*, 62 ORG. BEHAV. & HUM. DECISION PROCESSES 330 (1995); Christopher K. Hsee, *Elastic Justification: How Unjustifiable Factors Influence Judgments*, 66 ORG. BEHAV. & HUM. DECISION PROCESSES 122 (1996); William M. Klein & Ziva Kunda, *Motivated Person Perception: Constructing Justifications for Desired Beliefs*, 28 J. EXPERIMENTAL SOC. PSYCHOL. 145 (1992); Henry Montgomery, *From Cognition to Action: The Search for Dominance in Decision Making*, in PROCESS AND STRUCTURE IN HUMAN DECISION MAKING 23 (Henry Montgomery & Ola Svenson eds., 1989); Melvin L. Synder et al., *Avoidance of the Handicapped: An Attributional Ambiguity Analysis*, 37 J. PERSONALITY & SOC. PSYCHOL. 2297 (1979); Philip E. Tetlock & Jae Il Kim, *Accountability and Judgment Processes in Personality Prediction Task*, 52 J. PERSONALITY & SOC. PSYCHOL. 700 (1987).

328. KUNDA, *supra* note 6, at 230.

329. For more thorough discussions of the biases and of the evidence, see KUNDA, *supra* note 6, at 111–60 & 223–32; NISBETT & ROSS, *supra* note 129, at 67–89; Chen & Hanson, *Categorically Biased*, *supra* note 136, at 1195–1211 (describing various facets of the “schema-protection” motive); Hanson & Kysar, *Taking Behaviorism Seriously I*, *supra* note 126, at 646–54; Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998). For a more thorough discussion of the role of motivation, see *infra* Part III.C.2.

opposes the theory, or is mixed), will tend to result in more belief in the correctness of the original theory than normative dictates allow.

... When people approach a set of evidence without a theory and then form a theory based on initial evidence, the theory will be resistant to subsequent evidence. ... [and]

... When people formulate a theory based on some putatively probative evidence and later discover that the evidence is false, the theory often survives such total discrediting.³³⁰

The influence of those biases, and others,³³¹ makes clear one of the great problems with our schemas: we create them too quickly and maintain them too loyally. And, again, this problem is not limited to the processes of just lay scientists: “The tendency of professional scientists to persist in adhering to theories well past the point at which such adherence can be justified by the evidence has been observed by many.”³³² We will return to that point briefly below,³³³ and more thoroughly in subsequent articles.³³⁴ For now, the crux of our point is that all of us are subject to the same biasing process that we just do not see.

To be sure, we often see others as biased, prejudiced, vested, incoherent, inconsistent, or closed-minded.³³⁵ But those experiences are schematized as dispositional quirks, not as a reflection of their deeper interior situations.³³⁶ In ourselves, we see what every person is presumed capable of—clarity, objectivity, and open-mindedness.³³⁷ And we can maintain that self-affirming view—as do those who we feel should not—in significant part because we do not see the interior situation.³³⁸

As with the other biases, there’s a critical kicker to this analysis: *exterior*

330. NISBETT & ROSS, *supra* note 127, at 169.

331. See, e.g., Mark Snyder & William B. Swann, Jr., *Hypothesis-Testing Process in Interaction*, 36 J. PERSONALITY & SOC. PSYCHOL. 1202 (1978) (showing how people investigate a hypothesis in a way that tends to confirm it); see also KUNDA, *supra* note 6, at 111–60 (discussing how humans test hypotheses); SABINI, *supra* note 81, at 169–70 (contending that the choice of hypothesis may be subject to irrational or nonsensical forces).

332. NISBETT & ROSS, *supra* note 129, at 168 (citing sources).

333. See *infra* text accompanying notes 339–380.

334. See, e.g., Chen & Hanson, *Categorically Biased*, *supra* note 136, at 1239–52 (laying out some basic predictions about this effect on legal theory); Chen & Hanson, *The Illusion of Law*, *supra* note 32 (providing evidence confirming those predictions in the basic schemas of legal theory).

335. Cf. Lee Ross & Andrew Ward, *Naive Realism: Implications for Social Conflict and Misunderstanding*, in VALUES AND KNOWLEDGE 103 (Edward S. Reed et al. eds., 1997) (arguing that individuals ascribe differences of opinion in others to reliance upon conflicting data, incompetence, or bias).

336. See Emily Pronin, Thomas Gilovich, & Lee Ross, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781 (2004).

337. Cf. Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 374–76 (2002) (reporting that survey respondents had difficulty recognizing their own susceptibility to biases and claimed to possess more positive characteristics—such as objectivity—than the average person).

338. See generally Pronin, Gilovich & Ross, *supra* note 336 (describing our unseen mechanisms for responding to evidence or arguments that conflict with our own schemas).

situation, which we began by emphasizing our failure to appreciate, can wield an immense influence over which schemas we adopt, which we reject, and how and when we apply them. And that process is itself guided in part by the operation of interior schemas functioning below the level of our conscious awareness. Furthermore, once our schemas are in place, exterior situation can provide us the evidence and ambiguity we need to sustain them.

*b. Economics: A Preliminary Case Study*³³⁹

“The power of theory to organize information and guide inquiry is great and is the core of validity in the adage that you can’t beat a theory except with a better theory.”

~ Richard Posner³⁴⁰

“New ideas encounter formidable obstacles, the foremost being indifference, but also the new ideas will often conflict with old ideas or clash with apparently contradictory experience.”

~ George Stigler³⁴¹

Because, as we argued above, people have a stereotyped view of schemas (providing further evidence of their power and presence), we have thus far focused most of our attention on the most salient group concepts and have virtually ignored most of schemas’ other, more general distorting effects. (The tendency should now be, we hope, a familiar one.) No human inference process is without schematic structuring, and none is insulated from schematic distortions.³⁴² Indeed, there is significant evidence that the reasoning of professional scientists, despite their presumed role as purveyors of objective truth, is likewise distorted. Much of what is known about the structure of scientific revolutions (to borrow Thomas Kuhn’s phrase)³⁴³ is just one manifestation of a far more general human tendency to create, defend, and, when forced to, abandon a favored schema or knowledge structure. Here, we will use the real-world example at hand—the schema-driven history of the role of choice biases in

339. In a related project, one of us, with Ronald Chen, is exploring some fundamental ways in which knowledge structures are distorting law and legal theory. See Chen & Hanson, *Categorically Biased*, *supra* note 136; Ronald Chen & Jon Hanson, Distribution Versus Efficiency: Missing the Taste of the Pie (unpublished manuscript, on file with the authors) [hereinafter Chen & Hanson, Taste of the Pie].

340. Posner, *supra* note 249, at 278.

341. GEORGE J. STIGLER, *MEMOIRS OF AN UNREGULATED ECONOMIST* 8 (1988).

342. See C. Neil Macrae, Alan B. Milne & Galen V. Bodenhausen, *Stereotypes as Energy-Saving Devices: A Peek Inside the Cognitive Toolbox*, 66 J. PERSONALITY & SOC. PSYCHOL. 37 (1994).

343. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

economics and legal economics.³⁴⁴ This partial case study illustrates not only the distorting effects of knowledge structures, but also how their effects bedevil policy analysts, including legal economists.

i. Knowledge Structures in the Analysis of Temporal Effects

Consider the history of social scientific analysis of the effects of time on judgment—a history that we already hinted at above. At least since Adam Smith and well before the emergence of neoclassical economics, economists have been interested in intertemporal decisionmaking. The early economists sought to identify and examine the often-conflicting “sociological and psychological determinants of these choices.”³⁴⁵ In the early nineteenth century, for example, John Rae wrote about the affective attractiveness of immediate consumption as compared to the displeasure of saving:

Such pleasures as may now be enjoyed generally awaken a passion strongly prompting to the partaking of them. The actual presence of the immediate object of desire in the mind by exciting the attention, seems to rouse all the faculties, as it were to fix their view on it, and leads them to a very lively conception of the enjoyments which it offers to their instant possession.³⁴⁶

And around the same time economic theorist N.W. Senior wrote that “[t]o abstain from the enjoyment which is in our power, or to seek distant rather than immediate results, are among the most painful exertions of the human will.”³⁴⁷

Thus, the sort of variability of preferences to which neoclassical economists have long been blind had not only been identified by economists a century before, but had also been explained by them. Strikingly, both Rae and Senior intuited what social psychologists more than a century later came to call *immediacy*.³⁴⁸

Similarly, toward the late 1800s, some economists even began to write about the effects of heuristics in human cognitions. In 1889, Eugen von Böhm-Bawerk wrote:

It may be that we possess inadequate power to imagine and to abstract, or that we are not willing to put forth the necessary effort, but in any event we limn a more or less incomplete picture of our future wants and especially of the

344. For a related and more complete examination of the influence of knowledge structures on law and economic analysis of policy, see Chen & Hanson, *Categorically Biased*, *supra* note 136; Chen & Hanson, *The Illusion of Law*, *supra* note 32; Chen & Hanson, *Taste of the Pie*, *supra* note 339.

345. Frederick, Loewenstein & O'Donoghue, *supra* note 153, at 351.

346. JOHN RAE, *THE SOCIOLOGICAL THEORY OF CAPITAL* 120 (1834), *quoted in* Frederick, Loewenstein & O'Donoghue, *supra* note 153, at 353.

347. NASSAU W. SENIOR, *OUTLINE OF THE SCIENCE OF POLITICAL ECONOMY* 60 (1836), *quoted in* Frederick, Loewenstein & O'Donoghue, *supra* note 153, at 353.

348. *See supra* text accompanying notes 166–70.

remotely distant ones. And then there are all those wants that never come to mind at all.³⁴⁹

Thus, not only were these early economists developing a psychological theory to explain real human behavior,³⁵⁰ the theory they were developing—of a corner-cutting and schema-driven cognitive process—anticipated the very sort of interior fundamental attribution error that we are emphasizing here. In short, economists were beginning to glimpse something of our interior situation, particularly with respect to our cognitive miserliness.

But the insight itself makes predictable what would be done with it. There was then emerging a new brand (or schema) of economics—the far more technical, simplistic, and axiomatic (and far less realistic) approach that came to be known as neoclassical economics. In an effort to create a simple way of thinking about intertemporal choice that comported with the emerging economic models, Nobel Laureate Paul Samuelson, in a five-page article, offered the now-dominant discounted utility model.³⁵¹ “[I]n Samuelson’s simplified model, all the psychological concerns discussed over the previous century were compressed into a single parameter, the discount rate.”³⁵² The new model was based not upon social scientific analysis but on “little more than introspection and personal observation” on the part of several economists.³⁵³ As Frederick, Loewenstein, and O’Donoghue explain in their recent account, the path to theoretical dominance was quick and direct, owing not to realism but to what we would call schematic biases, a retreat from realism to simplicity:

Samuelson did not endorse the [discounted utility] model as a normative model of intertemporal choice, noting that “any connection between utility as discussed here and any welfare concept is disavowed” He also made no claims on behalf of its descriptive validity, stressing, “It is completely arbitrary to assume that the individual behaves so as to maximize an integral of the form envisaged in [the discounted utility model]” However, despite Samuelson’s manifest reservations, the simplicity and elegance of this formu-

349. EUGEN VON BOHM-BAWERK, CAPITAL AND INTEREST 268–69 (1889), *quoted in* Frederick, Loewenstein & O’Donoghue, *supra* note 153, at 354. Similarly, in 1920 Arthur Pigou, the economist to whom Ronald Coase was responding in his famous *The Problem of Social Cost*, explained that variation of time preferences resulted from the fact that “our telescopic faculty is defective, and we, therefore, see future pleasures, as it were, on a diminished scale.” ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE (1920), *quoted in* Frederick, Loewenstein & O’Donoghue, *supra* note 153, at 354 n.2.

350. *Cf.* Frederick, Loewenstein & O’Donoghue, *supra* note 153, at 355 (“In the early part of the twentieth century, ‘time preference’ was viewed as an amalgamation of various intertemporal motives.”).

351. Paul A. Samuelson, *A Note on Measurement of Utility*, 4 REV. ECON. STUD. 155 (1937). Samuelson did most of his pathbreaking work in very short articles, typically styled “notes.” It is telling, we believe, that that the efficiency of his ideas is evident in both their substance and form, qualities that our readers are likely craving about now.

352. Frederick, Loewenstein & O’Donoghue, *supra* note 153, at 355.

353. *Id.* at 352.

lation was irresistible, and the [discounted utility] model was rapidly adopted as the framework of choice for analyzing intertemporal decisions.

The [discounted utility] model received a scarcely needed further boost to its dominance as the standard model for intertemporal choice when Tjalling C. Koopmans showed that the model could be derived from a superficially plausible set of axioms. Koopmans, like Samuelson, did not argue that the [discounted utility] model was psychologically or normatively plausible; his goal was only to show that under some well-specified (though arguably unrealistic) circumstances, individuals were logically compelled to possess positive time preference. Producers of a product, however, cannot dictate how the product will be used, and Koopmans' central technical message was largely lost while his axiomatization of the [discounted utility] model helped to cement its popularity and bolster its perceived legitimacy.³⁵⁴

The influence of the discounted utility schema continues to be significant, even among the skeptics and nonbelievers. The theories offered to compete with the discounted utility model often have been heavily anchored to that model, although evidence of real human decisionmaking is forcing them to begin to take into account certain aspects of the situation.³⁵⁵ As we will detail below, the same is true for the more general rational-actor model in law and economics.³⁵⁶

Thus far, we have indicated two general ways in which economists over the last half-century have responded to evidence of the lack of realism in the rational-actor-based discounted utility model. The most common method (and a key reason that Samuelson's brief note has become such a dominant approach to positive and normative theory) has been to adopt the basic model without regard to its realism. That strategy tends to work when economists are not confronted with anomalous or falsifying evidence. A second method is to acknowledge the basic model's unrealism and to accommodate the anomalous evidence with as little violence to the original model as possible.³⁵⁷ That approach, as we've noted, reveals the anchoring effect of our knowledge structures.³⁵⁸

There is at least one more general method, a middle way between those two, which is to acknowledge the supposedly anomalous evidence, but construe it in a way that renders it confirmatory of the challenged model.³⁵⁹ This is a restatement of the confirmatory bias described above.³⁶⁰ The strategy thus takes what appears to be damaging evidence and transforms it into reinforcing evidence. But, again, the strategy often reflects not a fair and accurate interpreta-

354. *Id.* at 355–56 (citations omitted).

355. *See id.* at 365–73 (discussing alternative models that remain true to the discounted utility model).

356. *See infra* Part V.

357. *See* Frederick, Loewenstein & O'Donoghue, *supra* note 153, at 373.

358. *See supra* text accompanying notes 201–20.

359. There are, of course, more extreme strategies—such as abandoning the original model in its entirety. Such alternatives are as rare in practice as they are revolutionary in theory.

360. *See supra* text accompanying notes 216–17.

tion of the evidence, but a motivated attempt to maintain a favored theory.

Richard Posner's response to intertemporal inconsistencies exemplifies that approach. He takes evidence that most economic behavioralists consider a threat to the rational actor model's viability and reinterprets it as further support for that purported model:

[T]he reason for the [intertemporal choice variations] may simply be that I lack a clear conception of my consumption needs a decade hence; the reason may, in other words, be the imagination cost I cannot imagine what might make me pay in effect a huge interest rate to reallocate consumption [in the distant future, whereas I can imagine it today]. The fact that knowledge and imagination are "bounded" just shows, what no rational-choice economist doubts, that information costs are positive.³⁶¹

Posner thus cleverly explains the phenomenon in terms of now-somewhat-theorized information costs, exhibiting what Dean Radin describes as the "I thought of it first" stage of accepting an idea.³⁶² Posner's reasoning reflects the confirmatory bias in its classic form inasmuch as he interprets selective portions of the ambiguous evidence as consistent with his favored theory, failing to see that it is also consistent with competing theories or to examine whether other portions of the evidence can be similarly construed.³⁶³

But Posner's construal goes further and reveals what might be called *counterfeit confirmation bias*.³⁶⁴ Posner does more than just selectively reinterpret evidence to corroborate a favored theory. He also fundamentally adjusts the underlying theory, while falsely claiming that its pre-altered version has been confirmed. More specifically, Posner conflates information costs, a sliver of which economists have long included in their basic model, with "imagination costs," which economists conventionally do not have a place for in their models.³⁶⁵

Of course, we do not dispute that people have trouble imagining or appreciating factors that are less immediate. To the contrary, as we have been detailing for 1.5 articles, that difficulty is a fundamental feature of the situational character's interior situation. The problem is that conventional *economics* has

361. RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 259 (2001).

362. See *supra* note 322 and accompanying text.

363. Posner, like all of us, makes a habit of this. For example, he interprets evidence of downward-sloping demand curves as a valid basis for preferring the rational-actor model over alternative models (such as the situational character), though it isn't. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 161–63; *infra* notes 724–30 and accompanying text.

364. This is an unsurprising symptom of what we describe below, as *counterfeit realism*, one of several inadequate responses by legal economists to the challenge of realism. See *infra* Part V.C (describing and addressing economists' responses).

365. See Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 AM. ECON. REV. 460, 461–63 (2002) (describing in his Nobel lecture the reluctance and narrowness with which economists generally took information costs into account—for the same sorts of reasons that we describe in this Article).

generally meant something very different when referring to “information costs”—which is precisely why the insights of behavioralists have been slow in coming and why the bulk of social psychology and related fields have been ignored. The conventional assumption regarding the effect of information costs is not, contrary to Posner’s version, that people will be unable to imagine their needs in a future state of the world, but rather that rational actors will mis-estimate the risks they face in the current state of the world. Furthermore, economists do not generally assume, as Posner does here, that individuals will systematically *underestimate* risk, but rather that they will mis-estimate randomly such that they are correct on average.³⁶⁶ Posner himself makes this precise argument when discussing the general role of information costs on people’s consumption choices.³⁶⁷ And he makes the same sort of argument to help defend his rational actor theory when he claims that the presence of irrational actors may not alter the model’s prediction regarding downward-sloping demand curves,³⁶⁸ so long as the irrational actors behave, *on average*, like rational actors.³⁶⁹ Even accepting Posner’s elastic definition of “information costs,” his argument assumes that our limited imaginations are not a feature of our interiors that we can adjust for or control; otherwise, individuals would simply make rule-based (imagination-free) adjustments to help eliminate time effects on their choices.³⁷⁰ Posner is claiming, not just that “rational actors” have limited imaginations, but also that they do not recognize that they have limited imaginations. He is, in other words, implicitly positing the existence of unseen interior situational influences—a view that we share, but that he cannot plausibly sustain while remaining otherwise committed to the rational-choice model that he hopes to defend.³⁷¹

In that way, Posner re-fashions the model that he purports to be defending. This move reveals either the unrealism of the unaltered rational-choice model or the elasticity and non-falsifiability of that model.³⁷² Relatedly, by focusing so singlemindedly upon defending the rational actor model against the challenge at hand, Posner fails to see how his solution creates bigger problems for that model that were apparently beyond his imagination (or his cognitive budget) at

366. See, e.g., George J. Stigler, *Economists and Public Policy*, REGULATION, May-June 1982, at 13, 16 (“[P]eople act efficiently in their own interests. . . . [They] learn all the presently knowable things it pays them to know—always on average—and act with due regard for this knowledge.”).

367. See WILLIAM M. LANDES & RICHARD A. POSNER, *ECONOMIC STRUCTURE OF TORT LAW* 273–311 (1987).

368. Downward-sloping demand curves represent the basic economic axiom that “when the price of *x* goes up, the amount of *x* that the consumer will purchase goes down, and vice versa.” ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 23 (3d ed. 2000).

369. POSNER, *supra* note 361, at 261.

370. They could do so simply by rejecting today’s preferences that, without obvious reasons, contradict the preferences that would exist were the same choice postponed until tomorrow. Thus, in our example above, see *supra* text accompanying notes 153–56, a person could simply re-pose any choice in a hypothetical future time frame, and make more reliable judgments.

371. See *infra* Part V.C.1.

372. See *infra* text accompanying notes 724–49.

the time.³⁷³ But more important for our purposes, his arguments also exemplify one of the many ways in which all people selectively, unconsciously stretch their theories in service of a favored knowledge structure.

To more clearly view the influence of counterfeit confirmatory bias in this episode, consider again the historical context of this debate. By pointing to people's imperfect imaginations, Posner is unwittingly restating the basic arguments of the nineteenth-century economists, particularly those of Böhm-Bawerk.³⁷⁴ Böhm-Bawerk looked to psychology and sociology in an effort to generate a realistic portrait of the human agent, untethered to the strictures of the formal rational-actor model.³⁷⁵

Scholars who, a half-century later, adopted Samuelson and Koopmans' discounted utility model for explaining intertemporal decision making were rejecting the realism undergirding Böhm-Bawerk's argument for the sake of embracing the elegance and simplicity of the rational choice model.³⁷⁶ Thus Posner, in the name of maintaining the rational-choice model, is falling back on the very same realism that was rejected in the name of adopting that model. This is the same Posner who has argued repeatedly in the face of criticisms that simplicity and elegance are the touchstones of good science,³⁷⁷ and the same Posner who frequently admonishes that "[i]n theory-making, descriptive accuracy is purchased at a sacrifice of predictive power."³⁷⁸

But Posner does not maintain the simplicity or predictive power that he claims to value. At best, he preserves merely the appearance of such qualities by altering the once-simple theory to house evidence that had previously been rejected as too cumbersome to accommodate. It is not the theory's capacity for accommodation that has changed, but the weight, clarity, and prominence of the anomaly. Although Posner provides no meta-theory to explain when to relinquish reductionism for the sake of realism, the meta-theory is revealed in his

373. For other criticisms of the nonfalsifiability of Posner's theoretical commitments, see Christine Jolls, Cass R. Sunstein, & Richard Thaler, *Theories and Tropes: A Reply to Posner and Kelman*, 50 STAN. L. REV. 1593, 1595 (1998) ("Throughout Posner's commentary, he goes through the following ritual. He discusses one of the phenomena we identify as problematic for economic theory; he offers a modification or elaboration on the standard theory that could, in principle, be consistent with this phenomenon; and then he declares victory. Posner seems to think that the fact that it is possible to tell a rational choice story consistent with the data is sufficient to establish that this explanation is the correct one. This is obviously a fallacy. In no case does he offer evidence to suggest that his preferred explanation is correct, nor even a test that would, in principle, discriminate between his explanation and ours. For those of us who believe in falsifiability, this is an unfortunate omission."); Hanson, Reyes, & Schlanger, *supra* note 43 (arguing that Posner's positive theory of tort law is non-falsifiable).

374. See *supra* text accompanying notes 345–50.

375. See *supra* text accompanying note 349. See generally Benforado & Hanson, *The Costs of Dispositionism*, *supra* note 47 (comparing and contrasting Posner's narrow, dispositionist approach to legal theory with Guido Calabresi's relatively situationist approach).

376. See George Loewenstein, *The Fall and Rise of Psychological Explanations in the Economics of Intertemporal Choice*, in CHOICE OVER TIME 3 (George Loewenstein & Jon Elster eds., 1992).

377. See *infra* text accompanying note 725.

378. POSNER, *supra* note 361, at 263; see also *id.* at 264 ("Explanation and prediction must not be confused.").

practice. The meta-theory, which is found in the human interior situation, is to take into account only as much anomalous evidence as one's prevailing knowledge structure must, and to do so in a way that salvages as much of that knowledge structure as possible.

It is important to recognize a likely effect of—and, perhaps, motive behind—the counterfeit variation of confirmatory bias. Changing a theory, while pretending not to, in order to explain what would otherwise be disconfirming or falsifying evidence, allows for the pre-altered theory to be applied in unexamined form in other contexts. For example, Posner does not feel compelled at the end of his treatment of intertemporal judgments to rethink all areas of economic analysis to determine the possible influence of “imagination costs.” He is able to pretend that the rational-actor model, in unaltered form, has fully survived the skirmish with realism. The strategy further permits him to criticize those scholars who, in response to evidence of realism, call for new theories (with new names). Thus Posner claims that “behavioral economists tend to give up on rational-choice economics too soon.”³⁷⁹ Of course the point is that Posner, too, has given up on rational-choice economics. It is just that he has done so in a way that allows him to maintain the legitimating mantle of a longstanding theory and to fall back on the simplified model without justification.

In short, by engaging in the confirmatory bias—in both its classic and counterfeit forms—Posner has avoided the implications of the very “imagination costs” that rescued his rational actor model. If Posner were serious about imagination costs, he would be forced to recognize what those applying social science have, often to their own surprise, discovered and demonstrated: The limits of human imagination are not a factor that kicks in or should be relied on or explained away selectively. Instead, they are a permanent condition of our interior situations, an unseen condition that should be at the core of our understandings of human actors and, in turn, our legal theories.

Economists, spurred by the importuning of economic behavioralists, may appear to be approaching another revolution (or counter-revolution) in the spiraling trajectory of their thinking about intertemporal choices.³⁸⁰ It is difficult to read that history, however, without seeing the economizing and distorting role of schemas or knowledge structures channeling and shaping that thinking.

ii. The Focus on Choice Biases

But there is more to be observed about the silent influence of interior situational forces over economists' experiences with choice biases. There is

379. *See id.* at 260.

380. Frederick, Loewenstein, and O'Donoghue argue compellingly that the old “idea that intertemporal choices reflect an interplay of disparate and often competing psychological motives . . . should be resurrected,” because doing so “will help us to better understand and better explain the intertemporal choices we observe in the real world.” Frederick, Loewenstein & O'Donoghue, *supra* note 153, at 393. Put differently, they, like us, are calling for a critical realist scientific revolution—though theirs is a far narrower agenda.

another, more general way in which prevailing knowledge structures in economic and legal economic theory have evaded the most threatening implications of social psychology. It is no coincidence that, as noted in the previous section, it is *choice* biases that have been taken relatively seriously³⁸¹ by economists and legal economists. New subfields—behavioral economics and law and behavioralism—have emerged in an effort to incorporate the choice biases into tractable economic models.³⁸²

Indeed, Daniel Kahneman, one of several founders of behavioral economics, won the 2002 Nobel Prize in Economics. The economics establishment celebrated his choice-based work precisely because it was so directly relevant and easily incorporated into many traditional, dispositionist economic models.³⁸³ Choice biases focus on *choice*—the center of neoclassical economic theory. Thus, the behavioralist studies revealing choice biases are intended less to create a new general understanding of how humans think and more to reveal the flaws in the simple rational-actor and self-interest models of traditional economics.

The narrowness of choice biases makes them the most straightforward and accessible means of disproving the predictions of unrehabilitated economic theory.³⁸⁴ With such discrete, clear anomalies, behavioralists pose the most immediate challenge to conventional economic models. But such anomalies are also the least damaging to, or the most easily accommodated by, models that continue to take preferences and choices as the centerpiece of human activity.

381. Though not very seriously and not without substantial resistance. See *infra* Part IV.

382. See *infra* Part V; see also Daniel Altman, *A Nobel that Bridges Economics and Psychology*, N.Y.TIMES, Oct. 10, 2002, at C1 (“Behavioral economics and experimental methods have become hot topics for graduate students in some of the nation’s top economics departments. ‘Many of the best and the brightest young graduate students are interested in these issues, and they’re getting good jobs,’ [University of Chicago] Professor [Richard] Thaler said. Universities in the United States, Europe, Israel and Japan have opened centers dedicated to behavioral and experimental economics in the last few years. David I. Laibson at Harvard credited the rapidly rising interest in the subject to the strength of its science. ‘The field is based primarily on work that reflects real people’s choices,’ he said. ‘In that sense, the findings have an inherent validity.’”).

383. See Jon E. Hilsenrath, *Nobel Winners For Economics Are New Breed*, WALL ST. J., Oct. 10, 2002, at B1 (noting that “[t]he Nobel committee praised the 68-year-old professor for ‘having integrated insights from psychological research into economic science, especially concerning human judgment and decision-making.’”). Kahneman’s “prospect theory”—the work that many believe led to the Nobel Prize—is itself a dispositionist method of predicting consumer choices. It is, in other words, an important and seminal contribution to weak-form realism. See *infra* Part V.C.4 (discussing weak-form realism).

384. So it is that Richard Thaler, one of the most prominent of economic behavioralists, has based his important work on producing “convincing anomal[ies]” by finding “facts that contradict” the crisp predictions that flow from economics’ “two key assumptions [of] rationality and self-interest.” RICHARD THALER, *WINNER’S CURSE 2* (1992); see also POSNER, *supra* note 361, at 264 (behavioralism “is defined by its subject rather than by its method and its subject is merely the set of phenomena that rational-choice models (or at least the simplest of them) do not explain”); Andreas Ortmann & Gerd Gigerenzer, *Reasoning in Economics and Psychology: Why Social Context Matters*, in COGNITION, RATIONALITY, AND INSTITUTIONS 131, 133–34 (Manfred E. Streit et al. eds., 2000) (emphasizing the significance of “heuristics-and-biases” research for “identifying ever new anomalies, or systematic deviations from predictions of standard economic (game-theoretic) models”).

By focusing on choice biases, behavioralists do not investigate, much less challenge, the role of choice in the model, only the particular version of choice calculus conventionally assumed. Anomalies have thus been both easy to find and easy to present without implicating a far more thorough indictment of the entire economic paradigm that social psychology, taken seriously, would yield. Economists and economic behavioralists have thus been able to maintain their assumption about preference-driven, choice-making actors, while disputing only the extent to which that actor operates according to more or less rigid rationality assumptions. By focusing on choice biases, in other words, economists have been able to ignore the situation.³⁸⁵

But this is not a dispositional critique. We are not saying—nor do we believe—that economists ignore situational influences consciously or deliberately. They have been ignoring it because of the situation—their interior situation (and, arguably, their exterior situation, which rarely places them in direct contact with individuals or ideas that would challenge their dispositionist axioms). Their shared knowledge structures, for example, have distorted what they see and how they construe what they see.³⁸⁶ And, because their knowledge structure is itself situational, they have no reason to doubt what they think they see—that is, dispositional choice.

As this discussion helps to demonstrate, professional scientists and lay scientists are bedeviled by the same situation. Knowledge structures and schemas are all around us, guiding our every, or most every, thought, and simultaneously assisting and distorting what we “know.” The coloring concepts and theories we employ can lead us to focus on irrelevant details in our environment, to overlook the relevant details, and to misunderstand our world.³⁸⁷ As we hope the reader has already recalled (with the aid of the knowledge structure that we are attempting to create), that is precisely the mechanism behind the exterior and interior fundamental attribution errors.

4. Summary

Where lay people and economists see “thinking,” they vastly overstate its significance and vastly understate the interior situation of our thinking—that is, our unseen cognitions. Social psychology and related fields make clear that all of our cognitive processes are more or less influenced by unseen and distorting influences, from heuristics and framing effects on one hand to schematic and attributional processes on the other. And all of those unseen cognitions and cognitive processes render us more or less vulnerable to outside manipulation—indeed, the experiments revealing the cognitive phenomena simultaneously

385. See *infra* Part V (providing a more general critique of this type).

386. As we have already hinted, other interior situational features—such as motivation—may have also contributed to this tendency.

387. See KUNDA, *supra* note 6, at 20. See generally Chen & Hanson, *Categorically Biased*, *supra* note 136, at 1155–1216 (describing those and many other distorting influences of knowledge schemas and categories).

reveal the extent to which they can be tapped through exterior situation.

In short, this section has shown some of the ways in which, although it is *true* that we experience ourselves thinking, we do not think the way we think we think. There is more to the situation. And, as the next section illustrates, we have barely scratched the surface of our interior situations.

C. ATTITUDES (VS. "PREFERRING")

The previous section focused on the situation of our "thinking." This section focuses on the situation of our attitudes or "preferences." This section leads to the same sort of conclusion: although it is *true* that we experience ourselves preferring, there is more to the situation than what we perceive, and thus more to the meaning of preferences than most of us, legal economists and policy makers included, have appreciated.

1. Some Evolution of the Concept

a. *The Traditional View—Stable and Causal*

We begin by reminding our readers of *attitudes*, the name that social psychologists have given to the concept that economists have called preferences. Traditionally, attitudes were as central to the theories of social psychologists as preferences are to economists—and their centrality played a very similar role. In 1954 Gordon Allport claimed, "this concept is probably the most distinctive and indispensable concept in contemporary American social psychology."³⁸⁸ More recently, Richard Eiser claimed that

[t]he term 'attitude' is probably used more frequently than any other in social psychology. There are few theories in which the concept is not explicitly or implicitly introduced, and few experiments in which attitudes are not involved somewhere among the dependent variables.³⁸⁹

Preferences are similarly central to economic theories.³⁹⁰ One important difference is that while economists have, for decades, complacently assumed the actuality of their pre-theoretic concept of preferences, social psychologists have, for nearly a century,³⁹¹ painstakingly applied scientific methods to test and better understand their concept of attitudes.

Economists assume preferences are stable and exogenous—by which they

388. Gordon W. Allport, *The Historical Background of Modern Social Psychology*, in *HANDBOOK OF SOCIAL PSYCHOLOGY* 3, 43 (Gardner Lindzey ed., 1954).

389. J. RICHARD EISER, *SOCIAL PSYCHOLOGY: ATTITUDE, COGNITION, AND SOCIAL BEHAVIOR* 11 (1986).

390. See *infra* Part V.

391. For a description of some of the earlier, classic studies on the relationship (or surprising lack of relationship) between attitudes and behavior, see EISER, *supra* note 389, at 52–53; FISKE & TAYLOR, *supra* note 72, at 530–32.

essentially mean dispositional.³⁹² What social psychologists have learned about attitudes by studying them reveals attitudes are malleable and, for the most part, endogenously determined—by which we mean internally and externally situational.

Before describing the situational nature of attitudes, it is worth highlighting that even social psychologists initially believed or expected to find that there was a dispositional “there” there. For example, Allport, in 1935, defined “attitude” as “a mental and neural state of readiness, organized through experience, exerting a directive and dynamic influence upon the individual’s response to all objects and situations with which it is related.”³⁹³ In 1948, Krech and Crutchfield wrote “[a]n attitude can be defined as an enduring organization of motivational, emotional, perceptual, and cognitive processes with respect to some aspect of the individual’s world.”³⁹⁴ Those definitions reflect an old, now largely rejected, version of attitudes—as “involving beliefs, feelings, and dispositions to act.”³⁹⁵

b. The Modern View—Neither Stable nor Causal

It has only been through extensive social scientific efforts to pin them down that social psychologists have come to discover just how situationally contingent attitudes really are:

When one looks at those studies that have attempted directly to compare verbal expression of attitude towards a group or issue with other attitude-relevant behaviours, a rather confused picture emerges. Sometimes the verbal measures provide quite good predictors of the specific kinds of behaviour under investigation, but very often they seem to allow no such prediction at all.³⁹⁶

In response to the “many examples where measures of attitude and behaviour fail to correlate, or where correlations are found which are ambiguous with respect to the direction of causality,” most social psychologists have maintained their allegiance to the concept of attitudes, but changed its definition.³⁹⁷ More specifically, “theorists seem to be moving toward a conception of attitudes as evaluations that are related in complex ways to beliefs, feelings, and actions. This newer approach allows the question of the relation of attitudes to behavior,

392. See *infra* Part V.A.

393. Gordon W. Allport, *Attitudes*, in HANDBOOK OF SOCIAL PSYCHOLOGY 810 (Carl Murchison ed., 1935).

394. DAVID KRECH & RICHARD S. CRUTCHFIELD, THEORY AND PROBLEMS OF SOCIAL PSYCHOLOGY 152 (1948).

395. SABINI, *supra* note 81, at 527.

396. EISER, *supra* note 389, at 52.

397. *Id.* at 53.

for example, to be an empirical rather than a definitional issue.”³⁹⁸

And what the empirical evidence has shown is, first, that “attitudes” as traditionally conceived—and as they are imagined by most policy analysts and policymakers—do not reveal themselves as stable determinants of human behavior and, second, that exterior situation has an immense influence over the interior relationship between attitudes and behavior. As Allan Wicker put it in his summary of the evidence more than thirty years ago, there exists “little evidence to support the postulated existence of stable, underlying attitudes within the individual which influence both his verbal expressions and his actions.”³⁹⁹ And, more recently, Fiske and Taylor summarize the role of situation by asking:

Why should seemingly trivial aspects of a situation have such a clear impact on people’s behavior? Why should it matter what you temporarily access about your past behaviors or beliefs? Situationally induced salience can put relevant attitudes . . . in the mental foreground, making them more available as guides to action What is salient defines the situation for the individual, reducing ambiguity and inconsistency . . . ; it tells you what should be relevant to your behavior if you are uncertain of what to do. Finally, when [your] global attitudes . . . are made salient, responsibility for behaving consistently with one’s attitude will loom large. . . . To predict which cognitions will cohere with behavior, then, one must know which factors in a situation are salient.⁴⁰⁰

Again, the exterior situations interact with our interior situations—all outside of our conscious perception and all while we perceive ourselves to be acting according to our thoughts and preferences.

To be sure, we have some articulable attitudes. But even those attitudes are far more situationally contingent than we appreciate. And any situation in which we report or perceive our attitudes will rarely correlate with our actual behavior in other situations, or even our reporting or perception of our attitudes in other situations. Our failure to appreciate the role of our interior situations further interferes with our dispositionist expectations that attitudes will define our behavior. The following subsection offers a more thorough, though still summary, examination of the interior situation giving shape to our attitudes.

c. The Emerging View—Implicit and Automatic

While social psychologists first believed attitudes to be outside the reach of

398. SABINI, *supra* note 81, at 527–28. This newer approach to attitudes helps to illustrate the contribution that social cognition has made to its primary antecedent, social psychology. See FISKE & TAYLOR, *supra* note 72, at 464 (“Social cognition’s main contribution to the field of attitude research has been a fine-grained analysis of the mediating processes involved in attitude formation and change.”).

399. Allan W. Wicker, *Attitudes Versus Action: The Relationship of Verbal and Overt Behavioral Responses to Attitude Objects*, 25 J. SOC. ISSUES 41, 75 (1969).

400. FISKE & TAYLOR, *supra* note 72, at 531–32.

measurement, they have come to see that “attitudes”—an individual’s assessment of an object along a favorable-unfavorable dimension—could be measured and did influence people’s feelings, cognitions, and behavior. Again, attitudes were long a cornerstone concept in social psychology, and their measurement, through a variety of self-report mechanisms such as feeling thermometers and questionnaires, became one of the major preoccupations of social psychology. But emerging out of those then-revolutionary views of attitudes as measurable is what today some describe as “an orthodoxy,” which has made difficult the recognition of a less visible (more situational), but still measurable, type of attitude.⁴⁰¹

In the last several years, social psychologists have encountered “new, previously undetected forms of attitudes” that “elude conscious awareness, seem oblivious to conscious intention, and defy conscious control.”⁴⁰² Perhaps because of the recentness of the findings, they go by a number of names, including implicit attitudes, “automatic thoughts and feelings,” “unconscious thoughts,” “unconscious social cognition,”⁴⁰³ and “automatically activated attitudes.”⁴⁰⁴ Whatever their name, the phenomena are revealed through new methods that, very loosely, involve measuring the speed and strength with which people automatically make associations between objects and attitudes.⁴⁰⁵ Through such work, psychologists have found that the evidence regarding our worst tendencies—including stereotyping and prejudice—suggests that they

operate via the routine mechanisms of perception, memory, categorization, and decision-making. Just as those processes operate outside awareness, control, intention, and self-reflection, so do their more value-laden versions concerning stereotypes and attitudes about individual humans and the social groups to which they belong.⁴⁰⁶

The best evidence further indicates that “our minds contain knowledge about social groups (stereotypes) and attitudes (prejudice) toward them—whether we want to or not.”⁴⁰⁷ And that knowledge and those attitudes are influencing us even if we don’t want them to, and despite our best conscious efforts to prevent it.⁴⁰⁸ The findings are so disturbing that even social psychologists have strongly resisted them “with a passion atypical of the sterility of normal academic

401. See Banaji, *Implicit Attitudes*, *supra* note 105, at 117, 118. For a discussion of whether implicit attitudes are indeed attitudes or are something else, see *id.* at 120–31.

402. *Id.* at 118.

403. Banaji, *Ordinary Prejudice*, *supra* note 105, at 8.

404. Banaji, *Implicit Attitudes*, *supra* note 105, at 119.

405. See William A. Cunningham, Kristopher J. Preacher & Mahzarin R. Banaji, *Implicit Attitude Measures*, 12 AM. PSYCHOL. SOC. 163 (2001) (describing and assessing the various related techniques).

406. Banaji, *Ordinary Prejudice*, *supra* note 105, at 9.

407. *Id.*

408. See *id.*

exchange.”⁴⁰⁹

The work on these newly discovered forms of attitudes is a collaborative effort among numerous social psychologists at nearly as many universities.⁴¹⁰ Rather than recount that effort here, we will simply highlight some of the key findings that have come out of the work. First, researchers have found that people have stronger “automatic preferences” for groups with which they associate themselves—what social-psychologists call “in-groups”—than they do for “out-groups,” or people with whom they do not associate. Those findings are not uniform, however, for it has also been demonstrated that individuals who identify with groups that are dominant within the larger culture have stronger automatic in-group preferences than do individuals from less dominant groups. So, for example, white Americans appear to have a stronger implicit in-group preference than do African-Americans. Further, stereotypical “knowledge” about different social groups, whether more or less dominant, is activated automatically—such that, for example, the terms “black” and “athlete” are implicitly associated.⁴¹¹

Perhaps the most staggering insight of the implicit attitudes research is that the human mind does all this—conjuring stereotypical and dubious associations that give shape to our attitudes—outside our conscious awareness. What is more, as is true with every situational phenomenon, our implicit attitudes are subject to external situational influence. The very studies evoking implicit attitudes demonstrate that point. Such studies have also demonstrated that exposure to unfamiliar or counter-stereotypical associations can temporarily reshape implicit attitudes; with the right situational manipulations, for example, subjects begin to automatically associate the terms “strong” and “female,” or “black” and “good.”⁴¹² In sum, the important research indicates some of the ways that our attitudes are formed and altered by forces beyond our conscious awareness.⁴¹³

The scholars working in the burgeoning field of implicit attitudes admit to being quite “taken aback” by many of their own findings.⁴¹⁴ And, in reconciling

409. Banaji, *Implicit Attitudes*, *supra* note 105, at 118; *see also id.* at 119 (explaining that “issues and questions raised by experts and lay audiences appear to be equal in sophistication”); John A. Bargh, *The Cognitive Monster: The Law Against the Controllability of Automatic Stereotype Effects*, in *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY* 361 (Shelly Chaiken & Yaacov Trope eds., 1999).

410. A useful description of the work, as well as a collection of the relevant evidence, is available at <http://projectimplicit.net> (last visited Nov. 16, 2004).

411. Those implicit patterns are evident in both individuals who are members of the group that is automatically associated with some quality, and for individuals who are outside the group. For an illuminating review of the evidence of a “pro-white preference,” *see* Banaji, *Implicit Attitudes*, *supra* note 105, at 137–45.

412. *See* Banaji, *Ordinary Prejudice*, *supra* note 105, at 9–10.

413. For more extensive discussions of that research, *see* Jason Mitchell, Brian Nosek & Mahzarin Banaji, *Category Salience Determines Implicit Attitudes Toward Black Female and White Male Targets* (Paper presented at the First Annual Meeting of the Society for Personality and Social Psychology, Nashville, Tenn., 2000), *available at* <http://projectimplicit.net/nosek/talk/SPSP.mitchell.handout.2000.doc>.

414. *See, e.g.,* Banaji, *Implicit Attitudes*, *supra* note 105, at 136.

that surprise with their findings, they emphasize, as do we (though in slightly different terms), the parallel between our inability to see highly influential features of our exterior situations and our inability to see such features of our interior situations:

Just as social psychology's demonstrations of the power of social situation revealed something stunning and even jarring about the ordinary nature of horrific behavior, research on unconscious social cognition has the potential to nudge us similarly toward unappealing conclusions about ourselves: that the stuff in our minds about ourselves and other humans, about our social groups and theirs, can be activated automatically and that once activated they can potentially produce psychologically and socially beneficial and harmful effects.⁴¹⁵

That we resist recognizing or accepting such “stunning and even jarring” evidence about “the stuff in our minds” is in part the consequence of another element of our interior situations: motivation.

2. Motivation

To more completely understand our attitudes, such as they are, it is necessary to understand the role of motivation. Social psychologist Bernard Weiner claims that “motivation lies at the heart, the very center, of psychology.”⁴¹⁶ In the previous section we cited social psychologists claiming that “attitudes” were at the core of their discipline.⁴¹⁷ And, as this section will help show, the two claims are not necessarily inconsistent, for motivations may well be at the heart of our attitudes.

We might put the point slightly differently and claim that motivation lies at the heart of our interior situations. We have already suggested some of the effects of motivation on our cognitions. For instance, we argued that people were motivated to construe their world in a way that confirmed their knowledge structures, theories, or schemas.⁴¹⁸ But we can go further. Motivations influence not only what “data” we focus on and how we interpret ambiguous evidence, but also which knowledge structures, theories, or schemas we unconsciously embrace to begin with.⁴¹⁹ Motivations likewise have a significant influence on our attitudes—what our attitudes are at any given moment and how tenaciously we will resist altering them. And motives, like attitudes, are easily mistaken as “preferences” inasmuch as they “are the motor for behavior.”⁴²⁰

415. Banaji, *Ordinary Prejudice*, *supra* note 105, at 10.

416. BERNARD WEINER, *HUMAN MOTIVATION: METAPHORS, THEORIES, AND RESEARCH* 1 (1992).

417. *See, e.g., supra* note 384 and accompanying text.

418. *See supra* Part III.B.1.a.

419. *See* Chen & Hanson, *Categorically Biased*, *supra* note 136, at 1139–1218 (describing those effects).

420. FISKE, *supra* note 233, at 14.

It is not just that our minds have a mind of their own (as the previous analysis has indicated), it is also that those inner minds have a motivation—actually, a whole set of motivations—of their own.⁴²¹ In this section, we will describe a sample of findings concerning those motivations and some of the interior tensions caused by their coexistence.

Motivations are catalogued and categorized in different ways by different scholars. In our review of the relevant literatures, four general types of motivations stand out as particularly significant aspects of the situational character's inner life: (a) the motive to *understand*; (b) the motive to *self-affirm*; (c) the motive to *simplify*; and (d) the motive to *cohere*.⁴²² As our review of more specific motives will reveal, motivations can be, and often are, in tension with one another. The motive to understand, for example, is often in tension with the motives to self-affirm and simplify. The motive to cohere, then, pushes us to reconcile our conflicting motivations by altering exteriorly and interiorly our cognitions, attitudes, or behavior. But we are getting ahead of ourselves. It aids comprehension to first review one motive at a time.

a. Motive to Understand

Social psychologists, as indicated above, sometimes describe people as intuitive scientists because of people's strong desire to understand their worlds.⁴²³ That motive makes sense: satisfying it helps people to predict and control their world (or at least enjoy the comfort that comes from believing they can).⁴²⁴

In light of that explanation, it may seem more accurate to describe the motive as one of prediction and control, a motive that reveals itself as a desire to make sense of the world. To be sure, the motive to control is a robust one—though it will get short shrift in this Article. But social psychologists have not framed it that way, we suspect, because people's desire to understand seems often to exist,

421. We have chosen to place the topic of motivation under the larger heading of attitude not because the effect of motivations is limited to our attitudes, but because there is no clear limit and they needed to go somewhere. We are motivated to include motivations but our schema—which, necessarily, cannot be up to the task of representing our interior situations—does not have a definite place for them. So, to include them, we will force our schema to accommodate our motive. The difficulty of categorizing motivation is not unique to us—nor is our reaction. Cf. SABINI, *supra* note 81, at 167 (noting that the classification of motivations is “not so obvious[.]”). In any event, our main thesis regarding the impact and importance of the situation is not harmed—indeed, it is probably advanced—by evidence that the situation is actually more complex than our construct suggests.

422. Cf. FISKE, *supra* note 233, at 15 (dividing motive into “belonging, understanding, controlling, enhancing self, and trusting others” (emphasis omitted)); FISKE & TAYLOR, *supra* note 72, at 211–26 (breaking down motivational processes into the motives for “accuracy,” “self-enhancement,” and consistency); David A. Dunning, *On the Motives Underlying Social Cognition*, in EMOTION AND MOTIVATION 137, 154 (Marilynn B. Brewer & Miles Hewstone eds., 2004) (similarly dividing the motivational processes into the desires for “knowledge,” “affirm[ation],” and “coherence”).

423. See *supra* text accompanying notes 184–86; see also KUNDA, *supra* note 6, at 141 (describing our motive to understand our world and to find an understanding grounded in reasons).

424. See FISKE, *supra* note 233, at 17–18. For an early rendition of this explanation for the motive, see HEIDER, *supra* note 184. See generally Hanson, Reyes, & Schlanger, *Attributional Positivism*, *supra* note 43 (reviewing that and subsequent explanations).

at least in muted form, even when their prospect of controlling or even predicting is remote.⁴²⁵

Consider a pair of experiments providing a pure illustration of the motive to understand. In one study, subjects were shown from zero to three pictures of different body parts (hands, feet, and torso) of a man or woman. After viewing all of the selected pictures, the subjects were given the choice of either seeing a picture of the entire person or receiving a small sum of money as a "bonus payment."⁴²⁶ Those subjects who saw more body parts preferred to see the picture of the entire person.⁴²⁷ To be clear, subjects had no obvious personal stake in seeing the picture other than a desire to "see the full picture"—a desire to know.

In the second experiment, subjects in one group were told that they would be asked ten geography questions.⁴²⁸ Then, prior to hearing the geography questions, the subjects were asked if they would prefer to receive, after completing the test, a candy bar or the answers to the questions. A second group of subjects was first asked the questions, and then given the choice between the candy bar and the answers. As the experimenters predicted, three-quarters of the subjects who were offered the choice *before* being asked the questions chose the candy bar—illustrating the well-known craving for chocolate in the bellies of the subjects.⁴²⁹ However, in the second group, who actually heard the questions before being offered the choice, half of the subjects chose to receive the answers instead. Hearing the questions stimulated the not-so-well-known craving for understanding in the minds of the subjects.⁴³⁰

In a quite famous study, Ellen Langer had experimental confederates approach strangers about to begin making copies at a library copy machine and ask if they could cut in.⁴³¹ When the confederates provided no reason for cutting, saying only "Excuse me, I have five pages. May I use the Xerox machine?," sixty percent of the subjects honored the request. When would-be cutters provided a reason, however, saying "Excuse me, I have five pages. May

425. We want to be careful not to overstate our point. The perceived inability to control a force, event, or outcome may sometimes weaken our interest in understanding it. Indeed, a major source of dispositionism is, we believe, the widely held sense that situation is, insofar as it is recognized at all, presumed immune to any individual's choices. People tend to accept that which they perceive as fixed, and the belief that people should simply accept and make the most of their situation is a cultural truism.

426. George Loewenstein, *The Psychology of Curiosity: A Review and Reinterpretation*, 116 PSYCHOL. BULL. 75, 90 (1994).

427. *Id.*

428. See George Loewenstein, Drazen Prelec, & Catherine Shatto, Hot/Cold Intrapersonal Empathy Gaps and the Under-Prediction of Curiosity 1, 10 (1997) (unpublished manuscript, on file with authors).

429. *Id.*

430. See *id.* As stated by the authors, "people have limited introspective access to the factors that influence judgment and decisions . . . and, consequently. . . they cannot 'undo' the effects of information received." *Id.* at 16.

431. For a full account of the study, see Ellen Langer et al., *The Mindlessness of Ostensibly Thoughtful Action: The Role of "Placebic" Information in Interpersonal Interaction*, 36 J. PERSONALITY & SOC. PSYCHOL. 635 (1978).

I use the Xerox machine because I'm in a rush?," fully ninety-four percent of the subjects acceded.⁴³² Thus, when subjects were offered a good reason, they were far more willing to give up their spot. People want reasons.

But what Langer did next revealed even more about our desire to understand. When her confederates provided a meaningless reason (a "placebic" reason), subjects were just as willing to consent to the request as they were when the cutters had given a good reason. More precisely, when asked "Excuse me, I have five pages. May I use the Xerox machine because I have to make copies?," *ninety-three* percent of the subjects acceded.⁴³³ In other words, an empty reason can be as effective as a good reason in situations where both are significantly more influential than no reason.⁴³⁴ People want reasons so badly that they will sometimes settle for the mere appearance of a reason.⁴³⁵

Relatedly, the reasons we provide for our own conduct are often demonstrably inaccurate, even as they seem to confirm our self-concepts as attitude-driven.⁴³⁶ In a series of experiments, Timothy Wilson and his colleagues have shown that, far from being stable predictors of behavior, attitudes can be manipulated simply by prompting people to consider their reasons for holding them. In a typical study, subjects asked to contemplate their reasons for liking or disliking a variety of posters (prior to selecting one to keep) expressed less satisfaction with their choice when contacted weeks later by phone than did subjects who were not asked to consider their reasons.⁴³⁷ According to Wilson, that "introspection effect" results from the fact that our reasons are not plucked from a garden of stable attitudes within us; rather, they emanate from our motive to *have* reasons, which, in turn, leads us to focus on the most "plausible, accessible, and easy to verbalize" "reasons" available.⁴³⁸

432. *Id.* at 637 & tbl.1.

433. *Id.*

434. The results of this study have been somewhat controversial. Compare Valerie S. Folkes, *Mindlessness or Mindfulness: A Partial Replication and Extension of Langer, Blank, and Chanowitz*, 48 J. PERSONALITY & SOC. PSYCHOL. 600 (1985), with Ellen Langer et al., *Mindlessness-Mindfulness in Perspective: A Reply to Valerie Folkes*, 48 J. PERSONALITY & SOC. PSYCHOL. 605 (1985).

435. See Jonathan St. B.T. Evans & P.C. Wason, *Rationalization in a Reasoning Task*, 67 BRIT. J. PSYCHOL. 479 (1976) (describing and demonstrating how people's account of their own thought processes reveal little about their actual thought processes—and instead reveal our motive to cohere).

436. As we'll see below, this experiment reveals more motives beyond just a desire to understand. See *infra* Part III.E.1.

437. See Timothy DeCamp Wilson et al., *Introspecting About Reasons Can Reduce Post-Choice Satisfaction*, 19 PERSONALITY & SOC. PSYCHOL. BULL. 331 (1993).

438. See Timothy D. Wilson, Sarah D. Hodges & Susan J. LaFleur, *Effects of Introspecting About Reasons: Inferring Attitudes from Accessible Thoughts*, 69 J. PERSONALITY & SOC. PSYCHOL. 16, 16 (1995).

That desire for reasons, and the tendency to focus on the salient and simplistic, reflects and helps to reinforce dispositionist schemas in Western cultures. The need for "reasons" would seem to be heightened by dispositionism, inasmuch as people are presumed to act according to the "reasons" generated by the interplay between their thinking, their preferences, and their will. In a dispositionist culture, we need to make sense of our behavior in a way that our fellows and we ourselves can understand. We need dispositionist reasons. The desire to have reasons also reinforces dispositionism, because dispositionism is the most salient and simplistic place to begin when creating reasons. That is,

Social psychologists have long recognized that our desire to make sense of our world is one of our strongest desires. But it does not operate independently of many other features of our interior situation, including our other, sometimes-conflicting motives. It is important to resist the temptation to view those components of the situational character's interior as just discrete and incidental ambivalences in a dispositional actor's preference rankings. After all, the motives we are discussing here generally operate outside of our conscious awareness. It is for this reason that we are so easily persuaded by the illusion of our own articulated reasons, and treat them, unreflectively, as truly the causal wellspring of our behavior. This habit of reason-seeking and reason-offering is deeply ingrained in us, running through unseen canyons of our interior situation, and leaving us vulnerable to exterior manipulation.

As Ellen Langer's simple experiment illustrates, such situational influences, and the motives behind them, help determine how our motive to understand is satisfied. There are other interior motives, however, that also play a role. Our desire for understanding is closely related to the motive to be correct in our understanding—the motive to be accurate (or to perceive ourselves as accurate). That motive can strongly influence the nature of our mental processes—for example, the extent to which we rely on activated knowledge structures.⁴³⁹ When our motive for accuracy is strong, our minds become more focused, we are more calculating and diagnostic in our evaluations, and we rely less on general heuristics.⁴⁴⁰ The motive to be accurate, however, is not the only thing that drives our understanding, for our drive for accuracy is often confounded by more solipsistic ventures supporting a very powerful motive well studied by social psychology—the motive for self-affirmation.

b. Motive to Self-Affirm

At virtually every level of their existence, people tend toward self-affirming attitudes and cognitions. There are different ways of describing this motive. Susan Fiske summarizes it by stating that “[a]ll else being equal, people basically like to feel good about themselves . . . ; they like to feel that they are good and lovable.”⁴⁴¹ David Dunning stresses that “[i]f there is any theme that emerges again and again in social psychology it is that the [situational charac-

because the notion that human behavior reflects thinking, preferring, and willing is so widely accepted, and because that notion so easily explains (albeit tautologically) most behavior, dispositionism also quite naturally becomes the “reason” people settle on when they seek to explain, understand, predict, or control human behavior. Absent that schema, the goals of explaining behavior, assigning responsibility, and altering conduct seem complex and intractable. Similar dynamics help to explain why the dispositionist reasons offered for individual conduct in this culture tend to boil down to simple, often materialistic, notions of self-interest. See Dale T. Miller, *The Norm of Self-Interest*, 54 AM. PSYCHOLOGIST 1053 (1999) (describing ways in which the schemas or norms of self-interest are self-fulfilling).

439. See Chen & Hanson, *Categorically Biased*, *supra* note 136, at 1182–1211.

440. See Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 481–82 (1990).

441. FISKE, *supra* note 233, at 22.

ter] is a prideful one.”⁴⁴²

This motivation can be at odds with, and often overwhelms, accuracy motives. Research has shown that our pride is routinely misplaced, and that the impressions we form and maintain of ourselves have been widely demonstrated to be more self-affirming than accurate. Our self-conceptions are thus “falsely positive.”⁴⁴³

The motive for self-affirmation is aided by the confirmatory bias. We entertain a view of ourselves that is favorable, and in our mental life we search for and highlight evidence that will tend to confirm rather than disprove that view.⁴⁴⁴ And we do that with respect to our individual selves, the groups with which we identify, and the systems of which we are part.

i. Individual

On the individual level, “research . . . shows that people[] . . . are heavily influenced by the need to feel good about themselves and to maintain self-esteem [R]esearch suggests that the impressions that people hold of themselves may be falsely positive and somewhat exaggerated with respect to their actual abilities, talents, and social skills.”⁴⁴⁵ People are “eager to affirm . . . [that they are] competent, masterful, successful, and moral individual[s].”⁴⁴⁶

As those conclusory statements suggest, there are innumerable studies revealing people’s tendency to hold unrealistically rosy self-conceptions. This is why this motive is described as the motive to self-affirm—not a motive to understand oneself accurately, but rather a desire to feel good about oneself. In one study, researchers led a group of subjects to believe that extroversion was correlated with success and a second group to believe that introversion was.⁴⁴⁷ Later, the first group of subjects reported themselves to be extroverts, and the second group claimed to be introverts. No matter the requisite personality trait, then, people found a way to see (or portray) themselves as poised for success. The mechanism making those optimistic beliefs possible were, of course, hidden below the horizon of interior situations. According to the scholars conducting the experiments, the mechanism is similar to confirmatory bias, but here the relevant data was found in each person’s memory of herself. The motive to be viewed as successful made salient those memories of extroversion or introversion that could confirm the desired personality trait.

442. David Dunning, *On the Motives Underlying Social Cognition*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTRAINDIVIDUAL PROCESS 348, 352 (Abraham Tesser & Norbert Schwarz eds., 2001).

443. See FISKE & TAYLOR, *supra* note 72, at 212–16; see also A.G. Greenwald, F.S. Bellezza, & M.R. Banaji, *Is Self-Esteem a Central Ingredient of the Self-Concept?*, 14 PERSONALITY & SOC. PSYCHOL. BULL. 34 (1988); Kunda, *supra* note 440, at 485–86.

444. See KUNDA, *supra* note 6, at 119.

445. FISKE & TAYLOR, *supra* note 72, at 212–13.

446. Dunning, *supra* note 442, at 352.

447. Rasyid Sanitioso, Ziva Kunda & Geoffrey Fong, *Motivated Recall of Autobiographical Memory*, 59 J. PERSONALITY & SOC. PSYCHOL. 229 (1990).

The tendency towards optimism is ubiquitous in human self-perception. Neil Weinstein has devoted a significant portion of his impressive career to showing how people perceive themselves to be less likely than others to experience negative outcomes and more likely than others to experience positive outcomes.⁴⁴⁸ College students are six times more likely to think that they will have above average job satisfaction than below average and six times more likely to think they have an above average chance of being homeowners than a below average chance.⁴⁴⁹ Ninety-seven percent of consumers think they have a better-than-average ability to avoid power mower or bicycle accidents.⁴⁵⁰ And ninety percent of drivers consider themselves to be better-than-average drivers.⁴⁵¹ Our optimism bias and perception of a just world may even transcend to the heavens—literally. Polling shows that while 90% of Americans believe in heaven, only 73% believe in hell. As Weinstein might predict, even some believers skew their odds for a positive outcome in the afterlife: a full 94% of those who believe in heaven think they have fair-to-excellent chances of going to heaven, while a paltry 6% of those who believe in hell think they'll end up in hell.⁴⁵² Although proving those estimates wrong is, at this stage of our research, difficult, they do seem a bit skewed in the direction that we would predict. Whether in avoiding accidents or achieving success here or hereafter, we humans tend to be optimistic souls.

For our purposes, and perhaps for legal theory generally, one of the most revealing manifestations of our self-affirming tendencies is what social psychologists call the *illusion of control*: People believe themselves to exercise more control over their environments than they actually do—an illusion that itself reflects an underlying motive to exercise control. In one demonstration of that illusion, Ellen Langer and Jane Roth asked subjects to predict the outcome of a series of thirty coin tosses.⁴⁵³ All subjects were led to believe that they guessed correctly fifteen times (half the guesses), but some subjects were led to believe that their first four guesses were correct, while others were led to believe that four of their first five were incorrect. Those with early success rated their own overall performance more highly than did the less initially successful subjects

448. See, e.g., Neil D. Weinstein, *Unrealistic Optimism About Susceptibility to Health Problems: Conclusions from a Community-Wide Sample* 10 J. BEHAV. MED. 481 (1987).

449. Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 810 (1980).

450. W. KIP VISCUSI & WESLEY A. MAGAT, *LEARNING ABOUT RISK: CONSUMER AND WORKER RESPONSES TO HAZARD INFORMATION* 95 (1987).

451. Ola Svenson, *Are We All Less Risky and More Skillful than our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143, 146 (1981). Retrospectively, too, we tend to be optimistic in our contributions to joint products. See Michael Ross & Fiore Sicoly, *Egocentric Bias in Availability and Attribution*, 37 J. PERSONALITY & SOC. PSYCHOL. 322 (1979).

452. Russell Shorto, *Belief by the Numbers*, N.Y. TIMES, Dec. 7, 1997 §6, at 60 (Magazine) (summarizing poll data).

453. See Ellen J. Langer & Jane Roth, *Heads I Win, Tails It's Chance: The Illusion of Control as a Function of the Sequence of Outcomes in a Purely Chance Task*, 32 J. PERSONALITY & SOC. PSYCHOL. 951 (1975).

and were similarly biased in predicting their likely performance in future tosses. Significantly, subjects in the first group tended to see themselves as good (not lucky) guessers and subjects in the second group tended to see themselves as bad (not unlucky) guessers. In other words, subjects in both groups fell easy prey to the fundamental attribution error—failing to see the role of randomness in the situation and wrongly attributing perceived success or failure to their skill dispositions. The illusion of control is revealed not only in the tendency to dispositionalize the random event, but also in the fact that forty percent of all the subjects believed that they could enhance their performance at guessing random outcomes through practice, and twenty-five percent felt that their performance would be hampered by distraction.⁴⁵⁴

In a second demonstration of the illusion, Langer gave office workers tickets for a random lottery.⁴⁵⁵ Some of the workers were able to choose their ticket, while others had their ticket assigned. All workers were then given the option of trading their ticket in for another ticket in a different lottery with better odds. Langer found that the first group of subjects (those who had chosen their ticket) were significantly less likely to exchange their ticket than were the second group of subjects. As she concluded, subjects were apparently under the illusion that by choosing their tickets they had increased their chances of winning the first lottery. Put differently, they believed that their choice had given them some control over what was, in fact, random—that is, situational.

Some social psychologists have suggested that such self-affirming motives may contribute to the exterior and interior situational blindness that we have been highlighting. Thus, one can interpret through that lens the situational blindness exhibited in the study discussed above,⁴⁵⁶ in which subjects were told about the Milgram experiments and then asked to estimate how they would have behaved as one of Milgram's subjects. Most individuals believed that they would not have administered powerful shocks, a result that reveals the hidden influence of both exterior situation (pressures to conform) and interior situation (motive to self-affirm). As Mahzarin Banaji recently explained:

[T]he discovery that . . . the immediate situation may have [its] influence outside consciousness is hard to contend with The inability to draw the parallel to oneself, to realize the possible lack of control over one's thoughts and actions is stark and, I would add, psychologically interesting in its own right. It is difficult to see the power of the situation in oneself when the

454. *Id.* at 956.

455. Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311 (1975).

456. See *supra* text accompanying notes 166–70. But see Robert J. Wolosin et al., *Predictions of Own and Other's Conformity*, 43 J. PERSONALITY 357, 376 (1975) (reporting that observer subjects were not only able to predict the degree to which participant subjects would conform to bogus estimates of how many times they had heard and auditory tone but were also able to predict their own degree of conformity if they were the participants).

outcome is unpalatable, just as it is difficult to see the influence of any cause that is not immediate.⁴⁵⁷

As with the other elements of our interior situation, the illusion of control—and the underlying motive for control—renders us susceptible to manipulation through our exterior situations. We tend to accept the frame of those who tell us we are in control, even when our control is limited.⁴⁵⁸ The illusion of control reveals how our motives for self-affirmation often coincide with our dispositionism.⁴⁵⁹ Indeed, the view of our “self” that we each seem to be attempting to affirm is very often that of a dispositional actor.⁴⁶⁰

Sometimes, though, our self-affirming motives can conflict with our dispositionism—that is, there are instances, such as following a failed or disappointing performance, that we look to situation for causal attributions in order to avoid the disheartening conclusion that that failure reflected our own dispositional shortcomings.⁴⁶¹ One experimenter interviewed politicians several months after an election. The winners attributed their performance largely to dispositional factors such as hard work, perseverance, skill, planning, and strategy. The losers, on the other hand, looked to situation, and attributed their performance to the politics of the district, their opponents’ name recognition, to their lack of money, and so on.⁴⁶² The groups thus revealed the two-sided nature of the self-serving attributions: “a ‘self-enhancing bias’ (attributing success to internal relative to external causes) and a ‘self-protecting bias’ (attributing failure to external relative to internal causes).”⁴⁶³

Our desire for self-protection is so great that people often engage in situ-

457. Banaji, *Ordinary Prejudice*, *supra* note 105, at 8.

458. See Hanson & Kysar, *The Joint Failure*, *supra* note 298 (describing the ways in which cigarette manufacturers tapped into consumers’ illusion of control); Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 54 (making a similar point with respect to restaurant industry); Hanson & Yosifon, *The Situation*, *supra* note 5, at 285–99 (describing how scholars recognize only the most palpable situational restrictions on volition); see also Chen & Hanson, *The Illusion of Law*, *supra* note 32, at 99–105 (describing the market’s “illusion of freedom”).

459. Or perhaps it is as accurate to say that our dispositionism is partially a reflection of our motive for control, or that our self-affirming illusion of control partially reflects our dispositionism. The causal relationships are, we suspect, multidirectional.

460. See Steele, *supra* note 86, at 262 (describing our motive “to maintain a phenomenal experience of the self—self-conceptions and images—as adaptively and morally adequate—that is, as competent, good, coherent, unitary, stable, capable of free choice, capable of controlling important outcomes, and so on”).

461. See SABINI, *supra* note 81, at 167.

462. John W. Kingdon, *Politicians’ Beliefs About Voters*, 61 AM. POL. SCI. REV. 137, 141 (1967), cited in MILES HEWSTONE, CAUSAL ATTRIBUTION: FROM COGNITIVE PROCESSES TO COLLECTIVE BELIEFS 57–58 (1989).

463. HEWSTONE, *supra* note 462, at 58. These self-serving biases exemplify two occasions—and there are others—in which individuals are particularly likely to make situationist attributions. Even in those circumstances the attribution will be limited to only a tiny portion of the situation, as we have defined that concept, and is prone to inaccuracy inasmuch as it is motivated by the motive to self-affirm and not the motive for accuracy. See generally Hanson, Reyes, & Schlanger, *Attributional Positivism*, *supra* note 43.

ational manipulation in order to “self-handicap” prior to accepting a challenge.⁴⁶⁴ In one intriguing experiment purportedly about the performance effects of certain drugs, college students were given a choice to take either performance-enhancing drugs or performance-inhibiting drugs before performing either a simple or a difficult task. The group facing the simple task opted for the performance-enhancing drugs. The group facing the difficult task tended to prefer the performance inhibiting drugs. The second group seemed to want an excuse for their anticipated failure.⁴⁶⁵ In circumstances where we are uncertain of our own ability to perform well, we will often unconsciously create situational factors (or the appearance of such factors) on which we can hang responsibility for our failures.⁴⁶⁶

Indeed, one common way of avoiding threats to our self is to avoid the situation altogether in which such a threat might occur. For instance, we might avoid the threat posed by an exam that purports to measure our intelligence by avoiding the test altogether. More subtly, we can temper the threat by altering our attitudes about its significance. If, for example, we’re worried about how well we will perform on such an exam, we may subconsciously find a way to make “book smarts” an unimportant feature of our identity.⁴⁶⁷ By such handicapping—disengagement and disidentification—we protect not just the image that others have of us, but also our image of ourselves.⁴⁶⁸ Indeed, the subjects in the study discussed above self-handicapped to the same extent regardless of whether they believed anyone would know how well they performed the task.⁴⁶⁹ That we manage to fool even ourselves,⁴⁷⁰ reveals just how well hidden our motiva-

464. See, e.g., Dunning, *supra* note 442, at 357.

465. See Steven Berglas & Edward E. Jones, *Drug Choice as a Self-Handicapping Strategy as a Response to Non-Contingent Success*, 36 J. PERSONALITY & SOC. PSYCHOL. 405 (1978). For a review of other studies of self-handicapping, see FISKE & TAYLOR, *supra* note 72, at 235–38; SABINI, *supra* note 81, at 205–07.

466. The example in the text arguably involves not situational manipulation, but manipulation of attributions from the stable disposition of intelligence to the non-stable disposition of intoxication. Those attributions are less threatening to the self, because they are ostensibly temporary. Similarly, individuals might want to attribute some embarrassing behavior to temporary dispositions (for example, choice)—“I meant to do that”—rather than to stable dispositions (for example, ignorance or dimwittedness). In any event, the basic motive is the same, and social psychologists have shown that we adopt the same handicapping strategy by manipulating attributions from dispositions to situation. See, e.g., James A. Shepperd & Robert M. Arkin, *Behavioral Other-Enhancement: Strategically Obscuring the Link Between Performance and Evaluation*, 60 J. PERSONALITY & SOC. PSYCHOL. 79 (1991).

467. Cf. Steele, *supra* note 100, at 50 (explaining and reviewing evidence that one way to protect against stereotype threat, see *supra* text accompanying notes 252–65, is “by ceasing to care about the domain in which the stereotype applies”). For a more complete discussion of disidentification strategies including domain and group disidentification and less drastic types of selective disidentification, see Emily Pronin, Claude M. Steele & Lee Ross, *Identity Bifurcation in Response to Stereotype Threat: Women and Mathematics*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 152 (2004).

468. See Berglas & Jones, *supra* note 465.

469. See *id.*

470. Another possible explanation for such behavior is, not so much that people are attempting to trick themselves, but that people have, through the course of experience, generally pursued a goal that has become habituated. Social psychologists call those habituated motives *nonconscious goals* or

tions are within our interior situations.⁴⁷¹

ii. *Group*

Individuals engage in the same kind of motivated reasoning regarding the institutions, groups, and situations with which they identify as they do with regard to themselves. This is hardly surprising. Our motivation to maintain a positive view of ourselves encourages us to maintain a positive view of the groups with which we are affiliated. And so, as a general matter, we do. Social psychologists have referred to that tendency (which is popularly known as everything from “patriotism” to “racism”) as the “ethnocentric” or “group-serving” bias.⁴⁷²

The section on knowledge structures above⁴⁷³ discussed at length various forms of groupism—the human “tendency to view the world in terms of ‘we’ and ‘they,’ with at least a working hypothesis that ‘we’ are somehow better and more deserving” than “they.”⁴⁷⁴ Our emphasis in that section was on how knowledge structures—concepts, schemas, categories, stereotypes, and so on—influence our cognitive processes and perceptions. But a review of that section should make clear that coupled with the “we-they” schema was a “good-bad” motivation.⁴⁷⁵ When the Rattlers and Eagles food-fought with out-group members and uncritically embraced in-group members, a strikingly powerful and easily activated motivation was at work.⁴⁷⁶ “Merely telling [people] that they are now a group leads them to want to reward their own group more, and to see its members as having better personalities, nicer looks, less responsibility for any failures, and more responsibility for successes.”⁴⁷⁷ The self-serving attributional biases of individuals also appear on the group level as “in-group members [tend] to attribute internal [or dispositional] causes to positive in-group and negative out-group behavior and to attribute negative in-group behavior and positive out-group behavior to external [or situational] causes.”⁴⁷⁸

automatic goals. See Tanya L. Chartrand & Clara M. Cheng, *The Role of Nonconscious Goal Pursuit in Hope*, 13 PSYCHOL. INQUIRY 290 (2002). Interestingly, there is research suggesting that such nonconscious goals can be primed through exterior situation. See *id.*; Clara M. Cheng & Tanya L. Chartrand, *Self-Monitoring Without Awareness: Using Mimicry as a Nonconscious Affiliation Strategy*, 85 J. PERSONALITY & SOC. PSYCHOL. 1170 (2003). We discuss the role of automaticity in greater detail below. See *infra* Part III.E.1.

471. See also *supra* text accompanying notes 256–57 (discussing methods of coping with stereotype threat).

472. FISKE & TAYLOR, *supra* note 72, at 80–81.

473. See *supra* Part III.B.2.a.

474. ROSS & NISBETT, *supra* note 6, at 40.

475. See *supra* Part III.B.2.a.

476. See *supra* text accompanying notes 221–51.

477. FISKE & TAYLOR, *supra* note 72, at 134.

478. FISKE & TAYLOR, *supra* note 72, at 80–81 (citing Miles Hewstone & J.M.F. Jaspars, *Intergroup Relations and Attribution Processes*, in SOCIAL IDENTITY AND INTERGROUP RELATIONS 99 (H. Tajfel ed., 1982)).

iii. *System (and World)*

Our self-affirming motivations extend beyond our self and group identifications. Just as each of us is motivated to believe that “I am good,” and, with respect to our groups, “we are good,” so too are we motivated to believe that “our world is good.”

In a pioneering project within social psychology, Melvin Lerner demonstrated that people seek to confirm a “just world hypothesis.” Through a series of experiments, Lerner demonstrated that, “we do not believe that things just happen in our world; there is a pattern to events which conveys not only a sense of orderliness or predictability, but also the compelling experience of appropriateness expressed in the typically implicit judgment, ‘Yes, that is the way it should be.’”⁴⁷⁹ And, yes, “people get what they deserve.”⁴⁸⁰

In one classic demonstration of the phenomenon,⁴⁸¹ subjects watched another “subject” (actually a collaborator on videotape) apparently react with pain to a series of supposed electric shocks. The Milgramesque shocks were ostensibly punishments for errors in a human learning experiment. In one condition, the observers could, in effect, compensate the victim by reassigning her to a system in which she would earn money rewards for correct answers instead of continuing to receive electric-shock punishments for incorrect answers. In a second condition, no alternative was offered and observers were led to believe that the victims would continue to be subject to the painful shocks. Thus, in the former condition observers were able to (and did) restore justice,⁴⁸² while in the latter condition they could only observe their cohort’s suffering.

At the end of the experiment, subjects were asked to evaluate the victim. In a result that has been replicated in numerous experimental settings, observers of the second condition, which could not be changed, tended to disparage the victim, whereas observers of the first condition, which was subject to improvement, tended to be far more sympathetic to the victim. According to Lerner and Miller, “the sight of an innocent person suffering without the possibility of reward or compensation motivated people to devalue the attractiveness of the victim in order to bring about a more appropriate fit between her fate and her character.”⁴⁸³ In short, we are motivated to resist a perception of injustice either

479. MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION*, at vii (1980).

480. Melvin J. Lerner & Dale T. Miller, *The Attribution Process: Looking Back and Ahead*, 85 *PSYCHOL. BULL.* 1030, 1030 (1978).

481. See Melvin J. Lerner & C.H. Simmons, *The Observer’s Reaction to the “Innocent Victim”*: *Compassion or Rejection*, 4 *J. PERSONALITY & SOC. PSYCHOL.* 203 (1966). Our account of the experiment comes from the summary provided in Lerner & Miller, *supra* note 480, at 1031–32.

482. See Lerner & Miller, *supra* note 480, at 1031 (“[M]ost subjects took advantage of this opportunity to compensate the victim.”).

483. Lerner & Miller, *supra* note 480, at 1032. Lerner and Miller also cite numerous studies replicating those results with diverse populations. See *id.* As with all motives, this motive is neither total nor omnipotent. The motive to believe in a just world may be fairly anemic when the perceived injustice does not implicate the observer. See Isabel Correia, Jorge Vala, & Patricia Aguiar, *The Effects of Belief in a Just World and Victim’s Innocence on Secondary Victimization, Judgments of Justice and*

by restoring the perception of justice or by altering our perception that an injustice has in fact occurred.

In our effort to maintain our belief in a “just world” hypothesis, we tend to attribute bad outcomes to individual dispositions, because it is generally more comforting to presume that it is the person who was bad, rather than the situation. Another chilling, if somewhat dated, study in this area illustrates that phenomenon.⁴⁸⁴ Subjects participated in a simulated jury exercise in which a criminal defendant was said to have raped one of three victims. The victims had been arrayed along a continuum of “respectability”: a virgin (“most respectable”), a married woman (“respectable”), or a divorcee (“least respectable”). Subjects found the virgin and married woman to be more responsible than the divorcee for the rape. Presumably, it was easier for subjects to derogate the divorcee, and to accept that her suffering was compatible with a just world, than it was for them to accept that the “respectable” married woman and virgin would, in a just world, suffer such a fate. To maintain their belief in a just world, subjects needed to find the married woman and the virgin more dispositionally responsible for the bad outcomes they suffered:

[T]he knowledge that innocent, highly respectable females can be raped was particularly threatening to the subjects’ belief that the world is just, and to avoid the threat posed by this type of admission, it was necessary to find fault with the actions of the victim. Thus, the subjects appear to have tried to convince themselves that the victim was really not innocent and that she must have contributed, at least in some small but significant way, to her fate.⁴⁸⁵

The same tendency to find fault with the actions of the victim will exist where the victim is of high social status or personally attractive.⁴⁸⁶

Lerner’s “just world hypothesis” has recently been substantially advanced by contemporary social psychologists who study the operations and influences of our thinking about the social systems with which we identify. John T. Jost has, with numerous collaborators, found that across individuals, and across many

Deservingness, 14 Soc. JUSTICE RES. 327 (2002). Suffering in another part of the world, even if the victims might seem undeserving, can be attributed to forces well outside of our control and unthreatening to us. On the other hand, there are times when an injustice does implicate us and cannot simply be laid on the victim. The Oklahoma bombing and the terrorist acts of 9/11 are good examples. Indeed, that may well be part of what makes those events so horrifying. Our suspicion is that the word “evil” is invoked particularly when the events leave us with no way of alleviating or avoiding the harm and no way of believing that it is deserved.

484. E. Jones & E. Aronson, *Attribution of Fault to a Rape Victim as a Function of Respectability of the Victim*, 26 J. PERSONALITY & SOC. PSYCHOL. 415 (1973). This summary of Jones’s and Aronson’s research comes from Lerner & Miller, *supra* note 480, at 1034–35.

485. Lerner & Miller, *supra* note 480, at 1035.

486. *Id.* at 1041. It is important to recall here, as always, that while group and system affirmation may be evident in some manner in all people, its strength and the nature of its manifestations may also differ widely across individuals and across societies. With respect to cross-cultural distinctions in the situational character, see Hanson & Yosifon, *The Situation*, *supra* note 5, at 250–59.

kinds of social groups, there is a powerful motive to embrace and justify existing social systems.⁴⁸⁷ According to the theory they have developed and tested, people have a strong desire to “justify and rationalise the way things are, so that existing social arrangements are perceived as fair and legitimate, perhaps even natural and inevitable.”⁴⁸⁸ The motive is so strong that it is often pursued even when doing so conflicts with our other self-affirmation motivations.⁴⁸⁹

It is hardly surprising that individuals who enjoy high social status want to justify the system that supports and maintains that status. Legitimizing the system legitimates their own success. But here is the surprising part—low-status individuals also engage in system justification, particularly when that system is under threat. And doing so often leads them to hold more positive attitudes towards high-status individuals than they hold of themselves or members of their own group. In other words, as strong as our motives may be to affirm ourselves or our groups, they can take a back seat to our desire to legitimate the social, political, and economic status quo—to believe, that is, that our social situation is just.

There is a significant and growing body of evidence demonstrating people’s strong incentive to affirm the status quo. In one experiment, for example, Jost and his colleagues identified distinct groups of high-status and low-status Jews in Israel, the former represented by the politically and economically elite Ashkenazi Jews of European ancestry, and the latter by the much less powerful and poorer Sephardic Jews of Middle Eastern and African descent.⁴⁹⁰ The groups answered questions about a range of social issues confronting Israel and about the dispositional qualities of social groups in Israel. Two different versions of the questionnaire were used. In the first respondents were primed with a description of the state of Israeli society that was “low threat”—it described the current state of affairs in Israel as “good” and prospects for the future as

487. See John T. Jost & Orsolya Hunyady, *The Psychology of System Justification and the Palliative Function of Ideology*, 13 EUR. REV. SOC. PSYCHOL. 111 (2002); John T. Jost et al., *Non-Conscious Forms of System Justification: Implicit and Behavioral Preferences for Higher Status Groups*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 586 (2002); John T. Jost, *Outgroup Favoritism and the Theory of System Justification*, in FUTURE DIRECTIONS IN SOCIAL COGNITION 86 (G. Moskowitz ed., 2001); John T. Jost & Diana Burgess, *Attitudinal Ambivalence and the Conflict Between Group and System Justification Motives in Low Status Groups*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 293 (2000); John T. Jost & Mahzarin R. Banaji, *The Role of Stereotyping in System Justification and the Production of False Consciousness*, 33 BRIT. J. SOC. PSYCHOL. 1 (1994).

488. Jost & Hunyady, *supra* note 487, at 119 (emphasis omitted).

489. The concept of system justification has many theoretical forerunners, from Lerner’s “just world” hypothesis in social psychology to the theory of “false consciousness” and dominant ideology in political economy to the concept of ideology in critical theory, race studies, and feminism. Jost and his co-authors acknowledge the influence of this work on the development of system justification theory and argue that the new approach provides a more coherent—and scientifically supported—picture of this widely recognized reality of our interior situations operates. See, e.g., *id.* at 111–19. For one, system justification theory is itself not focused on any particular nexus of in- and out-groups (like class or race or gender), but is meant to provide an explanatory framework that is instructive across, and within, various situations. See Jost & Banaji, *supra* note 487, at 11.

490. Jost & Hunyady, *supra* note 487, at 126–28.

“hopeful.” In that version, when responding to the questions about social groups, high- and low-status Jews exhibited mild in-group favoritism. Members of each group rated their own group more positively on traits such as intelligence, ambition, responsibility, work-ethic, and open-mindedness.⁴⁹¹ In the second version of the questionnaire, respondents were primed with a “high-threat” description of Israeli society, one in which the present state of affairs was described as “precarious” and prospects for the future as “bleak.” In that version, the high-status Ashkenazi Jews continued to exhibit an in-group preference. But this time, with the social system under threat, the low-status Sephardic Jews exhibited an out-group favoritism, rating Ashkenazi Jews higher than their own group.⁴⁹² Apparently, where the social system itself is under threat, the motive to affirm the system can override the desire to affirm even our own groups.⁴⁹³

System-justification theory has led to numerous hypotheses. Among them is the prediction that, under certain circumstances, “members of disadvantaged groups should have the *strongest* system justification needs.”⁴⁹⁴ That hypothesis has found support from several social psychological studies and from data collected for other purposes. Indeed, “evidence from five US national surveys indicat[es] that members of disadvantaged groups show *enhanced* levels of system justification.”⁴⁹⁵ For instance, “low-income Latinos were more likely to believe that ‘the government is run for the benefit of all’ than were high-income Latinos”⁴⁹⁶ and low-income Americans and African Americans were both “more likely than others to believe that economic inequality is legitimate and necessary.”⁴⁹⁷

What is behind the system-justification motive? Probably the best explanation at this point stems from the “dissonance reduction” tradition. System affirmation, on this account, serves a palliative function both for high- and low-status individuals, soothing what would otherwise be irreconcilable tensions about one’s social condition:

[S]ystem justification, as a set of beliefs and assumptions about the existing social system, serves a *stress-preventing function* by allowing the individual to feel that the social context is stable, understandable, predictable, consistent, meaningful, and just We propose that in order to minimize or avoid certain kinds of stress, such as the stress that comes from perceiving that one is a victim of discrimination, people are willing to pay other psychological costs, such as those that follow from blaming themselves for their own

491. *See id.* at 126–28.

492. *Id.*

493. *See id.*

494. *Id.* at 122.

495. *Id.* at 142.

496. *Id.* at 142–43.

497. *Id.* at 143.

misfortune . . . It seem[s] to offer some measure of consolation to those who are disadvantaged as well as advantaged.⁴⁹⁸

There is another way of putting this: We dispositionalize, and attribute injustice to individual dispositional inadequacies or differences, in order to avoid the disconcerting possibility that our situations are unjust and, in particular, that our own suffering or disadvantage reflects system-wide injustice. Thus, in one study, “poor people reported more positive emotion, less guilt, and greater satisfaction when they felt responsible for their situation than when they made external (system-blame) attributions for their poverty.”⁴⁹⁹

For our purposes, one particularly important finding of system-justification research concerns the pivotal role of stereotyping as a legitimating device. Jost and Banaji argue that system justification theory predicts not only *when* stereotypes will emerge, but also what form stereotypes will take.⁵⁰⁰ Because the motive is to protect the coherence of the system, the system-justification motive generates stereotypes of low-status groups that attribute the group’s predicament to the group’s dispositions, rather than to the situation. The dispositionalizing stereotypes need not be negative. Aaron Kay and John Jost have identified a series of complementary, positive gender and class stereotypes (e.g. that women are kind and gentle while men are assertive and strong, and that poor people are happy and honest while rich people are miserable and dishonest) that increase support of the status quo without requiring victim derogation.⁵⁰¹ Through negative and positive dispositionalizing stereotypes, an unjust system can be plausibly perceived as a meritocracy.⁵⁰² And thus, system-affirmation is an additional influence entrenching our dispositionism.⁵⁰³

498. *Id.* at 147 (citations omitted).

499. *Id.* at 145 (citing JAMES R. KLUEGEL & ELIOT R. SMITH, *BELIEFS ABOUT INEQUALITY: AMERICANS’ VIEW OF WHAT IS AND WHAT OUGHT TO BE* 280–83 (1986)).

500. See Jost & Banaji, *supra* note 487.

501. See Aaron C. Kay & John T. Jost, *Complementary Justice: Effects of “Poor but Happy” and “Poor but Honest” Stereotype Exemplars on System Justification and Implicit Activation of the Justice Motive*, 85 J. PERSONALITY & SOC. PSYCHOL. 823 (2003).

502. Evidence further suggests that the stereotypes enabling us to justify the situation are activated automatically—“implicitly”—and influence even those of us who reject the explicit renditions. See Mahzarin R. Banaji & A. G. Greenwald, *Implicit Stereotyping and Prejudice*, in *THE PSYCHOLOGY OF PREJUDICE* 7 (Mark P. Zanna & James M. Olson eds., 1994); Jost & Banaji, *supra* note 487, at 15–16 (citing Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1983)).

503. A possible lesson of system justification theory is that, to combat stereotyping and its status-quo-supporting effects, it may be wise to aim less at changing individual dispositions and to focus more on changing the situation that produces the dispositionalizing impulse. Thus, Jost and Banaji conclude that an important implication of the system-justification approach “is that a most expedient way of changing stereotypes is to change material reality”—that is, by altering the situation. See Jost & Banaji, *supra* note 487, at 18; Alice H. Eagly & Valerie J. Steffen, *Gender Stereotypes Stem from the Distribution of Women and Men into Social Roles*, 46 J. PERSONALITY & SOC. PSYCHOL. 735 (1984); Curt Hoffman & Nancy Hurst, *Gender Stereotypes: Perception or Rationalization?*, 58 J. PERSONALITY & SOC. PSYCHOL. 197 (1990).

iv. Summary

In a wide variety of ways, we humans tend to hold self-affirming beliefs and reach conclusions that at some level we are motivated to hold, while at the same time we under-appreciate the motives or that tendency, particularly in ourselves. Each of those motivations reflects and enhances our dispositionism and our reluctance to appreciate the situation. In other words, self-affirming motivations, hidden out of sight and out of “mind” in our interior situation, wield tremendous influence over our sense of ourselves, the groups to which we belong (or do not belong), and the systems in which we live.

c. Motive to Simplify

The simpler the better—it is difficult to think of a context where that axiom does not apply. Unsurprisingly, the same is true of our social theories. We prefer hypotheses that are simple, and we are motivated to bolster such theories and defend them against more complex alternatives.⁵⁰⁴ We have already provided substantial evidence of this motive. Our discussions of heuristics and knowledge structures suggest that such cognitive tendencies and structures result, at least in significant part, from that motive—we seek simple cognitions and schemas because the situation of our minds is such that they operate under scarce capacity, cognitively, temporally, and conceptually. People thus generally employ a kind of lay version of the celebrated principle known among professional scientists as Occam’s Razor: causal explanations with fewer assumptions are to be preferred to those with more. Similarly, we prefer simple explanations, those that can explain the most with as little complexity as possible.⁵⁰⁵ Because we discussed several manifestations of this motive above, we will, for the sake of simplicity, offer no more examples. But a few comments about the interaction of this motive with others seem in order.

The simplification motivation may be congruent with—and may even further—some of our other motives, such as our motive for understanding. Yet it is in obvious tension with other basic motives, such as our motive to be accurate. Our too-simple interpretive and analytic habits often keep us from accurately assessing much about our environs and ourselves. Somewhat less obviously, this conflict between the motive for simplicity and the motive for accuracy may spill over and cause discord for our motive of self-affirmation. Those basic motives⁵⁰⁶ then can conflict with each other. That difficult mixture of motives is

504. See KUNDA, *supra* note 6, at 141 (discussing the motive to simplify).

505. We believe that this motivation, taken together with our deep capture thesis, suggests something about the kinds of ideas that will be successfully employed in deep capture efforts. More particularly it suggests a reason for the success of law and economics as compared with more complicated legal theories.

506. There are of course other motives that have been identified by social psychology, and refinements of these motives, that we are not reviewing here. Our treatment is meant only to provide an overview of this area of social psychology, and its implications for the situational character that we are here attempting to sketch. For a more exhaustive treatment, see Kunda, *supra* note 440.

held together by a yet another powerful motive—the motive to cohere.

d. Motive to Cohere

“One might say that this paradox—to be realistic, and at the same time be guided by high goals—lies at the heart of the problem of morale”

~Kurt Lewin⁵⁰⁷

We humans seek explanations that are coherent, that we can make sense of, and that can be supported by reasons.⁵⁰⁸ This coherence motive animates the relationship and tradeoff among motives. Because we value coherence, the desire to see it in ourselves dovetails with our motive for self-affirmation. That powerful driving force in our self-conception has figured prominently in social psychological research. Inquiry into “cognitive dissonance,” for example, has been a mainstay of the field for decades.⁵⁰⁹ Often it is the case, as we have already suggested, that our motivations are in conflict. Though motivated to view ourselves positively, our behavior can pose problems for that self-conception. There can be many reasons for such dissonance—not least of which is the fact that we are dispositionist situational characters.

While social psychologists debate some of the details of the cognitive dissonance dynamic,⁵¹⁰ it is the basic pattern, about which most agree, that best illustrates the dispositional illusion. The dispositionist sees behavior as reflecting little more than thinking, preferring, and willing. From that conception, the dissonance can be eliminated by bringing behavior into line with those interior elements. But it can also be, and commonly is, eliminated, by bringing the latter into line with the former.⁵¹¹ That basic challenge to dispositionism—that our behavior influences our beliefs and attitudes—has been a recurring theme in the cognitive dissonance literature: “Regardless of the exact motivational underpinnings of dissonance, the evidence clearly indicates that attitudinally discrepant actions can result in a reanalysis of the reasons why a person engaged in a certain behavior (or made a certain choice), and cause a person to rethink the merits of an attitude object.”⁵¹² That subconscious task can be accomplished in a myriad of ways, from changing our opinions outright to more subtly trivializ-

507. Kurt Lewin, *Time Perspective and Morale*, in KURT LEWIN, *RESOLVING SOCIAL CONFLICTS: SELECTED PAPERS ON GROUP DYNAMICS* 103 (1948).

508. See KUNDA, *supra* note 6, at 140.

509. See, e.g., LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

510. For an overview of disputes in the cognitive dissonance literature, see THE HANDBOOK OF SOCIAL PSYCHOLOGY 335–37 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 1998).

511. See generally Paul Thagard & Ziva Kunda, *Making Sense of People: Coherence Mechanisms*, in 1998 CONNECTIONIST MODELS OF SOCIAL REASONING AND SOCIAL BEHAVIOR 3; Paul Thagard, *Explaining Coherence*, 12 BEHAVIORAL & BRAIN SCI. 435 (1989).

512. THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 510, at 337.

ing a belief that is incongruent with our behavior.⁵¹³

The important critical realist lesson here is not just that behavior may not reflect a preference or belief. That much we have said before when describing how situation can powerfully influence behavior—disposition notwithstanding. The lesson is also that our preferences, such as they are, are themselves malleable, constructed, and contingent—subject to changes in our behavior and in our situation. The malleability of our attitudes, combined with our sense that attitudes are stable, assists us in our motive for coherence. The motive for coherence, like the motive for affirmation, is manifested at several levels, as we next explore.

i. Individual

One of the earliest and best-known experiments demonstrating our willingness to alter our attitudes in service of our self-image involved manipulating subjects to act in a manner contrary to their belief.⁵¹⁴ Subjects were first made to perform a boring task—moving pegs on a board—⁵¹⁵ and then were requested to tell other potential “subjects” that the task was actually quite interesting and fun. One group of subjects was paid \$1 and another, \$20 (a substantial sum in 1959). After describing the task, the original subjects were then asked about how they in fact felt about the experiment. Surprisingly, those who were paid \$1 reported finding the experiment far more interesting than those who were paid \$20.⁵¹⁶ In other words, those who were paid less changed their beliefs about the tedious task, internalizing their own efforts to persuade subsequent “subjects.” Those who were paid more maintained their original—and arguably more accurate—belief.

Simpler (dispositionist) models might predict that the less one was paid the less one would alter her belief about the activity. After all, a small amount of money would not offer an external signal to suggest, or incentive to believe, that the activity was worthwhile and worth embracing as such—but such a prediction would ignore the motivational significance of self-justification. The subjects receiving \$20 had a ready means of reconciling the dissonance between their beliefs and their words to the third-party. Subjects receiving just \$1, however, faced a bigger problem. Given the minimal payment, some other

513. See J.W. BREHM & A.R. COHEN, *EXPLORATIONS IN COGNITIVE DISSONANCE* (1966); Linda Simon et al., *Trivialization: The Forgotten Mode of Dissonance Reduction*, 68 J. PERSONALITY & SOC. PSYCHOL. 247 (1995); cf. THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 510, at 336 (“[T]he accumulated research of dissonance suggests that the negative feelings associated with dissonance can be reduced not only directly by modifying one of the cognitions involved, but indirectly by virtually any other means that would make a person feel less unpleasant.”).

514. See Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL & SOC. PSYCHOL. 203 (1959), available at <http://psychclassics.yorku.ca/Festinger>.

515. Subjects were, for instance, told to carefully turn each peg on a board a quarter turn. After turning all the pegs once, they were told to turn them another quarter turn. Later they were asked to remove each peg carefully, and then put them all back. After an hour, they were told they were done.

516. See Festinger & Carlsmith, *supra* note 514, at 203.

method of reconciliation was needed, and a subconscious alteration of attitudes provided the necessary consonance.⁵¹⁷

Hundreds of experiments have replicated that basic finding.⁵¹⁸ People are generally averse to being dishonest, and will avoid lying without good reason. One central lesson of the research on motivated reasoning, however, is that a ready way to avoid lying is to change beliefs rather than behavior. Dissonance can be induced or introduced into a circumstance of clarity and consonance, as it was here when the subject was asked to promote the experiment to another person. In nonexperimental settings such manipulation can obviously be more serious, sinister, or exploitative.

As a more recent body of work has demonstrated, a change of attitudes is just one way to respond to a threat to “one’s sense of oneself as an intelligent and decent person.”⁵¹⁹

Any thoughts and actions that bring to mind valued aspects of one’s self-concept can also serve to reestablish one’s sense of oneself as a worthy person, even if these are completely unrelated to the counterattitudinal behavior. For a scientist, self-worth could be reaffirmed through reading a scientific journal, for a religious person through prayer, and for an art-lover through a visit to an art gallery. If, following a counterattitudinal behavior, one is reminded of these valued aspects of oneself, this will reaffirm one’s global self-worth and, therefore, reduce the need to change one’s attitude in the service of self-affirmation.⁵²⁰

Instead of changing beliefs or lowering our self-image we can reduce the salience of local negative self-perceptions by searching globally for self-affirming counterexamples.⁵²¹ Or, as Claude Steele expresses it, “[i]n ego defense, people are concerned with the big picture It is the war, not the battle, that orients this system.”⁵²²

This desire to see ourselves in a positive light is an important motive behind what Lee Ross and his co-authors have dubbed “naïve realism”—the name

517. Social psychologists often refer to this as the less-leads-to-more effect: the less obvious the explanation for one’s behavior, the more one will tend to alter one’s attitudes to make sense of it. See BARON & BYRNE, *supra* note 311, at 150.

518. See EISER, *supra* note 389, at 92–99; ROSS & NISBETT, *supra* note 6, at 66; M. Riess & B.R. Schlenker, *Attitude Change and Responsibility Avoidance as Modes of Dilemma Resolution in Forced-Compliance Situations*, 35 J. PERSONALITY & SOC. PSYCHOL. 21 (1977); see also EISER, *supra* note 389, at 84–89 (reviewing portions of the literature on “intrinsic and extrinsic motivation” and the process of “overjustification”).

519. KUNDA, *supra* note 6, at 221; see also BARON & BYRNE, *supra* note 311, at 145–46 (describing other responses, including the more “direct” methods of “acquiring new information that supports our attitudes or our behavior,” trivializing the inconsistency by “concluding that the attitudes or behaviors in question are not important ones,” and the “indirect” tactics of focusing on “positive self-attributes” or distracting oneself from the dissonance through some activity or even by drinking alcohol).

520. KUNDA, *supra* note 6, at 221.

521. See generally Steele, *supra* note 86.

522. *Id.* at 289.

given to “three related convictions about the relation between [one’s] subjective experience and the nature of the phenomena that give rise to that subjective experience.”⁵²³ First, we *naively* believe that we see the world as it *really* is—through objective, unfiltered lenses. Most of us think that we “get it” for the same reason that the vast majority of us believe that we are above average drivers—it is self-affirming. Second, it almost goes without saying that anyone else who is similarly neutral and intelligent will see the world as we do—that is, accurately. At times, though, we are confronted with views that conflict with our own, an experience that creates a kind of dissonance. That suggests the third tenet of naïve realism. When our interpretation of a particular situation apparently conflicts with someone else’s, something has to give. Because we presume that we see things as they are, something must be distorting the perceptions of those who see things otherwise. Social psychological research shows that an extremely common means of relieving that dissonance is to attribute the gap between our outlook and theirs to a lack of objectivity on their part. We assume that there is some dispositional source of their bias—lack of intelligence, or laziness, or corruption. To be sure, we ourselves will admit to having a particular vantage point and set of experiences that inform our judgment and perspective—but as it turns out, *our* particular background was the path to authentic insight.⁵²⁴

This is a key source of our biases: we don’t believe that we are subject to them (allowing us to trust our own clear vision) and we are extremely quick to see them in others (allowing us to distrust others’ obscured vision).⁵²⁵ And so it is that we are quick to see ideological or political bias on the part of our adversaries and gullibility or vanity on the part of even our friends and family when they fail to share our worldview.⁵²⁶ And so it is that even scholars from one field of study are able to write off other fields of research writing on the same topic. Thus, Richard Posner writes:

Economic theory itself (including the application of the theory to law), at least when employed for positive rather than normative analysis, has no political valence. . . . [T]he sociology of law is, as far as I am able to judge, entirely

523. See, e.g., Lee Ross & Andrew Ward, *Naïve Realism: Implications for Social Conflict and Misunderstanding*, in *VALUES AND KNOWLEDGE* (Edward Reed et al. eds., 1997).

524. See *id.*; see also Robert J. Robinson, Dacher Kettner, Andrew Ward, & Lee Ross, *Actual Versus Assumed Differences in Construal: “Naïve Realism” in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 405 (1995) (describing naïve realism as one’s “unshakeable conviction that he or she is somehow privy to an invariant, knowable, objective reality—a reality that others will also perceive faithfully, provided that they are reasonable and rational, a reality that others are apt to misperceive only to the extent that they (in contrast to oneself) view the world through a prism of self-interest, ideological bias, or personal perversity”).

525. That asymmetry of attributions is what leads virtually all of us to believe that we are, ourselves, immune to the manipulative influences of marketing and advertising even as we acknowledge that advertising does work and that many people are easily manipulated. See JEAN KILBOURNE, *CAN’T BUY MY LOVE: HOW ADVERTISING CHANGES THE WAY WE THINK AND FEEL* 27 (1999).

526. See Pronin et al., *supra* note 337.

dominated by scholars of left-liberal bent. So uniform are their politics that they may unconsciously regard liberalism (in its modern “welfare state” sense) as part of the definition of their field, disqualifying economics from contributing to it.⁵²⁷

They are ideologically motivated. I am not.

Naïve realism, in those ways, helpfully reduces the dissonance that we might otherwise feel and protects our existing perceptions, including our positive self-image. Unfortunately, it also is a major part of what renders us biased and vulnerable to manipulation—precisely what we like to believe we are not.

It bears noting that a particularly common means of counteracting dissonance is to attribute other people’s “distorted” vision to their *self-interest*, typically a monetary incentive to a vested interest.⁵²⁸ Indeed, it is that tendency to dispositionalize people with self-interest that makes the “boring task” experiment described above so counterintuitive. When people are presumed to “like” what they find rewarding, it is jarring to discover that the poorly paid subjects enjoyed rearranging pegs more than the well-paid subjects. Experiments directly testing this phenomenon have shown that even people whose behavior reflects attitudes toward a social policy that are out of sync with their own self-interest will assume that the behavior of others will reflect attitudes that correspond with self-interest.⁵²⁹

In sum, we see bias *there*, but not *here*—and, in either case, dispositionism.⁵³⁰

ii. Group

“[S]ocial man lives constantly outside himself and only knows how to live in the opinion of other[s]”

~ Jean Jacques Rousseau⁵³¹

527. Posner, *supra* note 249, at 274 (emphasis omitted).

528. See Dale T. Miller & Rebecca K. Ratner, *The Disparity Between the Actual and Assumed Power of Self-Interest*, 74 J. PERSONALITY & SOC. PSYCHOL. 53 (1998) [hereinafter Miller & Ratner, *The Disparity*]; Dale T. Miller & Rebecca K. Ratner, *The Power of the Myth of Self-Interest*, in CURRENT SOCIETAL ISSUES IN JUSTICE 25–48 (Leo Montada & Melvin J. Lerner eds., 1996).

529. Miller & Ratner, *The Disparity*, *supra* note 528, at 58. And this is true despite evidence that the actual link between social attitudes and self-interest is often much weaker than we suppose. See David O. Sears & Carolyn L. Funk, *Self-Interest in Americans' Political Opinions*, in BEYOND SELF-INTEREST 147 (Jane Mansbridge ed., 1990); David O. Sears & Carolyn L. Funk, *The Role of Self-Interest in Social and Political Attitudes*, in 24 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 2 (1991).

530. The tendency of dispositionists to dismiss situational accounts has been dubbed “naïve cynicism.” See Benforado & Hanson, *Naïve Cynicism*, *supra* note 78. Much of the tort reform movement and the anti-PC backlash can be understood as a manifestation of naïve cynicism. *Id.* More generally, naïve cynicism influences—and is currently dominating—virtually all significant public policy debates.

531. JEAN JACQUES ROUSSEAU, A DISCOURSE ON THE ORIGIN OF INEQUALITY (1754), reprinted in JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 31, 116 (G.D.H. Cole trans., Everyman 1993).

The situational character is no island. Our motive for coherence guides not just our own self-conceptions, but also our conception of ourselves as beings situated among others in groupings, which in turn provide a powerful guide to our understanding of ourselves and our world.⁵³² We are, of course, each a member of myriad groups, some more prominent than others in our self-conceptions, from families, to workplaces, from nations to townships, from races to genders, from religions to political parties. Social psychologists have long studied the relationship between the individual and her group affiliations, and have been particularly interested in the influence of group identification on the formation and conception of the self. In the experimental literature, particular attention has been paid to the relationship and potential for dissonance between personally held beliefs and beliefs attributed to the group.

In analyzing the coherence motive as it plays out in groups, social psychologist Philip Tetlock has proposed a view of what we are calling the situational character as not so much lay scientists or lay economists striving—within our limited cognitive budgets—to understand the truth of the world around us or to maximize our own preferences, but rather as lay politicians, striving to situate ourselves comfortably and coherently among our relevant identity-group constituencies. We are motivated not only to make sense of our own behavior to ourselves, but also by the pervasive “expectation that [we] will be called on to justify [our] opinions or conduct to others.”⁵³³ Social psychologists have found that where our desire for approval is high, people predictably “adjust their public attitudes toward the views of the anticipated audience.”⁵³⁴ This is understandable and perhaps unsurprising for a person motivated to maintain a favorable, and thus self-bolstering, perception of (and approval by) the groups with which she affiliates. But our motive for coherence runs deeper; we are not rationally conspiring dispositional actors, scripting our public performances of belief while, on the interior, maintaining our own authentic views. To be sure, such public deceptions do occur, but the deeper tendency documented by social psychologists is to keep our private beliefs and our public expressions consonant. Tetlock writes:

Attitude shifting becomes psychologically costly to the degree that it requires compromising basic convictions and principles (stimulating dissonance) or back-tracking on past commitments (making decision makers look duplicitous, hypocritical, or sychophantic). . . . [E]vidence . . . indicates that when these obstacles have been removed, and the facilitative conditions are present, attitude shifting serves as a cognitively efficient and politically expedient

532. For a more general discussion of our motive for “belonging,” see FISKE, *supra* note 233, at 16–17.

533. Phillip E. Tetlock, *Intuitive Politicians, Theologians, and Prosecutors: Exploring the Empirical Implications of Deviant Functionalist Metaphors*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 582, 583 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

534. *Id.* at 585.

means of gaining approval that does not undermine the decision maker's self-concept as a moral and principled being, or his or her reputation for integrity in the wider social arena.⁵³⁵

Again, duplicity is not what drives us, but rather blindness to our interior situations and the divergence between what we see and what we do not see.

Social scientists have discovered numerous manifestations of our motive for group coherence. That motive, combined with the self-affirming faith we place in our own knowledge structures, contributes, for instance, to a phenomenon that social psychologists have dubbed the "false consensus" effect.⁵³⁶ In a classic demonstration of that effect, subjects were asked if they would participate in an experiment on different mediums of expression in which subjects would be required to walk the streets surrounding the university wearing a sandwich-board placard emblazoned with the slogan: "Eat at Joe's."⁵³⁷ After indicating their willingness to participate, subjects were then asked to estimate how other people would respond to the same request. The experimenters found that those who had agreed to wear the sandwich board estimated that a strong majority, sixty-two percent, of their peers would do the same, whereas those subjects who declined predicted that sixty-seven percent would respond as they did.⁵³⁸ This false consensus effect, a tendency to regard one's own views to be commonly held by others, has been demonstrated by more than a hundred empirical studies, over a wide range of topics from particular food preferences to broad political and social policy views.⁵³⁹

The group-coherence motive combined with dispositionism can yield some troubling and otherwise perplexing phenomena. Because we are dispositionists, our perception that certain behaviors are common (or uncommon) leads us to perceive that the attitudes, preferences and beliefs of others correspond to that common (or uncommon) behavior. Because we do not ourselves subscribe to those attitudes, we infer from others' behavior that our attitudes are exceptional. That dynamic contributes to the tendencies known in social psychology as "pluralistic ignorance" and "false uniqueness." Both illustrate the power of the group coherence motive.

Consider the illustration of the famous "Princeton drinking study," the signa-

535. *Id.*

536. For discussion of the mechanisms behind the false consensus effect see KUNDA, *supra* note 6, at 399; Steven J. Sherman et al., *Mechanisms Underlying the False Consensus Effect: The Special Role of Threats to the Self*, 10 PERSONALITY & SOC. PSYCHOL. BULL. 127 (1984).

537. See Lee Ross et al., *The "False Consensus Effect": An Ego-centric Bias in Social Perception and Attribution Processes*, 35 J. PERSONALITY & SOC. PSYCHOL. 880 (1977) (first reporting this study).

538. *Id.*

539. For reviews of these studies, see Joachim Krueger, *On the Perception of Social Consensus*, in 30 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 163 (Mark P. Zanna ed., 1998); Gary Marks & Norman Miller, *Ten Years of Research on the False-Consensus Effect: An Empirical and Theoretical Review*, 102 PSYCHOL. BULL. 72 (1987); Brian Mullen et al., *The False Consensus Effect: A Meta-Analysis of 115 Hypothesis Tests*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 262 (1985).

ture piece in an influential line of work by Deborah Prentice and Dale Miller.⁵⁴⁰ Their studies revealed how students misestimated their cohorts' attitudes toward alcohol consumption and the gap between those attitudes and their own. Specifically, most students actually had a rather negative view of the state of alcohol consumption on the campus, but incorrectly assumed their fellow students held more positive views. Almost sixty-six percent of their sample endorsed the view, the second strictest of five graded options, that "[a]n occasional 'drunk is okay, as long as it doesn't interfere with grades or responsibilities.'" Less than twenty percent endorsed the two most permissive gradations. However, when asked to indicate what they thought their collegiate colleagues' attitudes were towards alcohol consumption, more than sixty percent selected one of the two most permissive gradations—"a]n occasional 'drunk' is okay, even if it does occasionally interfere with grades or responsibilities," and "[a] frequent 'drunk' is okay, if that's what the individual wants to do."⁵⁴¹ In other words, the students exhibited significant pluralistic ignorance.⁵⁴²

Prentice and Miller's study did not end there. They also examined how pluralistic ignorance might itself influence behavior. The bad news was that some subjects began to alter their own behavior and beliefs to more closely correspond with their ignorant perceptions.⁵⁴³ Prentice and Miller attributed that troubling example of self-fulfilling group perceptions to a basic motive to avoid dissonance with one's key constituencies. Once again, it is crucial to recognize that the subjects were not faking their new attitudes. These are not rational actors operating within stable preferences, altering their conduct through clever performance while remaining true to their core beliefs. These are situational characters in whom stable preferences and core beliefs are largely an illusion. Our behavior and attitudes and the behavior and perceived attitudes of our groups are all mutually constructed and reconstructed as the situation requires. As each of us looks out at others seeing disposition and missing situation, we infer attitudes that do not exist. But, as these studies reveal, our false perceptions can be tragically powerful as we each seek to bring our own view and behavior into sync with shared misperceptions. Prentice and Miller "believe that group identification is the root cause for many cases of pluralistic ignorance—

540. See Deborah A. Prentice & Dale T. Miller, *Pluralistic Ignorance and the Perpetuation of Social Norms by Unwitting Actors*, in 28 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 161 (Mark P. Zanna ed., 1996).

541. *Id.* at 169.

542. Prentice and Miller point out that the phrase "pluralistic ignorance" is an unfortunate one, not only because it is somewhat inelegant, but also because it does not actually describe the phenomena well. More than being "ignorant" about others' beliefs, for example, we are actually mistaken about them. Prentice and Miller stuck with the term, however, because, by the time they were writing, it had been around in social psychology for more than fifty years. Using the somewhat wrongheaded phrase helped to illustrate Prentice and Miller's point: "[W]e are simply conceding the well-known social fact that it is much easier to abide by an established convention than to change it. Moreover, it is precisely this concession that often gives rise to pluralistic ignorance." *Id.* at 161–62.

543. *Id.* at 188.

that individuals often act of a desire to be good group members but interpret others' similarly motivated behavior as reflecting personal beliefs and opinions."⁵⁴⁴

The problem of pluralistic ignorance and the motive for group coherence distorts many social norms and would seem to have significant implications for policy and law. The dynamic seems to be at work in creating and reinforcing gender and sex roles.⁵⁴⁵ It is also behind the pervasive, dysfunctional classroom dynamic in which students do not ask questions because they assume that others' silence suggests they are themselves alone in their ignorance, thus contributing to the silence that encourages others to do the same.⁵⁴⁶ And so it is that even in most "learning" environments, ignorance begets ignorance. Perhaps most important, a form of pluralistic ignorance seems to animate the precise shape that our dispositionism takes in Western cultures—that is, of individuals devoted primarily to their own material self-interest.⁵⁴⁷

Understanding the cycles of ignorance can help us break them. Prentice and Miller found that spreading the word about what most people thought about alcohol was more successful in discouraging heavy drinking than the notoriously ineffective (perhaps counterproductive) approach of encouraging students to not be moved by peer pressure.⁵⁴⁸

In sum, as these examples demonstrate, our motive for group coherence is a powerful interior situational influence that, like the others, renders us subject to manipulation.

3. Affect

This Section has thus far focused generally on attitudes and motives. Each, as we've seen, could be mistaken (and has been mistaken⁵⁴⁹) for "preferences" by policy analysts. As previous sections illustrate, however, our attitudes and motives are simply not the well-behaved, stable preferences that policy analysts and policymakers generally assume. Put differently, although the intuitive, simplified, preference-based dispositionism that is foundational to law and policy is attractive to us, particularly given its simplicity and self-affirming implications, it is nonetheless wrong.

⁵⁴⁴. *Id.* at 163.

⁵⁴⁵. In addition to their famous drinking experiments, Prentice and Miller also pursued important studies of the role of pluralistic ignorance in the formation and internalization of gender stereotypes by children. *See id.* at 188–96; *see also* Chen & Hanson, *Categorically Biased*, *supra* note 135, at 1207–11 (discussing the self-fulfilling effect of schemas, including gender stereotypes).

⁵⁴⁶. *See* Dale T. Miller & Cathy McFarland, *Pluralistic Ignorance: When Similarity is Interpreted as Dissimilarity*, 53 J. PERSONALITY & SOC. PSYCHOL. 298 (1987). Some social psychologists have referred to the self-perpetuating nature of the pluralistic ignorance phenomena as the "spiral of silence." *See* ELISABETH NOELLE-NEUMANN, *THE SPIRAL OF SILENCE, PUBLIC OPINION—OUR SOCIAL SKIN* (1984).

⁵⁴⁷. That claim is the topic of future work. For a fascinating review of social psychological evidence supporting that claim, *see* Dale T. Miller, *The Norm of Self-Interest*, 54 AM. PSYCHOLOGIST 1053 (1999).

⁵⁴⁸. Prentice & Miller, *supra* note 540.

⁵⁴⁹. *See infra* Part IV.

We are more or less unaware of the greater part of our interiors, and that ignorance plays an immense causal role in our behavior. Another important aspect of our interiors that gives shape to the situational character is emotion or “affect.”⁵⁵⁰ Emotion is a topic that most legal scholars and laws acknowledge, if at all, only when it manifests itself in a blatant and unmistakable way. We are dispositional actors, according to this view, except in those rare and unfortunate instances when we are overwhelmed by emotion.⁵⁵¹

Social psychology reveals that this understanding of “emotion” is, like so much else regarding our self-knowledge, fundamentally wrong. That bold and broad claim is the topic of future work,⁵⁵² so we will provide only a cursory treatment here.

First, emotions are not just those rare overwhelming feelings we have when we are being “emotional.” Emotions are instead a ubiquitous feature of our interiors, interacting with virtually all interior situations, including all those we discuss in this Article.⁵⁵³ Thus, our attributions influence our emotions, and our emotions influence our attributions.⁵⁵⁴ Similarly, emotions influence the extent to which we rely on knowledge structures and precisely which ones we rely on.⁵⁵⁵ We have affective responses to virtually everything we see, and those reactions (of which we are rarely conscious) immensely influence our behavior and cognitions.⁵⁵⁶

Thus, emotion plays an immeasurable role in our day-to-day lives, though we perceive its role only in the most extreme circumstances when the emotion feels sufficiently intense to manifest itself in an unmistakable form. It is as though one were standing on Landsdowne Street on the outside of the “green monster” at Boston’s Fenway Park counting balls that cleared the wall as our measure of how many times a bat is swung inside the park. Our nearly blind vantage point leads us to miss the vast majority of swings, and the vast majority of what is moving the game.

Just as we fail to consciously sense our affective responses to our situation, we fail to appreciate just how powerfully the situation moves us. Few would expect, as social psychologists have demonstrated, that the stock-market tends

550. The study of affect has produced an extensive, and growing, literature. See, e.g., Daniel Gilbert et al., *Durability Bias in Affective Forecasting*, in *HEURISTICS AND BIASES*, *supra* note 72, at 292; Norbert Schwarz, *Feelings as Information: Mood Influence Judgments and Processing Strategies*, in *HEURISTICS AND BIASES*, *supra* note 72, at 534; Paul Slovic et al., *The Affect Heuristic*, in *HEURISTICS AND BIASES*, *supra* note 72, at 397.

551. In fact, the treatment of interior situation is quite analogous to the general treatment of exterior situation. We acknowledge the “heat of passion,” like we do “a gun to the head,” but little else. See David Arkush & Jon Hanson, *Situating Emotions* (unpublished manuscript, on file with authors).

552. See *id.*

553. See Robert B. Zajonc, *Closing the Debate Over the Independence of Affect*, in *FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION* 31 (Joseph P. Forgas ed., 2000).

554. See Hanson, Reyes, & Schlanger, *Attributional Positivism*, *supra* note 43.

555. For a description of that interaction, see Chen & Hanson, *Categorically Biased*, *supra* note 135.

556. See Antoine Bechara, Hanna Damasio, Daniel Tranel, & Antonio R. Damasio, *Deciding Advantageously Before Knowing the Advantageous Strategy*, 275 *SCIENCE* 1293 (1997).

to go up on a sunny day—good weather creating positive affect in human beings, producing an optimistic expectation of high returns—and down on a gray day—lousy weather creating a negative affect, producing gloominess.⁵⁵⁷ Beyond that market-measured behavioral response to one unseen affect, which has been observed in twenty-six different stock exchanges around the world,⁵⁵⁸ social psychologists have found that our views about our own overall happiness, or satisfaction with our job, or views of our prospects for future happiness, can be powerfully influenced by own present emotional state.⁵⁵⁹

Additionally, social psychologists have shown that by priming subjects with negative affective influences, such as stories of war or poverty—or by testing them on rainy days—subjects express far more negative views of totally unrelated matters, including their own overall happiness, than they otherwise do.⁵⁶⁰ Subjects in these experiments are generally unaware of the situational influences on their own subjective evaluations.⁵⁶¹ Influential research in this area has shown, for example, that merely being exposed to a stimulus—whether the exposure is conscious or unconscious—can influence a person's positive affect towards that stimulus on subsequent exposures.⁵⁶²

Thus far, the basic messages of the social psychological research we have highlighted have been, first, that emotion is omnipresent as an interior influence; second, that emotion is, whether we are aware of it or not (and usually we are not), immensely influential over our cognitions, attitudes, and behavior; and third, that emotion and affect are highly sensitive to exterior situation, including

557. See Edward M. Saunders, *Stock Prices and Wall Street Weather*, 83 AM. ECON. REV. 1337, 1344 (1993).

558. David Hirshleifer & Tyler Shumway, Good Day Sunshine: Stock Returns and the Weather 2–3 (unpublished manuscript), available at <http://www.cob.ohio-state.edu/fin/dice/papers/2001/2001-3.pdf> (last visited Sept. 11, 2003).

559. For a summary of studies, see Schwarz, *supra* note 550, at 534–36.

560. *Id.* The importance of nonconscious situational influences on affect was discovered and elaborated in a series of studies by Robert Zajonc and his colleagues. See Robert B. Zajonc, *Attitudinal Effects of Mere Exposure*, 9 J. PERSONALITY & SOC. PSYCHOL. MONOGRAPH 1 (1968); Robert B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151 (1980); Robert B. Zajonc & Hazel Markus, *Affective and Cognitive Factors in Preferences*, 9 J. CONSUMER RES. 123 (1982).

561. Schwarz, *supra* note 550, at 536–38. Such findings about the nature of situational influences on our emotional lives obviously have important implications with respect to the potential for the situational manipulation of affective responses. See Paul Slovic et al., *supra* note 530, at 417 (“As Epstein observes, ‘Cigarette advertising agencies and their clients are willing to bet millions of dollars in advertising costs that the . . . appeal of their messages to the experiential system will prevail over the verbal message of the Surgeon General that smoking can endanger one’s life, an appeal directed at the rational system.’ Through the workings of the affect heuristic . . . we now have evidence suggesting that cigarette advertising designed to increase the positive affect associated with smoking will quite likely depress perceptions of risk.” (citing Seymour Epstein, *Integration of the Cognitive and Psychodynamic Unconscious*, 49 AM. PSYCHOLOGIST 709, 712 (1994))). See generally Hanson & Kysar, *Taking Behaviorism Seriously II*, *supra* note 132.

562. See Robert F. Bornstein, *Exposure and Affect: Overview and Meta-Analysis of Research*, 106 PSYCHOL. BULL. 265 (1989); Robert F. Bornstein & Paul R. D’Agostino, *Stimulus Recognition and the Mere Exposure Effect*, 63 J. PERSONALITY & SOC. PSYCHOL. 545 (1992).

those elements of the environment of which we are not mindful. Each of those findings contradicts the basic assumptions of dispositionism.

Still, there is also evidence that in some circumstances our behavior appears to be controlled by something that looks like careful deliberation and choice based on the anticipated emotional effect of our choices. We seem to choose option “A” instead of “B” or “C” because we expect it to deliver us the greatest amount of happiness or least amount of displeasure.

The “happiness” or “displeasure” that we seek or repel in this dispositional mode are, of course, emotions. And here emerges another major flaw in the dispositionist model. The best evidence about our ability to predict (or even remember) our emotional states reveals that we are often poor judges of our own well-being. The problem is not so much that we do not know what will bring us pleasure or pain. People typically are correct to assume that a new car will elicit some happiness and that a bad accident will generate unhappiness. The problem is that, owing to our *ineffective forecasting*, we vastly overestimate the intensity and duration of our emotional reactions to such happenings.⁵⁶³

Winning the lottery, landing a good teaching job, and falling in love all may bring us some joy. Losing a bet, a job, or a lover will certainly bring sadness. But none of these events will affect us as much as we tend to imagine.⁵⁶⁴ Because of this *impact bias*, “common events typically influence people’s subjective well-being for little more than a few months, and even uncommon events—such as losing a child in a car accident, getting cancer, becoming paralyzed, or being sent to a concentration camp—seem to have less impact on long-term happiness than one might naïvely expect.”⁵⁶⁵

In one study, for example, associate professors were asked to estimate what their overall happiness would be if they made tenure, or were denied it. The study found that, in the short term, those who received tenure were less happy than they expected, and those who were denied tenure were happier than they predicted.⁵⁶⁶ Another study asked student respondents who were involved in committed, long-term relationships to estimate what their happiness levels would be if they suffered a break-up. Their happiness estimates were far lower than the actual reported happiness levels of other students who *had* recently suffered a break-up.⁵⁶⁷

Our pattern of poorly forecasting our affective states has been demonstrated in a number of studies of political events. One version of the study asked Republicans and Democrats how happy or unhappy they thought they would be the week following the 1996 presidential election if Bill Clinton were re-

563. See generally Gilbert et al., *supra* note 550.

564. This tendency reflects, in part, a problem we highlighted above: the failure of our imaginations to see beyond the salient. We see the imagined event plainly, but it eclipses other events that will serve to counteract it.

565. Gilbert et al., *supra* note 550, at 292 (collecting studies) (citations omitted).

566. *Id.* at 299–300.

567. *Id.* at 297–99.

elected. A week after the election, Democrats who had predicted that they would be substantially happier if Clinton won in fact reported overall happiness levels that were no different than before the election. Republicans were only slightly less happy overall than they were before the election, although they had predicted that they would be substantially less happy.⁵⁶⁸ Even in ordinary circumstances that we experience repeatedly—such as consumer or employment decisions—we continue to make the same affective forecasting errors again and again.⁵⁶⁹ There is apparently too much working in favor of the maintenance of our dispositionism for it to be compromised by evidence of it failing us.

The basic lesson of affective forecasting research is clear. Despite our overly optimistic and overly pessimistic predictions, the truth about ourselves is, as Daniel Gilbert and his co-authors put it: “Most people are reasonably happy most of the time, and most events do little to change that for long.”⁵⁷⁰

So what explains this inability to accurately assess our own emotional reactions? There are, it seems, numerous causes. But most of them stem from our dispositionist tendencies and the fact that we miss most of the effect of our exterior and interior situations. Thus, when people overestimate just how happy winning a lottery will make them, or just how unhappy becoming a paraplegic will leave them, they do so largely because they are incapable of seeing past the salient situational factor—a million dollars or life in a wheelchair—to all the other situational influences that help determine their overall level of happiness. Similarly, we vastly underestimate the way our interior situation is motivated—well-equipped to make the “bad outcome” seem not so bad—and to make the opportunities missed appear, like unreachable grapes, sour. Our affective forecasting, then, responds to our dispositionist intuitions and tendencies, while our emotions respond as well to our situations.⁵⁷¹

568. See Timothy D. Wilson et al., *Focalism: A Source of Durability Bias in Affective Forecasting*, 78 J. PERSONALITY & SOC. PSYCHOL. 821, 822 (2000).

569. See B.L. Fredrickson & Daniel Kahneman, *Duration Neglect in Retrospective Evaluations of Affective Episodes*, 65 J. PERSONALITY & SOC. PSYCHOL. 45 (1993); Terence R. Mitchell et al., *Temporal Adjustments in the Evaluation of Events: The “Rosy View,”* 33 J. EXPERIMENTAL SOC. PSYCHOL. 421 (1994).

570. Gilbert et al., *supra* note 550, at 293.

571. Social psychologists have offered a number of explanations for the affective forecasting phenomenon, including that we misconstrue the nature of future events, that we are motivated to distort our affective predictions, that the process of predicting focuses our imagination to the exclusion of other aspects of our future lives that will influence our affect (“focalism”), and that our interior situations immunize us from being emotionally subsumed by bad outcomes in our lives. See Gilbert et al., *supra* note 550, at 293–97 (summarizing explanations of affective forecasting findings). These explanations are consonant with our own analysis in this Article, which, in turn, draws on them.

We should point out that affective (mis)forecasting, like so many features of our situational character, can have a very positive or adaptive part to play in our lives. Like the heuristics and knowledge structures that enable us to make decisions with our limited brainpower, our poor affective forecasting is no quirk; rather, it is central to our psychological makeup. Affective reactions can give us a basis for acting and a means of recovering from the disappointment of bad outcomes. In that way, our interior situation protects us from ourselves.

D. BEHAVIOR (VS. "CHOOSING")

This Article is now deep into its examination of the situational character. The contrast with the dispositionist models of the human actor that now dominate policy, policymaking, and common sense is becoming clear. We are subject to a fundamental interior attribution error—an error that helps explain the fundamental exterior attribution error and that leaves us vulnerable to many varieties of situational manipulation. As Parts III.B and III.C make clear, our thinking and our preferences are not what they seem. Thus, it should by this point be no surprise that our behavior—which the dispositionist models assume is the product of “thinking + preferring + willing”—is likewise not what it seems. Our behavior, which we tend to attribute to conscious choices based on stable preferences and given information, is more often a manifestation of the interior and exterior situational influences to which we are largely blind. That conclusion is implicit in the evidence and arguments provided above regarding our cognitions and attitudes. Many of the experiments, including Milgram’s, contained a behavioral component that itself proved the point. This Section supplements that evidence and highlights several ways in which our behavior is not what our dispositionist schemas presume.

1. Visceral Factors

We have already discussed the malleability and implicit aspects of our attitudes. We have also described the power of situational forces—in our interiors and exteriors—to shape our behavior and, in turn, the power of our behavior to change our attitudes. According to recent work by George Loewenstein and several of his co-authors, we are often moved by interior drive states to act in ways that contradict even our explicit attitudes, that is, in ways that we actually experience as counter-attitudinal. Those drive states include hunger, thirst, sexual desire, sleeplessness, moods, emotions, and physical pain: “At sufficient levels of intensity, these, and most other visceral factors, cause people to behave contrary to their own long-term self-interest, often with full awareness that they are doing so.”⁵⁷²

To be sure, those urges are all manifestations of regulatory processes “essential for our survival, but all are also associated with behavior disorders—for example, hunger and overeating, fear and phobias, sexual desire and sexual compulsion, anger and spouse abuse, and craving and addiction.”⁵⁷³ Thus, visceral factors are like many of the interior features that we have been reviewing: generally useful but potentially quite harmful and capable of dominating those interior elements to which we attribute our dispositionism.

There are two key reasons why visceral factors lead us to knowingly behave

572. George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 J. ORG. BEHAV. & HUM. DECISION PROCESSES 272, 272–73 (1996).

573. George Loewenstein, *A Visceral Account of Addiction*, in *SMOKING: RISK, PERCEPTION, & POLICY*, *supra* note 298, at 188, 188–89.

counter-attitudinally. First, they tend to “crowd out” all goals other than that of mitigating the visceral factors themselves.⁵⁷⁴ They “focus attention” on the present, the self, and on satisfying a single craving.⁵⁷⁵ If you find that difficult to understand, try holding your breath for two minutes or dropping an anvil on your toe, and see what significance your other goals and attitudes have in your behavior before the pain subsides.

Of course, responding to such intense bodily reactions makes perfect sense and is not, in itself, problematic. People *should* prioritize the acquisition of oxygen when it is scarce. And people *should* attend to their acute injuries before checking to make sure the anvil is ok. The problem stems from the fact that people often behave, in response to visceral cues, in ways that contradict their view of how they *should* behave, and sometimes even their own volition. And that problem occurs, according to Loewenstein, because of the second key feature of visceral factors, which is that “people underestimate the impact on their own behavior of visceral factors they will experience in the future”:⁵⁷⁶ “Unlike currently experienced visceral factors which have a disproportionate impact on behavior, delayed visceral factors tend to be ignored or to be severely underweighted in decision making. Today’s pain, hunger, anger, and so on are palpable, but the same sensations anticipated in the future receive little weight.”⁵⁷⁷

In one experiment, for example, two groups of male subjects were shown photographs and then asked to imagine how they would behave in the context of a date-rape scenario. The group that had been shown sexually arousing photographs reported a much greater likelihood of behaving aggressively than the group that had been shown non-arousing photos.⁵⁷⁸ Without being aroused by the photographs, the second group seemed less able to imagine what they would do when aroused on a date.

Loewenstein explains that this divergence in our ability to appreciate visceral factors in the present and in the future is probably an artifact of our interiors, which “seem[] ill suited to storing information about visceral sensations.”⁵⁷⁹ Thus, although “we can easily *recognize* pain, . . . few can *recall* it in the sense of reexperiencing it in imagination or memory.”⁵⁸⁰ Pain, cravings, and motives in the present wield greater influence than pain, cravings, and motives in the future because the former are cognitively vivid while the latter are cognitively pallid.

Put differently, immediate visceral factors are like dispositional factors that dominate our field of interior vision, while future visceral factors are like

574. *Id.* at 189.

575. *Id.* at 191–92.

576. *Id.* at 189.

577. *Id.* at 193.

578. George Loewenstein et al., *The Effect of Sexual Arousal on Expectations of Sexual Forcefulness*, 34 J. RES. CRIME & DELINQ. 443, 455–56 & tbl.1 (1997).

579. Loewenstein, *supra* note 573, at 194.

580. *Id.*

situational factors that tend to be obscured, and their future influence thereby underappreciated. Visceral factors are yet another manifestation of the interior fundamental attribution error. And the influence of this error is hardly limited to the margins of extreme exceptions. "Visceral factors are a ubiquitous aspect of everyday life, and they regularly undermine the rationality of decisionmaking, due to both their underestimation in prospect and their disproportional force when they operate in the present."⁵⁸¹

2. The Inverted Causal Relationship Between Attitudes and Behavior

The evidence on visceral factors provides further confirmation for our claim that people fail to see much of their interior situation and that behavior often reflects that failure as much or more than it reflects a person's stable preferences. But the dispositionist presumption—that behavior is more or less caused by preferences or attitudes—can be even more fundamentally challenged. Social psychology teaches that, although we like to believe that such a causal relationship between attitudes and behavior exists, it is often just the reverse—that is, our attitudes reflect our behavior (which, in turn, reflects our situation). The temptation to see preferences first and behavior as the consequence is widely shared. When we act, we need to believe that there exists an attitude or preference behind that act—our motive for coherence creates a need for reasons.

But very often reasons do not precede behavior. So, we are motivated to concoct them—so motivated that we will often alter pre-existing attitudes. We have already described some examples of that phenomenon. In Festinger and Carlsmith's classic peg-moving study,⁵⁸² for instance, subjects paid \$20 to tell others that the boring subject was interesting felt no dissonance, and thus did not need to alter their attitudes. On the other hand, subjects who were paid only \$1 were still situationally moved to cooperate with the experimenter, though they needed some way to relieve the dissonance they felt between experience and attitude. That situational manipulation and their behavior led them to alter their attitudes toward the peg-moving task.⁵⁸³

Following up on that "induced compliance" study, Philip Zimbardo and his collaborators asked subjects to participate in a study that ostensibly was about novel foods.⁵⁸⁴ More specifically, the subjects, who included ROTC members, military reservists, and other college students, were told that the new "mobile military" was interested in determining how much people enjoyed (or did not

581. *Id.* at 213.

582. *See* Festinger & Carlsmith, *supra* note 514.

583. Other examples of this phenomenon include disidentification and self-handicapping. *See supra* Part III.C.2.b.i. We alter our behavior to protect either cherished views of ourselves or our self-esteem; we try to trick ourselves in the same way that we trick, or are tricked by, others.

584. *See* Philip G. Zimbardo et al., *Communicator Effectiveness in Producing Public Conformity and Private Attitude Change*, 33 J. PERSONALITY 233 (1965).

enjoy) eating fried grasshoppers.⁵⁸⁵ The supposed taste test was administered by one of two individuals. Some subjects were warmly greeted by “Mr. Nice”—a sensitive and gentle person who worked well with his coworkers.⁵⁸⁶ Other subjects took instruction from “Mr. Nasty,” a cantankerous taskmaster who berated his coworkers. Many participants ate one or more grasshoppers, but their assessments varied depending upon who administered the test.⁵⁸⁷ Those taking instructions from the gruff “Mr. Nasty” reported that they liked the grasshoppers much more than “Mr. Nice’s” subjects did.⁵⁸⁸ The experiment thus situationally induced participants to eat something that they otherwise would not. Those who were taking instructions from “Mr. Nice” had a good reason for doing so—after all, “Mr. Nice” was asking them to. But those who were eating grasshoppers under the instruction of “Mr. Nasty” needed to justify complying with the wishes of a jerk. Their solution, then, was to alter their attitudes toward the grasshoppers.⁵⁸⁹

Today there are hundreds of experiments demonstrating the same phenomenon.⁵⁹⁰ As Claude Steele puts it:

For nearly 30 years, dissonance researchers have tricked subjects into “volunteering” . . . [such] self-contradictory actions as writing public essays against their beliefs, expending effort on meaningless tasks, and delivering embarrassing speeches in front of prestigious audiences. Lacking any better means of reducing the distress over these actions, subjects typically attempt to justify them by changing their beliefs or attitudes to be more consistent with their actions.⁵⁹¹

Indeed, from evidence that our attitudes tend to be caused by our behavior rather than the other way around, Daryl Bem developed a plausible and initially compelling theory that individuals do not “know” their attitudes and other interior dispositions, but rather infer them from their behavior. As he summarized his *self-perception theory*:

Individuals come to “know” their own attitudes, emotions, and other internal states partially by inferring them from observations of their own overt behavior and/or the circumstances in which this behavior occurs. Thus, to the extent that internal cues are weak, ambiguous, or uninterpretable, the individual is functionally in the same position as an outside observer, an observer who

585. *Id.* at 237–41.

586. *Id.*

587. *Id.* at 241–54.

588. *Id.*

589. *See id.*

590. *See generally* Steele, *supra* note 86.

591. *Id.* at 269.

must necessarily rely upon those same external cues to infer the individual's inner states.⁵⁹²

In short, there is considerable evidence that the dispositionist view that attitudes lead to behavior is, at least at times, backwards. The cart is often our attitudes; the horse is often our behavior.⁵⁹³

There is another way of making this point. The cognitive dissonance literature, which depends so heavily on induced compliance studies, is actually a demonstration of the fundamental attribution error as much as it is a demonstration of cognitive dissonance. Subjects are routinely manipulated through situation to act in ways that are counter to their attitudes or perceived dispositions. What experimenters call "induced compliance," then, subjects experience as free choice. Because the subjects are dispositionists, and experience themselves as acting according to their own attitudes or preferences, they react to their counter-attitudinal behavior by feeling a dissonance, a dispositional dissonance. To maintain their dispositionist self-conception, they unwittingly alter their attitudes or otherwise adjust their perceptions to relieve that dissonance.⁵⁹⁴ Subjects thus see disposition and free choice based on stable preferences; they miss the importance of both the exterior situational forces that induced their compliance, and the interior situational forces that invisibly lead to their altered attitudes.

E. AUTOMATICITY AND THE ILLUSION OF CONSCIOUS WILL ("THE WILL")

"The whole sting and excitement of our voluntary life . . . depends on our sense that in it things are really being decided from one moment to another. . ."

~ William James⁵⁹⁵

And so we come at last to the conscious will, that inarticulable, yet unmistakable, inner experience of "oomph" that is, in many ways, the crown jewel of our

592. Daryl J. Bem, *Self-Perception Theory*, in 6 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1, 2 (L. Berkowitz ed., 1972). For a discussion of the history of Bem's theory and the challenge it posed to cognitive dissonance theory, see KUNDA, *supra* note 6, at 217–20.

593. Our claim is not that our attitudes are always giving way in response to our behavior. In fact, there are other ways to reduce dissonance, including changing our behavior. See *supra* text accompanying notes 510–513 (summarizing alternatives); see also Joel Cooper & Steven J. Scher, *Actions and Attitudes: The Role of Responsibility and Aversive Consequences in Persuasion*, in PERSUASION 95, 95–111 (Timothy C. Brock & Sharon Shavitt eds., 1994) (explaining when attitude change is most likely to change in response to dissonant behavior). Our point is that the one-way causal relationship presumed by lay and legal-theoretic dispositionist models is missing what social psychology has demonstrated about our interior situations.

594. See *supra* notes 510–548 and accompanying text (summarizing some of the ways that cognitive dissonance is reduced and citing authorities).

595. WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 453 (1890).

dispositionist self-conception.⁵⁹⁶ We have been emphasizing throughout this Article that there is a vast interior situation that invisibly influences our thoughts, preferences, and actions, and leaves us vulnerable to exterior situational forces that do the same. What, then, of the conscious will? Much of the social psychological material canvassed in this Article has touched on the issue of conscious will only implicitly, if at all. Nonetheless, such material has quietly suggested the same conclusion drawn by those researchers who have examined the issue directly. If we perceive that we consciously will our actions, even as the best evidence indicates that our behavior is substantially influenced by interior and exterior situational factors, then this experience of “will” may be a part of our dispositionist deception. Indeed, as Daniel Wegner concludes in a book that brings together generations of experimental research on the felt experience of human will: “[C]onscious will is an illusion. It is an illusion in the sense that *the experience of consciously willing an action is not a direct indication that the conscious thought has caused the action.*”⁵⁹⁷ Two other leading researchers of the will, John Bargh and Tanya Chartrand, have made an extremely compelling, if unsettling, case that “most of a person’s everyday life is determined not by [her] conscious intentions and deliberate choices but by mental processes that are put into motion by features of the environment and that operate outside of conscious awareness and guidance”—a thesis that they acknowledge is “difficult . . . for people to accept.”⁵⁹⁸

In part for that reason, we want to be certain that the claim is not misconstrued. None of the researchers in this field of social science have concluded, nor do we, that the “conscious will” is purely and totally an illusion. What is asserted—and what researchers have demonstrated—is that the *experience* of will is far more widespread than the *reality* of will. Wegner calls the latter the *empirical will*⁵⁹⁹ and argues that our perceived will is often an unreliable and misleading basis for understanding our behavior. The experience of will occurs often without empirical will, and thus creates the illusion of will. Moreover, it contributes to the illusions of choice, preference, and, more generally, dispositionism.

596. It is worth noting that economists do not often speak of, or have a place in their models for, “the will.” Furthermore, they generally have no need for the concept, inasmuch as they assume that behavior reflects preference-satisfying choices and that those underlying preferences are exogenous and stable. In that sense, economists embrace a form of determinism. Individuals have no real choice but to act as their preferences dictate. We focus on “the will” in this Article because it is important in lay conceptions of the interior situation and many other influential conceptions of the human animal in law and legal theory. (Furthermore, we suspect that most legal economists do not conceive of themselves as determinists or their theories as based on such a determinist conception.)

597. WEGNER, *supra* note 84, at 2.

598. John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 AM. PSYCHOLOGIST 462, 462 (1999).

599. WEGNER, *supra* note 84, at 14.

1. Automaticity

Exhibit A in the case that our conscious will is not as central as we presume is the fact that our conscious attentional capacity is extraordinarily limited.⁶⁰⁰ Remember your first attempt at driving a manual transmission automobile—before the processes became automatic. If you are like us, the memory still causes some embarrassment. Images of stalling, chugging, and squealing evince the limits of our ability to tell our feet and legs—much less the car—precisely how to behave. Now suppose that, at the same time you were attempting to let the clutch out with your left foot while depressing the gas pedal with your right, you were attempting to have a serious phone conversation with a friend about, say, your love problems. Such multitasking would be all but impossible given the severe limits on our ability to be consciously attentive. The point has been demonstrated in numerous experiments.⁶⁰¹ For instance, studies have shown that eating radishes instead of available chocolates depletes one's ability to persist in attempting to solve puzzles, and that suppressing emotional reactions to a movie depletes one's ability to solve anagrams or to squeeze a handgrip exerciser.⁶⁰² The unhappy truth is that because “even minor acts of self-control, such as making a simple choice, use up [one's] limited self-regulatory resource, conscious acts of self-regulation can occur only rarely in the course of one's day.”⁶⁰³ Social psychologists studying the phenomenon have concluded that, in our daily lives, our conscious will “plays a causal role only [five percent] or so of the time.”⁶⁰⁴ Little wonder that the growing popularity of cell phones has made driving generally more dangerous, even for experienced drivers.⁶⁰⁵

Exhibit B in the case for automaticity is the now-cascading evidence demonstrating the extent to which our choice biases, our schemas, our memories, our attributions, our affective responses, our motives, our perceptions, and so on are activated automatically—outside our conscious awareness, and often by exterior situational features and events.⁶⁰⁶ The evidence of implicit attitudes summarized above is just a small strand of the larger fabric of automaticity operating within our interiors.⁶⁰⁷

There is also mounting evidence that our automatic perceptions are linked to

600. See *supra* text accompanying notes 72–78.

601. For an illuminating summary, see Wendy Wood et al., *Habits in Everyday Life: Thought, Emotion, and Action*, 83 J. PERSONALITY & SOC. PSYCHOL. 1281 (2002).

602. See Roy F. Baumeister et al., *Ego Depletion: Is the Active Self a Limited Resource?*, 74 J. PERSONALITY & SOC. PSYCHOL. 1252 (1998); Mark Muraven et al., *Self-Control as Limited Resource: Regulatory Depletion Patterns*, 74 J. PERSONALITY & SOC. PSYCHOL. 774 (1998).

603. Bargh & Chartrand, *supra* note 598, at 464.

604. *Id.*

605. See, e.g., Consumer Reports, *New studies define cell-phone hazards*, at http://www.consumerreports.org/main/content/display_report.jsp?FOLDER%3C%3Efolder_id=334665&bmUID=1105999597136 (describing research on role of cell phone use in accidents) (last visited Jan. 17, 2005).

606. See Bargh & Chartrand, *supra* note 598, at 465.

607. See *supra* text accompanying notes 401–415.

our behavior, also through automatic means.⁶⁰⁸ Charles Carver and his colleagues, for instance, found that subjects participating as the “teacher” in a Milgram-esque experiment tended to give longer shocks when they had been primed with a list of hostility-related words.⁶⁰⁹ More recently, John Bargh and his collaborators have made numerous demonstrations of the automatic perception-behavior link. In one experiment, for example, some subjects were primed with words related to rudeness, others, with words related to politeness.⁶¹⁰ The subjects were then placed in a situation that presented both an opportunity and motive to interrupt an ongoing conversation. The first, rude-primed group interrupted *more than sixty* percent of the time, while the second, polite-primed group interrupted *less than twenty* percent of the time.⁶¹¹ In other studies, subjects primed with stereotypical qualities of elderly people (e.g., wrinkles, Florida) behaved more like elderly people—walked more slowly, were more forgetful, and so on—than subjects who were not similarly primed.⁶¹² And Chartrand and Bargh have shown in other experiments that, without being aware of it, subjects often engage in so-called “behavior matching,” or the “chameleon effect.” For instance, when subjects are placed next to an interaction partner who is either rubbing his or her face or shaking his or her foot, the subjects tend to engage in behavioral patterns matching those of their interaction partner.⁶¹³

But the automaticity doesn’t stop there. Although we sometimes intentionally try to transform our conscious acts into automatic behavior—recall how you practiced playing the piano, dribbling a basketball, or driving that darn stick shift—much of what becomes automatic does so automatically. And that includes many of our goals and motivations.⁶¹⁴ In one study, for instance, subjects were asked to rearrange scrambled words to make a sentence.⁶¹⁵ Some subjects were nonconsciously primed to succeed because the words included items like “strive,” “achieve,” and “succeed.” Others were given neutral words that would

608. See Bargh & Chartrand, *supra* note 598, at 466 (describing and summarizing evidence of the “perception-behavior link”).

609. Charles S. Carver et al., *Modeling: An Analysis in Terms of Category Accessibility*, 19 J. EXPERIMENTAL SOC. PSYCHOL. 403 (1983).

610. John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 233 (1996).

611. See *id.* at 235 fig.1. A control group, which was primed with neither type of word, interrupted thirty-eight percent of the time. See *id.*

612. See Ap Dijksterhuis et al., *Of Men and Mackerels: Attention, Subjective Experience, and Automatic Social Behavior*, in *THE MESSAGE WITHIN: THE ROLE OF SUBJECTIVE EXPERIENCE IN SOCIAL COGNITION AND BEHAVIOR* 37, 39 (Herbert Bless & Joseph P. Forgas eds., 2000) (citing Bargh et al., *supra* note 610, at 236).

613. See Tanya L. Chartrand & John A. Bargh, *The Chameleon Effect: The Perception-Behavior Link and Social Interaction*, 76 J. PERSONALITY & SOC. PSYCHOL. 893, 897–900 (1999).

614. See Bargh & Chartrand, *supra* note 598, at 468–73.

615. Tanya L. Chartrand & John A. Bargh, *Nonconscious Motivations: Their Activation, Operation, and Consequences*, in *SELF AND MOTIVATION: EMERGING PSYCHOLOGICAL PERSPECTIVES* 13 (Abraham Tesser et al. eds., 2002).

not prime the goal to achieve.⁶¹⁶ All of the subjects then were given a second, timed task—to rearrange letters in words to create new words. The anagrams ranged from simple to impossible.⁶¹⁷ After completing the anagrams or running out of time, the subjects filled out questionnaires about their moods. Subjects who were not primed to succeed reported similar moods whether they performed well or poorly. The moods of the subjects who *were* primed to succeed, however, varied depending on whether they succeeded or failed. That is, they seemed to care about how well they performed, even though they were unaware of what caused their moods, much less that it was the success-oriented words they encountered in the first task.⁶¹⁸ Subjects were, beneath their conscious radars, given a goal that they did not even know they had, and that goal remained, hidden in their interior situation, shaping their moods in ways they neither saw nor appreciated.

Our automatic goals are quite pervasive. When we commonly adopt a particular goal in a given situation—be it the workplace, the classroom, or the ping-pong table—that goal is likely to be triggered automatically in that situation, whether or not we want it to be triggered.⁶¹⁹ As with all evidence of situational influence, such automatic goal-setting and mood-affecting evidence further reveals the extent to which we humans are susceptible to situational manipulation.

2. The Illusion of Will

If most of what we perceive, feel, and do is driven by automatic processes, then why is it that most of us perceive our behavior to be the consequence of our conscious will? There are several reasons. First, we are rarely conscious of that which is automatic in us—indeed, that’s the point: automaticity frees up for other purposes our extremely limited capacity for conscious thinking and acting. It is as if automaticity occurs silently in the dark, whereas conscious thinking happens noisily beneath a spotlight. The conscious eclipses the automatic before our introspective eye.

Perhaps more important, when we do experience ourselves consciously willing our actions, we are often mistaken. Daniel Wegner, in his superb book *The Illusion of Conscious Will*, brings together an intriguing array of direct evidence to make his case that we humans are subject to an *illusion of will* (which, again, we think has been circumstantially implied in evidence of the more general

616. *Id.* at 30.

617. *Id.*

618. *Id.*

619. See Tanya L. Chartrand & Clara M. Cheng, *The Role of Nonconscious Goal Pursuit in Hope*, 13 PSYCHOL. INQUIRY 290 (2002). This and related work also demonstrate how nonconscious goals can affect not only our moods, but also the way we perform and the judgments we make about others. See, e.g., Tanya L. Chartrand & Valerie Jefferis, *Consequences of Automatic Goal Pursuit and the Case of Nonconscious Mimicry*, in RESPONDING TO THE SOCIAL WORLD: IMPLICIT AND EXPLICIT PROCESSES IN SOCIAL JUDGMENTS AND DECISIONS 290 (Joseph P. Forgas et al. eds., 2003).

illusion of dispositionism).

Consider the case of “phantom limbs.” People who have had an arm or a leg amputated usually report that they continue to “feel” the presence of the limb long after it is gone. One pair of researchers who studied a group of three hundred World War II amputees found that ninety-eight percent experienced the phantom limb phenomenon. But there is more: Many amputees report that they can voluntarily move their phantom limbs, especially their fingers and toes. They report having the experience of consciously willing the movement of the limb, despite the absence of the limb or any willing movement of it. They perceive themselves willing something that clearly is not there to will. This is one intriguing piece of evidence that “the intention to move can create the experience of conscious will *without any action at all*.”⁶²⁰

Another intriguing study provides another clue to the puzzle of conscious will. Researchers used highly sensitive electromyographical devices to study the patterns of electrical impulses generated during the performance of a “willed action.” Hooked to electrodes, subjects were asked to move their fingers “at will.” The researchers established a baseline electrical impulse that was witnessed in the brain shortly before the subjects moved their finger, which preceded a second impulse that was seen when the finger actually moved. This first impulse register was dubbed “readiness potential.” In a recent version of the study, subjects were placed before an especially sensitive clock, and were asked to report for each finger movement the position of the clock hand at the moment that they experienced a “conscious awareness of ‘wanting’ to perform the finger movement.”⁶²¹ The researchers found that they were able to identify three distinct blips (to use the scientific term) in the electrical impulses of the brain throughout the course of action. The first was the “readiness potential” registered in the baseline. Sometime after the “readiness potential,” however, came the experience of willing the finger. Finally, in a third distinct moment, there was an impulse associated with the actual movement of the finger. The researchers discovered that the subject’s “readiness potential” occurred distinctly before the subjects themselves perceived a will to move the finger. The experience of conscious will, it appears, arises at some point after the brain has already begun the action. As the chief researcher of this study concluded:

[T]he initiation of the voluntary act appears to be an unconscious cerebral process. Clearly, free will or free choice of whether *to act now* could not be the initiating agent, contrary to one widely held view. This is of course also contrary to each individual’s own introspective feeling that he/she consciously initiates such voluntary acts; this provides an important empirical example of the possibility that the subjective experience of a mental causality need not

620. WEGNER, *supra* note 84, at 40 (referring to original study by Henderson & Smyth (1948)).

621. *Id.* at 50–52 (referring to original study by Kornhuber & Deecke (1965)).

necessarily reflect the actual causative relationship between mental and brain events.⁶²²

In another fascinating study, researchers put a series of subjects into a “transcranial magnetic stimulation” device, which has been found to cause—through a directed magnetic impulse—the involuntary movement of different parts of the human body.⁶²³ Without explaining the operation of the device to subjects, the experimenters asked subjects to move either their right or their left finger, whichever they chose, whenever they heard a click. The click was actually the sound of the device turning on, and forcing the movement of a particular digit. Although the magnetic impulses led the subjects to move the finger they moved, the subjects nevertheless perceived that they were choosing which finger to move, and then moving it.⁶²⁴ “When asked whether they had voluntarily chosen which finger to move, participants showed no inkling that something other than their will was creating their choice.”⁶²⁵ Findings such as these suggest that the experience of conscious will may stem from an internal system that is distinct from both the action itself and the action’s true source. Put differently, willing may be different than acting, and although the experience of both may often be coterminous, they are not necessarily causally related. Furthermore, even when some unappreciated situational force—including the business end of a transcranial magnetic stimulation device—is leading us to act in a particular way, we tend to experience our actions as volitional, willed choices. Again, we miss situation and see disposition.

Based on his review of many such studies, including his own research, Wegner concludes that our minds produce the experience of conscious will through a process that is independent of the actual cause of our behavior. “[W]e must be careful to distinguish,” Wegner argues, “between . . . *empirical will*—the causality of the person’s conscious thoughts as established by . . . their covariation with the person’s behavior—and the *phenomenal will*—the person’s reported experience of will.”⁶²⁶

There are, to be sure, times when we experience that we have willed something when, in fact, we have.⁶²⁷ Foregoing a just-out-of-the-oven chocolate chip cookie can be, when we succeed, evidence of the empirical will. But

622. B. Libet, *The Neural Time-Factor in Perception, Volition and Free Will*, 97 *REVUE DE METAPHYSIQUE ET DE MORALE* 255 (1992), quoted in WEGNER, *supra* note 84, at 54. As often occurs in social science, the significance and implications of this line of research are not without controversy. Our treatment here is based largely on Wegner’s analysis, which is, in our view, as balanced and reliable account in this developing field as is presently available for use in legal theory.

623. See WEGNER, *supra* note 84, at 47 (citing Joaquim P. Brasil-Neto et al., *Focal Transcranial Magnetic Stimulation and Response Bias in a Forced-Choice Task*, 55 *J. NEUROLOGY, NEUROSURGERY & PSYCHIATRY* 964 (1992)). Apparently this one slipped by the human subjects committee.

624. WEGNER, *supra* note 84, at 48.

625. *Id.*

626. *Id.* at 14.

627. See *id.* at 15. Wegner writes:

the experience of will is not reliable evidence of the empirical will. The experience of will is generated by our minds to accompany behaviors whose source may be an unwilled situation. "The experience of will," as Wegner puts it, "is the way our minds portray their operations to us, not their actual operation."⁶²⁸ Wegner's diagnosis reveals the limited viability of the experience of will as a last bastion of dispositionism.

Though we perceive will and behave and experience ourselves "as if" our will were controlling our behavior, and though we project will onto the behavior of others, these intuitive conceptions of the will are fundamentally unreliable indicators of both the reality of our will and the source of our behavior. Here again, there is more to the situation.⁶²⁹

[T]he brain structure that provides the experience of will is *separate* from the brain source of action. It appears possible to produce voluntary action through brain stimulation with or without an experience of conscious will. This, in turn, suggests the interesting possibility that conscious will is an add-on, an experience that has its own origins and consequences. The experience of will may not be very firmly connected to the processes that produce action, in that whatever creates the experience of will may function in a way that is only loosely coupled with the mechanisms that yield action itself.⁶³⁰

A final experiment suggests the extent to which our experience of will can be subject to situational influence, again without our conscious awareness. Subjects viewed a computer screen that flashed strings of letters and were asked to judge whether they saw words in what flashed.⁶³¹ The screen would go entirely blank

In psychology, clear indications of the empirical will can be found whenever causal relationships are observed between people's thoughts, beliefs, intentions, plans, or other conscious psychological states and their subsequent actions. The *feeling* of consciously willing our actions, in contrast, is not a direct readout of such scientifically verifiable will power.

Id. (emphasis added); *see also id.* at 327 (observing that there often is a correlation between our felt experience of will and scientifically verifiable empirical will power).

628. *Id.* at 96.

629. *Cf. id.* at 66 ("Although day always precedes night, for example, it is a mistake to say that day *causes* night, because of course both are caused in this sequence by the rotation of the earth in the presence of the sun."). We perceive ourselves consciously thinking and willing our actions, and wrongly believe that we perceive all there is. In part, we perceive our conscious will because any time we look for it, we find it. The problem is that when we are not looking for it, it is rarely there. *See generally* Bargh & Chartrand, *supra* note 598 (finding that much of human behavior is nonconscious and situational). It is as though we conclude from the fact that every time we look into the mirror we see ourselves looking back, that our reflection is always in that mirror, looking out. It is not, but when we look, it is—and, so, what we see when we look gives us a false sense of what is happening when we are not looking.

630. WEGNER, *supra* note 84, at 47; *see also id.* at 64 ("The theory of apparent mental causation, then, is this: *People experience conscious will when they interpret their own thought as the cause of their action.* This means that people experience conscious will quite independently of any actual causal connection between their thoughts and their actions.").

631. Ap Dijksterhuis et al., *Unconscious Priming of Conscious Will* (2001) (unpublished manuscript, on file with authors).

once each trial, either after the subject pressed the response button, or automatically after a very short time (400-650 milliseconds) if the subject failed to respond. The intervals were so quick that it was difficult for subjects to tell whether their response triggered the blank screen, or whether it had automatically gone blank. One group of subjects, however, was subliminally primed with a flash of the word “I” or “me” (subjects reported not recognizing it) just prior to the flash of letters that they could consciously see and were to evaluate. The researchers found that subjects primed with the dispositionist terms “I” or “me” were more likely to conclude that they had caused the screen to go blank than were subjects who had not been so primed. The subjects, it seems, “were influenced by the unconscious priming of self to attribute an ambiguous action to their own will.”⁶³² Our experience of will then, is not only an internal illusion, it is an internal illusion that is susceptible to external situational manipulation.

The will, it turns out, rather than being the trump card in the dispositionist’s deck, may be the joker in our dispositional delusion.⁶³³ As Wegner summarizes:

The unique human convenience of conscious thoughts that preview our actions gives us the privilege of feeling we willfully cause what we do. In fact, however, unconscious and inscrutable mechanisms create both conscious thought about action and the action, and also produce the sense of will we experience by perceiving the thought as the cause of the action. So, while our thoughts may have deep, important, and unconscious causal connections to our actions, the experience of conscious will arises from a process that interprets these connections, not from the connections themselves.⁶³⁴

We want to emphasize again what we are not claiming, lest our actual claims be wrongly caricatured and dismissed. We have not argued here, or elsewhere in this Article, that there is “no such thing” as will, or that everything we seem to will is, to the contrary, determined for us. We do not doubt the existence of the

632. See WEGNER, *supra* note 84, at 209. For a related discussion of how sellers attempt to attribute consumer behavior to the free exercise of consumers’ wills, informed by stable preferences, see Hanson, Yosifon, & Benforado, *Broken Scales*, *supra* note 54.

633. See WEGNER, *supra* note 84, at 28 (“The mind has a self-explanation mechanism that produces a roughly continuous sense that what is in consciousness is the cause of action—the phenomenal will—whereas in fact the mind can’t ever know itself well enough to be able to say what the causes of its actions are.”).

634. *Id.* at 98. Wegner adds:

We must remember that this analysis suggests that the real causal mechanisms underlying behavior are never present in consciousness. Rather, the engines of causation operate without revealing themselves to us and so may be unconscious mechanisms of mind. Much of the recent research suggesting a fundamental role for automatic processes in everyday behavior . . . can be understood in this light. The real causes of human action are unconscious, so it is not surprising that behavior could often arise—as in automaticity experiments—without the person’s having conscious insight into its causation. Conscious will itself arises from a set of processes that are not the same processes as those that cause the behavior to which the experience of will pertains, however.

individual human will, and we do not doubt that there is human genius rightly to be attributed to it. Our point, rather, is that our *experience* of will—our familiar experience that our will is responsible for our conduct—is often not a reliable indicator of the actual cause of our behavior. The felt experience of will therefore contributes greatly to our dispositionism. Where we are moved situationally, the phenomenon of will fills out our stories and helps to eclipse our vision of the situational influences that move us. When it seems that our “will” is doing the moving, it follows that we must have “chosen” our actions. And if we chose our actions, we must have had reasons or preferences for doing so. Thus, the illusion of will is a central feature of the illusion of dispositionism. How, after all, can *situation* be moving us, when we can “feel” the disposition?

Our point, then, is both subtle and disquieting: The experienced “will,” rather than a mirror and measure of our true selves, may be another mask in the disguise of dispositionism that keeps us from seeing what really moves us.

IV. A FEW POSSIBLE LESSONS FOR LAW AND LEGAL THEORY

Part I of this Article examined the person schema that forms the foundation of most laws and legal theories. Part III summarized some of what psychology teaches about what actually moves human beings. What is now fairly clear is that the dominant lay and legal theories of the person (or “personology”) are wrong—not just “too simple,” but fundamentally wrong. Social science has clearly demonstrated that we are not who we think we are. It is true that we experience ourselves thinking, preferring, acting, and willing, but those comforting perceptions are often illusory, and they obscure the far more significant influence of our unseen interior situation.

What should also be clear is that every experiment demonstrating the extent and power of our interior situations likewise indicates just how incredibly vulnerable we—our cognitions, attitudes, behavior, and even our conscious will—are to exterior situational manipulation. To see that, one need only go back and note how each experiment discussed above revealed one or another element of our interior situations by secretly manipulating the subjects’ exterior situations. Our dispositionist self-schemas and our perceptions of thinking, preferring, willing, and choosing lead us to miss the situation, and render us vulnerable to it. So it is that the hidden situation can be as powerful as a loaded gun. This, we believe, is the central lesson of our argument. Understanding its implications generally for law, policy, policymaking, and legal theory goes well beyond the scope of this Article.⁶³⁵ Still, we will suggest a few tentative

635. This Part offers a few positive predictions about the contours of the law and legal theory. Beyond what we can describe here, there is much to learn about the legal institutions (indeed all institutions) when one begins with a more realistic conception of the human animal. And, for now, we are concerned in this project primarily with pursuing such positive questions about why the human animal and its institutions behave as they do.

implications here.⁶³⁶

A. THE LAW

Getting to know something about the situational character teaches us something about how better to understand our laws. The point is taken up in other work, but some preliminary observations are worth making here. For instance, we believe that “law” itself can be usefully understood as a kind of dispositionist situational character, reflecting all the same tendencies of the human variety. That is true, in our view, because legal systems place judges, juries, legislators, and the like in a position of resolving disputes between competing interests. Those decision-makers—be they individuals, or groups or processes that conceive of themselves as individuals—tend to see their institutions as human-like entities.⁶³⁷ They see themselves and their institutions very much the same way we humans conceive of ourselves—as information-gathering, reasonable thinkers with steady sets of preferences—and they are subject to the same sorts of situational influences, such as the various motivations for coherence, simplicity, system-affirmation, and so on.⁶³⁸

For lawmakers, such preferences might be identified in various policy scripts defining the purpose of law or lawmaking.⁶³⁹ In the case of judges, the preferences might be found in similar scripts in various legal principles and

When we have presented this paper in various settings, our most vociferous and incredulous questioners have tended to disregard the positive implications of our work and to press on us the possible normative questions raised by critical realist situationism. Oftentimes (though certainly not always), those individuals seem to suggest that, absent a clear normative description of what goal the law should serve and how the law should be reformed to better serve that goal, we have said little of interest to legal theorists.

Needless to say, we disagree. Some conception of the human animal—be it explicit or implicit, realistic or farcical—forms the foundation of all legal theories—positive or normative. Positive theories are important for understanding, predicting, and influencing the law and legal institutions. And a positive theory, particularly one that is committed to a realistic account of the human animal, can be significant for both assessing existing normative and prescriptive theories and for developing or shaping such theories. Put differently, we believe that the sort of evidence that we are reviewing, and the positivist arguments we are making in this Article and elsewhere, have immense normative implications. And we look forward to exploring these implications in the future. In the meantime, we believe that, in light of the evidence, the burden is not on us to develop a new situationist-based normative theory, but on those who embrace some form of dispositionism to justify their normative theories or to join in the effort of trying to understand the normative implications of situationism.

636. *Id.* at 97. In related work, we hope to elaborate these and other implications. See, e.g., Chen & Hanson, *Categorically Biased*, *supra* note 136; Chen & Hanson, *The Illusion of Law*, *supra* note 32; Hanson & Kysar, *Taking Behavioralism Seriously II*, *supra* note 132; Hanson & Yosifon, *The Situation*, *supra* note 5. Other scholars have also made important strides in considering the implications of social psychology (and related fields) for law, legal theory, and legal institutions. See, e.g., Ross & Shestowsky, *supra* note 56.

637. See FISKE, *supra* note 233, at 460–63 (describing the perceived “entativity” of groups).

638. See Wendy Wood, *Attitude Change: Persuasion and Social Influence*, 51 ANN. REV. PSYCHOL. 539 (2000) (summarizing much of the recent evidence on individual and group decision-making—private and public).

639. See generally Chen & Hanson, *Categorically Biased*, *supra* note 136, at 1239–52 (offering a set of predictions about the role of knowledge structures on legal theories and law); Chen & Hanson, *The*

precedents. Judges, being human, understand and portray their individual decisions as both internally coherent and coherent across cases, doctrines, and time—hence the common provision in written opinions intended to reconcile any given decision with all previous ones.⁶⁴⁰ The coherence will be, just as it is with the human version of the situational character, largely an illusion, but not so obviously an illusion that the system's legitimacy is threatened.⁶⁴¹ The patterns behind the laws will reflect the situational influences of those individuals and institutions best able to influence lawmakers' situation.

Furthermore, courts, in making judgments, will operate according to the same attributional impulses and biases—assessing causation, responsibility, and blame—very much the way we all do.⁶⁴² Indeed, a major task for the law is to sort out attributional stories and judge responsibility based on the disputants' conflicting versions.⁶⁴³ Because of our biases, individuals most likely to be held personally responsible are the salient individuals closest to the injury, particularly when their behavior was, in some sense, non-normal (encouraging counterfactual thinking), when they are members of cultural out-groups, or when attributional stereotypes point in their direction. The legal system will seek to identify the causes of harm quickly, simply, and in a way that promotes the perceptions of closure and coherence.⁶⁴⁴

For that reason, and many others that we have highlighted above, judicial attributions will be far too dispositionist—a claim for which we have already provided some evidence.⁶⁴⁵ Where harms are caused by situational influences, the law will tend either to seek out and name a dispositional scapegoat on which to place responsibility, or to deny that there was a harm (perhaps by derogating the victim)⁶⁴⁶ or the possibility of a legal remedy. Furthermore, in an effort to legitimate, not only their own decisions, but the entire system, lawmakers will ignore, tolerate, or justify many outcomes that could otherwise be perceived as unjust. And they will do so by accepting and reinforcing dispositionism and rejecting situationism. Relatedly, lawmakers and those subject to laws will be particularly keen to promote and protect individuals' perceived rights to be dispositionists—that is, their ability to choose whatever options they like with-

Illusion of Law, *supra* note 33 (providing evidence consistent with those predictions with regard to the non-dominant general schemas of policymaking and corporate law).

640. See generally Phoebe Ellsworth, *Legal Reasoning*, in *THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING* (forthcoming 2005) (on file with authors).

641. See generally Chen & Hanson, *The Illusion of Law*, *supra* note 32.

642. See generally Hanson, Reyes & Schlanger, *Attributional Positivism*, *supra* note 43.

643. See *id.*

644. See generally Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 54. This helps explain the attraction of Langdellian positivism in early academic theories and the fact that, to this day, jurists continue to claim to be simply applying the law. See Ellsworth, *supra* note 640.

645. See *supra* text accompanying notes 35–63.

646. See *supra* Part III.C.2.b.iii (summarizing evidence of people's tendency to derogate victims in order to preserve their perception of a "just world").

out the interference of arbitrary or unfair restrictions by salient actors.⁶⁴⁷

In addition, lawmakers will seek to avoid obvious tension or contradictions between their stated goals and their actions, and they will likely seek to resolve “precedential dissonance” in many of the same ways individuals do—from changing their goals to changing their opinions, and from trivializing the dissonance to emphasizing unrelated self-enhancing features of the system.⁶⁴⁸ Their decisions will ultimately be rationalized as consistent with basic self-affirming and system-affirming conceptions of justice, fairness, equality, merit, choice, and the like.

B. LEGAL THEORY

Getting to know the situational character, we have come to know more than just what moves us. The discussion in Part III teaches us something about what moves our own theories about what moves us. We are not referring here to the many exterior situational forces behind the long and successful “life” of the dispositional actor. That is the topic of other work⁶⁴⁹ (and, less explicitly, the topic of Part V below). We are referring instead to the influence that our interior situation tends to have on the shape of the policy theories likely to be most successful. Legal theory, too, will share much in common with the law. But, as an outside observer, a legal theorist is to law something closer to what a social psychologist is to the human variety of situational characters: an observer attempting to ascertain what really moves the situational character—to see, for example, if the purported attitudes, reasons, and rationalizations of the situational character square with its behavior. Where apparent incoherence is identified, legal scholars offer theories intended either to make sense of the decisions (positive theories, which can be legitimating or delegitimizing) or to show how the law, in practice, should be (re)formed or (re)structured to achieve a particular goal (normative theories).

Knowing something more about the situational character, we can better predict which theories will be most highly valued outside of law schools, and thus which ones will tend to be advantaged, other things being equal. First, successful theories will rely on a highly dispositionist view of the human actor—one that presumes that humans will their choices through thought and preferences. The model actor—the one that sets the standard for all of us—will

647. That prediction is connected to the illusion of control (and associated motive for control). Numerous experiments testing “reactance theory” have demonstrated that people (particularly in this culture, we suspect) do not like to be told what they can or cannot do. Broadly speaking, when individuals perceive an unfair restriction of their conduct, they often experience a strong motivational state (“reactance”) to remove the perceived restriction or reject it. For thorough discussions of reactance theory and evidence supporting it, see JACK W. BREHM, *A THEORY OF PSYCHOLOGICAL REACTANCE* (1966) and SHARON BREHM & JACK W. BREHM, *PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL* (1981).

648. See *supra* notes 472–503 and accompanying text.

649. See, e.g., Chen & Hanson, *The Illusion of Law*, *supra* note 32; Hanson & Yosifon, *The Situation*, *supra* note 5.

be a fairly robust version of our widely held, dispositionist self-conceptions. The model actor therefore will be a thoughtful, reasoning actor, who approaches questions from a data-driven, bottom-up perspective, one who is not biased by cognitive shortcuts, distorting knowledge structures, emotions, or any unseen interior influences. She will have stable preferences that are consistent over time and with her behavior. And exceptions to that conception will be narrow and snugly anchored to that conception.

Legal conclusions and legal-theoretic inclinations will tend to favor the most powerful groups (and cultural in-groups).⁶⁵⁰ Various cloaks of legitimacy will be draped over the law and legal theories.⁶⁵¹ Categories and schemas that tend to favor those groups will be created and perceived as neutral and natural, even when they are false, incomplete, or biasing. Laws and legal theories will also, on the whole, tend to be system-affirming. For all of these reasons, legal theories will, like the laws, tend to underestimate the role of situation—too often ignoring or downplaying the role of unseen forces that move or exploit the situation.⁶⁵² Similarly, they will vastly limit our ability to see certain harmful situational forces and our ability to correct for those that we do see, such as the role of market manipulation.⁶⁵³

System affirmation will be accomplished in significant part through the dispositionism that already infects our attributions. Throughout, there will be little serious attention given to the possibility that people's conduct deviates from that of the model (dispositional) actor. That is, only the most obvious interior and exterior situational influences will be acknowledged.⁶⁵⁴ And those theorists who challenge the dominant conceptions will be viewed (along with their theories) as members of the same marginal and threatening out-group(s).⁶⁵⁵

The above description, we believe, accurately depicts much of traditional law and economics, and it helps to explain its tremendous real-world influence.⁶⁵⁶ Unfortunately, social psychology also strongly suggests that such a legal theory or legal system will have significant harmful effects—even as measured by existing normative theories regarding the goal or goals of law. As the footnotes in this section suggest, we have provided evidence for many of these claims in

650. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 230–84.

651. See generally Chen & Hanson, *The Illusion of Law*, *supra* note 32.

652. See *supra* text accompanying notes 472–503 (discussing the role of dispositionism in system affirmation).

653. See Hanson & Kysar, *The Failure*, *supra* note 132 (describing the failure of existing laws to recognize and counteract the market manipulation techniques of the tobacco industry); Hanson, Yosifon, & Benforado, *Broken Scales*, *supra* note 54 (same with respect to situational sources of obesity epidemic).

654. See *supra* text accompanying notes 15–62.

655. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 157–66; Chen & Hanson, *The Illusion of Law*, *supra* note 32.

656. For a description of both, see Hanson & Yosifon, *The Situation*, *supra* note 5; Jon Hanson & Melissa Hart, *Law and Economics*, in BLACKWELL'S COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 311–31 (Dennis Patterson ed., 1996).

related work.

Our point here is that a better understanding of the situational character helps us to better understand our policy and policymaking systems. And the lessons of social psychology may be as unsettling and counterintuitive for our understanding of those systems as they have been for our understanding of ourselves. The very theories that we use to legitimate our systems, for example, may in fact be contributing to injustice—as defined by those theories. Insofar as we ignore situation, we ignore the limits of presumed autonomy and many of the most influential forces in our society—often far more influential than personal choice. That situational ignorance, it would seem, likely advantages those people, groups, and interests with the greatest autonomy to start with. Thus, situational ignorance helps to create—and then legitimate and maintain—power relationships.⁶⁵⁷ Power that is reinforced by the law is legitimated as the acceptable outcome of neutral legal processes. When those processes are understood as part of the manipulated, constructed, hidden situation that creates that power, any claim of neutrality vanishes—and, with it, the legitimacy that guards associated inequalities.

Part V will provide some support for many of the assertions in this Part; it will also demonstrate how legal theorists have dealt with the dissonance created by the growing social scientific evidence that we are situational characters.

V. DISPOSITIONISM IN LAW AND ECONOMICS

“Living in economic science makes economists think a little differently than other people.”

~ George Stigler⁶⁵⁸

In Part I, we described the generally dispositionist starting place of legal analysis, laws, lawmakers, and indeed virtually all western individuals and institutions. As we suggested, no social theory more formally and explicitly embraces the basic pre-theoretic axioms of lay dispositionism than neoclassical (law and) economics.⁶⁵⁹ As we argued in a previous article, the success of the economic view in policymaking has likely both depended upon and contributed to a similar commonsense vision.⁶⁶⁰ But, as we have argued in this Article, the dominant dispositionist model is, in many ways, fundamentally flawed.

As evidence of those flaws has gained wider audiences and has begun to disseminate through academia, that evidence has begun to pose a threat to the legal theorists and jurists who are committed to dispositionism. It has created a

657. Dominant dispositionist theories thus are most valuable to the very groups who have the greatest ability to promote such theories through situational influence.

658. GEORGE J. STIGLER, *MEMOIRS OF AN UNREGULATED ECONOMIST* 8 (1988).

659. We view law and economics as a subgenre of neoclassical economics.

660. Hanson & Yosifon, *The Situation*, *supra* note 5.

dissonance between their motives to achieve simplicity and confirm their existing theories, on one hand, and their motive for accuracy on the other. The threat has been felt most acutely among (law and) economic theorists because of their field's dominance in modern policymaking, its clear and formal adoption of dispositionism, and the system-affirming quality of much of their work. There is now an unmistakable uneasiness among (legal) economists and a great deal of work attempting to reconcile their theories with the growing evidence that seems to contradict it. Indeed, much of the most interesting and important work these days involves applying certain features of social psychology to the law and economics model.⁶⁶¹

Most economists are, of course, humans, and their strategies for coping with the theoretic-empiric dissonance are all too human. This section looks closely at how law and economics has responded, and how seriously its advocates have taken the insights of social psychology. First, it reveals that the dispositionist actor has been carefully guarded. Second, it provides further evidence that even scholars who have devoted their careers to one or another version of the rational actor remain situational characters.

A. THE DISPOSITIONIST ACTOR OF LAY AND LEGAL-ECONOMIC THEORIES

"The theory of consumer demand, as is now widely accepted, is based on [the] . . . proposition . . . that wants originate in the personality of the consumer or, in any case, that they are given data for the economist."

~ John Kenneth Galbraith⁶⁶²

Economists assume that human agents gather and process information (*think*) in order to identify the best method or means of satisfying their (stable and exogenous) *preferences* through *willed choice*. Robert Cooter and Thomas Ulen, legal economists, summarize this basic starting place in their classic law and economics text:

The construction of the economic model of consumer choice begins with an account of the preferences of consumers. Consumers are assumed to know the things they like and dislike and to be able to rank the available alternative combinations of goods and services according to their ability to satisfy the consumer's preferences. This involves no more than ranking the alternatives as better than, worse than, or equally as good as one another. . . .

[T]he preferences of the consumer are *subjective*. Different people have different tastes, and these will be reflected in the fact that they may have different preference orderings over the same goods and services. Economists leave to other disciplines, such as psychology and sociology, the study of the

661. See *infra* Part V.C.

662. JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 2–3 (1958).

source of these preferences. We take consumer tastes or preferences as given, or, as we sometimes say, as *exogenous*, which means that they are determined outside the economic system.⁶⁶³

From such axioms, it is easy to conclude that each person's *actions* constitute willed choices reflecting the outcome of that information-gathering, preference-pursuing process. Or, as economist David Kreps summarizes, the basic economic approach presumes that "*choice is induced from preference . . .*"⁶⁶⁴

That is the lesson of what economists call the "Generalized Axiom of Revealed Preference" ("GARP")⁶⁶⁵—the approach that, since its first articulation sixty-five years ago "has gradually taken hold of choice theory in general and demand theory in particular."⁶⁶⁶ According to Nobel Laureate Paul Samuelson, who first formulated revealed preference theory, "[t]he individual guinea-pig, by his market behaviour, reveals his preference pattern—if there is such a consistent pattern."⁶⁶⁷ In this world according to GARP, preferences drive choices; so preferences can be inferred from (are *revealed* by) actual choices—such that there is no need to ask consumers *why* they do what they do, because *what* they do reveals the story:⁶⁶⁸

Standard economic theory employs an "objectivist" position based on observable choices made by individuals. Individual utility only depends on tangible

663. COOTER & ULEN, *supra* note 19, at 17; *see also id.* at 17 n.3 ("[W]e hold to the view that economics per se is about how [the] alteration [of consumer tastes] takes place."); Martha Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1197–98 (1997) ("Law and Economics has been built on a particular set of conceptual foundations. These involve at least the following ideas: that rational agents are self-interested maximizers of utility; that utility can best be understood (for explanatory/predictive purposes) as a single item varying only in quantity; that utility is best analyzed in terms of the satisfaction of preferences; that preferences are exogenous, i.e., not significantly shaped by laws and institutions; and that the ends adopted by an agent cannot themselves be the subject of rational deliberation, although agents may deliberate about instrumental means to ends.").

664. DAVID M. KREPS, *A COURSE IN MICROECONOMIC THEORY* 25 (1990).

665. *Id.* at 41–45.

666. Amartya K. Sen, *Behaviour and the Concept of Preference*, 40 *ECONOMICA* 241, 241 (1973); *see also id.* at 242 (explaining that the revealed preference approach is not limited to market choices "and indeed . . . has been used in studying preferences revealed by non-market behaviour such as government decisions, choices of public bodies and political acts like voting").

667. Paul A. Samuelson, *A Note on the Pure Theory of Consumer's Behaviour*, 5 *ECONOMICA* 61 (1938); *see also* Paul A. Samuelson, *A Note on the Pure Theory of Consumer's Behaviour: An Addendum*, 5 *ECONOMICA* 353 (1938).

668. PAUL A. SAMUELSON, *FOUNDATIONS OF ECONOMIC ANALYSIS* 90–113 (1947); *see also* KREPS, *supra* note 664, at 27, 29–30; EDWIN MANSFIELD, *ECONOMICS* 71–72 (7th ed. 1992); Sen, *supra* note 666, at 241 ("From the point of view of introspection of the person in question, the process runs from his preference to his choice, but from the point of view of the scientific observer the arrow runs in the opposite direction: choices are observed first and preferences are then presumed from these observations.").

goods and services and leisure. It is inferred from behavior (or revealed preferences), and is in turn used to explain the choices made.⁶⁶⁹

In this theory, choices are the means by which individuals satisfy their preferences and by which policy analysts infer those preferences and measure social welfare.⁶⁷⁰ Amartya Sen, yet another Nobel Laureate, insightfully suggests that “the popularity of this view . . . may be due to a mixture of an obsessive concern with observability and a . . . belief that choice . . . is the only human aspect that can be observed.”⁶⁷¹

It is worth noting here, briefly, the striking parallel between “revealed preferences” and the fundamental attribution error: both presume, based largely on observability, that behavior is dispositionally explained. Moreover, revealed preference theory is successful, not because it has been shown to be true, but because it is tractable and comports with our intuitions. Sen (who is an important exception to this overgeneralized description of economics)⁶⁷² puts the point this way:

Faith in the axioms of revealed preference arises . . . not from empirical verification, but from the intuitive reasonableness of these axioms interpreted precisely in terms of preference. . . .

I would, therefore, argue that the claim of explaining “behaviour without reference to anything other than behaviour” is pure rhetoric and if the theory of revealed preference makes sense it does so not because no psychological assumptions are used but because the psychological assumptions used are sensibly chosen.⁶⁷³

As we have shown, however, those psychological assumptions are *not* sensibly chosen, and thus there would appear to exist a fundamental attribution error at the heart of revealed preference theory and the economic analysis that has been built upon it.⁶⁷⁴

669. Bruno S. Frey & Alois Stutzer, *What Can Economists Learn from Happiness Research?*, 40 J. ECON. LITERATURE 402, 404 (2002).

670. See, e.g., J.R. Hicks, *REVISION OF DEMAND THEORY* 6 (1956) (“The economic theory of demand does study human beings, but only as entities having certain patterns of market behaviour; it makes no claim, no pretence, to be able to see inside their heads.”); I.M.D. Little, *A Reformulation of the Theory of Consumer's Behaviour*, 1 OXFORD ECON. PAPERS 90, 97 (1949) (“[T]he new formulation is scientifically more respectable [because] [i]f an individual's behaviour is consistent, then it must be possible to explain that behaviour without reference to anything other than behaviour.”).

671. Amartya K. Sen, *The Standard of Living*, in 7 TANNER LECTURES ON HUMAN VALUES 18 (1986).

672. Sen is particularly sensitive to what we would call situational considerations. Very loosely, Sen argues that, in addition to a person's choices, policymakers should be concerned with a person's situation, or range of alternatives or “capabilities.” See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (2000); AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1985).

673. Sen, *supra* note 666, at 243–44 (citation omitted) (emphasis added); see also *id.* at 254 (indicating that the dominant theory “makes the analysis simpler”).

674. Again, Sen himself believes that there is more to the situation than most economists assume or their theories allow. For instance, in one article, Sen offered the following speculation:

It is unsurprising, given their assumptions and perspectives, that many economists similarly infer freedom (and happiness or welfare)⁶⁷⁵ from the perception of choice and, hence, celebrate markets as the most trustworthy of vehicles for the actualization of preferences. Thus, Milton Friedman explains:

When you hear people objecting to the market or to capitalism and you examine their objections, you will find that most of those objections are objections to freedom itself. *What most people are objecting to is that the market gives people what the people want instead of what the person talking thinks the people ought to want.* That is true whether you are talking of the objections of a Galbraith to the market, whether you are talking of the objections of a Nader to the market, whether you are talking of the objections of a Marx or an Engels or a Lenin to the market.⁶⁷⁶

To Friedman and to most economists, a market choice is, absent strong reason to believe otherwise, a free choice.⁶⁷⁷ And free choice is, in light of the other pre-theoretic axioms, the normative standard against which all laws, policies, and regulations should be measured. Policies should encourage contracting and market transactions wherever possible, and should otherwise seek to achieve outcomes that mimic the allocations that would occur were free markets fully functioning.⁶⁷⁸ And it is largely because of those presumptions that many economists have responded to evidence that their simple model is badly flawed, not by denying the veracity of the evidence, but by warning that any serious discussion of such evidence opens the door, or begins us down a slippery slope,

I would argue that the philosophy of the revealed preference approach essentially underestimates the fact that man is a social animal and his choices are not rigidly bound to his own preferences only. I do not find it difficult to believe that birds and bees and dogs and cats do reveal their preferences by their choice; it is with human beings that the proposition is not particularly persuasive. An act of choice for this social animal is, in a fundamental sense, always a social act. He may be only dimly aware of the immense problems of interdependence that characterize a society, of which the problem under discussion is only one. But his behaviour is something more than a mere translation of his personal preferences.

Id. at 252–53.

Professor Jerry Green, in his graduate-level introduction to microeconomics at Harvard University, makes a similar admission. He notes that, in attempting to infer people's preferences, economists tend to concentrate on "operationaliz[ing] a quantitative description of their observed actions," despite the fact that questions about the "context in which we think the people are operating" are just as important. Jerry R. Green, Lecture Notes: Lecture 1, Economics 2010a (Fall 2002) (unpublished manuscript, on file with authors).

675. See Sen, *supra* note 666, at 244 ("[A] person is, on the whole, likely to be happier the more he is able to have what he would choose.") (quoting Little, *supra* note 670, at 98); Sen, *supra* note 666, at 254 (discussing the "rigid correspondence between choice, preference and welfare assumed in traditional economic theory").

676. MILTON FRIEDMAN, BRIGHT PROMISES, DISMAL PERFORMANCE 89 (1983) (emphasis added).

677. See, e.g., Hanson & Yosifon, *The Situation*, *supra* note 5, at 157–165 (discussing the extent of economists' dispositionism).

678. See generally FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991).

to one or another form of totalitarianism.⁶⁷⁹

When people perceive a threat to the social system, they tend to see the world in more dispositionist terms.⁶⁸⁰ Relatedly, when dispositionists—particularly hard-core dispositionists like “a Friedman”—are confronted with evidence or opinions that situation is more significant than they believe, they perceive that evidence or opinion as a threat to the system. And all those who offer such criticisms—be they “a Galbraith . . . a Nader a Marx or an Engels or a Lenin”—are themselves dispositionalized into a single out-group of individuals who pose a threat to our system.⁶⁸¹

We suspect that the interior fundamental attribution error largely explains—or at least makes possible—both the pre-theoretic axioms of economic models and the normative social policies that most legal economists embrace.⁶⁸² Again, the attraction and success of that approach stems in part from its consonance with perceived, if unexamined, human experience (and with its system-affirming effects). And, for similar reasons, we suspect that the same influence is reflected in the theories underlying many of our most influential social, cultural, political, and economic institutions—particularly those that, like economics, have not taken seriously the project of examining our exterior or interior situations.⁶⁸³

The consonance between economic assumptions and common Western lay assumptions⁶⁸⁴ goes beyond merely the pre-theoretic axioms regarding the landscape of our interiors. Economists share not only the lay intuition that people act according to their thoughts and preferences, but also (at least loosely) widely held lay presumptions regarding what those thoughts, preferences, and acts tend to be. As several social psychologists recently summarized, “the model of the ideal person,” “especially in the United States since the 1970s,” has come to embody the following characteristics, characteristics that likewise imbue the rational actor:

- oriented primarily toward independent “success” and “achievement.”
- formulates personal goals derived principally from these attributes and orientations.
- evaluates life with reference to the achievement of these goals.
- makes (or should make) independent, more or less rational choices in the pursuit of those goals.

679. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 190–91 (discussing “the totalitarian bogeyman”).

680. See *supra* text accompanying notes 472–503 (describing motive to affirm system through dispositionalizing stereotypes).

681. FRIEDMAN, *supra* note 660, at 89.

682. See *supra* text accompanying notes 15–23 (describing legal economists’ failure to account for situation).

683. See *supra* text accompanying notes 24–63.

684. See *supra* text accompanying notes 79–102.

- is largely in control of—and individually responsible for—“personal” behavior and its outcomes.
- often regards relationships as competing with personal needs and regards group pressures as interfering with personal goals. . . .
- strives first and foremost to feel good about the self.⁶⁸⁵

Thus, there is an overlap between economic models and lay institutions, not only in the interior source of dispositionism, but also in precisely what those dispositions are generally assumed to be.⁶⁸⁶ That second overlap, like the first, is no coincidence, a claim we bolster in other work.⁶⁸⁷ For now, it is sufficient to state that the typical assumptions of economic models regarding what people’s precise dispositions are both reflect and reinforce common lay intuitions. Moreover, those dispositions are easily presumed, and difficult to disprove, given that the shared pre-theoretic axioms have little or no place for situation. In other words, the presumption that our interiors are driven primarily by thinking, preferring, and acting make it difficult to understand how something other than self-interested goals are behind our behaviors and difficult to understand how people’s “free” choices could be anything but personally—and, taken together, collectively—satisfying.

B. SCRUTINIZING THE MYTH OF THE RATIONAL ACTOR

“The notion that humans abide by normative principles dies hard, especially amongst economists”

~ Philip N. Johnson-Laird & Eldar Shafir⁶⁸⁸

After getting to know the situational character and learning that our assumptions about how we think and why we act are fundamentally flawed, it is illuminating to look more closely at the most sophisticated justifications thus far offered for the unrealistic dispositionism of economics and legal economics. Doing so suggests that there is, in fact, no compelling justification.

Stanford economist David Kreps, winner of the prestigious John Bates Clark Medal, and one of the most respected economists and game theorists in the business, begins his leading graduate-level text by laying out the basic concepts, schemas, and purpose of microeconomics.⁶⁸⁹ His treatment illustrates what today’s top economists are teaching tomorrow’s top economists about how to

685. Fiske et al., *supra* note 84, at 920.

686. See *supra* text accompanying note 548 (explaining that economists, like most non-economists in this culture, typically assume that individuals pursue narrow material ends in self-interested ways).

687. See, e.g., Chen & Hanson, *The Illusion of Law*, *supra* note 32; Hanson & Yosifon, *The Situation*, *supra* note 5, at 230–84.

688. Johnson-Laird & Shafir, *supra* note 88, at 6.

689. He calls them the “basic categories: Actors, behavior, institutions, and equilibrium.” KREPS, *supra* note 664, at 4.

justify their approach, and the fact that economics, more than any other social science, defines policy analysis and shapes policy.⁶⁹⁰

Kreps opens his book by setting forth the basic pre-theoretic axioms of economics. He explains, for example, that

[i]n the standard approach, behavior always takes the form of constrained maximization. The actor chooses from some specified set of options, selecting the option that maximizes some objective function. In orthodox theory, consumers have *preferences* that are represented by a *utility function*, and they choose in a way that maximizes their utility⁶⁹¹

On this view, nothing inside the model other than *preferences* influences people's behavior,⁶⁹² and any action reflects a utility maximizing *choice* among options. In other words, the standard economic approach assumes that people are both *rational* and dispositional *actors*. Thus, Kreps begins by providing the basic economic account of human behavior.⁶⁹³

To his credit, Kreps goes on to admit that people (by whom we suspect he means "non-economists") often find those assumptions to be counterintuitive or contrary to their own casual empiricism. He writes:

These models of consumer . . . behavior typically strike people as fairly obnoxious. We don't find consumers strolling down the aisles consulting a utility function when making their choices Nonetheless, we will use the standard model of consumer behavior throughout . . . the book.⁶⁹⁴

Because of this lack of realism,⁶⁹⁵ Kreps concedes, it would "behoove" economists to explain "why [they] think such models are useful," a task that he then takes up.⁶⁹⁶

According to Kreps, economists typically rely on one or more of several defenses. The first defense is that

690. Kreps's description of and justifications for the basic economic approach are fairly conventional—and, unsurprisingly, they resemble the descriptions and justifications provided by legal economists for their approach. See *supra* text accompanying note 664.

691. KREPS, *supra* note 664, at 4.

692. The only allowance made for the role of situation is in recognizing the exogenous (that is, outside the model and unexamined) constraints of limited budget and limited set of available options.

693. See *supra* text accompanying note 664.

694. KREPS, *supra* note 664, at 4.

695. Kreps is not any more specific in describing the common criticism of the economist's model. Perhaps he believes, as seems plausible, that people find obnoxious only the hyper-rational actors assumed in economics (those who are assumed to "stroll down the aisles of grocery stores of supermarkets consulting a utility function"), but not the less extreme versions of economists' key assumptions that people act by choosing among options based on preferences. See *id.*

696. *Id.*

economic models don't presume that consumers actively maximize some tangible utility function; the presumption is that consumers act *as if* this is what they do. Hence, an important part of the theory of individual behavior concerns *testable restrictions* of the models we use: what behavior, if observed, would clearly falsify our models? If the models are not falsified by our observations, then our models are good positive models—perhaps not descriptive as to *why* things happen, but good in describing *what* happens.⁶⁹⁷

Thus, the first line of defense is to claim that microeconomics theory is not a normative or causal theory, but a positive theory—that is, a theory concerned not with describing “why” individuals do what they do, but with predicting “what” individuals will do. According to Kreps, therefore, so long as the rational actor theory generates testable predictions, and so long as people do in fact behave “*as if*” they are rational actors, then microeconomics is justified as a positive theory, even if the theory does not provide a realistic account of *why* people act that way.⁶⁹⁸

That defense was first offered a half century ago by Milton Friedman in response to the same basic criticism,⁶⁹⁹ and it has been refined very little since. Its longevity notwithstanding, close inspection reveals some flaws in the logic behind the economists’ Maginot Line. First, the “*as if*” claim, insofar as it is true, justifies economics only as a positive theory, and not a causal or normative theory. Thus, it largely fails as a defense against the criticism it is intended to repel: How does one justify premising policy goals and policies on an unrealistic positive theory, except perhaps when the basic model is relied upon solely to help predict the effects of a policy change?⁷⁰⁰ We are getting slightly ahead of ourselves. We should first consider whether economics succeeds even as a positive theory.

As Kreps partially recognizes, the positive theory has some problems: “Unhappily, rather a lot of data has been collected, especially experimentally, which falsifies the models we will employ.”⁷⁰¹ Presumably, Kreps is here acknowledging the recent work of economic behavioralists on choice biases.⁷⁰² Still, according to Kreps, the game may not be over, because economists still have some moves:

697. *Id.* at 4–5.

698. *See id.* at 5 (concluding that “the ultimate test of [a positive economic] theory is its ability to predict *real-world events*”).

699. *See* MILTON FRIEDMAN, *ESSAYS IN POSITIVE ECONOMICS passim* (1953).

700. *Cf.* Sen, *supra* note 666, at 254 (“People’s behaviour may still correspond to some consistent *as if* preference but a numerical representation of the *as if* preference cannot be interpreted as individual welfare. In particular, basing normative criteria . . . on these *as if* preferences poses immense difficulties.”).

701. KREPS, *supra* note 664, at 5.

702. *See generally infra* Part III.B.1.

At this [economists] fall back to our second line of defense by saying that such violations may be minor and not amount to much. That is, the standard models may be good approximations of individual behavior, and the conclusions of models built from such approximations may thus be approximately valid. This requires a leap of faith, but it is still a leap that has some intuitive appeal.⁷⁰³

That seems right. Economists can claim (and, indeed, have long claimed)⁷⁰⁴ that the anomalies are trivial in fact or trivial in effect. According to that defense, the positive economic model is still a reasonable approximation of individual behavior. As Kreps acknowledges, however, any such assertion is just that: an assertion. Such a claim will be convincing only to those people willing to make the “leap of faith” necessary to conclude that the empirically demonstrated anomalies are minor.⁷⁰⁵

Kreps indicates that many people are willing to make such a leap because of the basic model’s “intuitive appeal.” That also seems right. After all, the leap appears to have been made by generations of economists and legal economists.⁷⁰⁶ Still, it is an assertion that seems somewhat in tension with the observation that led him to offer these defenses in the first place—namely that (non-economistic) people found the basic model counterintuitive.⁷⁰⁷ And it is an assertion that seems rarely tested, and sometimes shown to be sorely mistaken when it is.⁷⁰⁸

703. KREPS, *supra* note 664, at 4.

704. See Gary S. Becker, *Irrational Behavior and Economic Theory*, 70 J. POL. ECON. 1, 1–2 (1962).

705. Robert Cooter and Thomas Ulen are similarly nonplussed by the disjunction between conventional economic assumptions and realistic criticisms of those assumptions. See COOTER & ULEN, *supra* note 20, at 12 (“While these criticisms sometimes have merit, the fact remains that the three basic economic concepts[, maximization, equilibrium, and efficiency,] have wide application to law.”).

706. See Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 VAND. L. REV. 1729, 1730 (1998) (stating that “virtually all law and economics scholarship exists at the theoretical plane, turning on formal models rather than observed behavior”).

707. See *supra* text accompanying note 694.

708. For instance, in his recent Nobel Prize lecture, Joseph Stiglitz recounted how the standard defenses of the perfect-information assumption of neoclassical economics failed to withstand frontal challenges:

For more than 100 years, formal modeling in economics had focused on models in which information was assumed to be perfect. Of course, everyone recognized that information was in fact imperfect, but the hope, following Marshall’s dictum “*Natura non facit saltum*,” was that economies in which information was not too imperfect would look very much like economics in which information was perfect.

Stiglitz, *supra* note 365, at 461. “The standard proofs of [several] fundamental theorems of welfare economics did not even list in their enumerated assumptions those concerning information: the perfect information assumption was so ingrained it did not have to be explicitly stated. . . . [The market failures that were taken seriously] were highly circumscribed by assumption.” *Id.* at 466. As it turned out, however, “[o]ne of the main results of [Stiglitz’s] research was to show that this was not true; that even a small amount of information imperfection could have a profound effect on the nature of the equilibrium.” *Id.* at 461; see also *id.* at 463 (“[E]ven slight departures from the underlying assumption of perfect information had large consequences.”). Stiglitz goes on to suggest what might have

Alternatively, according to Kreps, the positive model may be salvaged if one changes the level of abstraction from individual behavior to that of aggregate behavior. That popular defense, too, has purchase, Kreps admits, only “if we believe that violations of [the] models . . . cancel out at the level of aggregate behavior,” another leap of faith, and “only if all we care about is aggregate behavior.”⁷⁰⁹

Those are two big “only if’s,” which require another leap of faith that seems contrary to the best available evidence. The problem is that there have been few testable predictions at that level of abstraction (“aggregate behavior”) that have in fact been tested in a way that provides much significant support for the basic economic assumptions. Indeed, to the contrary, the behavioral critiques of the rationality assumption are not aimed just at individual behavior. They reveal systematic biases that simply do not cancel out on net.⁷¹⁰

It is precisely the assumption that deviations will tend to cancel out that many economic behavioralists claim to have disproven through empirical testing. That the Nobel Prize was recently awarded to Daniel Kahneman for his decades of work identifying tendencies that often do not cancel out bodes ill for the future of this still-popular defense. Moreover, as we have already summarized, the evidence that economists do sometimes offer—like downward-sloping demand curves—is of little value as an empirical defense of the rational actor model inasmuch as it is consistent with a vast range of possible alternative theories.⁷¹¹ And, finally, even if behavioral deviations from the rational actor model were to somehow disappear in the aggregate, it is not clear why that should be any more comforting to economists than the person with one foot in ice and the other foot in boiling water would be comforted by the observation that, on average, his feet are warm.

motivated this long-term unwillingness to embrace the realism of imperfect information, suggestions that resonate with our more general realist critique:

The creators of the neoclassical model, the reigning economic paradigm of the twentieth century, ignored the warnings of nineteenth-century and still earlier masters about how information concerns might alter their analyses—perhaps because they could not see how to embrace them in their seemingly precise models, perhaps because doing so would have led to uncomfortable conclusions about the efficiency of markets.

Id. at 461. The appearance of precision, the motive to reach certain conclusions, we believe, has implications far beyond merely, the question of whether economists take into account the reality that information is rarely perfect.

709. KREPS, *supra* note 664, at 5.

710. See generally Hanson & Kysar, *Taking Behavioralism Seriously I*, *supra* note 126 (reviewing the economic behavioralism literature, which demonstrates systematic biases of human decisionmaking); see also Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 166–67 (2003) (“A ‘mountain of experiments’ performed in psychology and related disciplines, much of it in the ‘heuristics and biases’ tradition founded by psychologists Daniel Kahneman and Amos Tversky, demonstrate that people tend to deviate systematically from rational norms when they make decisions.”).

711. See Hanson and Yosifron, *The Situation*, *supra* note 5, at 198–202 (describing how the dispositional, profit-maximization assumption about firms is premised ultimately on situational market forces).

So, it seems, the first line of defense is either not a defense or has already fallen, and the second line is driven solely by faith and intuition—a faith and intuition that not only lacks empirical support but that is contrary to the best evidence.⁷¹²

The weaknesses with those defenses become even more evident when one looks at how Kreps, in a subsequent section of his book, describes the *purpose* of economic theory. The topics are closely related, as Kreps seems to recognize, given that the defensibility of any theory should depend in part on the purpose to which it is being put. That the sun behaves *as if* activated by a rooster's crow may be a useful positive theory to the farmer for deciding when to rise for morning chores, but it would be a mistake to use such a theory in attempting to influence or understand the sun's relationship to the earth. So what is the goal or purpose of economics? According to Kreps, it is to analyze the efficiency and specific inefficiencies in various institutional frameworks with a view towards policy.

One tries to see whether a particular institution can, by tinkering or by drastic change, be made to yield a socially better outcome; the vague presumption is that changes that improve the social weal might be made via social and political processes.⁷¹³

Notice Kreps's dramatic, though only implicit, change in emphasis. When defending microeconomics, Kreps focused neither on the understanding that the theory provides nor the fact that microeconomics can tell us what people want or how policy should be made. Indeed, he explicitly distanced economics from that ambition. His point was that despite the unrealism of economic models, they might nonetheless provide useful *positive* theories of behavior. In contrast, when discussing the *purpose* of microeconomics, Kreps indicates that its primary use is to improve social welfare through policy prescriptions and to

712. That leaves the third and "most subtle" "line of defense," which, roughly, is that economists are able to control the unrealism of economic models:

Even if we know that there are systematic violations of our models by individuals, violations that do not cancel out, we can still gain insight into questions of interest by studying models where we assume away those violations. This line of defense is delicate because it requires the theorist to have a deep understanding of which assumptions drive the conclusions that are generated by the theory

KREPS, *supra* note 664, at 5. The point is indeed subtle, and we are not sure we understand it. But Kreps seems to be suggesting that economists can and do, in conducting their efficiency analyses, ignore their models' biases, no matter how major and systematic they may be, and then adjust the conclusions appropriately in light of what the economists know about the sources and sizes of those biases. That third defense requires its own leap of faith—specifically, that economists generating conclusions can and do make such "delicate" adjustments. If ours is an accurate interpretation of Kreps's point, we can see no reason or evidence to support making such a leap.

713. *Id.* at 7.

provide “a better understanding of economic activity and outcomes.”⁷¹⁴ Thus, as we have already hinted, Kreps is attempting to justify a *prescriptive* use of economics by arguing (with little success) that the rational-actor model may be useful in making *predictions*. Put differently, Kreps, like most conventional economists, is looking to the rooster for an understanding of the sun.

The problem for Kreps—indeed, for all of microeconomics, including law and economics⁷¹⁵—is that even if economic models did provide valuable positive predictions, there is no reason to believe that those models will help us understand ourselves or that the policy prescriptions based on those models will “improve the social weal.” To serve such purposes, we would at least need some reason to believe that the “as if” theories of economics are based on a realistic account of the human experience.

It is one thing to use economics to predict that, say, a tax on an activity will decrease the amount of that activity. Such a positive prediction follows from the “as if” hypothesis and may indeed be useful to policymakers, just as a rooster’s crow is useful to farmers.⁷¹⁶ The problem is that economics is being used to do much more in the policymaking arena. The notion of choice-based preference satisfaction (and the welfare maximization presumed to follow from it) provides the *normative* analytic for determining which activities should be taxed in the first place. Indeed, it is the basic person schema that forms the foundation for all of law and policy.⁷¹⁷ If the very notion of choice-based preference satisfaction is a widely shared myth, then on what grounds should policy be built around it? It is reliance on the presumption of such dispositionism that appears to justify Kreps’s and others’ implicit jump from positive analysis to normative analysis, and it is that very presumption that we have argued *is* mostly myth, rendering the jump unjustified.

Our critique comes into clearer focus by examining more closely what Kreps means by the sort of theory on which policy makers should rely. He asks:

[H]ow does one know when one has learned something from an exercise in microeconomic theory? The standard acid test is that the theory should be (a) testable and (b) tested empirically, either in the real world or in the lab. But many of the models and theories given in this book have not been subjected to a rigorous empirical test, and some of them may never be. Yet, I maintain,

714. *Id.* at 7. Kreps also mentions the purposes of satisfying intellectual curiosity and giving market participants a better way of making “markets work better for themselves.” *Id.*

715. See, e.g., COOTER & ULEN, *supra* note 19, at 3–4 (describing the use of economics on positive grounds, “a scientific theory of behavior,” and on prescriptive grounds, “a useful normative standard for evaluating law and policy”).

716. As we have already explained, however, the fact that behavior may comport with the dispositional theory does not imply that the behavior is not in fact a consequence of situational constraints. See generally Hanson & Yosifon, *The Situation*, *supra* note 5.

717. See Chen & Hanson, *The Illusion of Law*, *supra* note 32, *passim*; Hanson & Yosifon, *The Situation*, *supra* note 5, at 230–336; *supra* Part I.

models untested rigorously may still lead to better understanding, through a process that combines casual empiricism and intuition.

By casual empiricism joined with intuition I mean that the reader should look at any given model or idea and ask: Based on personal experience and intuition about how things are, does this make sense? Does it help to put into perspective things that have been observed? Does it help organize thoughts about a number of “facts?” When and if so, the exercise of theory construction has been useful.⁷¹⁸

In short, Kreps’s argument seems to be that, although it would be preferable to have reliable social scientific research to defer to, the fact that economics tends to rely on far less is not really a concern. And so Kreps, the pure economist, makes explicit what the work of legal economists evinces: The best we can hope for from economic models of the sort that dominate policy analysis is not realism or testable and tested theories of human behavior, but theory anchored, at bottom, in casual empiricism and intuition and a theory that *seems* to “make sense.” This is not to say that economists and legal economists do not construct and test theories. Clearly they do. The point is that those theories emerge from models about human behavior that are themselves untested (at least by economists).

Thus, as we emphasized at the outset, the place where economists decide to defer to casual empiricism is precisely the place where many critics claim that their theory is “obnoxious” and precisely the place where social psychology applies its focus.⁷¹⁹ Instead of falling back on casual empiricism or intuition, social psychology relies on testable hypotheses and testing. What social psychology through such research teaches—and what we have reviewed throughout this Article and its companion—is that it is precisely at that point where neither our intuitions nor our casual empiricism can be trusted. As psychologist Robert Crowder has expressed the point, intuition can no better teach us about the actual operation of our minds than it can about the operation of our kidneys. “To deny this means to accept that the brain is translucent in process whereas other organs are opaque. Why should this be the case?”⁷²⁰

718. KREPS, *supra* note 664, at 7. Kreps adds, by way of example:

Imagine that you are trying to explain a particular phenomenon with one of two competing theories. Neither fits the data perfectly, but the first does a somewhat better job according to standard statistical measures. At the same time, the first theory is built on some hypotheses about behavior by individuals that are entirely ad hoc, whereas the second is based on a model of behavior that appeals to your intuition about how people act in this sort of situation. I assert that trying to decide which model does a better job of “explaining” is *not* simply a matter of looking at which fits better statistically. The second model should gain credence because of its greater face validity, which brings to bear, in an informal sense, other data.

Id. at 8.

719. See *supra* text accompanying notes 694.

720. Robert Crowder, *The Brain, the Kidney, and the Consciousness* (unpublished manuscript, c. 1990), in Banaji, *Implicit Attitudes*, *supra* note 105, at 130. We would go further than Crowder—for

The situation that economists, like most humans, have failed to take into account, is, like renal workings, barely observable through the lens of consciousness, intuition, or casual empiricism. And so it is that both the interior and exterior situations combine to lead us toward the fundamental attribution error, to see relatively weak dispositions, and to overlook the more powerful situation.

At bottom, despite economists' claims and aspirations to be social scientific, their work is based on little more than faith and unreliable intuitions, motives, and situation. Our best social science tells us not to trust our intuitions as Kreps urges, but to be suspicious of them. What "makes sense" to us is too often demonstrably wrong. Economics, while claiming to be the hardest of social sciences is, at its core, among the softest. Its pre-theoretic axioms are little more than the appealing products of our constructed perceptions. And, as we argue in other work, the success of economics is partially the result of the fact that many people share those intuitions and readily dismiss or disregard more reliable, but less self-affirming or system-affirming, findings of social psychology.⁷²¹

Let us belabor the point with one more metaphor. It is as if economists are advising pilots flying in poor visibility to ignore altimeters that warn of rapid descent and to rely instead on intuition about direction and trajectory. Unfortunately, that practice is the tragic inclination of many unseasoned pilots. The right advice, of course, is for pilots to disregard intuition and fly their aircraft based on scientific instrumentation. Thus, while economists and legal economists urge us to abide by our shared vertigoes, critical realism urges that we recognize, understand, and strive to counteract our intuitive but vertiginous dispositionism.

C. FIVE TYPES OF INADEQUATE "REALISM"

"[T]he profession of economics is not lacking in the instinct of self-preservation. The other bear sees in the threat to her cubs the ultimate threat to the survival of her kind. She reacts with angry venom. Nothing is more likely to produce a similar reaction from defenders of the conventional economic wisdom than an attack on the edifice which now rationalizes the importance of production and the urgency of consumer need.

The parallel with maternal instinct is important, for the defense of the present value system . . . is largely intuitive. Few economists in recent years can have escaped some uneasiness That uneasiness has reflected the crucial weakness of the literature on this point."

~ John Kenneth Galbraith⁷²²

unlike our kidneys, our mind may be sending us misleading signals and may itself be subject to distorting motivations and manipulations.

721. See Hanson & Yosifon, *The Situation*, *supra* note 5; Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 54.

722. GALBRAITH, *supra* note 662, at 2-3.

In response to mounting criticism, legal economists, following the lead of a burgeoning camp of economists, have gradually sought to portray their models as based on reasonably realistic accounts of human actors.⁷²³ Responses range from efforts to minimize the problem of unrealism by denying that the model of humanity in conventional economic analysis is in fact terribly unreal, to paying lip service to the problem but otherwise ignoring it, to more elaborate efforts that involve pursuing the limits of the rational actor model as a research agenda. All of these approaches, however, share a basic, and often deep, commitment to the basic law and economics paradigm. They countenance only as much “realism” as their authors believe the paradigm can withstand.

1. Counterfeit Realism

Some of Richard Posner’s writings exemplify the minimalist version of legal economists’ response to the realism challenge. Posner denies that law and economics is as unreal or reductionist as its critics contend. In his view,

[f]ar from being reductionist, as its detractors believe . . . [the project of law and economics] is not to reduce human behavior to some biological propensity, some faculty of reason, let alone to prove that deep within us, pulling the strings, is a nasty little “economic man.” It is to construct and test models of human behavior for the purpose of predicting and (where appropriate) controlling that behavior. Economics imagines the individual not as “economic man,” but as . . . one who bases decisions not on sunk costs—these he treats as bygones (“Don’t cry over spilt milk”)—but on the costs to be incurred and the benefits to be reaped from alternative courses of action that remain open. The individual imagined by economics is not committed to any narrow, selfish goal such as pecuniary wealth maximization. Nothing in economics prescribes an individual’s goals. But whatever his goal or goals, some or for that matter all of which may be altruistic, he is assumed to pursue them in a forward-looking fashion by comparing the opportunities open to him when he must choose.⁷²⁴

Posner’s point here seems to be that law and economics is based not on a caricatured and reductive rational actor model, but on a far more realistic and flexible model of humanity—one that allows for virtually any goal. Those familiar with much law and economics scholarship may be scratching their heads. Posner has often celebrated the reductionism of economic analysis⁷²⁵—

723. See, e.g., W. KIP VISCUSI, *SMOKE AND MIRRORS: MAKING THE RISKY DECISION* (1992); see also Hanson & Kysar, *Taking Behavioralism Seriously II*, *supra* note 132, at 1548–51. The criticism is actually an old one, but only recently has it built up enough weight and legitimacy to get much attention from the legal economists themselves.

724. RICHARD A. POSNER, *OVERCOMING LAW* 16 (1995).

725. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 16 (3d ed. 1986) (“[R]ationality may be a reductionist notion, but reductionism is inherent in scientific inquiry.”); POSNER, *supra* note 18, at 17–18 (“The reader who lacks previous acquaintance with economics may be troubled by what appear

almost as frequently as he has assumed that wealth or some similarly “narrow” and “selfish” goal is at the bottom of human decision-making,⁷²⁶ and that other goals or motivators, such as “morality” should play no role in judicial decisions.⁷²⁷ It was Posner, after all, who based his positive theory of the common law on “wealth maximization,”⁷²⁸ and who informed readers that economic theory is “committed to” the assumptions “that people seek to advance their self-interest and do so rationally.”⁷²⁹ And he is not alone. Contrary to Posner’s claim in the block quote above, “[t]he individual imagined by economics” is in fact virtually always “committed to a[] narrow” goal, almost always a “selfish” goal, and usually that of “pecuniary wealth maximization.”⁷³⁰

Posner thus responds to the realist critique by denying aspects of his theory that he sometimes embraces, even celebrates. But his denial is in the form of assertions, not evidence—assertions about what law and economics could be, rather than about what it is. He takes refuge in the (largely unrealized) *potential* of law and economics to be more realistic.⁷³¹ So it is that he claims that “[n]othing in economics *prescribes* an individual’s goals,” instead of claiming, as he could not, that legal economists are, in practice, ecumenical in modeling a vast range of possible human goals.⁷³² So it is that he asserts that the project of law and economics is not “to *prove* that deep within us, pulling the strings, is a nasty little ‘economic man,’” instead of asserting, as he could not, that the little monster does not figure prominently in most of the analyses that legal economists conduct, and from which they generate their policy prescriptions.⁷³³

to be severely unrealistic assumptions that underlie economic theory. . . . But abstraction is of the essence of scientific inquiry, and economics aspires to be scientific.”). See generally Posner, *supra* note 4 (responding to Jolls, Sunstein & Thaler, *supra* note 64).

726. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981) (explicating Posner’s theory that the goal of “wealth maximization” best explains the development of the common law).

727. See generally RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 107–44 (1999).

728. See POSNER, *supra* note 18, *passim*.

729. Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 343 (1974).

730. See, e.g., *supra* text accompanying notes 690–97 (quoting economist David Kreps’s admissions regarding the unrealistic nature of conventional economic analysis).

731. A “real” account of law and economics, taken generally, would never claim that the field existed simply to “construct and test models of human behavior for the purpose of predicting . . . that behavior.” See *supra* text accompanying note 724. There are, as we have seen, social sciences devoted to that purpose—though Posner and other legal economists have routinely disregarded or disparaged them. See *supra* text accompanying note 587. In any event, law and economics has not been such a field.

732. See W. Bradley Wendel, *Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation*, 77 IND. L.J. 13 (2002) (“The economic mode of analysis has an almost pathological aversion to explanations that appeal to values, commitments, loyalties, relationships, or emotions.”).

733. See DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 18 (1994); Gregory S. Crespi, *Does the Chicago School Need to Expand its Curriculum?*, 22 L. & SOC. INQUIRY 149, 150–51 (1997). See generally A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 10 (2d ed. 1989).

We are taking the trouble to lay out Posner's largely nonresponsive response—emphasizing what law and economics *could* do rather than what law and economics typically does—because this type of defense is extremely common.⁷³⁴ Yet even the potential version of law and economics, which Posner and other legal economists believe immunizes the entire approach, is profoundly unrealistic.⁷³⁵ Posner, for example, is willing to accept that people might be motivated by goals other than wealth maximization—such as altruism.⁷³⁶ But he nevertheless maintains his commitment to the view that whatever the chosen goal, it is pursued in a prototypically rational way, with costs and benefits balanced in a forward-looking maximizing manner.⁷³⁷ And, of course, beneath this assumption is an unstated axiom that it is always one or more personally held goals—our dispositions—that move us. This, too, is a common response.

734. As Gary Becker highlighted in his Nobel lecture, rationality “assumes that individuals maximize welfare as they conceive it, whether they be selfish, altruistic, loyal, spiteful, or masochistic.” GARY BECKER, ACCOUNTING FOR TASTES 139 (1996). Becker is not alone among Nobel Laureates to emphasize the point. See, e.g., KENNETH ARROW, THE LIMITS OF ORGANIZATION 17 (1974) (“Rationality, after all, has to do with means and ends and their relation. It does not specify what the ends are.”). Moreover, “[t] here is no general principle that prevents the creation of an economic theory based on other hypotheses than that of rationality. . . . [A]ny coherent theory of reactions to the stimuli appropriate in an economic context . . . could in principle lead to a theory of the economy.” Jolls, Sunstein & Thaler, *supra* note 64, at 1478 n. 13 (citing Kenneth J. Arrow, *Rationality of Self and Others in an Economic System*, in RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 201, 202 (Robin M. Hogarth & Melvin W. Reder eds., 1987)).

735. Moreover, it risks sacrificing one of the core values of legal economists—namely that their theories be falsifiable, and thus amenable to social scientific methodologies. See Hanson, Reyes, & Schlanger, *supra* note 43.

736. “Altruism” is a popular concept for economists to turn to when their rational maximizing model is challenged. We suspect that “altruism” is so frequently raised because it appears to be on the opposite end of the relevant spectrum from “self-interest,” suggesting that economists are entirely open-minded about possible “rational” motivations. For a couple of reasons, however, that appearance is, particularly as economists define “altruism,” an illusion. Altruism is typically treated as motivated ultimately by some form of self-interest. Thus, the underlying motive never changes, just its manifestation. See Lynn A. Stout, *Judges As Altruistic Hierarchs*, 43 WM. & MARY L. REV. 1605, 1610 n.17 (“It is something of a standard move for rational choice theorists to suggest that if people behave altruistically this must mean that they get pleasure (utility) from helping others, so altruism remains consistent with self-interest. This move has a tautological flavor: it presumes that people are selfish and so anything they do, they must do to make themselves better off.”); see, e.g., Posner, *supra* note 4, at 1557 (“All that is required to understand altruism as a form of rational self-interest is the assumption of interdependent utilities.”). The beauty of “altruism” as an acceptable, rational motive is that it renders explicable behavior that otherwise seems to contradict narrower models of rational action. Altruism, thus understood, is an escape hatch for hard-core rationalists. But it also raises significant questions about the falsifiability of those models, suggesting that the hard-core rationalists are not hard-core social scientists. See Jolls, Sunstein, & Thaler, *supra* note 64, at 1488–89; cf. Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 326–44 (1977). A second problem with the altruism out is that it maintains the focus on dispositions, a point to which we’ll return.

737. See, e.g., Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 761 (1974) (“The basis of an economic approach to law is the assumption that the people involved with the legal system act as rational maximizers of their satisfactions.”); Richard A. Posner, *Values and Consequences: An Introduction to Economic Analysis of Law*, in CHICAGO LECTURES IN LAW AND ECONOMICS 189, 191 (Eric A. Posner ed., 2000) (“Most economic analysis consists of tracing out the consequences of assuming that people are more or less rational in their social interactions.”).

Indeed, it may be one of the few responses available to those who, like legal economists, are committed to “rational actor”⁷³⁸ or “rational choice” models.⁷³⁹

Although it is certainly realistic to acknowledge that people may have motives other than wealth maximization, it is not realistic to leave unexamined and unchallenged the assumption that those ends are pursued by goal-maximizing, fully autonomous, forward-directed, rational actors. Who, for example, is this “man” who suffers no pause over spilled milk, if not the “economic man?”⁷⁴⁰ The colloquialism is itself a signal of the human tendency to be influenced by sunk costs, a tendency that has been documented as systematic by social psychologists.⁷⁴¹ Posner’s denial of realism is belied by the fact that even his account of what law and economics *could be* simply ignores much of what *is* in the human experience. Posner makes no serious attempt to begin legal-economic analysis with a realistic depiction of how human beings think and behave. As we have demonstrated, when one begins to look systematically at broad ranges of what social science has taught us about humanity, the conventional law and economics model’s unrealism is revealed as severe in almost every aspect.

Clinging to a demonstrably unrealistic model of the human actor, Posner nonetheless goes on to assert that law and economics is comfortable with the realities of the human mind:

738. See *infra* Part I.C.1 (describing the rational-actor assumption and its significance).

739. The term “rational choice” assumes a dispositional causal attribution for an actor’s behavior. Indeed, the inability to identify a maximand or tractable number of maximands has often delayed the application of rational choice models to certain actors. See Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 107 (1983) (“[E]conomists have not had much success in creating a theory to explain the objectives of public judges.”); David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647, 653 n.19 (1997) (reviewing MAXWELL L. STEARNS, *PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY* (1997)) (“Public choice theorists have had far more difficulty modeling . . . judges’ behavior, as compared to . . . private economic actors, due to the absence of a compelling theory as to what . . . judges maximize.”). That hurdle, however, has not stopped the most resolute economic “modelers.” See, e.g., Cooter, *supra* (arguing that judges seek to maximize their prestige among litigants and lawyers); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993) (indicating that judges self-interestedly pursue numerous ends, including their reputations, prestige, and leisure). And, unsurprisingly, “most rational choice analysis of the judiciary rests implicitly on the assumption that judges and other people look out only for their own interests, narrowly defined.” Stout, *supra* note 736, at 1610 n.17.

740. See, e.g., Posner, *supra* note 729, at 343 (“The economic theory [of regulation] is committed to the strong assumptions of economic theory generally, notably that people seek to advance their self-interest and do so rationally. . . . The economist [unlike the non-economist] is reluctant to accept . . . [the distinction] between a profit foregone and a loss incurred—the former is a cost too, indeed the same kind of cost.”); POSNER, *supra* note 18, at 7–8 (describing the rational actor as one who ignores sunk costs).

741. E.g., Jolls, Sunstein, & Thaler, *supra* note 64, at 1489–93. In light of such evidence, Posner has very recently revamped his “rational actor model” to “predict” this phenomenon—the absence of which he once indicated was the defining feature of that rational actor model. POSNER, *supra* note 361, at 257–58.

Realistic about means as well as ends, economics does not depend on the idea that human beings are effortless and infallible calculators. A market may behave rationally, and hence the economic model of human behavior apply to it, even if most of the individual buyers (or buys) are irrational. Irrational purchase decisions are likely to be random and hence cancel each other out, leaving the average behavior of the market to be determined by the minority of rational buyers (or purchases).⁷⁴²

While Posner begins here by stating that the economic approach is “realistic” about ends and means, what he actually argues is that economics does not “depend” on realistic assumptions about human beings. Posner’s point is that economic theory can predict downward-sloping demand curves even if “most” people are not rational. In other words, because price increases do lead to quantity decreases in the number of products purchased by consumers, as basic economic models predict, Posner suggests that his reliance on the economic model is fully vindicated, as is his dismissal of other realities that his approach ignores. In a world where consumer behavior does map a downward-sloping demand curve, legal economists may, according to this view, feel confident disregarding factors other than conventional “choice” variables, such as price, that might influence consumer behavior.

But this is a non sequitur. No one is claiming that the problem with law and economics is its inability to predict a downward-sloping demand curve. Neither do critics argue that more realistic views of human behavior actually predict upward sloping demand-curves. Downward-sloping demand curves are perfectly consistent with numerous consumer models;⁷⁴³ they are neither the test of realism, nor the issue under debate.⁷⁴⁴ Ultimately, Posner falls back on the

742. POSNER, *supra* note 725, at 16–17.

743. See, e.g., Dan Ariely, George Loewenstein, & Drazen Prelec, *Coherent Arbitrariness: Stable Demand Curves Without Stable Preferences*, 118 Q.J. ECON. 73–106 (2003) (demonstrating how the illusion of stable, ordered preferences can be created with arbitrary anchors, and considering the effects of that possibility for conventional economic assumptions); Gary Becker, *Irrational Behavior and Economic Theory*, 70 J. POL. ECON. 1, 4 (showing that “negatively inclined market demand curves result not so much from rational behavior per se as from a general principle which includes a wide class of irrational behavior as well”). For discussions of those insights for policy purposes, see Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1219 n.254 (1998); Jolls, Sunstein, & Thaler, *supra* note 64, at 1481–82; Loewenstein, *supra* note 573, at 212 (“Sensitivity to price and other costs and benefits is a prediction of purely rational theories of addiction, but almost any decision-theoretic model of addiction, including [a visceral account of addiction], would predict responsiveness to price.”).

744. Posner emphasizes in a recent book that, although Gary Becker did show that a downward-sloping demand curve is not evidence that people are behaving as rational actors, Becker

did not suggest that most consumers *are* irrational . . . or that well-attested economic phenomena other than the downward-sloping market demand curve, such as the tendency of the prices of the same good to be equalized, could be explained without assuming rationality. Buyers do not in fact choose randomly. Rationality is the only reasonable explanation for their reactions to changes in relative prices.

POSNER, *supra* note 361, at 261. Posner misses the point. First, Becker did not set out to show that

claim that the rational-actor construct is intended, not as a realistic model of human behavior, but as a model whose legitimacy rests in its ability to predict human behavior.⁷⁴⁵ His assumption that people often behave *as if* they are rational actors is, despite the absence of compelling empirical evidence in support of that belief,⁷⁴⁶ enough for Posner and most other economists.⁷⁴⁷ But even if the rational actor model did generate accurate predictions of human behavior, the fact that that model is premised on demonstrably unrealistic assumptions should cut against the wisdom of making it the basic framework through which to analyze law, not in favor of it. That the sun rises *as if* the rooster's crow released it from the horizon may be a useful positive theory for deciding when to awaken; but if the purpose is one of "predicting and (where appropriate) controlling"⁷⁴⁸ the sun's behavior, one would do well to forget the rooster and to begin with a more realistic account of celestial dynamics.

In sum, although they claim that economics is committed to realism, Posner and many scholars applying his basic approach only pretend to be sensitive to

consumers are irrational; he would have been unjustified in claiming as much, given that his was a theoretical argument. What Becker did show is that the key piece of evidence that Posner and other economists have relied on as proof of the rationality of consumers does not, in fact, provide such a demonstration. As Becker explained, a vast range of (non-rational) models are consistent with downward-sloping demand curves, including even the extreme model in which people make purchases *randomly*. But no scholar has claimed, as Posner seems to suggest, that people behave totally randomly. And again, we have yet to see any scholar propose a model that would predict upward-sloping demand curves. Posner is thus knocking down a straw man. The point is that downward-sloping demand curves reveal very little about what moves consumers, and Posner offers little else by way of evidence to suggest that the rational actor model has had much predictive success.

Similarly, the fact that Becker said nothing explicitly about "the tendency of the prices of the same good to be equalized," *see id.*, is no help to Posner. First, we are not sure that Becker's insight about downward-sloping demand curves does not apply as well to the tendency for prices of the same good to be equalized. The fact that people have limited resources and will not buy as many of the higher-priced versions of the same good, even if they make their purchases randomly, may itself lead sellers to push prices toward equality. Second, we again know of no one who has argued that their model of human behavior predicts that the prices of the same good should tend toward vast disparities. Indeed, we cannot even imagine what such a model would look like.

Couple all that with the vast amount of evidence indicating that people do not behave according to the rational actor model and the justification for maintaining the model appears to lie in something other than the logic of the argument itself can express.

Finally, if all that economists mean by "rational" is that a person about to buy a widget will choose the lower priced of two otherwise identical widgets, then we hereby accept the claim that people are, other things (including the situation) equal, rational. But by so describing humanity we would not have described much that is meaningful about them, and we would hardly have provided a useful theory of the human animal for making or reforming (or even just explaining) law.

745. POSNER, *supra* note 361, at 263 (Although "'economic man' is unrecognizable in real life," "a psychologically realistic picture of the average person . . . has methodological problems. In theory-making, descriptive accuracy is purchased at a sacrifice of predictive power.").

746. Cf. Banaji, *Implicit Attitudes*, *supra* note 105, at 131 ("The stronger the assumption that a concept has already earned admission to the mansion of science, the lower may be the demand to immediately prove just what the particular procedure and construct it presumably captures really predict.").

747. *See supra* text accompanying notes 688–721.

748. *See supra* text accompanying note 725.

realism in order to justify ignoring it. He is engaging in what we describe as *counterfeit realism*; it is both token and false.⁷⁴⁹

2. Defensive Realism

Defensive realists, in contrast to counterfeit realists, accept the notion that more accurate descriptions of human behavior exist, but they nevertheless resist the implication that the law and economics approach should therefore be significantly altered. The work of Jennifer Arlen exemplifies this relatively recent tendency of legal economists to acknowledge the discoveries of social psychologists with one hand even as they sweep away its significance with the other.⁷⁵⁰ Arlen, for example, agrees that

[c]onventional law and economics scholars must take behavioral research into account in analyzing legal issues, particularly in analyzing the merits of normative policy prescriptions derived from standard economic theory. The growing body of literature that enriches conventional law and economics in this way is an exciting development.⁷⁵¹

But Arlen quickly marginalizes the potential implications of behavioral research for conventional law and economics. Her treatment, like that of many other legal economists, appears to reveal defensiveness more than it does “excitement” about the implications of behavioralism. She examines three salient biases identified by behavioralists—the endowment effect, the optimism bias, and the “fairness” preference—and indicates how “real world forces . . . might cause these biases to be weaker [in real life] than they appear to be in the laboratory.”⁷⁵² Arlen further emphasizes that experts, and lawyers in particular, may be able to “reduce” people’s tendency to fall prey to the illogical behavioral patterns mapped by the realist critics of law and economics. And then she concludes with the observation that a theory that assumes the presence of certain central specific findings of behavioralists “cannot yield clear normative policy implications any more than can conventional law and economics.”⁷⁵³

Re-examining the well-known Cornell coffee mug experiment, for example, Arlen argues that the implications of the “endowment effect” which that study appears to have demonstrated, may not be as important to legal analysis as economic behavioralists have proposed.⁷⁵⁴ She points out that the endowment

749. Posner deserves credit, though, for at least responding to the critique that law and economics is based fundamentally on unrealistic assumptions about the human actor. The more common response has, until recently, largely been to ignore such criticisms.

750. Jennifer Arlen, *Comment: The Future of Behavioral Economic Analysis of Law*, 51 VAND. L. REV. 1765 (1998).

751. *Id.* at 1787.

752. *Id.* at 1770.

753. *Id.* at 1780.

754. See *supra* notes 143–46 and accompanying text; Hanson & Kysar, *Taking Behavioralism Seriously I*, *supra* note 126, at 674–75 (reviewing experiments).

effect has not been strong when subjects receive, not a mug, but only a fungible token that may be redeemed for an assigned value. Most commercial transactions, she notes, involve currency that is more similar to tokens than coffee mugs. Furthermore, the endowment effect appears to vanish when people “do not actually possess the commodity at the time they are asked to trade it, but possess only the promise of the commodity.”⁷⁵⁵

Arlen argues that the influence of the “optimism bias” is similarly variable, and would not, without more specification, justify additional regulatory intervention.⁷⁵⁶ People overestimate the risk of being hit by lightning, she argues, but may underestimate “a whole category of risk, such as the risk of product defects when some risks in the category are well-publicized and others are not.”⁷⁵⁷ People also increase their ability to assess risk, Arlen contends, in multiple-play scenarios—that is, where people repeatedly encounter the same kind of risk. And again, Arlen suggests that with respect to the legal system, people will rely on experts and lawyers who have experience and are thus “less likely to overestimate the merits of their case.”⁷⁵⁸

Arlen also downplays evidence that people exhibit favorable attitudes towards “fairness,” an attitude that does not seem to comport well with the basic law and economics approach. The “fairness bias” is revealed in experiments such as the ultimatum game. Typically, a subject is asked in that experiment to accept or reject another subject’s proposed split of a given sum of money. If the first subject accepts the split they both pocket the money according to their agreement. If the subject rejects the split, neither party takes home anything. In such experiments subjects regularly reject inequitable divisions, a result that does not square easily with the standard conception of the rational actor, who should be as worried about what the other person gets as she is about spilled milk. Free money, on this account, is free money.

Arlen again contends that such evidence does not warrant a departure from the conventional economic approach. Fairness concerns are, she emphasizes, context-dependent. Indeed, there is “some evidence . . . that people will obey instructions to ignore fairness concerns.”⁷⁵⁹ Relatedly, there is no way of knowing when fairness will be a factor: “[T]he role of fairness concerns . . . appear[s] to depend on many situation-specific factors such as the background of the person, the context of the decision, [and] the instructions given. . . .”⁷⁶⁰ For this reason, it seems doubtful to Arlen that that the situation-specific

755. Arlen, *supra* note 750, at 1778–79. She also emphasizes findings that the endowment effect may not apply if a liability rule rather than a property rule protects the entitlement. *Id.*

756. The optimism bias refers to the well-documented finding that people tend to think that their own chances of obtaining a good outcome from a set of circumstances is greater than the chances of people in general of obtaining a good outcome from the same circumstances. See Hanson and Kysar, *Taking Behavioralism Seriously I*, *supra* note 126, at 654–58 (reviewing studies).

757. Arlen, *supra* note 750, at 1783.

758. *Id.* at 1784.

759. *Id.* at 1786.

760. *Id.* at 1787.

consideration of “fairness” will be a helpful concept in the analysis of law.

Notice that Arlen is not attempting to incorporate social psychology’s insights, as she claims to want to do. Nor does she ask about how social psychological findings might undermine assumptions of law and economics or how those insights might render individuals and institutions subject to forces that legal economists have never considered. Instead, hers is essentially an apology for, and defense of, conventional law and economics, which systematically disregards those insights. Thus, she concludes:

[B]ehavioral economic analysis of law is likely to remain as a set of suggestions for amending conventional law and economics, together with an associated set of problems that require sustained attention. It is not likely to emerge as an alternative framework for analyzing legal issues. Behavioral economic analysis of law is unlikely to replace conventional law and economics unless it can formulate a superior model of human behavior suitable for making normative decisions about optimal legal regimes⁷⁶¹

Like many legal economists, Arlen seems preoccupied with the possibility that behavioralist insights might be used to “justify additional intervention” by law into the affairs of the autonomous rational actor that lies at the core of the legal economist’s vision of the person, the economy, and the republic. And it is a possibility that she seems strongly to oppose. She is by no means unusual in that regard—dispositionism and related schemas for markets (as preference-satisfying) and regulations (as preference-frustrating and paternalistic) are immensely influential in policymaking and among dominant policy theorists (particularly legal economists).⁷⁶² Arlen therefore emphasizes that insofar as the alleged biases exist, they should be understood to bedevil and render untrustworthy the decision making of judges, juries, and other potential governmental intermeddlers.

Samuel Issacharoff has, at times, responded to behavioralism in that same defensive-realist vein. That is, he is willing to stipulate that people are subject to specific cognitive biases that are inconsistent, in theory, with the conventional law and economics model.⁷⁶³ The “self-serving bias,” he recognizes, encourages “people to integrate information in a fashion most consistent with their self-interest” which can obstruct, for instance, efficient or wealth-maximizing settlements of their disputes.⁷⁶⁴ And other decisional heuristics, Issacharoff notes, can lead people to act as if they have an aversion “for extreme positions.”⁷⁶⁵

761. *Id.* at 1787–88.

762. See generally Chen & Hanson, *The Illusion of Law*, *supra* note 32, at 6–32 (describing some of the history and effects of the “markets good” and “regulation bad” policy schemas).

763. Issacharoff, *supra* note 706, at 1735.

764. *Id.* at 1738.

765. *Id.* at 1740.

Indeed, Issacharoff not only makes these admissions, but he also correctly places himself among the vanguard of legal scholars advancing behavioralist insights. He “has actively participated in developing the experimental economic literature and [has sought] to apply it in the development of legal norms.”⁷⁶⁶ He is, by any measure, exceptionally open-minded among legal economists and among the vanguard of behavioralists in legal academia. Nonetheless, Issacharoff, like Arlen, is unwilling to relinquish law and economics’ basic presumptions. Before doing so, “there must [first] be a normative theory of how to assess” the lessons of behavioral science with respect to social welfare.⁷⁶⁷ Furthermore, Issacharoff makes clear that theory must comport with the basic dispositionist axioms of law and economics:

There is no doubt that in order to perfect its models of rational conduct, law and economics requires a terribly reductionist account of human behavior. . . . It is certainly the case that the mechanical simplifications of *Homo economicus* strongly caution against most forms of regulatory restraints on the market. It is further true that the tools of psychology may yet yield a richer understanding of how these human wants and desires play out in the institutional setting of law.

But this cannot possibly translate into a justification for greater constraints on individual decision making. Bounded rationality should not become the pretext for the imposition of an overarching regulatory structure on individuals. . . . [F]undamentally, it would indeed be ironic if greater insight into the complexity of human decision making became the justification for taking the freedom to decide, even if imperfectly, from those very individuals.⁷⁶⁸

Thus Issacharoff, like Arlen, draws the line at any “greater insight into the complexity of human decision making” that could justify greater intervention by law into the affairs of autonomous individuals. Arlen and Issacharoff are, it seems, more committed to protecting the appearance of a manageable legal theory than they are to taking seriously the possibility that that theory is itself deeply threatened by the sort of evidence they are reviewing. Their realism, in that sense, is defensive.⁷⁶⁹

766. *Id.* at 1731.

767. *Id.* at 1736. The point seems to assume, among other things, that (1) law and economics provides such a normative theory, (2) the positive implications of behavioralist findings do not have prescriptive implications for policy, and (3) any general normative theory of law is not itself undermined by those findings.

768. *Id.* at 1745 (footnotes omitted).

769. The key difference between counterfeit realism and defensive realism is that defensive realists, unlike counterfeit realists, do not claim to be realists in fact. Rather, they seek to justify their commitment to unrealistic models. In other respects counterfeit realism and defensive realism share much in common. In both, the conversation about social psychology’s implications for the rational actor model is extremely narrow. Biases and heuristics are singled out and flips are made concerning their applications in specific doctrinal areas. In a way, this positions behavioralism in a familiar trope of legal-theoretic dispute, mirroring the contours of the debate witnessed in many of the critical legal

In the time since Issacharoff posed the critiques and reservations that we have described above, he and several coauthors have embarked on a project that aims to cordon off more precisely those areas of legal policy where social psychological insights should be brought to bear, and beyond which the import of such insights can and should be passed over in favor of the basic rational actor model.⁷⁷⁰ Two other prominent behavioralists, Cass Sunstein and Richard Thaler, have been simultaneously advancing a similar project.⁷⁷¹ Both pieces conclude, roughly, that social psychology's teachings about human actors should be taken into account when doing so would: 1) benefit large groups of people who are prone to non-rationality, and 2) where doing so would not unduly burden, or limit the freedom of, those who are not so afflicted and actually do think rationally.⁷⁷²

That formulation is quite appealing as an analytical proposition, but it reckons with only a small and tractable sample of the lessons of social psychology and affiliated fields. Issacharoff and his co-authors write as if realism does not pose a significant challenge to the basic law and economics approach:

[W]e argue that in many cases it is possible to have one's cake and eat it too. We propose an approach to evaluating paternalistic regulations and doctrines that we call "asymmetric paternalism." A regulation is asymmetrically paternalistic if it creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational. Such regulations are relatively harmless to those who reliably make decisions in their best interest, while at the same time advantageous to those making suboptimal choices.⁷⁷³

The explicit goal of this project is to develop a theory that can both respond to critiques of the conventional rational actor model and also sustain dispositionism:

studies critiques of law and economics. In any event, it is ironic that this indeterminacy charge is now employed by legal economists against the newer threat of behavioralism. Part of our larger project is to show that social psychology is not so indeterminate in its lessons for law. But for now we simply want to emphasize the shallow level at which the question of realism is evaluated by legal economists responding to behavioral critiques of their approach.

770. Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"*, 151 U. PA. L. REV. 1211 (2003). For other writings in which Issacharoff has repeated and extended his call for a conservative use of the insights of social psychology in legal analysis, see Samuel Issacharoff, *Behavioral Decision Theory in the Court of Public Opinion*, 87 CORNELL L. REV. 671 (2002); Samuel Issacharoff, *The Difficult Path from Observation to Prescription*, 77 N.Y.U. L. REV. 36 (2002).

771. Professors Sunstein and Thaler have written an article with a very similar purpose, and which tracks Issacharoff and his colleagues' arguments fairly closely. Both sets of authors apparently developed the idea independently and at about the same time. See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003). We will not review the Sunstein and Thaler piece here, but we believe that our analysis is appropriate to it no less than to Issacharoff and his coauthors.

772. Camerer et al., *supra* note 770, at 1212; Sunstein & Thaler, *supra* note 771, at 1162.

773. Camerer et al., *supra* note 770, at 1212 (footnote omitted).

[The] approach we term “asymmetric paternalism,” reflects trepidations shared among all of the authors about the use of behavioral research to justify paternalistic policies. We have two major concerns. First, while research in behavioral economics documents commons mistakes, those mistakes are typically far from universal, and we worry that paternalistic policies may impose undue burdens on those people who are behaving rationally in a particular situation. Second, behavioral economics is in an early stage of development, and therefore its findings should elicit more caution than those from more “mature” fields (which are by no means themselves invulnerable to revision). These and related concerns suggest caution in promoting paternalistic policies at this stage and lead to our more conservative notion of asymmetric paternalism.⁷⁷⁴

There are, in our view, several analytic and normative problems with “asymmetric paternalism,”⁷⁷⁵ but for present purposes we want only to highlight how strongly it is committed to engaging social psychology’s insights in a manner that leaves the basic dispositionist picture of the human actor in place, unchallenged as the central starting place for legal theory.⁷⁷⁶

One way that it does so is by beginning with a highly schematic view of human actors as somehow comprised of two basic categories of people: those who “make errors” in their own utility analyses, and those who are “fully rational” in a given situation.⁷⁷⁷ Those categories are not, in our view, the fundamental starting places that emerge from the lessons of social psychology. While it is true that studies focused on narrowly defined “choice biases” show that some people are more prone to them in narrowly defined choice-contexts than are others, this, as we have tried to demonstrate in this Article, is just one

774. *Id.* at 1215. Sunstein and Thaler are similarly explicit about their pre-analytic allegiance: “Our only qualification is that the general presumption should be in favor of freedom of choice, and that the presumption should be rejected only when individual choice is demonstrably inconsistent with individual welfare.” Sunstein & Thaler, *supra* note 771, at 24.

775. Not the least of these problems is framing the debate in terms of paternalism and anti-paternalism. We have not used those terms throughout this Article, reflecting our serious misgivings regarding the definitions, connotations, and schematic associations of those categories in policy debates. As we have previously argued, a situationist or critical realist perspective requires a reconceptualization of the idea of paternalism. See Hanson & Yosifon, *The Situation*, *supra* note 5, at 336–40 (grappling with “the paternalism bogeyman”).

776. It may be worth highlighting again that, while the “behavioral economics” work that Issacharoff and his co-authors refer to here might fairly be described as new (indeed, it is new to economists), social sciences other than economics have long been interested in studying and theorizing about why humans behave as they do and how they make sense of themselves and their environs. Put differently, the fields that we are summarizing in this Article seem quite “mature”—at least as compared to law and economics which, though influential, seems more the boisterous adolescent.

777. Issacharoff and his co-authors simply assert that these are the findings of social psychology that are relevant to a paternalism inquiry: “Recent developments in the social sciences have provided new foundations for paternalism. The latest entrant into the paternalism debate comes from the introduction into legal analysis of developments in behavioral economics. By cataloging a list of common decision-making errors that even highly competent, well-functioning people make in predictable situations, this research potentially broadens the scope of situations in which paternalistic policies could usefully be developed.” Camerer et al., *supra* note 770, at 1214.

small part of the situation, and just one aspect of the situational character.⁷⁷⁸ The absence of evidence of bias in a particular choice context hardly justifies the conclusion that legal theory can therefore rest easy relying on the conventional rational actor model in such contexts. Nor is bias in choice-making the only relevant situation influencing those who do make “irrational” choices in a given context. We have argued in this Article that we are all, in virtually all situations, in incredibly powerful ways influenced by features of our situations that we do not appreciate.⁷⁷⁹ There remains an ardent dispositionist presumption

778. See *supra* Part III.B.1.a (describing legal scholars’ tendency to focus on “choice biases” in their efforts to incorporate social psychology into legal analysis).

779. Readers and commentators have occasionally suggested that we have overstated the extent to which individuals are moved by situation. They point out that roughly one-third of the subjects in Milgram’s first set of experiments, in which “teachers” were told to shock “students” up to 450 volts, actually declined to do so. They claim that such evidence is in tension with our thesis that people are situational characters. Some critics go further and suggest that, in light of such dispositionist heroes, this project should be devoted, not to describing the situational character, but to encouraging people to be more successful dispositional actors. To those observations, we have several responses.

First, the social psychology experiments, such as Milgram’s, do not actually indicate that some subjects were not significantly influenced by external situation. To begin with, all of the subjects in Milgram’s first experiment “shocked” the “teacher” up to at least 300 volts—a greater shock than most people would predict they themselves would inflict in such a setting. Moreover, Milgram’s experiment was set up to be a “situation” in which people would not be induced to inflict much harm on the “students.” That is, the design and protocol were intended and predicted to lead most subjects to “choose” against inflicting significant shocks: after all, there was a fellow subject (with heart trouble!), screaming and kicking the wall and asking to be set free in the next room. There were, in other words, extremely strong (and obvious) situational forces encouraging people to not shock or to stop at low levels. That is what is so amazing about the experiment: it revealed features of the environment that seemed irrelevant but that were far more powerful than the more visible and seemingly more powerful features. The fact that some subjects opted to stop shocking between 300 volts and 450 volts doesn’t necessarily prove the strength of their disposition; it may simply reveal the growing force of other elements of their situation. Put differently, all of the behavior in that experiment is consistent with our situational account of human behavior—and much of it is inconsistent with the dominant dispositional account. (The dispositionist actor should beware Occam’s Razor.)

Second, our definition of “situation” is not limited to merely underappreciated or unseen “external” influences. This is an important point, because some confusion may result from the fact that when social psychologists were first discovering the power of situation, they were focused on environmental influences. Advances in social psychology revealing just how mysterious our own interiors are to even ourselves—dispositionist schemas, notwithstanding—help make clear that our interiors, too, are “situational,” as we have defined that term. Thus, even when people behave in ways that seem inconsistent with the pressures of external forces, that does not imply that they are making “choices” in response to their “will,” conscious thinking, and stable preferences. As we have argued at length, although the concepts of thinking, preferring, willing, and choosing may give us an affirming story, narrative, or schema for understanding our behavior and that of others, they are more or less illusory. And that is a major part of what we mean by “situational.”

We have occasionally heard the related objection that we are ignoring evidence that people often do attribute their behavior to situational forces. For instance, when students perform poorly on an exam, they are more inclined to attribute the outcome to some situational force (“That test was unfair!”) than they are when they perform well (“I’m a genius!”). We acknowledge that tendency and others like it, as well as the cultural influences that can make individuals more or less inclined to attribute conduct to external influences. And we believe those exceptions are important for a number of reasons that we hope in future work to get to examine. We pay them scant attention here because they do not pose an exception to dispositionism, as we define that term: The situationist attributions that do sometimes occur are typically limited to only the most obvious or affirming elements of situation, a fact that itself

in back of the whole asymmetric-paternalism approach, one that never strays from the presumption that all people's preferences are more-or-less stable and exogenous to their situations. Even among those who have a hard time rationally pursuing their preferences, the preferences themselves are mostly taken as given, or are at least not considered a pressing element of the inquiry.

Asymmetric paternalism is a theory designed to evade rather than to grapple with the evidence suggesting that we are situational characters. In so doing it reaches conclusions that are largely uncontroversial, and not at all threatening to our sense of ourselves. It is hard to take issue with the claim that defaults should be set in a manner that will likely engender the most utility for most, but which allows for individual opt-outs for those who exercise their rationality and can determine for themselves that a different arrangement will be better for them personally. Who's not for that? The approach bears, by its authors' own account, a striking resemblance to conventional ways of thinking about default rules, to the way legal economists typically think about default rules, and to how default rules actually work.⁷⁸⁰ Issacharoff and his co-authors recognize this and offer it as evidence of the fact that their approach can contribute to, rather than detract from, the advance of the basic law and economics approach:

An appealing way to explain how these laws came about [laws embracing utility maximizing default rules but allowing for mutability by individuals] is that the law reflects what we are calling asymmetric paternalism and uses it as a cost-benefit standard. In this sense, asymmetric paternalism complements the basic law and economics belief that the law tends to move toward efficient solutions. An attentiveness to minimizing costs to rational actors while maximizing benefits to boundedly rational actors fits well within a richer conception of efficiency.⁷⁸¹

Issacharoff and his co-authors went looking for a theory that traditional antipaternalists, and traditional legal economists, could accept without much quarrel, and that is exactly what they found. It is no surprise then that their framework, like those in its intended audience, misses much of the situation and

reveals the otherwise unseen power of our interior situation (such as the role of motivation), and are often subject to the very same criticisms that we make of the dispositionist default.

All that being said, we do not disagree with those who suggest people should learn how better to control or determine their own behavior. Our problem is with the assumption that the means to that end is by continuing to promote dispositionism and ignore the more powerful role of situation. As this Article should suggest, we believe it is important for individuals (citizens, consumers, lawmakers, legal theorists, and others) to become far more aware than they are of the extent to which we are all moved by forces within us and around us that are more or less unseen. Such an understanding will not transform them from situational characters to dispositional actors; rather, it will reduce the effect of the dispositionist illusion and give them greater awareness of and control (perhaps even dispositional control) over their situations.

780. Cf. Sunstein & Thaler, *supra* note 771, at 1199 ("The argument for libertarian paternalism seems compelling to us, even obvious.").

781. Camerer et al., *supra* note 770, at 1223.

promotes a legal-theoretic focus that guarantees not finding it. As Issacharoff and his coauthors conclude their article: “[Asymmetric paternalism] should appeal to everyone across the political spectrum and can potentially shift the debate from one about whether or not paternalism is justified, to one about whether the benefits of mistake-prevention are larger than the harms imposed on rational people. The idea is designed to focus debates about paternalism on these empirical terms.”⁷⁸² Shifting the debate in this direction, we contend, entrenches an unrealistic dispositionism more than it offers a response to evidence critiquing it. These scholars focus the debate on empirical questions that emerge from a theoretical starting place that is not, we contend, well-steeped in empiricism, much less critical realism.

3. Selective Realism

Another category of response to the realist challenge has been what we call “selective realism.” In this approach scholars employ specific findings from social psychology to justify specific claims or conclusions, but make no effort to incorporate a full range of evidence from social psychology, either for the particular claim they are pursuing or for the basic starting point of their approach to legal analysis. Selective realism of that sort has already been adequately described elsewhere.⁷⁸³ Given the length of this article already, therefore, we cannot justify a proportional discussion here. It is, we hope, sufficient to point out that product liability scholars have long been tapping into the economic behavioralism literature to make assertions about how well informed consumers are. In doing so, they have tended to be quite selective about what “cognitive biases” they emphasize, depending on whether they have concluded that consumers overestimate risks or underestimate risks. Essentially, those scholars still employ the rational actor model, with some selected biases thrown in.

4. Weak-Form Realism

Other efficiency-oriented scholars have been more willing to get real. Professors Christine Jolls, Cass Sunstein, and Richard Thaler, for example, use strands of psychological research in an approach dubbed “behavioral economics” or “behavioralism,” to “explore the implications of actual (not hypothesized) human behavior for the law.”⁷⁸⁴ Although they fall further from the trunk than

782. *Id.* at 1254.

783. See, e.g., Hanson & Kysar, *Taking Behavioralism Seriously I*, *supra* note 126, at 693–723 (describing and providing examples of selective realism in products liability debate); Hanson & Kysar, *Taking Behavioralism Seriously II*, *supra* note 132, at 1548–53 (describing Kip Viscusi’s selective realism in analyzing cigarette markets, smoking, and the need for regulation); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: A Response to Market Manipulation*, 6 ROGER WILLIAMS U. L. REV. 259, 370–80 (2000) (describing James Henderson and Jeffrey Rachlinski’s selective realism in their critique of enterprise liability).

784. See Jolls, Sunstein & Thaler, *supra* note 64, at 1476. Weak-form realism is distinguished from selective realism, as we have defined the terms, in that it is not limited to a particular policy question or

Posner, and the other quasi-realists, they do not fall far from the law and economics tree. They attempt “to model and predict behavior relevant to law with the tools of traditional economic analysis, but with more accurate assumptions about human behavior.”⁷⁸⁵ They emphasize that their project is “deeply constructive”⁷⁸⁶ to the law and economics paradigm: “Behavioral economics is a form of economics, and our goal is to strengthen the predictive and analytic power of law and economics, not to undermine it.”⁷⁸⁷ We describe this as *weak-form realism*, currently the most common and fastest growing mode of psychology-based critical engagement with economics.⁷⁸⁸

The inadequacy of weak-form realism, though perhaps less acute, has much in common with the failures of counterfeit realism, defensive realism, and selective realism. Instead of beginning with a realistic understanding of human actors, weak-form realists maintain the familiar and affirming dispositionist actor and engage only “phenomena that have reasonably precise implications for legal issues.”⁷⁸⁹ They pick and choose among psychological findings, and select only those that seem directly applicable to a pre-existing policy debate within the law and economics paradigm.⁷⁹⁰ And, in doing so, they operate according to the same “economics first, realism second,” priority rule:

The project of behavioral law and economics . . . is to take the core insights and successes of economics and build upon them by making more realistic assumptions about human behavior. We wish to retain the power of the economist’s approach to social science while offering a better description of the behavior of the agents in society and the economy.⁷⁹¹

In other words, phenomena that do not “have reasonably precise implications for legal issues” or that may threaten “the core insights of economics” (and, we might add, core conceptions of the human animal) are off the table. So, for instance, Jolls, Sunstein, and Thaler maintain the consumer “choice” center-

issue. Weak-form realism, in other words, attempts to provide a general theory (a revised law and economics) to be applied across all settings. Weak-form realism, as we will describe, is nonetheless selective in the sense that it considers only a small fraction of tractable choice biases.

785. *Id.*

786. *Id.*

787. *Id.*

788. For other excellent work adopting what we describe as the weak-form realist approach, see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000); Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739 (2000) (arguing that the new approach provides a “more accurate description of human choice than the law otherwise has available, which in turn should improve both positive and normative legal analysis”).

789. See Jolls, Sunstein, & Thaler, *supra* note 64, at 1481.

790. As Richard Posner complains in his defense against weak-form realism, “Behavioral economics is defined by its subject rather than by its method and its subject is merely the set of phenomena that rational-choice models (or at least the simplest of them) do not explain.” POSNER, *supra* note 361, at 264.

791. Jolls, Sunstein, & Thaler, *supra* note 64, at 1487.

piece of basic economics, in which consumers are presumed to act dispositionally to serve their own ends.⁷⁹² The only difference here is that the consumer's behavior is "bounded" in ways that influence, in predictable ways, the consumer's actual decisions. The focus remains on the actor—who is deciding, consuming, and judging in accordance with her mostly exogenous dispositions and preferences. The now-bounded actor is simply plugged into the choice-driven models of conventional law and economics to yield positive or normative policy conclusions. In short, realism, in the weak-form variety adopted by Jolls, Sunstein, and Thaler, is bounded.

5. Strong-Form Realism

A few have gone still further in abandoning the artificiality of conventional economic modeling. In a set of articles coauthored with Doug Kysar, one of us has argued that behavioralism should be "taken more seriously" than scholars had previously allowed. It is not enough to recognize that, say, consumers may be subject to certain biases in their processing of product information. Rather, a clear implication of the behavioralist literature is the deeper insight that perceptions, and even preferences, are manipulable by other actors in the model. That is, perceptions and preferences are endogenous in the sense that they are subject to influence by other actors, such as product manufacturers and sellers.⁷⁹³ And, further, because those actors can influence perceptions and preferences, they *will*—indeed, competitive processes require as much. We call that approach *strong-form realism*.⁷⁹⁴

But even that form of realism, as two of its critics highlight, may be unjustifiably shy in holding onto the law and economic approach that it purports to challenge. Professors Henderson and Rachlinski assert in the concluding paragraphs of their critique:

[W]e cannot help but note that although [Hanson & Kysar] claim to have embraced cognitive psychology and taken it seriously, in truth they hold

792. And that view is common among economic behavioralists. See, e.g., Thomas S. Ulen, *Evolution, Human Behavior, and Law: A Response to Owen Jones's Dunwoody Lecture*, 53 FLA. L. REV. 931, 933–34 (2001) ("The central distinguishing contention of this emerging emendation of rational choice theory is that human beings are imperfectly rational. In the pursuit of their ends people make systematic, predictable mistakes that the law can take into account in its attempts to regulate human behavior.").

793. See Hanson & Kysar, *Taking Behavioralism Seriously I*, *supra* note 126 (identifying the problem); Hanson & Kysar, *Taking Behavioralism Seriously II*, *supra* note 132 (providing market evidence); Hanson & Kysar, *Taking Behavioralism Seriously III*, *supra* note 786 (discussing possible solutions); Hanson & Kysar, *The Failure*, *supra* note 403.

794. One author has recently lumped Hanson and Kysar's work in with the weak-form behavioralists and interpreted it as assuming that "irrational behavior" is stable, in the sense that it is insensitive to the role of context. See Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907 (2002). We can only assume that Professor Mitchell somehow missed those sections of the Hanson and Kysar trilogy that emphasized "market manipulation."

closely to a conventional economic analysis of product-related risk. For example, Hanson and Kysar argue that “manufacturers’ manipulative practices may inflate consumers’ perceptions of a product’s overall desirability,” and the “consumers’ misperception [that this manipulation creates] would result in inefficient purchases.” If consumer preferences are completely constructed, then what exactly is supposed to be the efficient level of consumption? Should the socially optimal demand for soup be measured with the cans in alphabetical order, or not? On a rainy day, or sunny? With what kind of music or ambient odors (if any) in the background? In what section of the store? What should the labels look like? How big are the cans? Risk is no different. . . . The notion that manufacturers distort consumer risk-perception assumes that there is some natural and appropriate risk-benefit assessment from which manufacturers lead consumers astray. If we take seriously the psychological proposition that all preferences are constructed, then there is no magical correct level of risk that consumers should endure.

. . . A complete, serious assessment of what cognitive psychology means for products liability has yet to be undertaken.⁷⁹⁵

Although we would challenge portions of their description of Hanson and Kysar’s work,⁷⁹⁶ we accept their final point that legal scholars have yet to conduct “a complete . . . assessment” of the implications of cognitive psychology for law. Current strains in the debate all share an unwillingness to relinquish a demonstrably unrealistic conception of the human animal and to build instead from a more realistic foundation. It is to introduce that project—what we call “critical realism”—that this Article and its companion are largely directed.

VI. THE SITUATIONAL CHARACTER’S SITUATION

Throughout this Article, we have focused on social psychological findings that reveal the fallacy of the dispositionism that pervades common sense, law, conventional legal theory, and, as we just reviewed, the dominant theoretic domains of economics and economic behavioralism. In depicting the situational character, we have shown how, dispositionist appearances notwithstanding, much of what moves us is unseen. We have described some of the countless interior and exterior situational influences that give shape to our sense of our experience. We have particularly emphasized the interior situational realities behind our dispositionist charade—the unseen biases in our mind, unseen knowledge structures, and motivations, and many other aspects of unexamined and often un-examinable interiors. We have illustrated how our interior situation

795. James A. Henderson, Jr. & Jeffrey J. Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 ROGER WILLIAMS U. L. REV. 213, 258 (2000).

796. Among other things, it understates the extent to which Hanson and Kysar challenge the conventional economic model, overstates the extent to which they argue that preferences are constructed, and significantly misstates the source of “distortion.”

and behavior can be easily influenced by exterior situational influences. Indeed, virtually every experiment in social psychology largely depends upon, and thus reveals, that manipulability.

Of course, it is not just the social psychologists in their labs who are attempting to move us through the situation. As we explained in *The Situation*, the (situational) imperatives of the market, themselves situational imperatives, provide one common and possibly troubling source of external situational influence. But there is a lot more to the situation.

A. SEEING IT

And there are other even simpler ways to demonstrate the role of situation, our fear of it, and our attempt to ignore or downplay its existence. It is not just that we are by our nature subject to situational influences over our thoughts and behavior. Before we ever think or behave at all, our lives are already powerfully shaped by the situation of our births in society. There's a situational character born every minute. And each is born into a situation that tremendously influences what her life will be like, what opportunities she will have, or not have, and how she will respond to the opportunities she does have. We are born rich or poor. We are born "wanted" or "unwanted." We are each born with a particular set of talents and limits. We are each endowed with our looks, our brains, and our bodies. We are born first among siblings, last, or somewhere in between. We may be part of one family or another, one community or another, and one culture or another. Though perhaps none of those situational parameters is decisive, taken together they provide an immense influence over our options, our aspirations, our experiences, our memories, our sense of ourselves, our sense of what is natural and appropriate, and more. And just as importantly, to further our picture of the situational character, the situational influences of the "birth lottery," though in many ways self-evident, remain largely unseen through our dispositionist lenses.

The power of the birth-lottery belies our dispositionist self-conceptions, and the dispositionist assumptions at root in so many of our conventional legal and social theories. For example, there are approximately 240 million Americans with health insurance, and approximately 40 million without. Those without it are generally the working poor, who cannot afford to buy private health insurance and who are often ineligible for state and federal health insurance programs. Those forty million suffer higher rates of deaths from treatable diseases than do the rest of us. Those who live in poor neighborhoods attend schools with far fewer educational resources available than those who live in wealthy ones, and consequently find themselves on the short end of the achievement gap.⁷⁹⁷

Those born into an African-American family are three times more likely to

797. See MATTHEW MILLER, *THE TWO PERCENT SOLUTION* 7–11 (2003) ("Every free-market fan knows that you get what you pay for. When the affluent suburb of Scarsdale, New York, pays teachers with a

find themselves living below the poverty line than are those born into a white family.⁷⁹⁸ The average African-American family's net worth is about twelve percent of the average white family's net worth.⁷⁹⁹ And that huge disparity is not explained by factors like earnings rates, education, or savings rates.⁸⁰⁰ More than 25% of black households have no positive wealth, while just 14% of white households are in that situation.⁸⁰¹ Similarly, those born into single parent households are three times more likely to find themselves living in poverty than are those born to two-parent households.⁸⁰² Those who happen to be born in Mississippi are more than twice as likely to find themselves starting off in poverty than are those lucky enough to be born in Connecticut.⁸⁰³ And those who are born into poverty tend to end up far poorer than those born into wealth, with concomitantly lower levels of overall health, occupational opportunities, consumption patterns, and life-expectancies.⁸⁰⁴ And, of course, all of those examples assume a person is born in America—itself an assumption with potentially immense situational consequences.

B. MISSING IT

The evidence is all around us, and one need not have read a single social psychological experiment to see and understand the power of situation. Even the deepest dispositionists among us can see this situational elephant in the corner when it is called to our attention. And yet, we tend to look away and again see only ourselves and other individuals. Our common, affirming knowledge structures and self-conceptions do not take account of those situational influences and manage to keep us a safe distance from "that corner."

In his recent book *The Two Percent Solution*, Matthew Miller examines the problem of what he calls "luck" in American society. As Miller uses the term, "luck is the shorthand that describes those things that shape our lives that are entirely outside our control. We're talking mostly about the pre-birth lottery, those aspects of a person's experience dictated by the womb from which he or she happens to emerge."⁸⁰⁵ In his chapter "Taking Luck Seriously," Miller

masters degree and five years of teaching more than \$60,000, and New York City pays her counterpart in the 40s, is there really a question about where most of the top talent goes?").

798. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 447 (121st ed. 2001).

799. See DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 1 (1999).

800. See generally *id.*

801. See EDWARD N. WOLFF, TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA AND WHAT CAN BE DONE ABOUT IT 3 (2002).

802. See U.S. CENSUS BUREAU, *supra* note 798, at 447.

803. See A STATISTICAL PORTRAIT OF THE UNITED STATES: SOCIAL CONDITIONS AND TRENDS 80 (Mark S. Litman ed., 1998).

804. See generally ROBERT M. HAUSER, INTERGENERATIONAL ECONOMIC MOBILITY IN THE UNITED STATES: MEASURES, DIFFERENTIALS, AND TRENDS (Ctr. For Demography and Ecology, Univ. of Wis.-Madison, CDE Working Paper No. 98-12, 1998).

805. MILLER, *supra* note 797, at 70.

points out the elephant to two of the best-known and most effective proselytizing dispositionists, Milton Friedman, the Nobel Laureate in economics, and William Bennett, the conservative moralist. Miller, in a mind-bogglingly simple research strategy, simply asked them about it.

Bennett, when asked about the bigger picture, could not easily hide behind reassuring dispositionist anecdotes. Instead, he just admitted that factors relating to a person's birth lottery "matter hugely" and that many people don't "exercise autonomy and make a difference in their own lives . . . because they're in crappy families, crappy schools, crappy neighborhoods."⁸⁰⁶

Friedman's response was even more revealing.⁸⁰⁷ Friedman, recall, is among the most influential proponents of the necessary relationship between freedom and free markets, a view that begins and ends with a deep dispositionism. Even as a young economist, Friedman was aware of the problem posed by the situational elephant for the economic theories he advocated. In an early paper, as Miller describes, Friedman took pains to show that social inequality may be not just the result of "natural endowments or inherited wealth," but also the byproduct of individual work and spending habits:

[O]ne cannot rule out the possibility that a large part of the existing inequality of wealth can be regarded as produced by men to satisfy their tastes and preferences . . . [that] the link between differences in natural endowment or inherited wealth and the realized distribution of income is less direct and simple than is generally supposed [This analysis] has implications for normative judgments about the distribution of income and the arrangements producing it—inequalities resulting from deliberate decisions . . . clearly raise very different normative issues than do inequalities imposed on individuals from the outside.⁸⁰⁸

Even were Friedman correct that we cannot "rule out the possibility" that individual choice accounts for disparities in poverty,⁸⁰⁹ that would not suggest that we should therefore make that possibility the cornerstone assumption in our theories. Rather it should counsel a further look at just how "possible" this is, and how possible it is that "outside" influences, such as inherited wealth, are actually hugely important. And of course, as we have been arguing in this Article, the fact that wealth effects might be attributable to individual choices and behaviors does not support the dispositionist conclusions that Friedman claims to deduce from them.

In any event, we are here interested in how scholars and policymakers, even

806. *See id.* at 84.

807. *See id.* at 69–92.

808. *See id.* at 73 (quoting Milton Friedman, *Chance, Choice and the Distribution of Income*, 61 J. POL. ECON. 277, 290 (1953) (third alteration in original)).

809. More recent scholarship, by the way, suggests that we *can* rule out that possibility. *See, e.g.,* CONLEY, *supra* note 799.

those with no reason to encounter the findings of social psychology, have managed to miss some seemingly obvious elements of “the situation.” Following that early article, Friedman spent the next several decades of his career without ever seriously questioning his early argument. In 1962’s *Capitalism and Freedom*, however, he did supplement it, arguing that there was no more reason to question a landholder’s inheritance of property than there was to question a singer’s inheritance of her voice. And based on that observation, Friedman concluded that “[m]ost differences of status or position or wealth can be regarded as the product of chance at a far enough remove.”⁸¹⁰

Sensing that there still seemed to be a giant elephant in the room, Miller pointed out to Friedman that the cases of the lucky property owner and the lucky vocalist do not nullify the problem of situational luck. Instead, they exemplify the ubiquity of the problem. Microphone in hand, Miller pushed Friedman on the point. Friedman revealed that even after spending most of his Nobel-Prize winning career largely ignoring it, he could still see, when it was highlighted in this way, that indeed luck is a powerful situational influence on individuals. “Society may want to do something about luck,” Friedman told Miller, as if he had just seen the elephant for the first time. “You’ve asked a very hard question. I don’t know that I have the simple answer to it,” Friedman conceded to Miller.⁸¹¹

Yet in book after book and article after article over the course of decades, Friedman’s solution to this “very hard question” has been to paper over it. Friedman is like the rest of us. Even the situation that is in our midst and that should be obvious to us, the most basic situational influences over our lives, are easily missed or explained away. Although situational forces can be in plain view, a person, armed with reassuring knowledge structures, can spend a lifetime not seeing them. It bears noting that perhaps no American intellectual has had as much influence over American policy over the last half-century as Milton Friedman has.⁸¹²

But, there with Miller in his den, Friedman had a few more moves to make, which further reveal the lengths to which many of us will go to ignore powerful situational influences for the sake of maintaining a simpler, more reassuring dispositionism. Regarding the ubiquity of luck and its importance as a social factor, Friedman regrouped and retorted: “See, the question is, what you’re really talking about, is determinism versus free will”: “But you can’t really justify free will. . . . You can keep going back. There’s no first cause. Nobody has ever solved the argument of determinism versus free will. And you and I

810. See MILLER, *supra* note 797, at 75 (quoting MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962)).

811. *Id.* at 85.

812. For a review of Friedman’s career and influence, see Chen & Hanson, *The Illusion of Law*, *supra* note 32, at 14–23; see also George W. Bush, Remarks in a Tribute to Milton Friedman, 38 WEEKLY COMP. PRES. DOC. 782 (May 9, 2002) (proclaiming that Friedman’s “vision has changed America, and it is changing the world”).

aren't going to do so either."⁸¹³ Consciously or not, Friedman sought to escape from the question of luck by jumping down an unrelated slippery slope. Miller was not claiming, nor would we, that luck *determines* outcomes; instead, he was pointing out that luck, as William Bennett put it, "matters hugely."⁸¹⁴ The question still pending for Friedman was, if you can't say that free will is at the bottom of all relevant human behavior, then why assume it is and why assume that situation is all but totally irrelevant? Put another way, if there is an unsolvable philosophical conundrum afoot, or a problem of empirical uncertainty, then what wisdom is there in shrugging our shoulders and assuming that it can be left out of our fundamental theories altogether? There are numerous reasons why individuals tend to see situationist arguments as determinist claims. One that bears highlighting here is simply that our general inability to see situation renders us unable to see either its effects or how it and its effects might be usefully altered. Situation is treated as given, fixed, and natural. From that perspective, situationist arguments look like claims that we are moved by forces over which we have no control—as individuals or as a society. That claim seems determinist and, in any event, is quite threatening to our own sense of ourselves and our systems. Understandably, those making such a claim—that unseen forces play a major role in our behavior—are eagerly dismissed as, among other things, straw-men determinists. But to acknowledge situation is not to surrender to it, but rather it is to take a necessary step in gaining some control over it. The situation can be altered—indeed, is being altered constantly. It reflects and reinforces those entities or groups with the power to influence it. The elephant is not just sitting in the corner; it moves and can be made to move.

C. DENYING WHAT WE CANNOT ADMIT

Friedman, at one point, did answer the question. Acknowledging the elephant in one breath and then denying it in the next, he said: "In a sense we are determinists. In a sense we are and in another sense we can't let ourselves be."⁸¹⁵ Although it is true that situation matters hugely, "we can't let ourselves be" anything but dispositionists.⁸¹⁶

And so the game is up. The theories that we develop for understanding and predicting and influencing human conduct – including (or, perhaps particularly), the policy theories developed by the most sophisticated and influential analysts, are not meant to be based on what we know to be true. It is about maintaining a

813. MILLER, *supra* note 797, at 86–87. Note that economists generally have no place for the "will" in their models; instead, their models tend to be determinist in the sense that preferences are treated as fixed and exogenous, and behavior is treated as responsive to those preferences.

814. See *supra* note 806. Ironically, Milton and Rose Friedman's memoirs are entitled, *Two Lucky People*, an irony that did not escape Milton.

815. MILLER, *supra* note 797, at 86–87.

816. This reaction is not unlike the sort of reaction that many of us undergo when experiencing cognitive dissonance. See *supra* notes 461–71 and accompanying text (describing how we seek to trivialize the dissonance or to highlight other affirming features of ourselves or our beliefs).

theory that is plausible, simple, and affirming. Denying the effect of exterior and interior situation is itself a manifestation of that very situation. Friedman, it seems, can't handle the truth. But, then, who can? Situationism is, for all the reasons we've provided (and then some), a frightening and potentially paralyzing vantage point.

There is a long tradition of denying situationism among economists. A half century ago, for instance, John Kenneth Galbraith lamented the dispositionism of his fellow economists: "At least in social disciplines, obsolescence and irrelevance are a small price to pay for the privileges of remaining comfortably, even if archaically, with the familiar, the settled and the safe."⁸¹⁷ But the fear is by no means exclusive to economists.

Situationism is widely feared. Even social psychologists who are most familiar with the power of situation lose sleep over what their evidence seems to suggest. Susan Fiske, one of the most prominent social psychologists of her generation, describes her fear this way:

An absence of intent ultimately implies an absence of responsibility for the effects of categorization. . . . It has led me to have the following nightmare: After testifying for the plaintiff in a case of egregious and demonstrable discrimination, a cognitive social psychologist faces the cross-examining attorney. The hostile attorney, who looms taller than Goliath, says "Tell us, Professor, do people intend to discriminate?" The cognitive social psychologist hedges about not having any hard data with regard to discrimination, being an expert mainly in stereotyping. When pressed, the psychologist admits that stereotypic cognitions are presumed to underlie discriminatory behavior. Pressed still further, the psychologist reluctantly mumbles that, indeed, a common interpretation of the cognitive approach is that people do not stereotype intentionally, whereupon the cross-examining attorney says in a tone of triumph, "No further questions, Your Honor."⁸¹⁸

Her concern, just like Friedman's and our own, is what to do with the individuals who seem to act unjustly—those times when we see a victim and an injurer and we want the injurer to pay and the victim to be compensated. Are we left with no option but to chalk it up to situation and send the parties on their way? That seems to be the only alternative that the dispositionist can imagine. Fiske, as she would go on to explain, got back to dispositionism by claiming that individuals can choose to wield some influence over their automatically activated stereotypes. But as others have pointed out since, although her rescuing argument was reassuring, the best evidence suggests that it is overly

817. JOHN KENNETH GALBRAITH, *THE AGE OF UNCERTAINTY* 2 (1977).

818. Susan T. Fiske, *Examining the Role of Intent: Toward Understanding Its Role in Stereotyping and Prejudice*, in *UNINTENDED THOUGHT* 253, 254 (James S. Uleman & John A. Bargh eds., 1989) (citation omitted).

optimistic.⁸¹⁹

So, we are stuck with our nightmare. We hold onto our dispositionist views tenaciously, even well beyond the point where our claims about the truth of the matter have been abandoned. We are dispositionists, not because humans are dispositional, but because there is too much that has already been built upon the dispositionist foundation to begin building elsewhere, and because dispositionism helps us to sleep.

As Nobel Laureate Isaac Bashevis Singer elegantly expressed the dilemma: “Of course I believe in free will. I have no choice.”⁸²⁰ And so it is that the illusion of our freedom, our dispositionism, our wills, are forced upon us by fears and forces in our situation that we do not see, and would prefer not to. We have no choice but to pretend that we have a choice.

VII. CONCLUSION

“None of us enjoys the thought that what we do depends on processes we do not know; we prefer to attribute our choices to volition, will, or self-control. . . . Perhaps it would be more honest to say, ‘My decision was determined by . . . forces I do not understand.’”

~ Marvin Minsky⁸²¹

Taken together, the social psychological findings we have reviewed here should shake our self-conception at its foundation. What has been revealed in the studies we reviewed cannot be considered marginal or anomalous. Situation, it seems, moves us far more than we suspect in our slumbering, blissful dispositionism. That conclusion is hard to take, hard even to get our mind around, because of this very dispositionism, which sees us as responsible for our situations and not the other way around.

Our “situational character” is clearly incomplete as a model, a description, or a vision of humanity.⁸²² But our aim has not been to provide a comprehensive picture. It has been to demonstrate that the model of human agency we so often

819. See Bargh & Chartrand, *supra* note 598; see also *supra* text accompanying notes 595–619 (discussing automaticity).

820. See Norman Green, *The Salon Interview—Isaac Bashevis Singer*, SALON.COM, Apr. 28, 1998, at http://dir.salon.com/books/int/1998/04/cov_si_28int.html.

821. MARVIN MINSKY, *THE SOCIETY OF MIND* 306 (1985).

822. There are no doubt many influences to which we are susceptible that are not visible through the lens that we have offered, either because of their complexity, or because they are as yet undiscovered by the social science on which we draw. And, although we have certainly privileged social psychology and related fields in this Article, our focus reflects our own situational and cognitive limitations and not a belief that other social sciences or ways of understanding ourselves don’t have much to offer. To the contrary, we believe that there is a great deal to learn about what moves us from anthropology, sociology, history, other subfields of psychology, various critical theories, and market practices (such as marketing and public relations). If that is correct, then it should only heighten concern about the flaws of dispositionism, rather than weigh against adopting a situationist approach.

work with—as laypeople, as legal scholars, and as policymakers—is wrong. And not just wrong, but clearly and dangerously wrong, in that it drastically understates both internal and external situational influence over our perceived cognitions, attitudes, will, and behavior.

Our readers may be asking themselves, or itching to ask us, just exactly where all this leaves us. How can the situational character be put to work, as the rational actor, for example, has been? In future writing, we will have much more to say, and others will too,⁸²³ about the implications of situationism for policymaking and legal theory. In this Article and its companion, our ambition is to make the case for realism and to reveal many of the sources of the unreal perceptions and theories that now dominate.

The situational character is meant to retire the rational actor and its dispositionist kin, not to fill its shoes and perform in legal theory as we have come to expect our theories to perform. We have shed light on why, given that we are situational characters, dispositionist worldviews have emerged and why many people react as they do to challenges to those worldviews. Such resistance, in itself, does not rebut the claims we have made; it simply helps prove them. Social science is not supposed to be answer-driven, and our system of justice is not supposed to be appearance-driven, stopping only at convenient and comfortable conclusions.

When proponents of dispositionism embrace situational blindness in the name of freedom and responsibility, the untruth on which our systems are built is laid bare. To relieve the resultant dissonance, requires that we relinquish

823. In fact, some scholars are more situational than others. Outside of law and economics, some scholars have been quite sensitive to one or more element of situation. See, e.g., Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990) (synthesizing fundamental elements of feminist legal scholarship, including the concept of “positionality,” which parallels in significant ways our notion of “situationism”); GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (2000) (analyzing the ways in which government policies and the built environment, rather than individual personal choice, give shape to lived experience within different communities); LANI GUINIER ET AL., *BECOMING GENTLEMEN: LAW SCHOOL AND INSTITUTIONAL CHANGE* (1997) (arguing that traditional legal pedagogy is often alienating to women, forcing women to abandon values and perspectives brought with them to law school in order to conform to the law school environment); Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF THE LAW: A PROGRESSIVE CRITIQUE* 40 (David Kairys ed., 1982) (exploring the ways in which the structure of legal education channels students career choices in definite ways, but which nevertheless provide a plausible account of student complicity in the process); TODD D. RAKOFF, *A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE* (2002) (arguing, among other things, that the structure of our days and nights is changing under the influence of unseen but powerful influences over the management of time); ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* (2003) (arguing that, contrary to widespread belief, two-income families typically spend nearly all of their income on situational necessities rather than on choice-driven luxuries, leaving most families on the brink of bankruptcy should they encounter unforeseen expenses such as illness or unemployment). And some social psychologists have begun to write, as we have, explicitly about the distortions of dispositionism and the power of situation. Our hope is that by identifying some of the sources of our dispositionism, and detailing the extent to which we are situational characters, we have buttressed that work by connecting it to a firm social-scientific, general foundation and by revealing the unreal foundations of now-dominant theories.

either the belief that our system is legitimate—meritocratic, fair, democratic, just, freedom-enhancing, and so on—or the immense edifice erected upon that dispositionist bulwark.

We are dispositionists trapped in situational characters. We can't escape our condition through denial—be it deliberate disregard of what we know about the human animal or subconscious redoubling of our faith in the illusion of dispositionism. Any solution is to be located mostly, like the problem itself, in the situation.

There is a tragic irony in our predicament. By blinding ourselves to the very forces that impinge upon our freedom, we are surrendering to them. To be serious about liberty requires that we not unwittingly turn over the situational strings to whoever has the means and ends to manipulate them. Indeed, our greatest dispositional act may be to acknowledge that we are situational characters and to choose to understand and gain some voice and control over the situation that largely controls us. In that very important sense, we do have a choice.

