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ARTICLES

THE GREAT ATTRIBUTIONAL DIVIDE: HOW DIVERGENT VIEWS OF HUMAN BEHAVIOR ARE SHAPING LEGAL POLICY

Adam Benforado^{*} & *Jon Hanson*^{**}

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^{*} Associate, Jenner & Block LLP (Washington, D.C.).

^{**} Alfred Smart Professor of Law, Harvard Law School. Thanks to Douglas Callahan, Jeff Dubner, Tracy Conn, Nikki Flores, Greta Gao, Alec Karakatsanis, Lexie Kuznick, Sarah Marcus, and Matt Robson for excellent research assistance, and to Carol Igoe for outstanding secretarial assistance. We also want to express our deepest gratitude and love to Lenore Coberly and Kathleen, Emily, Erin, and Ian Hanson.

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At the roots of every ideology there are premises about the nature of causation, the agents of causation, [and] the appropriate ways for explaining complex events.

—Robert E. Lane¹

Don't believe the man who tells you that there are two sides to every question. There is only one side to the truth.

—William Peter Hamilton²

INTRODUCTION

There is a *real*, meaningful divide in America—a great rift that extends across debates. As we explore in this Article, the divide is based on two attributional approaches: the dispositionist approach, which explains outcomes and behavior with reference to people's dispositions (i.e., personalities, preferences, and the like), and the situationist approach, which bases attributions of causation and responsibility on unseen or unappreciated influences within us and around us. Those different methods of constructing causal stories and assigning fault not only color individual issues from gay marriage to welfare and from abortion to social security reform, but also help define the walls of the broader liberal-conservative crevasse.

Marking out its contours is vitally important because law is centrally concerned with making attributions. At its foundation, most law seeks to answer three central questions: (1) What caused an outcome?; (2) Who or what was responsible?; and (3) Is anyone to blame? A legal education trains students in the categories and distinctions of law that help sort out what counts as a harm and what fines, punishments, rewards, and compensations people should receive based on those attributions in different settings. Moreover, attributions matter to legal scholars and lawmakers because, if legal policy prescriptions are based on the wrong attributions, they are unlikely to solve the problems that they are designed to address and, indeed, may make matters worse. Thus, lawmakers and legal theorists should be, and often are, very

¹ ROBERT E. LANE, *POLITICAL IDEOLOGY: WHY THE AMERICAN COMMON MAN BELIEVES WHAT HE DOES* 319 (1962).

² *Hamilton Reveals Methods of a Wall Street Editor*, WALL ST. J., Sept. 12, 1922, at 9, *quoted in* Op-Ed., *Review & Outlook: An Independent Newspaper*, WALL ST. J., June 6, 2007, at A18. Hamilton was one of the first editorial page editors of the *Wall Street Journal*.

concerned with determining whether certain attributions are more likely to be correct and, if so, which attributions those are.

As it happens, social scientists have been working hard on those very questions for many decades and have come to some surprising conclusions. Nonetheless, their research has yet to be thoroughly taken up by legal academics, and one purpose of the *critical realist* project, of which this Article is a component,³ is to encourage and expedite this process.⁴

³ Critical realism (or *situationism*) understands that the naïve psychology—that is, the highly simplified, affirming, and widely held model for understanding human thinking and behavior—undergirding our laws and institutions is largely inaccurate. The critical realist project seeks first to establish a view of the human animal that is as realistic as possible before turning to legal theory or policy. To do so, works in the project rely on the insights of scientific disciplines devoted to understanding how humans make sense of their world—including social psychology, social cognition, and related disciplines—and the practices of institutions devoted to understanding, predicting, and influencing people’s conduct—particularly market practices. For more detailed descriptions of critical realism, see Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645 (2004) [hereinafter Benforado, Hanson & Yosifon, *Broken Scales*]; Adam Benforado & Jon Hanson, *The Costs of Dispositionism: The Premature Demise of Situationist Law and Economics*, 64 MD. L. REV. 24 (2005) [hereinafter Benforado & Hanson, *The Costs*]; Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004) [hereinafter Chen & Hanson, *Categorically Biased*]; Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004) [hereinafter Chen & Hanson, *The Illusion of Law*]; 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, 149–79 (2003) [hereinafter Hanson & Yosifon, *The Situation*]; Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004) [hereinafter Hanson & Yosifon, *The Situational Character*]. For other articles taking a situationist approach, see Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413 (2006) [hereinafter Hanson & Hanson, *Blame Frame*]; Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983 (2005); Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819 (2006); David G. Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children*, 39 LOY. L.A. L. REV. 507 (2006); Note, *War, Schemas, and Legitimation: Analyzing the National Discourse About War*, 119 HARV. L. REV. 2099 (2006).

Elsewhere, critical realism has been carefully distinguished from other, related legal-theoretic approaches, such as law and economics and economic behavioralism. See Hanson & Yosifon, *The Situation*, *supra*; Hanson & Yosifon, *The Situational Character*, *supra*. Recently, several prominent scholars have offered the term “behavioral realism” to describe an approach that is more or less identical to, though somewhat more narrow in focus than, critical realism. Behavioral realists are focused on the important task of encouraging judges to take seriously more realistic accounts of human behavior in particular cases before them—a goal that critical realists share. If there is a difference between those *neo-realist* or situationist approaches, it is that critical realists have thus far gone further to consider implications of such accounts for understanding law, legal institutions, legal theory, policy debates, and so on. See, e.g., Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1000 (2006) (explaining that “‘behavioral realism’ holds that as judges develop and elaborate substantive legal theories, they should guard against basing their analyses on inaccurate conceptions of relevant, real world phenomena”). Krieger and Fiske explain:

What social scientists have discovered is that, far from neutral processors of information, we humans are subject to significant attributional biases. We tend to rely heavily on familiar stories of thinking, preferring, willing, and choosing to explain human actions.⁵ Want to know what made America great? Easy: people with the most American of character traits—“rugged individualism and self-reliance.”⁶ Want to know what is “poisoning” America? Again, easy: not “impersonal forces beyond anyone’s control” but “specific individuals” with bad dispositions.⁷ In spite of the prevalence and strong appeal of those notions, however, we humans are actually moved significantly more by our situations—unseen or underappreciated elements in our environment and within our interiors—than we are by disposition-based choice.⁸ Thus, situationist accounts—those that, for instance, suggest that

To the extent that legal doctrines rely on stated or unstated theories about the nature of real world phenomena, behavioral realism argues, those theories should remain consistent with advances in relevant fields of empirical inquiry. And where the real world phenomena relevant to a particular area of law concern human social perception, motivation, and judgment, the relevant domains of empirical inquiry with which legal theories should remain consistent include cognitive social psychology and the related social sciences.

Id. at 1001. For other excellent examples of the behavioral realist approach, see R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169 (2006); Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063 (2006).

In broad terms, the distinctions among approaches can be understood as follows: law and economics applies the rational actor model to all topics related to law, legal institutions, and legal theory; economic behavioralism applies the boundedly rational actor model to specific legal areas (e.g., products liability or employment law); behavioral realism applies the situational character model to specific legal areas (particularly, thus far, anti-discrimination law); and critical realism applies the situational character model to that, as well as all topics related to law, legal institutions, and legal theory. See Chen & Hanson, *Categorically Biased*, *supra*, at 1222–28.

⁴ In addition to situationist law-review articles, there is also a blog and website devoted to the situationist approach both of which can be accessed at www.lawandmind.com. The blog and website are the products of The Project on Law and Mind Sciences at Harvard Law School.

⁵ See Hanson & Yosifon, *The Situational Character*, *supra* note 3, *passim* (summarizing evidence).

⁶ *The Rush Limbaugh Show: The Updated 35, Undeniable Truths* (radio broadcast Feb. 18, 1994).

⁷ BERNARD GOLDBERG, 100 PEOPLE WHO ARE SCREWING UP AMERICA (AND AL FRANKEN IS #37), at viii (2005). According to Goldberg, the “slow poison . . . running through the veins of this great country” is directly attributable to a small number of rotten apples: greed-driven culprits, villains, scoundrels and miscreants—100 of them, in all—who are screwing up America. *Id.*

⁸ That dispositionism is a significantly more inaccurate attributional approach than situationism may seem to be a controversial claim. However, were social science our guide, it would not be. One feature of the tendency we are focusing on is so fundamental to our attributional proclivities that it has actually been dubbed the “fundamental attribution error” by social psychologists. That error—the tendency to attribute to the person what is often the consequence of the person’s exterior situation—has been heavily researched, tested, and documented, and (although there are also well-documented exceptions to it) it remains among the most settled

people tend to file for bankruptcy because of lost jobs, divorce, or unforeseen medical costs—tend to hold more promise for being correct than dispositionist accounts—those that, for example, assert that bankruptcies are the result of character flaws.⁹ Unfortunately, just like everything else, our attributional tendencies are situationally dependent, and for most of us (some of us more than others), our situations lead us toward dispositionism.

An apt metaphor for this tendency can be found in the old joke about the drunk who loses his keys in a distant field but searches under a lamppost because the light is better. Social scientists have shown that we humans tend to make our behavioral attributions under the lamppost of dispositionism when the key to our behavior is to be found in the dark field of situationism.

Given that there is an attributional approach—situationism—that is more accurate (or less-certainly inaccurate) than the alternative, and given that attributional tendencies are largely the result of elements in our situations, identifying the relevant elements should be a major priority of legal scholars.¹⁰

of social psychological insights. See, e.g., SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 67–86 (2d ed. 1991) (discussing the fundamental attribution error, defined as a “bias in social perception,” whereby a person’s behavior is attributed to “her own dispositional qualities, rather than to situational factors”); EDWARD E. JONES, *INTERPERSONAL PERCEPTION* 164 (1990) (characterizing the fundamental attribution error as “the most robust and ubiquitous finding in the domain of interpersonal perception”); ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 429 (1999) (noting that participants in psychological studies routinely make the fundamental attribution error by “underestim[ing] the extent to which behavior is shaped by the constraints of the situation and overestim[ing] the extent to which it is shaped by people’s underlying dispositions”); LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 4 (1991) (“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.’”); Daniel T. Gilbert, Brett W. Pelham & Douglas S. Krull, *On Cognitive Busyness: When Person Perceivers Meet Persons Perceived*, 54 *J. PERSONALITY & SOC. PSYCHOL.* 733, 733–40 (1988) (explaining how people make dispositional attributions first and then only adjust (inadequately) those attributions through consideration of situational factors); Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 *PSYCHOL. BULL.* 21 (1995) (providing an intellectual history of the fundamental attribution error—or correspondence bias—and a description of some of its causes and limits); Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in 10 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 173, 173–220 (Leonard Berkowitz ed., 1977) (naming and explaining the fundamental attribution error in one of the field’s landmark essays). As we have focused on extensively documenting the inaccuracy of dispositionism in other work, we do not spend time in this Article offering further support to this claim. See Hanson & Yosifon, *The Situation*, *supra* note 3.

⁹ See generally ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* (2003); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 *STAN. L. REV.* 213 (2006).

¹⁰ It is important to stress at the outset several arguments that we are not making and do not endorse. First, we are not claiming that situationism leads directly to the truth and dispositionism directly away from it. Clearly, if a situationist approach were to focus on the wrong situational factors or to give too great or too little

With such information, legal academics could predict which individuals,

weight to the correct situational factors, such a model would be inaccurate. Our point is that dispositionism, by itself, is almost certainly going to lead us astray. Any hope of making accurate causal attributions lies in taking situation seriously. Situationism is a necessary, though not sufficient, condition for making accurate causal attributions. See *supra* note 8 (citing some of the extensive social psychological research documenting this phenomenon).

Second, our claim about the inaccuracy of dispositionism is about the correctness of *attributions* (“People are poor because they have bad dispositions”), not about the correctness of *beliefs* (“I don’t believe the government should help poor people”). The normative implication of this Article is that beliefs based on incorrect attributions ought to be reconsidered, but we do not take a position on whether it is “right” or “wrong” to, for example, believe that each person should take care of himself and not be forced to assist others.

Third, we are not asserting that dispositionism is without value or influence. Dispositionism, even if inaccurate, can be a simple, time-saving, affirming, psychic-cost-minimizing heuristic. See Gilbert & Malone, *supra* note 8, at 35 (noting that “dispositional inferences are easy to make and are undoubtedly correct on some occasions,” and that “dispositional inferences afford the observer a culturally acceptable way of gaining a sense of control over her or his environment, and feelings of control, however illusory, may ultimately yield greater psychological benefits than would logically impeccable inferences”); Hanson & Yosifon, *The Situational Character*, *supra* note 3, *passim*. It can be useful as a means of predicting and influencing those with whom we interact. See Hanson & Yosifon, *The Situation*, *supra* note 3, at 174–76; see also Benforado, Hanson, & Yosifon, *Broken Scales*, *supra* note 3, at 1689–1768 (describing how fast food companies manipulate our situations to increase sales and avoid costly liability for harms from their products). And it may be quite valuable as a means of encouraging individuals to make the most of their situations. A strong belief in the power of individuals to succeed through good choices, hard work, and personal responsibility has undoubtedly helped many individuals born into impoverished environments to achieve wealth and power, from Oprah Winfrey to former Attorney General Alberto Gonzales. See, e.g., Michael Duffy, *Bush’s Man from Humble*, TIME, Nov. 22, 2004, at 56. In addition, dispositionist attributions, self-concepts, and narratives can themselves have a powerful, often self-fulfilling, impact on people’s behavior even if the perceived disposition is just imagined. Cf. CAROL DWECK, MINDSET (2006) (describing the role of self-theories in achievement, education, sports, and so on).

Fourth, we are not suggesting that there are just two kinds of people in the world—situationists and dispositionists—and that situationists are smart and “get it” and that dispositionists are stupid and “miss it.” We are all basically dispositionists, and we all sometimes make situationist attributions. The important question examined in this Article concerns the *extent* of our dispositionism—how low or high is our threshold to situationism and how much of the situation do we see? Where we fit along the attributional spectrum is itself situational and, thus, generally beyond our conscious awareness and control.

Fifth, our argument ultimately turns on the reasons that we make particular types of attributions as much or more than it does on the types of attributions we make. As reviewed below, there are many factors that contribute to the ubiquity of dispositionism—including numerous subconscious motivations—and it is those factors that are the real source of inaccuracy. See *infra* Part II.A. In certain circumstances, those factors can actually encourage situationist attributions, and in such cases, the attributions are no more reliable or accurate than dispositionist attributions. See *infra* notes 41–47 and accompanying text (describing examples of such situationist attributions); Hanson & Hanson, *Blame Frame*, *supra* note 3, at 426–27, 454–55 (defining and discussing “naïve situationism”).

Finally, we are not claiming that the human animal is without agency—the ability to influence his or her own behavior toward some ends. Rather, our argument is that situational forces around us and within us are far more influential than we generally recognize and that human agency is different in kind and in significance than generally presumed. See Hanson & Yosifon, *The Situational Character*, *supra* note 3, *passim*.

institutions, and societies are most likely to produce situationist ideas—in other words, which have the greatest potential for developing the accurate attributions of human behavior that are so important to law. That is the focus of this Article, the first in a series.¹¹

This Article begins by looking at the *interior* factors that contribute to dispositionism, including perceptual limitations; motives for reasons, closure, simplicity; and self-, group-, and system-affirming motives. We note how those factors may be enhanced by sources, cues, and frames in our environment. That discussion helps to generate several predictions.

The first is that the weaker those interior elements are within an individual, the greater will be that person's chances to appreciate situational influences. In a second prediction, we loosely describe a set of *exterior* factors that allow individuals more easily to break away from the dominant dispositionist schema. We explore those factors by looking at the demographic variable of "occupation" and, as part of the third prediction, suggest that pockets of relative situationism are apt to emerge among academics, judges, journalists, and others who have occupational settings that encourage careful causal analysis. As the latter part of that prediction, we highlight several other group-identity and cultural effects that might make certain individuals and groups more likely to see the situation. Next, we consider the familiar liberal-conservative divide that is explicit in most of our policy debates and suggest that, in significant part, it reflects the less-familiar situationist-dispositionist rift. Finally, we turn from the positive to the normative and offer a set of conclusions arising from the identification of the key situational elements that provide certain individuals, institutions, and societies with a greater opportunity for developing accurate attributions. In particular, we suggest that (1) policymakers should rely primarily—if not exclusively—on sources that provide the greatest opportunity for situationist insights; (2) we should vigorously protect the existing structures that allow certain individuals, institutions, and societies to develop situationist attributions; and (3) we should consider adopting additional measures, based upon the situationism-bolstering elements investigated in this Article, that encourage the attributional approach in a broad range of areas.

A second, companion article, *Naïve Cynicism*, examines some of the interpersonal dynamics that help insulate incorrect dispositionist worldviews

¹¹ As we will explain, the first two articles develop a set of predictions to be tested in subsequent work.

from disconfirming, situationist evidence.¹² In particular, it explores how people manage to guard their schemas by minimizing conflicting ideas and discrediting the individuals, institutions (e.g., academia, the press, or the judiciary), and societies that communicate them.¹³ Thus, the second article offers an explanation of how less accurate attributions manage to survive and dominate over more accurate attributions, which has important implications for why many policy prescriptions fail to achieve results.¹⁴ In what amounts to a fourth prediction, the companion piece explains how the scope of the backlash against situationism, which we call “naïve cynicism,” is largely determined by the factors we identify in the first prediction. The fifth prediction focuses on the form of the backlash—in particular, how naïve cynicism involves an affirmation of existing dispositionist notions and an attack on the situationist attributions themselves, the individuals, institutions, and societies offering those attributions, and the individuals or groups whose behavior has been explained. In the sixth prediction, we identify the targets of the backlash against situationism and outline the specific types of theories and evidence that are apt to be used to discredit them. In the seventh prediction, we hypothesize that entities with the incentive and ability to promote dispositionism—in particular, large commercial interests—will also be active in framing issues to encourage naïve cynicism.

A third article in this series, *Legal Academic Backlash*, illustrates the influence of the backlash dynamic in the specific context of legal theory.¹⁵ Specifically, it shows how naïve cynicism, operating as we have predicted, has played a significant role in retarding the growth and influence of more accurate situationist insights from social psychology and related fields within the dominant legal theoretical frameworks of the last half-century.¹⁶ A fourth article in this series, *Backlash*, is devoted to testing the predictions developed in the first two articles more broadly.¹⁷ It begins by briefly examining the first three predictions in the context of the 1960s and early 1970s and suggests that

¹² Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499 (2008) [hereinafter Benforado & Hanson, *Naïve Cynicism*].

¹³ *Id. passim*

¹⁴ *Id.*

¹⁵ Adam Benforado & Jon Hanson, *Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights*, 57 EMORY L.J. (forthcoming 2008) [hereinafter Benforado & Hanson, *Legal Academic Backlash*].

¹⁶ *Id. passim*.

¹⁷ Adam Benforado & Jon Hanson, *Backlash: The Response of Dispositionists to Twentieth Century Situationism* (Oct. 5, 2007) (unpublished manuscript, on file with authors) [hereinafter Benforado & Hanson, *Backlash*].

the era was a distinct moment of situational sensitivity.¹⁸ That article reviews some of the broader societal shifts that produced a generally situationist backdrop, the specific interior motivations, and exterior incentives and opportunities that allowed certain individuals—most notably academics, journalists, and judges—to appreciate the power of some situational forces and promote a more situationist vision to the mass populace.¹⁹ It then turns to a subsequent moment, occurring over the last several decades. Consistent with the predictions of *Naïve Cynicism*,²⁰ the article provides evidence of a dispositionist backlash against the situationist ideas of the 1960s and early 1970s as well as the individuals and institutions that were viewed as most closely associated with those ideas.²¹ As argued in *Backlash*, many of the policy debates and reforms in this recent period have been shaped by the backlash dynamic, with the unfortunate consequence of allowing the inferior competitor to triumph in the battle over attributional presumptions.²²

I. THE DIVIDE

A. *Situational Sources of Dispositionism*

While our dispositionism is the result of many largely complementary influences,²³ this Article addresses several of the most central interior proclivities. For the sake of time and space, it will merely sketch those that have been detailed elsewhere and will detail only those that are new to the law review literature.

1. *Interior Sources of Dispositionism*

a. *Perceptual Limitations*

Individuals realize that situational factors play a significant role in shaping behavior when, and to the extent that, the situational factors are cognitively striking.²⁴ With our limited cognitive capacities, we humans focus on only a

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Benforado & Hanson, *Naïve Cynicism*, *supra* note 12, *passim*.

²¹ Benforado & Hanson, *Backlash*, *supra* note 17.

²² *Id.*; *see also* Hanson & Yosifon, *The Situational Character*, *supra* note 3, *passim*.

²⁴ *See* Yaacov Trope & Ruth Gaunt, *Processing Alternative Explanations of Behavior: Correction or Integration?*, 79 J. PERSONALITY & SOC. PSYCHOL. 344, 346–48 (2000) (providing evidence that as situational

few elements of any drama and notice the situation only when it somehow stands out.²⁵ Often, we concentrate only on the “lead actors” and miss everything else—the lighting, the scenery, the script, and the director sitting in the front row. In our eyes, the welfare recipient buying a wide-screen Magnavox at inflated prices on a rent-to-own credit plan is a foolish consumer making another bad decision—a wasteful extravagance for someone struggling to pay the light bill and save for retirement. All of the situational elements that moved her toward renting the TV—the promise from her kids that they will spend more time at home, the deceptive wording of the credit plan, the clever sales techniques of the retailer, the fact that a neighbor has one and “loves” it, the absence of other retailers willing to sell in the inner city, and the optimism that a raise will come through at the end of the year—are not particularly noticeable as we watch her signing on the dotted line. Were we the ones making the purchase, those and other situational elements might seem very relevant (and, indeed, hard to miss), but as mere observers, it is difficult to see anything but a spendthrift exercising her free choice and a retailer responding to the customer’s demands.²⁶ Without some overt, coercive element to draw

factors are made more salient, individuals become more likely to discount dispositionist explanations for behavior).

²⁵ See Hanson & Yosifon, *The Situational Character*, *supra* note 3; see also Fiske & Taylor, *supra* note 8, at 247–66 (1984) (describing how a person or characteristic can become salient and the consequences of salience); Shelley E. Taylor, Jennifer Crocker, Susan T. Fiske, Merle Sprinzen & Joachim D. Winkler, *The Generalizability of Salience Effects*, 37 J. PERSONALITY & SOC. PSYCHOL. 357, 357 (1979) (noting that “the evaluative qualities of salient stimuli are exaggerated”).

²⁶ Social psychologists refer to this phenomenon as the actor-observer bias. Usually, we are more apt to see situational forces when we are motivated to see situation—for instance, when “we” perform badly or “they” perform well. See DONALD C. PENNINGTON, SOCIAL COGNITION 37–60 (2000) (summarizing attributional biases); Edward E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior*, in ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR 79, 79–94 (Edward E. Jones et al. eds., 1972) (same). Generally, individuals are most likely to see things in situational terms with respect to their own experiences and the experiences of their fellow in-group members, since it is here that they have the most information, time, and incentive. Indeed, at some level, we are often aware of the power of situation in our day-to-day lives: we apply cosmetics to look our best (attempting to do so in a way that will not be consciously detected); we sometimes recognize that we purchase more “junk” at the grocery store when we go shopping while hungry; we occasionally notice our priorities and perceptions shifting when sexually aroused; we hear ourselves yelling at our kids more late in the day; and we wait for the “right moment” to ask our employers for a raise. But none of those small situationist realizations alters our basic dispositionist schemas because we continue to have strong, general, cognitive and motivational reasons to dispositionalize. Moreover, those situational attributions tend to be quite narrow and incomplete; our situationism, in other words, tends to be *naïve situationism*. See Hanson & Hanson, *Blame Frame*, *supra* note 3, at 426–27, 454–55 (defining and discussing naïve situationism).

our attention—say, a gun to the woman’s head—disposition comes to the fore and situational influence fades into the background.²⁷

Although it need not be so, our minds seem to have little space for any notion of partial or incomplete autonomy. When we see the welfare mother exiting the rent-to-own appliance store, our attributional options are limited to “choice” or “coercion” with no place in between for imperfect agency. Such is the bipolarity of our categories and schemas—a manifestation of our mind’s desire to avoid the cognitively costly task of distinguishing among the grays.²⁸

*b. Motives for Reasons, Closure, and Simplicity*²⁹

People like their world to make sense. All of us have a strong desire to understand how and why things happen—call us “curious.”³⁰ And it is not just that we desire reasons; it is that we seek *particular* kinds of reasons—ones that bring closure and minimize any threat to ourselves, our groups, and our systems.³¹

Those motivations are so strong that we are often willing to make rather surprising concessions to reach a definitive answer or conclusion. Indeed, social psychologists have demonstrated that, in many circumstances, the urge to reach a solution and to resolve uncertainty results in individuals avoiding, misconstruing, or discrediting information that would undermine their initial hypotheses.³² Simple explanations prove to be most appealing, and we are motivated to defend straightforward theories against more complex ones.³³

²⁷ What is more, our conceptions of, and feelings toward, “welfare mothers,” generally, are confirmed or informed by this example of a foolish extravagance. Cf. ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* 68–75 (2004) (describing the public image of welfare mothers). The fact that this mother is wasting money on something she does not need is proof of what we already knew: that welfare mothers have bad dispositions.

²⁸ See Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1139–1217 (describing the cognitive sources and distorting effects of categorization).

²⁹ These motives are elaborated in a later section on the motives underlying conservatism. See *infra* Part II.C.

³⁰ See Hanson & Yosifon, *Situational Character*, *supra* note 3, at 91–94 (summarizing evidence of our curiosity).

³¹ See Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1182–1211; Hanson & Yosifon, *Situational Character*, *supra* note 3, at 71–74, 91–94, 106–14.

³² See Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1189–1211.

³³ See Hanson & Yosifon, *Situational Character*, *supra* note 3, at 106–07; see also *id.* at 71–83, 138–70 (illustrating the role of that motive in the history of economics and law and economics).

Dispositionism, by offering simple and automatic answers to complex problems, often satisfies our urge for expedient resolution.³⁴

c. Motive for Self-Affirmation

Another reason that we are inclined toward dispositionist attributions lies in our desire to see ourselves in self-affirming ways. We like to believe that we are independent, intelligent consumers of life's many options—the attitude-driven, reasoning, choice-makers of commercials and Westerns. Rather than victims of situation, we see ourselves as in control of our destinies—not just humans, but “Marlboro Men” or “Virginia Slims.”³⁵

Our desire to maintain that satisfying conception causes us to react strongly whenever we sense that our freedom is being unfairly limited. Indeed, we often react to perceived constraints on our choices (DO NOT READ THE REST OF THIS SENTENCE!) by taking (or suddenly wanting to take) the prohibited option. Psychologists call this desire to maintain (the perception of) control *reactance*—a tendency that marketers have been exploiting for as long as there have been marketers.³⁶ Attempts to restrict an individual's emotions, attitudes, or behavior often produce a similar “boomerang effect”—that is, an increase in the restricted feelings or behavior.³⁷ Although we often enjoy no

³⁴ Simple (that is, dispositionist) schemas can also be fairly reliable as positive or predictive theories of human behavior to the extent that relevant interior and exterior situations are stable. When two people encounter each other routinely, their schemas and roles, as well as their environments, will often cause them to behave consistently in their interactions across time. Thus, although the causal story is largely incorrect, each party can attribute the other's behavior to “personality” without losing the ability to anticipate the other person's conduct in their next encounter. For a more complete discussion of how situations can serve to confirm dispositionist attributions, see Hanson & Yosifon, *The Situation*, *supra* note 3, at 174–76.

³⁵ See Hanson & Yosifon, *The Situation*, *supra* note 3, at 242–50; Hanson & Yosifon, *The Situational Character*, *supra* note 3, at 8–20. In other work, we explore how corporate interests—including cigarette companies and fast food manufactures—have appealed to our self-affirming motivations with advertising and public relations campaigns. See Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 3, at 1689–1768.

³⁶ For a more detailed discussion of Reactance Theory, see Daniel Epps, Jon Hanson & Daniel Tehrani, *Freedom/Coercion, Public/Private, and Other Categorical Illusions: A Critical Realist Revival of Legal Realist Insights* (Mar. 6, 2006) (unpublished manuscript, on file with authors). For the foundational work on reactance theory, see JACK W. BREHM, *A THEORY OF PSYCHOLOGICAL REACTANCE* (1966). For a discussion of how the reactance theory is exploited by marketers, see ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION*, at ch. 7 (2007).

³⁷ See Ziva Kunda & Shalom H. Schwartz, *Undermining Intrinsic Moral Motivation: External Reward and Self-Preservation*, 45 J. PERSONALITY & SOC. PSYCHOL. 763, 770 (1983) (discussing the boomerang effect with respect to helping behavior).

more than an illusion of control over our situations,³⁸ we are strongly motivated to see ourselves in the driver's seat. Dispositionism, with its focus on individual choice, puts the wheel in our hand and the brake and accelerator beneath our feet.

Our craving for control is evident not only in our response to apparent restraints but also with respect to how we deal with news of negative outcomes. When something bad happens, we want someone to blame. The worse the outcome, the greater is our desire to find an evildoer behind the act—particularly, an evildoer who does not implicate us.³⁹ Again, the motive is generated by our need to feel safe and in control. When it is situation and not disposition that caused a problem, all of us who share that situation feel threatened. We defensively seek protection through our attributions. If, for instance, we can find a way to blame the victim of a bad event by focusing on his or her bad disposition or flawed choice, we can assure ourselves that the world is just and maintain our firm grip on the reins of destiny.⁴⁰ We can continue to be the strong individualists who, unfazed by the winds of situation, avoid negative results by making good choices and relying on our stalwart dispositions. We can blaze our own trails, march to our own drummers, pull our own strings, create our own luck, and, in the autumn of our lives, can look back without regrets knowing we did it “our way.”

d. Motive for Group-Affirmation

The strong dispositionism many of us experience also derives from the way we perceive groups.⁴¹ As soon as a group is created, we begin to lose our ability to perceive variability among members, particularly when they are

³⁸ In general, people believe themselves to exercise far more control over their environments than they actually do. For more extensive summaries of that research, see Hanson & Yosifon, *The Situational Character*, *supra* note 3, at 96 (discussing illusion of control).

³⁹ See Hanson & Hanson, *Blame Frame*, *supra* note 3, *passim*; see also SUSAN T. FISKE, SOCIAL BEINGS: A CORE MOTIVES APPROACH TO SOCIAL PSYCHOLOGY 117 (2004) (describing defensive attributions); Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 3, at 1664–68; Hanson & Yosifon, *The Situational Character*, *supra* note 3, at 101–05 (summarizing related evidence regarding just world hypothesis and system-legitimation).

⁴⁰ See Hanson & Hanson, *Blame Frame*, *supra* note 3, *passim*.

⁴¹ See FISKE & TAYLOR, *supra* note 8, at 122 (observing that the simple act of “categorizing people into groups minimizes within-group variability and maximizes between-group differences”). The need for, process of, and effects of categorization are discussed in detail in other work in the critical realist project. See Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1139–73.

members of an out-group.⁴² In such circumstances, we may largely forgo making individualized attributions and, instead, may rely on ready schemas—often dispositionalizing stereotypes—to explain outcomes. This process, in part, reflects a strong motivation to see our in-groups in affirming ways. The process may either be one of selectively privileging in-group members or de-privileging out-group members through our attributions. For example, we will tend to explain the success of an in-group member as resulting from a good disposition common to the group, while we will tend to explain the failure of an out-group member as resulting from the bad traits common to that group.⁴³ This “ultimate attribution error,” as it is sometimes called, is influential in the maintenance of stereotypes.⁴⁴ When, other things being equal, a woman wins the office NCAA tournament pool, for example, men will be more likely to write off her success as “lucky,” whereas a man’s success is more likely to evince his sports acumen.⁴⁵ Although it is the same action and the same result, we perceive it in very different ways depending on our group associations for the actor.⁴⁶ Subconsciously, we pick and choose our attributional styles. Often, dispositionism turns out to be strongly affirming.⁴⁷

⁴² See Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1160–63; FISKE & TAYLOR, *supra* note 8 at 123; see also Hanson & Yosifon, *Situational Character*, *supra* note 3, at 100–01 (summarizing evidence on “groupisim”).

⁴³ Conversely, when considering negative outcomes for in-group members or positive results for out-group members, our group-based motivations will sometimes overwhelm our dispositionist presumptions, and we will look to situation (though usually only narrowly) for our causal stories. Thus, when it comes to groups, we can be selective situationists. As we explain below, however, even that tendency to look for factors extrinsic to our basic person schemas is often overcome in the face of “system threat.” See *infra* text accompanying notes 48–51.

⁴⁴ See FISKE, *supra* note 39, at 410.

⁴⁵ *Id.* (finding that “women’s success at traditionally male tasks is often explained away as due to luck . . . , whereas men’s comparable success is often attributed to their intrinsic dispositions, such as ability or ambition”) (citations omitted).

⁴⁶ By way of another example, when we lose all of our money gambling, we have two options: acknowledge that we have made a bad decision or acknowledge that our hand was, quite literally, controlled by forces beyond our control. We usually settle on the latter. When a stranger across the way drops \$5,000 on roulette, however, we tend to see a man choosing to throw his savings away. That we could be so inconsistent in our attributions may seem surprising, but it is predicted by social psychology. As humans, we entertain multiple schemas that often overlap and often contradict one another. See Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1195–1211. Not only do we manage to evade the tensions and contradictions within and between our own schemas, but we also rarely acknowledge or understand that we have a conception of the human actor at all.

⁴⁷ For a discussion of the role of the ultimate attribution error in justifying oppression in America, see Hanson & Hanson, *Blame Frame*, *supra* note 3, *passim*.

e. Motive for System-Affirmation

Just as we are motivated to see our in-groups and ourselves in positive ways—and in ways that allow us to feel in control—we are also inclined to believe that the systems of which we are a part are just and legitimate. We maintain that illusion by attributing bad outcomes to bad people, not to a bad world. And we tend to see evidence of apparent unfairness or inequality as the result of disposition or merit.⁴⁸ Tom Tyler recently summarized the evidence this way:

American legitimating myths justify these differences [in economic or social status across social groups] through reference to stereotypes about the characteristics of the members of groups. For example, minority group members are argued to deserve subordinate economic status because they are “lax” or “not intelligent,” and holding higher status is associated with possessing more favorable traits, such as competence.⁴⁹

People are particularly eager to defend their systems when they perceive their legitimacy or stability as threatened. In those circumstances, people will internalize unfavorable stereotypes, rationalize the positions of disadvantaged groups, and oppose extensions of equality,⁵⁰ even when it comes at the expense of themselves or members of their own in-groups.⁵¹

⁴⁸ For a review of the relevant evidence on system affirmation, see Benforado, Hanson, & Yosifon, *Broken Scales*, *supra* note 3, at 1664–68; Blasi & Jost, *supra* note 3, *passim*; and Hanson & Yosifon, *Situational Character*, *supra* note 3, at 101–06.

⁴⁹ Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 575 ANN. REV. PSYCHOL. 375, 385 (2006) (citing Susan T. Fiske, Amy J. Cuddy, Peter Glick, & Jun Xu, *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCHOL. 878 (2002); see also *infra* text accompanying notes 237–41 (summarizing evidence on how individuals legitimate the system by justifying inter-group disparities).

⁵⁰ Indeed, we often maintain complimentary stereotypes that make sense of anticipated social and political outcomes: for example, “poor but happy (or honest)” and “rich but miserable (or dishonest).” See John T. Jost & Aaron C. Kay, *Exposure to Benevolent Sexism and Complementary Gender Stereotypes: Consequences for Specific and Diffuse Forms of System Justification*, 88 J. PERSONALITY & SOC. PSYCHOL. 498 *passim* (2005); John T. Jost, Yifat Kivetz, Monica Rubini, Grazia Guermandi & Cristina Mosso, *System-Justifying Functions of Complementary Regional and Ethnic Stereotypes: Cross-National Evidence*, 18 SOC. JUST. RES. 305, *passim* (2005); 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, *passim* (2003); see also Peter Glick & Susan T. Fiske, *Ambivalent Stereotypes as Legitimizing Ideologies*, in *THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS* 278–306 (John T. Jost & Brenda Major eds., 2001) (describing the legitimating role of “ambivalent stereotypes,” which contain both positive and negative components when describing out-groups).

⁵¹ There is a tendency among members of powerless groups to subjectively enhance the legitimacy of their powerlessness, and in some cases, those individuals show even greater support for the system than do

f. Prediction I

Putting together the various factors identified in the previous pages as interior sources of dispositionism, we arrive at our first prediction.

Within any situation, those individuals

- (1) whose interiors allow or encourage them to look beyond salient disposition to appreciate harder-to-see situational factors;
- (2) who experience a weaker desire for simple explanations and closure; and
- (3) who have less need for dispositionist self-, group-, or system-affirmation

will be more likely than otherwise to resist dispositionism, although they will still face powerful exterior factors that may temper the development of situationist perspectives and insights (see Predictions II and III below).⁵²

2. Exterior Sources of Dispositionism

The interior sources of dispositionism are often powerfully linked to exterior sources, cues, and frames. As noted above, the strength of our dispositionism changes based on whether we are making a causal attribution for our own behavior or for others' behavior and based on whether the outcome is good or bad.⁵³ We may also make different attributions based on whether we are caught in the moment or trying to make sense of a past event.⁵⁴ Moreover, in some cases, elements in our environment that appear quite separate from the attribution at hand may influence the extent of our dispositionism. For example, since the strength of our dispositionism seems to depend significantly on whether we are facing an outside threat, a series of terrorist attacks may make us more likely to explain a homeless person's condition as the result of a poor disposition, as opposed to systemic problems.⁵⁵

members of powerful groups. John T. Jost & Mahzarin R. Banaji, *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 *POL. PSYCHOL.* 881, 890 (2004).

⁵² See discussion *infra* Part II.B.

⁵³ See *supra* text accompanying notes 43–47.

⁵⁴ See generally Hanson & Hanson, *Blame Frame*, *supra* note 3, *passim* (explaining, with numerous examples, the tendency to see errors or injustices of the past that are missed in the present).

⁵⁵ See *supra* text accompanying notes 50–51.

Because exterior situations matter, it should be no surprise that dispositionism varies across groups and cultures and within any one group or culture across time.⁵⁶ Furthermore, even within a particular group or culture at a given time, individual members may be more or less dispositionist, depending on the particular exterior situations they face.⁵⁷

That said, it is not just undirected “natural” forces that stack the cards in favor of dispositionism. It turns out that the five interior proclivities outlined above can be controlled—highlighted or heightened with the introduction of certain exterior situational constraints—by any individual or entity with the necessary motives and resources to do so. Indeed, issues can be framed by *attributional entrepreneurs* in order to activate certain familiar schemas or make us feel that we are under threat.⁵⁸ A friend, parent, teacher, salesperson, corporation, church, or government, among others, can move us powerfully in the direction of further engrained dispositionism. To be sure, they can also frame things in ways that encourage situationism. As argued elsewhere, however, dispositionism proves to be incredibly valuable to some of the most powerful and wealthy interests on the planet, and they have both the incentive and the ability to reinforce the psychic gravity already in force.⁵⁹ Indeed, they generally work collaboratively (though not consciously so) by promoting mutually reinforcing dispositionist outlooks.⁶⁰ As we investigate in more detail in *Backlash*, the dominant conceptions of capitalism, religious fundamentalism, and nationalism (among other pertinent “isms”) all involve dispositionist frames based around individual “choice,” a strong faith in the righteousness of “our” institutions and systems, and potent in-group-out-group

⁵⁶ For a review of some inter-cultural differences between the “East” and the “West,” see Hanson & Yosifon, *The Situation*, *supra* note 3, at 250–59 (summarizing evidence of cross-cultural variations in attributional tendencies, with special focus on RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* (2003)).

⁵⁷ See *infra* Part II.C (summarizing evidence of situational sources of ideology).

⁵⁸ In other work, we have referred to the efforts and investment of individuals and groups to influence attributional schemas as *deep capture*. See Hanson & Yosifon, *The Situation*, *supra* note 3, at 202–84 (introducing the basic deep capture hypothesis and providing some confirming evidence); Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 3, at 1727–1805 (providing some evidence of the deep capture hypothesis with regard to attributions regarding obesity).

⁵⁹ See Jon Hanson et al., *Deep Capture: History of an Idea in the 20th Century* (2006) (unpublished manuscript, on file with authors) [hereinafter Hanson et al., *Deep Capture*]; Jon Hanson & Adam Wright, *In the Driver’s Seat: Why Promoting Dispositionism Is Good Business* (2005) (unpublished manuscript, on file with authors) [hereinafter Hanson & Wright, *Driver’s Seat*]; Hanson & Yosifon, *The Situation*, *supra* note 3, at 219–30.

⁶⁰ In other work, we (and our coauthors) explore in more detail the dynamics of promoting dispositionism by corporations. See sources cited *supra* note 58.

associations.⁶¹ According to the common perspective, out-group members promote false gods and false utopias and, by making bad choices (and encouraging us to make bad choices), pose a substantial threat to us as individuals, to our groups, and to our system.⁶²

B. *Breaking Away from Dispositionism*

As the previous section suggested, there are powerful interior motivations and exterior forces pushing us toward dispositionism. For a variety of reasons, the human animal usually relies heavily on automatic schemas and only rarely exerts the cognitive energy necessary to approach a problem from the “bottom up.” Dispositionism—and its attendant concepts of “thinking,” “preferring,” “willing,” and “choosing”—is just such an automatic schema.⁶³ Absent motivations to make situational attributions, doing cognitive work outside the dispositionist box remains quite exceptional. Still, as we have hinted, stepping beyond the cardboard walls does occasionally occur; our attributional outlook is not unchangeable, and the relative strength or weakness of certain situational variables is likely to cause individuals to be more or less dispositionist.

This section examines some of the exterior sources of *situationism*—the possible situational differences across our environments that may explain certain variation along the dispositionism spectrum. This discussion leads to predictions concerning which individuals, groups, cultures, and time periods will be relatively situationist and which individuals or institutions are likely to influence such trends in attributional proclivities. Again, this information is vitally important, because it tells us where (and to whom) to look to find the most accurate attributions—attributions that are at the core of not only much legal policy but also policy in general.

The discussion is broken into three parts. First, we lay out the social-psychological research on the general conditions in which individuals are more or less inclined to override their automatic dispositionism and notice the powerful role of situation.⁶⁴ There are at least two areas of social psychology that are especially relevant in this regard: one examines the circumstances in which people are less inclined to rely on automatic schemas, and the other

⁶¹ Benforado & Hanson, *Backlash*, *supra* note 17.

⁶² See Hanson & Hanson, *Blame Frame*, *supra* note 3, *passim*.

⁶³ See Hanson & Yosifon, *Situational Character*, *supra* note 3, *passim*.

⁶⁴ This section draws upon a more complete summary of the same literature (reviewed for a different purpose) in Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1228–39.

focuses on particular active approaches that help individuals see beyond triggered schemas. Although we treat them separately, the two are quite related and the lessons we draw from them are complementary.

Second, we consider how these schema-breaking factors play out with respect to one of the most important demographic variables: occupation. In applying these factors, we contrast the occupational settings of the general public to those of academics, judges, and journalists.

Third, because space constraints prevent us from offering similar individualized analysis of other demographic characteristics—such as age and wealth—we offer a more general discussion of the importance of group-identity and cultural effects on encouraging situationism.

1. Relevant Social-Psychological Research

a. Conditions of Decreased Schema Reliance

There are numerous significant hurdles that people must overcome to move beyond dispositionist presumptions and appreciate the importance of situational elements, and no particular exterior situation offers an easy boost to clearing all of them. Even when the exterior situation gives an individual a leg up on situational sensitivity, a substantial jump is still necessary.

For instance, for situationism to have a chance at gaining on dispositionism, an individual's situation needs to lead that person to avoid widely held and often automatic attributions regarding human behavior and to do actual attributional work.⁶⁵ In a dispositionist culture, in which dispositionist accounts are the norm and the expectation, those circumstances will be rare. The problem is that even if making (fresh) attributions is a fundamental part of, say, someone's job description, that does not imply that those holding that job are particularly likely to appreciate the role of situation. In most cases, as we explain below, the job will only reinforce the more widespread dispositionism that typifies our culture.

Similarly, for an exterior situation to weaken dispositionist presumptions, the situation must put an individual in a position to encounter evidence that clearly challenges those presumptions—an outcome that many individuals may

⁶⁵ See Gilbert, Pelham & Krull, *supra* note 8, at 733.

subconsciously resist.⁶⁶ One of the great strengths of dispositionism is that virtually any behavior can be construed as confirmatory. Why did Mr. Jones buy an Extra Value Meal when, before entering the McDonald's, he was planning to just get a small order of fries? Because that is what he preferred when the choices were actually in front of him. If the theory is that dispositions—our thoughts, preferences, and choices—lead to behavior, then without ready alternative schemas, virtually all behavior can be, and will be, attributed to disposition.⁶⁷ If, as is usually the case, people behave as we expect them to,⁶⁸ or if the cause of their behavior is ambiguous, our dispositionist model is confirmed, even though that behavior is often at least as consistent with situationist alternatives.⁶⁹

Although some exterior situations may encourage people to ask the right types of attributional questions and encounter evidence that is not easily construed in dispositionist terms, even that is rarely sufficient to encourage robust situationism. When answering those questions and encountering that evidence, it is also necessary that the individual “not already be too cognitively busy or occupied when confronted with new information or evidence.”⁷⁰ Dispositionist tendencies are particularly pronounced—or, more accurately, situational considerations are particularly unlikely to influence perceptions—when observers are distracted or “cognitively taxed” when they make

⁶⁶ Cf. William B. Swann, Jr., *Self-Verification: Bringing Social Reality into Harmony with the Self*, in 2 SOCIAL PSYCHOLOGICAL PERSPECTIVES ON THE SELF 33–66 (J. Suls & A.G. Greenwald eds., 1983) (describing how individuals develop and maintain various “opportunity structures” that confirm their existing conceptions).

⁶⁷ The same is sometimes said to be true of the basic rational actor model. See, e.g., Christopher Roederer, *Negotiating the Jurisprudential Terrain: A Model Theoretic Approach to Legal Theory*, 27 SEATTLE U. L. REV. 385, 429–30 (2003) (“In its overly ambitious mode, the [law and economics] approach can become tautological, or merely conceptual in the definitional sense. What can happen is that all behavior is simply defined as being rationally self-interested, wealth-maximizing behavior. If this is the case, then the theory has no truth-value. It cannot be tested, nor can it give us new knowledge.”); 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.”).

⁶⁸ As noted above, people often act as we expect them to, not because they have stable dispositions, but because we tend to encounter people in the same situations. See *supra* note 34.

⁶⁹ There is evidence that we construe ambiguous evidence not just in a way that comports with our preferred theories, but also in a way that strengthens our confidence in those theories. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 647–54 (1999) [hereinafter Hanson & Kysar, *Taking Behavioralism Seriously*] (summarizing research on “confirmatory” and “perseverance” biases).

⁷⁰ Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1229 (describing some of the necessary, though not sufficient, conditions for altering our own schemas).

attributional assessments.⁷¹ That is true because it takes cognitive energy and effort to deviate from the dispositionist default and consider situational influences.⁷² As Fiske and Taylor explain, “encoding inconsistent information requires creating a compatible niche for it, whereas for consistent information the schema provides a ready-made niche.”⁷³ When we are occupied, tired, intoxicated, or otherwise cognitively taxed, we are particularly unlikely to expend the extra effort. In one study demonstrating this dynamic, subjects were significantly more inclined to resist stereotypical inferences—based purely on gender schemas, race schemas, age schemas, and the like—when they were given cognitively undemanding tasks to complete than when they were given complex tasks.⁷⁴

Unfortunately, even when an exterior situation provides individuals with an opportunity to focus in a sustained way on evidence that conflicts with dominant schemas, that evidence is often quite easy to accommodate without challenging the basic dispositionist presumption. For instance, the gentle and kind person can come to be seen as having a temporary or partial alternative disposition that only emerges in exceptional circumstances (e.g., “he is in a bad mood” or “she has a bad temper”).⁷⁵ Furthermore, even when it is necessary to draw from the situationist well, that can be done in a way that minimizes any challenge to the dispositionist presumption (e.g., “he happens to be under a lot of pressure” or “she just isn’t herself today”).⁷⁶ Accordingly, those individuals who manage to gain a quite sophisticated sense of the role of situation in one particular context rarely appreciate the role of situation in all circumstances.

⁷¹ See Gilbert, Pelham & Krull, *supra* note 8, at 733; Daniel T. Gilbert, *Thinking Lightly About Others: Automatic Components of the Social Inference Process*, in UNINTENDED THOUGHT 189, 196–97 (James S. Uleman & John A. Bargh eds., 1989); see also Hanson & Yosifon, *The Situation*, *supra* note 3, at 165–66 (reviewing the relevant research).

⁷² Again, there are times—particularly when an individual is motivated to see the situation—that a situationist attributional schema enjoys the advantage of automaticity.

⁷³ FISKE & TAYLOR, *supra* note 25, at 129.

⁷⁴ See Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. PERSONALITY & SOC. PSYCHOL. 871, 877–79 (1987).

⁷⁵ Those examples assume, as we believe is true, that “emotions,” “moods,” and “affective states” of various sorts are noticed when there is strong motive to see them or when they are particularly salient. Generally, though, disposition is presumed to act independently of “emotions,” “moods,” and “affective states,” which are seen as exceptional. See Hanson & Yosifon, *Situational Character*, *supra* note 3, at 115–20.

⁷⁶ This is a form of “subtyping.” See Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1204–06.

b. General Debiasing Literature

Social psychologists have devoted some attention to the question of how individuals might reduce the biasing effect of certain cognitive tendencies and schemas. Their findings and theories are not particularly surprising, but they may be helpful in our search for sources of situationism.

Psychologist Scott Plous argues that one way to avoid the influence of the confirmatory biases—the tendency to see all evidence as confirming our active schemas—is to approach and ask questions in a way that encourages disconfirming evidence.⁷⁷ Hence, by searching for evidence that challenges the dispositionist presumption, individuals should be more apt to make situationist attributions.⁷⁸

In addition, Thomas Gilovich has outlined “compensatory mental habits” that have the potential to counteract the simple, but biasing, cognitive processes that tend to be automatically triggered.⁷⁹ According to Gilovich, it helps to be mindful of our own tendencies and to make the effort of “step[ping] back” and developing “the habit of thinking more broadly.”⁸⁰ In light of the fundamental attribution error, that self-awareness would suggest, for instance, that individuals should go the extra cognitive mile to look for the role of situational influences and to counteract the strong, automatic dispositionist default. More broadly, Gilovich encourages a “greater familiarity with the

⁷⁷ See SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 239 (1993).

⁷⁸ See FISKE & TAYLOR, *supra* note 25, at 151 (“Perseverance can be undercut . . . by asking people to consider the opposite possible perspective or outcome”); PLOUS, *supra* note 77, at 256 (“Many of the most effective debiasing techniques involve the consideration of alternative perspectives.”). As Plous explains in more detail,

Overconfidence is usually reduced by considering why answers might be wrong. Hindsight biases can be reduced or eliminated by considering reasons why a different outcome might have occurred. Framing effects are minimized when the same problem is framed in multiple ways. Groupthink can be avoided by having one member of the group play the role of devil’s advocate. Actor-observer differences in attribution can be reversed by having actors and observers swap visual orientations. In all of these cases, “considering the opposite” leads to greater accuracy in judgment.

Id. at 239. For an example of a company president who actively tries to gather discomfoting evidence before making decisions, see *id.* at 239–40 (citing J. EDWARD RUSSO & PAUL J.H. SCHOEMAKER, *DECISION TRAPS: TEN BARRIERS TO BRILLIANT DECISION MAKING AND HOW TO OVERCOME THEM* 103–04 (1989)).

⁷⁹ See THOMAS GILOVICH, *HOW WE KNOW WHAT ISN’T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE* 186 (1991).

⁸⁰ *Id.* at 189.

scientific enterprise” so as to contribute to “a healthy skepticism toward claims about how things are or should be.”⁸¹

Ellen Langer makes similar recommendations in her writings on “mindful thinking” (that is, thinking outside the boxes of automatic knowledge structures)⁸² and “mindlessness” (that is, the more typical tendency to rely rigidly upon them).⁸³ Langer suggests that the critical components of mindful thinking are, in particular, the “creation of new categories,” “openness to new information,” and “awareness of more than one perspective.”⁸⁴ Thinking mindfully, for our purposes, means resisting the satisfying and simple answers and predictions that come with dispositionism and engaging in the more unsettling process of doubting our categories and scripts and looking for the harder-to-see effects of context and situation.

Thus, actively ensuring a consideration of “the other side,” “stepping back,” gaining “awareness of more than one perspective,” and “engaging in non-superficial contacts” are some of the better ways to reduce the biases that result from our automatic cognitive processes.⁸⁵ Yet, these approaches may have only marginal effects inasmuch as it is easy for us to believe that we have considered the “other side” and been open to new information and perspectives, even when we have not.⁸⁶ Indeed, we often fail to appreciate the power and biasing effects of knowledge structures in our own thinking and generally exhibit great faith in our objectivity—a faith that is buoyed by our own conscious efforts to avoid undue partiality (and our cluelessness about what occurs beneath consciousness).⁸⁷ Furthermore, we generally lack any

⁸¹ *Id.*

⁸² See ELLEN J. LANGER, *MINDFULNESS* 61–79 (1989).

⁸³ *Id.* at 11.

⁸⁴ *Id.* at 61–79. Social psychologists studying how to decrease the biasing effects of racial (and other group-based) schemas and implicit associations have offered likeminded approaches. As Jerry Kang and Mahzarin Banaji summarize, “distill[ing] the conditions that contribute to a debiasing environment”: “People must be: (1) exposed to disconfirming data; (2) interact with others of equal status; (3) cooperate; (4) engage in non-superficial contact; and (5) receive clear norms in favor of equality.” Kang & Banaji, *supra* note 3, at 1101; see also *id.* at 1102–08 (summarizing some of the relevant evidence on the debiasing consequences of certain types of social contacts).

⁸⁵ See *id.* at 240 (citing Asher Koriat, Sarah Lichtenstein & Barich Fischhoff, *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCHOL.: HUMAN LEARNING & MEMORY 107 (1980)); Charles G. Lord, Mark R. Lepper & Elizabeth Preston, *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231 (1984).

⁸⁶ See Benforado & Hanson, *Naïve Cynicism*, *supra* note 12, at 519–33 (summarizing relevant studies by Emily Pronin and others).

⁸⁷ See *id.*

strong motive to discover the subconscious or subtle sources of bias beyond, perhaps, assuring ourselves that we are fair, balanced, and accurate.⁸⁸

Still, there are certain processes, expectations, and motivations that may enhance our motivation to control for our own biases. When, for instance, we believe that we are being monitored or when we sense that we may be asked to explain our positions, we tend to do a better job of seeing the other side. Social psychologists sometimes call this the *accountability motive*—“the implicit or explicit expectation that one may be called on to justify one’s beliefs, feelings, and actions to others.”⁸⁹ Individuals tend to adjust their views to those of their audience,⁹⁰ and when the views of the audience are not known, individuals often engage in *preemptive self-criticism*, thinking in “more self-critical, integratively complex ways in which they consider multiple perspectives on the issue and try to anticipate the objections” that others might raise.⁹¹ Concerns about accountability—the fear of invalidity and motive for coherence—lead people “to muster the additional cognitive resources required for data-driven processes, utilizing those processes rather than the schematic processes that are more prone to error.”⁹²

⁸⁸ See Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1182–1206; see also Kang & Banaji, *supra* note 3, at 1090–91 (“As a threshold matter, in order to correct bias, decision makers . . . must be made aware of their own implicit biases. Since so many of us are convinced that we are race- or gender-blind, we tend to dismiss evidence of pervasive implicit bias as somehow inapplicable to ourselves.”).

⁸⁹ See Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 255 (1999) (reviewing research on accountability); see also Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1185–86 (describing the accountability motive, among many others, and its effects on knowledge structures); Jon D. Hanson & Douglas A. Kysar, *The Joint Failure of Economic Theory and Legal Regulation*, in SMOKING: RISK, PERCEPTION, AND POLICY 229, 237–39 (Paul Slovic ed., 2001) (discussing the accountability motive and the ways in which cigarette manufacturers manipulated that motive through their marketing).

⁹⁰ See Lerner & Tetlock, *supra* note 89, at 256.

⁹¹ *Id.* at 257; see also Philip E. Tetlock, Linda Skitka & Richard Boettger, *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERSONALITY & SOC. PSYCHOL. 632 *passim* (1989) (explaining how subjects who feel accountable to others are more likely to research, present evidence, and make decisions to please their audience, while subjects who do not feel accountable tend to engage in more self-justification and less self-criticism).

⁹² Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1185 (citing JACQUES-PHILIPPE LEYENS, VINCENT YZERBYT & GEORGES SCHADRON, STEREOTYPES AND SOCIAL COGNITION 134–37 (1994)); see also LEYENS, YZERBYT & SCHADRON, *supra*, at 136 (describing how accountability leads subjects to “actively try to anticipate the objections or counter-arguments that might be raised against their positions,” and explaining that to do so effectively, subjects must “pay close attention to the available evidence, . . . avoid judgments based on insufficient information, and . . . try to integrate inconsistent data”).

Thus, in experiments where subjects are told that they will be interviewed about their inference processes after they have made a judgment, they are more likely to invest cognitive energy toward being accurate and toward forming more complex impressions. See *id.* at 136–37; Philip E. Tetlock & Jae Il Kim, *Accountability and Judgment Processes in a Personality Prediction Task*, 52 J. PERSONALITY & SOC.

But there may be a kind of internal backlash associated with such cognitive expenditures. Recent research indicates that, even when an individual manages to take situational considerations into account, the very act of suppressing the more automatic dispositionist inferences leads to a “rebound effect,” which can lead to greater dispositionism in subsequent attributions.⁹³ Put differently, the investment of cognitive resources required for situationist attributions can come at a cost in terms of our ability to make similar investments next time. In that way and others, dispositionism is advantaged by what amounts to a sort of cognitive gravity—pulling all attributions toward it while limiting efforts to resist.

For techniques of evading schematic processes, like dispositionism, to be successful outside of a controlled laboratory setting, there must be a personal and institutional commitment to employing them. Institutions that value and encourage numerous perspectives—particularly those that challenge common-sense intuitions and simplifying, affirming knowledge structures—are more likely to promote situationist attributions. Similarly, neutral arbiters and processes that encourage dissent and full presentation of alternative viewpoints may be necessary (though, again, not sufficient) for significantly overcoming the dispositionist presumption. Of course, such institutions and processes are also at risk and must temper their pursuit of accuracy, precisely because they do challenge popular conceptions.

c. *Prediction II*

As the overview in the last few pages has suggested, although the particular confluence of conditions that must align to push toward a significantly situationist perspective are likely to be rare,⁹⁴ certain situational factors provide individuals with a chance to move beyond dispositionism. Exterior situations that

PSYCHOL. 700, 700 (1987). In a study by other social psychologists, subject-interviewers informed that interviewees would be sensitive to questions that were asked (viewing particular questions as discriminatory) were more likely to uncover evidence that disconfirmed pertinent stereotypes. See Mark Snyder, Bruce H. Campbell & Elizabeth Preston, *Testing Hypotheses About Human Nature: Assessing the Accuracy of Social Stereotypes*, 1 SOC. COGNITION 256 (1982).

⁹³ See Nicolas Geeraert, Vincent Y. Yzerbyt, Olivier Corneille & Daniel Wigboldus, *The Return of Dispositionalism: On the Linguistic Consequences of Dispositional Suppression*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 264 *passim* (2004).

⁹⁴ Cf. Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1238 (“The optimal conditions, both internal and external, that help to reduce the influence of schemas, are rarely present.”).

- (1) require or encourage individuals to make or encounter many causal attributions regarding human behavior;
- (2) present individuals with evidence that is not easily accommodated by the dispositionist model, and allow or, better still, promote unconventional interpretations of that evidence;
- (3) provide adequate time and opportunity to consider the role of situation;
- (4) do so across a wide range of situations in a sustained way; and
- (5) encourage accuracy or, better yet, hold individuals accountable for accuracy

will, other things being equal, encourage situational sensitivity and situationist attributions.

2. *Relative Situationists and Relative Dispositionists*

At any given time, the strength of dispositionism should vary significantly across the population based on the specifics of individual situations. Although each person's situation is unique, certain demographic characteristics—among them occupation, “identity,” wealth and income, age, education, and community environment—appear to influence situational sensitivity by allowing or encouraging individuals to break the automatic dispositionist schema. The main focus of this Article is on occupation—in particular, on the differences between the occupational situations of those in the general population and those of journalists, judges, and academics. The analysis is structured around the five schema-breaking factors outlined above. In addition, we also consider the extent to which certain job settings provide individuals with the motivation and ability to *encourage* situationism in *others*.⁹⁵

⁹⁵ Were space constraints not a consideration, we would be inclined to provide a full analysis for all of the characteristics; such a project would, we suspect, provide a number of additional insights.

a. *Occupations*

i. *The General Population*

(a) *Factor I: Focus on Causal Attribution*

Most employment settings do not encourage workers to make the sort of attributional assessments that can lead to a more situationist outlook.⁹⁶ Rather, individuals tend to be paid to perform a series of tasks within a given situation—whether it is producing goods or providing services.⁹⁷ An electrical engineer, house painter, or surgeon, for instance, spends the bulk of her day occupied with issues other than predicting or explaining human behavior. The attributional background that is necessary for a job tends to be obvious, irrelevant, or conveniently specified for the relevant parties. Thus, the most prized traits in fast-food restaurant employees are not creativity or breadth of vision, but obedience to assembly-line-like instructions and willingness to operate according to highly specified routines.⁹⁸ The same may be said for many white-collar employees, including many young corporate lawyers who spend long days following carefully specified instructions on completing document reviews or proofreading documents to confirm to “firm style.”⁹⁹ Even where an individual shows a willingness to perform, or talent for performing, cognitively taxing attributional work, there is generally little need

⁹⁶ The emphasis here is not on whether an individual makes basic causal attributions as part of her work—that is, in fact, quite common. Rather, it is on whether the individual does so in a way that is different in kind or degree than is typical outside of the workplace (where dispositionism dominates).

⁹⁷ For example, Barbara Ehrenreich describes the highly mechanized and choreographed “systems” devised by the cleaning services industry and imparted to employees. The elaborate systems of rules and steps ensure that “the biggest decision an employee has to make is which fluid and scrubbing instrument (rag, brush, or Dobie-brand plastic scouring pad) to deploy on which kind of surface.” Barbara Ehrenreich, *Maid to Order*, in *GLOBAL WOMAN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY* 97 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2003). She explains that “[i]t’s not easy for anyone with extensive cleaning experience—and I include myself in this category—to accept this loss of autonomy over her movements from minute to minute,” but “[a]fter a week or two on the job, I found myself moving robotlike from surface to surface, grateful to have been relieved of the thinking process.” *Id.* at 98.

⁹⁸ See, e.g., ROBIN LEIDNER, *FAST FOOD, FAST TALK: SERVICE WORK AND THE ROUTINIZATION OF EVERYDAY LIFE* (1993) (illustrating how many service-industry jobs are becoming increasingly routinized—from task performance to language, from attitudes to ideas, and from demeanor to looks); ESTER REITER, *MAKING FAST FOOD: FROM THE FRYING PAN INTO THE FRYER* 165 (1996) (describing how fast food companies value “obedience” over longevity); GEORGE RITZER, *THE MCDONALDIZATION OF SOCIETY* (2004) (arguing that the same rationalization process characteristic of the fast food industry is spreading to many social institutions, including our education and criminal justice systems).

⁹⁹ See *infra* note 102.

or opportunity to ponder why customers, patients, or fellow employees act the way they do.

(b) Factor II: Presentation of Situationist Evidence and Promotion of Situationist Interpretation

Most employees are not forced to confront situationist evidence that challenges dispositionist presumptions, nor are they given special tools to discover such evidence when it remains, as it generally does, hidden from their perceptions. For many jobs, set procedures and institutional structures operate alongside powerful conceptions of proper employee behavior—*role schemas*—to ensure that dispositionism remains engrained.¹⁰⁰

Whether through the existence of a formal hierarchy, an employee manual, a fee-for-service billing arrangement, a dollar-per-hour wage scheme, an assembly line, or a deadline, most individuals in this country have little opportunity or incentive to examine carefully the role of situation.¹⁰¹ This point may be easy to see when it comes to workers on the factory floor or Wal-Mart associates, but the same holds true—and increasingly so—for highly educated and remunerated physicians and law firm associates.¹⁰²

¹⁰⁰ See *supra* note 98.

¹⁰¹ Eric Schlosser provides two descriptions of the modern American workplace that seem particularly revealing. The first focuses on the dynamics of “deskilling” operations at McDonald’s:

Cooking instructions are not only printed in the manual, they are often designed into the machines. A McDonald’s kitchen is full of buzzers and flashing lights that tell employees what to do At the front counter, computerized cash registers issue their own commands. Once an order has been placed, buttons light up and suggest other menu items that can be added. Workers at the counter are told to increase the size of an order by recommending special promotions, pushing dessert, pointing out the financial logic behind the purchase of a larger drink. While doing so, they are instructed to be upbeat and friendly . . . [such as] “[s]mile with a greeting and make a positive first impression” [on your customers or] . . . “[s]how them you are glad to see them. Include eye contact with the cheerful greeting.”

ERIC SCHLOSSER, *FAST FOOD NATION* 70 (2001). Thus, management has carefully scripted every aspect of the job. Although employees are kept very busy, they rarely, if ever, are required to engage in the kind of thinking necessary for situationist understanding to emerge. A similar environment is present in many “office” jobs as well. For example, telemarketers sit in front of a computer which automatically dials people throughout the United States. When a person answers, his or her name appears on the screen along with detailed scripts of pitches and suggested rebuttals. *Id.* at 81.

¹⁰² There is a growing literature on the changing dynamics of large law firms that suggests that a significant number of young associates face task-specific demands that overwhelm any opportunities for situationist understanding. David B. Wilkins and G. Mitu Gulati, for instance, have recast the promotion-to-partnership tournament as a dual-track model, where young attorneys are divided into “training-work associates” and “paperwork associates,” based the firm’s business model and associates’ commitment levels. David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and*

Furthermore, it is not just that most occupations deny employees the chance to appreciate the importance of situation; it is also that most occupations are structured in a way that actively encourages dispositionist notions. For example, the career “tournament,” in which individuals compete for advancement by working hard, making good choices, and demonstrating leadership skills builds on, and powerfully reinforces the dispositionist person schema. Jobs are purportedly allocated according to individual merit, and success is a result of determination and toil. According to that dominant schema, disposition, not situation, determines occupational outcomes.¹⁰³ White-collar job seekers are constantly “enjoin[ed] to maintain or develop a ‘winning attitude,’” and to embrace “ideologies that are explicitly hostile to any larger, social understanding of [their] situation.”¹⁰⁴ After being fired for reasons outside their control, workers are told to take control of their destinies. The steady advice, according to Ehrenreich, is to “look inward, not outward; the world is entirely what you will it to be.”¹⁰⁵ Look to disposition, that is, not to situation.

The institutional success of even corporate managers increasingly turns upon their *not* focusing on situational questions and, instead, having the right

Information Control in the Internal Labor Markets of Elite Law Firms, 84 VA. L. REV. 1581, 1644 (1998) (citation omitted). Even training-work associates face significant hurdles to situationist experiences; many of the deals that they are involved in are powerfully framed, at the outset, by previous deals. And with computerized databases of previous agreements at many corporate firms, much of an associate’s work will be limited to substituting names and numbers into old document templates and then carefully proofreading subsequent drafts until the final printing.

The changing legal services market may also limit the ability of older lawyers to engage in situationism-boosting decisionmaking. As David Van Zandt, Dean of Northwestern University School of Law, explains, “[l]aw firms structured like businesses are becoming far more common,” where most partners are not involved in key decisions and there is increasing pressure to better cater to clients’ particular requirements. See John T. Slania, *More Firms Mind Their Business; Corporate Model Helps Streamline Decision-Making*, CRAIN’S CHI. BUS., Jan. 28, 2002, at SR10. This is important because the more law firms lose their professional independence and become merely creatures of their clients’ needs (a process powerfully encouraged by the growth of billable-hour requirements), the less opportunity there will be for situationism to flourish within their walls.

¹⁰³ Charley Reese offers a good example of the dispositionist outlook:

This is still a country where anybody of average intelligence can achieve some level of success if he is willing to work hard. I personally know many immigrants who came here without a dime, some not even speaking English, but who through hard work have made themselves wealthy with no assistance from the government or anybody else.

Charley Reese, *Poor Do It for Themselves*, LEWROCKWELL.COM, Oct. 8, 2005, <http://www.lewrockwell.com/reese/reese226.html>.

¹⁰⁴ BARBARA EHRENREICH, *BAIT AND SWITCH: THE (FUTILE) PURSUIT OF THE AMERICAN DREAM* 220–21 (2005).

¹⁰⁵ *Id.* at 221.

disposition. Lucy Kellaway of the *Financial Times* recounts her lunch conversation with a man who had recently stepped down from “one of the biggest jobs in British business.”¹⁰⁶ According to her lunch mate, his biggest problem as a manager was “too many intelligent people”: “There is nothing worse,” he complained, “than a managerial meeting of brilliant minds, all seeing multiple sides to complex problems. What you need are energetic people with gusto who get things done. They can be smart—but they must not be cerebral.”¹⁰⁷

Kellaway admits being initially dubious about her lunch companion’s aversion for thinkers,¹⁰⁸ but she eventually “warm[ed]” to it:

Think what characteri[z]es the really intelligent person. They can think for themselves. They love abstract ideas. They can look dispassionately at the facts. Humbug is their enemy. Dissent comes easily to them, as does complexity. These are traits that are not only unnecessary for most business jobs, they are actually a handicap when it comes to rising through the ranks of large companies.¹⁰⁹

In other words, businesses do not need—indeed, they should discourage—“mindful”¹¹⁰ thinking on the part of employees and managers.¹¹¹

Some top law firms appear to have reached the same conclusion, avoiding “intellectual” students with broad interests (and backgrounds) and instead favoring focused, hard workers. As the Chairman of Cadwalader, Wickersham & Taft, Robert O. Link, recently admitted, explaining why the firm does not recruit at Yale Law School, “[t]hey don’t seem to produce the kind of lawyer we want.”¹¹² According to Link, corporate law firms would do well to steer

¹⁰⁶ Lucy Kellaway, *Companies Don’t Need Brainy People*, FT.COM, Nov. 22, 2004, <http://www.ft.com/cms/s/2/92d94ba6-24e4-11d8-81c608209b00dd01.print=yes.id=041121002649.html>.

¹⁰⁷ *Id.*; see also *id.* (“Big companies need one or two heavy-duty analytical brains: beyond that, declining returns set in. When recruiting for future senior managers, companies should forget about Oxford and Cambridge and hire a much broader range of less academic people.”).

¹⁰⁸ We are conflating “intelligent” and “situationist” here because Kellaway and her lunchmate appear to define an “intelligent” person in a way that closely parallels what we mean by a “situationist”: a person who revels in complexity and who encourages multiple perspectives or wants to think “outside the box” of dominant conceptions. *Id.* (“[C]ompanies really want people to think inside the box at all times. They demand assent . . .”).

¹⁰⁹ *Id.*

¹¹⁰ See *supra* notes 82–84 and accompanying text.

¹¹¹ For an in-depth and up-close account of how managers think and of what habits and characteristics do and do not lead to corporate success, see ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* (1988).

¹¹² Anthony Lin, *Does the Future Belong to Cadwalader?*, N.Y.L.J., Feb. 5, 2007.

clear of “all these history majors who found out they couldn’t get jobs in history and decided to go to law school.”¹¹³

(c) *Factor III: Time and Resources*

As suggested above, when people are cognitively occupied, they experience a decreased ability to break away from the dispositionist schema and are less likely to appreciate the role of situation.¹¹⁴ Unfortunately, for most of us, busyness is the rule in the workplace, just as it is in our “outside lives.”¹¹⁵ In both settings, therefore, most of us have few opportunities to

¹¹³ *Id.* As Lin describes in the article, Cadwalader’s recent surge into the elite of the nation’s law firms with respect to profitability has other firms taking serious notice of Cadwalader’s approach to hiring and organization. *See id.* As one managing partner at a leading New York firm explained, “They are definitely the firm to watch Even though they recognize the business realities, most law firms still hold on to certain ways of doing things. Cadwalader is run like a corporation.” *Id.*

¹¹⁴ *See supra* text accompanying notes 70–74.

¹¹⁵ People have many roles to inhabit as parents, friends, neighbors, family members, teammates, congregation members, and citizens. They likewise have endless non-career tasks to complete (including, among many others, grocery shopping, clothes laundering, cooking, commuting, exercising, bathing, caregiving, sleeping, and maintaining relationships). A number of studies suggest that many American workers are working more hours with fewer breaks during the day and fewer vacation days and that they generally have less time to pursue non-work-related goals. *See* Paul E. Gabriel & Susanne Schmitz, *Leisure Versus Labor: What Do Recent Labor Market Trends Reveal About the “Overworked American”?*, PROC. MIDWEST BUS. ECON. ASS’N, Mar. 2004, at 82 (suggesting that annual hours increased for most Americans during the 1990s); Laura Leete & Juliet B. Schor, *Assessing the Time-Squeeze Hypothesis: Hours Worked in the United States, 1969–1989*, 33 INDUS. REL. 25, 25 (finding that those workers who were neither under- nor unemployed faced the most significant “time-squeeze” in recent decades); Philip L. Rones, Randy Ilg & Jennifer M. Gardner, *Trends in Hours of Work Since the Mid-1970s*, 120 MONTHLY LAB. REV. 3, 3 (Apr. 1997) (documenting that the “proportion of persons working very long workweeks has risen”). The number of companies with paid vacation fell to 91% in 2002 from 95% in 1999. *See* Stephanie Armour, *Faced with Less Time off, Workers Take More*, USA TODAY, Oct. 29, 2002, at 1A. And the average American worked 199 hours more in 2000 than in 1973. *See* Penelope Wang, *All Work and No Play?*, MONEY, Nov. 2003, at 30. Moreover, a survey sponsored by Oxford Health Plans suggested that:

One in six American workers (18%) is unable to use up annual vacation time because of job demands.

34% say their jobs are so pressing that they have no down time at work.

32% work and eat lunch at the same time.

32% never leave the building once they arrive at work.

19% say their jobs make them feel older than they are.

17% say work causes them to lose sleep at home.

Americans Are Working Too Hard, USA TODAY (MAGAZINE), Sept. 1, 2001, at 6. A 2001 survey of 1,000 U.S. workers conducted by the Families and Work Institute showed that 28 percent of respondents often felt overworked. Twenty-eight percent said they felt overwhelmed by their workload, and 29 percent said they felt they had no time to step back and reflect on their work. *See* Kathy Slobogin, *Many US Workers Feel Overworked and Overstressed, Study Says*, [http://www.shkaminski.com/Classes/Samples/CNN_com%20-%20Many%20U_S_%20employees%20feel%20overworked,%20stressed,%20study%20says%20-%20May%](http://www.shkaminski.com/Classes/Samples/CNN_com%20-%20Many%20U_S_%20employees%20feel%20overworked,%20stressed,%20study%20says%20-%20May%20)

develop situationally sensitive views.¹¹⁶ Even when we do have a bit of time, dispositionism tends to be so engrained that situationism still has an uphill battle. Although being laid off can provide a “time to reflect” and ask “what’s wrong with this picture?”¹¹⁷—to consider, among other things, the situational forces that led to the loss of a job—the dispositionist story is often too strong to be shaken. Furthermore, few people have the other resources—from support staff to deal with consuming administrative matters to access to situationism-bolstering information and tools—needed to overcome the dispositionalizing constraints of the workplace.

(d) Factor IV: Diversity of Encounters

Rather than interacting with individuals in a range of different settings, or encountering different perspectives on the same situation, most workers engage in a narrow set of repetitive exchanges. A situationally-static employment environment provides few opportunities for situationism to emerge; indeed, it provides just the sort of situational constraints that help make dispositionism successful as a positive theory of behavior.¹¹⁸

2016,%202001.htm. According to the survey, twenty-four percent of U.S. workers said they spent fifty or more hours on the job each week. *Id.* Twenty-two percent said they worked six to seven days a week, and twenty-five percent said they do not use vacation time to which they are entitled. *Id.*

¹¹⁶ See JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 83 (1993) (“In addition to the forty-plus hours of work a full-time woman employee puts in on the job each week, different studies estimate that she does anywhere from twenty-five to forty-five hours in the home.”). As Schor summarizes,

Nationwide, people report their leisure time has declined by as much as one third since the early 1970s. Predictably, they are spending less time on the basics, like sleeping and eating. Parents are devoting less attention to their children. Stress is on the rise, partly owing to the “balancing act” of reconciling the demands of work and family life.

Id. at 5.

¹¹⁷ EHRENREICH, *supra* note 104, at 217–21.

¹¹⁸ See *supra* text accompanying notes 33, 66–68. By way of example, consider a typical office interaction with a coworker with a particular function or area of expertise. Before we even walk down to the mailroom, we know how Rita, the deliveries manager, will behave—she will be curt and cross, because she is not a nice person. What we fail to realize is that her curtness may be a result of the fact that she manages a group of young men who would otherwise not take her seriously or that she has been told by supervisors not to waste time with small talk. We have no way of knowing (and no incentive to find out) that when she is at the beach with her friends, she talks a mile-a-minute and has a quick wit and a contagious laugh. Similarly, we are unaware of how our own stereotypes regarding how a woman or a deliveries manager should behave is leading us to be attentive to or misremember certain aspects of her behavior. The dispositionist model remains unchallenged and, when she is once again curt with us, appears to be confirmed. See *supra* note 33 (describing how stable situations make dispositionist attributions more reliable).

In our interactions with coworkers, colleagues, and customers, we will sometimes uncover the power of situation, but it will tend to be a particular, limited sort of situationist realization—tightly restricted by the structured setting of most occupations and by the task at hand, whether marketing a particular product, lowering insurance costs for a client, or making an alum feel a special connection to her alma mater. A real estate agent may know that the order in which homes are shown can influence clients' reactions.¹¹⁹ She may come to understand that a buyer's stated reasons for liking or disliking a particular home are unreliable indicators of what home the buyer will ultimately select. She may also know just how to frame the descriptive blurb in the open-house advertisement to generate interest.¹²⁰ And she can explain to the seller that a home priced at \$151,050 is less likely to sell than the same home priced at \$149,900.¹²¹ Still, while the agent may be quite aware that when it comes to selling houses, situation matters a great deal—a lesson with very strong implications for her success—the context-specific situationism tends not to translate to other contexts. Situation-specific situational expertise tends to be left at the office. The same realtor is as likely as anyone to be swayed by the smell of fresh baked goods to buy two pumpkin muffies at Panera Bread, by the allure of new, shiny things to crave the latest model of the BMW X5 SAV, or by the compelling nature of dispositionism to feel anger and disgust toward the obese passenger squeezed in the seat next to hers on the plane, or to feel little sympathy for the people occupying the impoverished communities she passes on her daily commute.

(e) Factor V: Pressures for Accuracy and Accountability

Although we suggested in section (a) that most occupations do not involve attributional analysis,¹²² there are some jobs—like that of a counselor or historian—where individuals are routinely faced with the need to predict, understand, or make sense of people's behavior. But even those disciplines that fancy themselves “social sciences” and are devoted to theorizing about human behavior can be strongly dispositionist. A major reason for this is that

¹¹⁹ Similarly, a restaurateur may know that presentation is as important as taste—indeed, partially determines taste—and that patrons draw inferences, often subconsciously, about the cleanliness of the kitchen from the condition of the bathrooms.

¹²⁰ She will call a small, poorly maintained home a “cozy fixer-upper” and a tiny room containing a bar stool, mini-fridge, sink, and toaster an “efficiency kitchen.”

¹²¹ See Hanson & Kysar, *Taking Behavioralism Seriously*, *supra* note 69, at 1440–44 (summarizing a evident but generally unappreciated pricing tricks).

¹²² See *supra* text accompanying notes 95–98.

there are many outside forces that encourage dispositionism, and without equally potent bulwarks requiring accuracy in attributions, individuals are inclined to stick to their dispositionist presumptions. Most occupations neither demand such accuracy nor provide the necessary buffers to ensure the independence necessary for it to be achieved.

To appreciate how easy it is for dispositionism to seep through the cracks in the wall and saturate a room—even where steps have been taken to seal a space off from outside influence—one need only consider the history of law and economics. Until very recently, law and economics, the most influential legal theory of the last half century, was criticized by both insiders and outsiders for failing to take seriously evidence that its highly dispositionist rational-actor model of human behavior was badly flawed.¹²³ As calls for more empirical tests of the basic assumptions of that model were heeded, the hardcore dispositionist assumptions began to waver.¹²⁴ Today, reflecting those trends, neoclassical economics is being substantially revolutionized by such evidence, and a trend toward a more situationist perspective is evident in much of the most cutting-edge scholarship of economists and legal economists. That progress notwithstanding, the trend toward situationism has been drastically slowed by, and anchored to, the dispositionist presumption.¹²⁵ In any event, given that a great deal of evidence is easily explained as the product of

¹²³ See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 152–53 (1987) (noting that some scholars argue that the conclusions of legal economists are “invariably grounded in unwarranted a priori theorizing, and that proving them valid in particular cases would require empirical evidence that is either utterly unavailable or far less convincing than the [legal economists] would wish”); Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REV. 263, 285 (1989) (criticizing some law-and-economics scholarship for failing “to comport with the criterion of falsifiability”); Richard A. Posner, *The Future of Law and Economics: A Comment on Ellickson*, 65 CHI.-KENT L. REV. 57, 61–62 (1989) (urging legal economists to get on with much needed empirical work). Not surprisingly, some scholars have explained the shortage of empirical scholarship as the consequence of economic forces. See, e.g., Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 330–33 (1989) (arguing that rational law professors respond to institutional disincentives to conduct empirical research).

¹²⁴ See, e.g., ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (summarizing others' evidence and providing evidence of his own that, contrary to the (often implicit) assumption of virtually every law-and-economics model, individuals are moved significantly by social norms and customs outside the law); RICHARD H. THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 2–4 (1992) (describing how many of even the most basic assumptions of the rational actor model are contradicted by the evidence). See also generally *id.* (summarizing evidence of interior situational influences that influence people's choices).

¹²⁵ For a full review of the trend, see Benforado & Hanson, *Legal Academic Backlash*, *supra* note 17; Hanson & Yosifon, *The Situational Character*, *supra* note 3, at 152–69; see also Benforado & Hanson, *Costs of Dispositionism*, *supra* note 3 (describing the attributional divide between two seminal figures in law and economics, Judges Calabresi and Posner).

dispositions, and given that that is the cultural presumption, it is no surprise that most jobs often fortify the dispositionist faithful.

(f) *Another Consideration: Incentive and Ability to Reach a Wider Audience*

Most of the time, when a person's situation allows or encourages her to shed certain dispositionist notions, she will still lack the incentive to communicate her understanding to a wider audience. Often, the incentive, particularly for those engaged in commercial transactions, is to do the opposite—to camouflage situational manipulations with dispositionist explanations. To render the relevant situational tactics evident is often to undermine their efficacy with consumers and to make them more readily imitated by competitors. It is in part for those reasons that commercial institutions that tend to be quite situational in practice frequently go out of their way to attribute consumer conduct to "choice" and "preference."¹²⁶

Even when a person has an incentive to share her situationist insights, she is unlikely to have ready access to an effective means of sharing that lesson with a large audience (be it through television, print media, or public appearances). And while a megaphone or microphone allows one's voice to carry, this does not mean that one's voice is *heard*. For people to listen to ideas that challenge the things that they believe to be true (i.e., dispositionism), the speaker must possess the credibility—either as an individual or as a member of an institution with applicable credibility—to be taken seriously.¹²⁷ Moreover, while existing credibility is clearly helpful, the very act of casting doubt on affirming dispositionist notions immediately begins to erode that credibility and to reduce the number of individuals who are willing to countenance one's ideas.¹²⁸ Finally, because dispositionism is valuable to some of the most powerful entities in society and accepted by most members of the broader community, an individual who asserts situationist conceptions

¹²⁶ See Hanson & Wright, *Driver's Seat*, *supra* note 59; see also Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 3, at 1689–1769 (describing dispositionalizing efforts of food industry).

¹²⁷ See Zakary L. Tormala, Pablo Briñol & Richard E. Petty, *When Credibility Attacks: The Reverse Impact of Source Credibility on Persuasion*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 684, 684 (2006) (providing brief overview of source-credibility literature).

¹²⁸ This process is developed more fully in our companion article. See Benforado & Hanson, *Naïve Cynicism*, *supra* note 12, at 525–32.

may also have to contend with powerfully asserted counterarguments or damaging ad hominem attacks.¹²⁹

ii. Some Relative Exceptions: Academics, Journalists, and Judges

Although most occupations tend to reinforce dispositionism, a few provide individuals with a greater opportunity and incentive to discover, analyze, and teach others about the role of situation. This section looks particularly at the unusual work environments of some academics, journalists,¹³⁰ and judges. We focus on these occupations or institutions as case studies to highlight the importance of certain occupational factors that we believe are likely to be linked to situationism. We do not mean to imply that these are the only (or even the best) examples of situationist-nurturing occupations.¹³¹ Nor are we suggesting that all of (or even most of) the members of any given occupation are relatively situationist,¹³² or that these three institutions are intrinsically situationist.¹³³ Nor are we claiming that the situational forces that might make individuals in a particular occupation in one era relatively situationist will necessarily be stable across cultures or time periods. Our argument is that these are occupations that have, at least in the recent past, provided situations

¹²⁹ See Benforado & Hanson, *Backlash*, *supra* note 17; see, e.g., Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 3, at 1746–69 (describing food industry’s reaction to *Supersize Me*).

¹³⁰ We use the terms “journalists,” “press,” and “the media” somewhat loosely in this Article because our focus is on the situationism-enhancing variables that may characterize certain occupations and not the lay meanings attached to certain job titles or jobs. As a number of scholars have pointed out, in part because of significant changes within the last few decades, it is hard to define the institution, or set of institutions, encapsulated in “the press.” See, e.g., David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 435 (2002) (finding that “traditional forms are merging and dissolving into new ones, which makes [a] method of defining ‘press’ [by form] problematic”). Many media entities now own newspapers, magazines, television and radio stations, and book publishers. See BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 4 (2d ed. 1987). And many corporations, like General Electric (NBC) or Disney (ABC), own interests in both media and non-media businesses as well. See *The Big Media Roadmap*, BRILL’S CONTENT, Dec. 1999–Jan. 2000, at 99–102.

¹³¹ For example, the environments of many artists and religious leaders often encourage situationism.

¹³² As mentioned above, some academic schools of thought—like law and economics—have a strong history of dispositionist work. See *supra* notes 123–25 and accompanying text.

¹³³ For instance, it is important to acknowledge that becoming a judge does not turn every person into a situationist. As we explore in related work, the particular situations of an individual federal judge—including her outside affiliations, interests, and identity; her previous professional experiences; her experience during the confirmation process; her adherence to a particular judicial approach, if any; and the existing composition of the court—can all have an effect on a judge’s attributional outlook once seated. See Jon D. Hanson & Adam Benforado, *The Drifters: Why the Supreme Court Makes Justices More Liberal*, BOSTON REV., Jan.–Feb. 2006, at 23 [hereinafter Hanson & Benforado, *The Drifters*]. Moreover, judges are constrained by public perceptions of the judiciary—the extent to which given outcomes, judicial theories, courts, and judges are seen by the public as legitimate—and those perceptions can be actively altered by powerful entities external to the court system. See *id.*

in which the individuals who occupy them are more likely than the general population, on average, to adopt and promote a situationist perspective.¹³⁴ If situationist flowers are going to bloom among the dispositionist weeds, they are more likely to do so in the nourishing soil of those occupations than in the hard-packed clay associated with most job settings.

(a) *Factor I: Focus on Causal Attributions*

Although it is not uniformly true, academia, the press, and the judiciary are good examples of institutions that directly confront attributional questions. Each institution is more or less devoted to explaining and making attributions of causation, responsibility, and (occasionally) blame with respect to certain harmful or unexpected outcomes.¹³⁵ That process, successfully realized, requires journalists, academics, and judges to employ and test implicit or explicit theories regarding what moves people and what behavior and events individuals can control and what behavior they cannot.¹³⁶ Although the

¹³⁴ Despite occupational settings that are particularly likely to encourage situationist views, professors, journalists, and judges are still tethered to the dispositionist anchor. Legal scholars, for instance, may not appreciate the power of situation in all law, but only in respect to the particular area of law that they focus on, be it prisoners' rights, labor law, or bankruptcy. They are even less likely to see situational factors in their everyday lives. The reason is simple. Outside of the one context in which they may have glimpsed the power of situation and the myth of disposition, they are like the rest of us, and subject to all the same situational pressures, interior and exterior, to be dispositionists.

¹³⁵ For example, in his famous description of the unique work of being a judge, Lon Fuller placed special emphasis on the need to delve into what moves people: "[m]en's interests and desires form a complex network, and . . . to discover the most effective and least disruptive pattern of order within this network requires an intimate acquaintance with the network itself and the interests and desires of which it is composed." LON L. FULLER, *THE PROBLEMS OF JURISPRUDENCE* 706–07 (Temp. ed., 1949).

¹³⁶ Rather than accepting given attributions, journalists, judges, and academics are often encouraged to be skeptical and to test basic assumptions about why things happen. That, at least, is how they tend to be idealized. For instance, a Google search for the phrase "the role of an academic is," generated the following conclusions: (1) "to critically process, analyze and challenge human thought," Andrew Creed & Don Swanson, *Mental Tacility: The Ascendance of Writing in Online Management Education* (2004), <http://www.ascilite.org.au/conferences/perth04/procs/creed.html>; (2) "that of an honest broker," Tufts-Fletcher-News, Professor Lisa Lynch Speaks About Politics, Career and the Modern Woman, <http://fletcher.tufts.edu/news/2005/11/phenomenal-lynch.shtml> (last visited Oct. 14, 2007); (3) "to evaluate evidence, to dissect the soft from the hard, to identify gaps, and to present his findings without fear or favour," Edwin AM Gale, *Between Two Cultures: The Expert Clinician and the Pharmaceutical Industry*, 3 *CLINICAL MEDICINE* 538, 540 (2003), available at <http://www.ucl.ac.uk/Pharmacology/dc-bits/gale.pdf>; (4) "to find out the facts," Owen Bowcott, Academics in War of Words Over Calls to Boycott Israel (May 27, 2002), <http://www.inminds.co.uk/boycott-news-0115.html>; (5) "to listen carefully to what people have to say about their experiences . . . [and] to generalize from those experiences and share that message in forms that people elsewhere can hear," Jason Zengerle, Investing in Social Capital, <http://www.swarthmore.edu/bulletin/archive/97/sept97/putnam.html> (last visited Oct. 14, 2007); (7) "to talk about complicated theory . . . [as opposed to] the role of a politician [which] is to talk about simple choices and matters that people can understand," Michael R. Reich, *Ethical Analysis in*

answers to those questions are sometimes already framed—in that, for example, a law may detail the mental state necessary for a crime to have been committed, and a social-scientific theory may assume that human behavior does (or does not) reflect rational choice—there is often room, and sometimes encouragement, for individuals within these occupations to contemplate and debate those questions. On the whole, the more general the institutional commitment is to exploring and testing questions of causation, responsibility, and blame, the more likely it is that some members of those institutions will make relatively situationist attributions.

(b) Factor II: Presentation of Situationist Evidence and Promotion of Situationist Interpretation

The situational forces at work within academia, the press, and the judiciary encourage situationism both by forcing constituent members to confront evidence that challenges the dispositionist schema and by providing individuals with “special tools” that can better enable them to see the situation. Those “situationist glasses” can take many forms, from (1) widely shared conceptions of proper occupational behavior; to (2) actual equipment, procedures, or institutional structures; to (3) the existing culture within an institution.¹³⁷

Public Health, 2000 PROC. OF THE SYMPOSIUM ON INT’L HEALTH AND MEDICAL ETHICS 15, 17, available at <http://www.med.or.jp/english/pdf/takemi.pdf> (last visited Oct. 14, 2007).

Similarly, journalists are often charged with the task of “challenging” existing attributions—or, in the words of Ashley Kelly, “expos[ing] hidden truths.” Ashley Kelly, *The Role of a Journalist*, HILLTOP, Mar. 2, 2004. As Kelly argues,

Journalists must be watchdogs for the world. It is the responsibility of the journalist to not believe everything he or she is told [A journalist] must read between the lines and find the true meaning behind the fancy worlds that people in high places often use to hide the truth.

Id. Drawing the comparison between correct attributions and incorrect attributions is at the core of what it is to be a journalist. As the committee awarding the 2004 Alfred I. DuPont-Columbia University Awards for broadcast journalism suggested, “the role of a journalist [is] to measure what we are being told against what we find out.” *War Coverage and Government “Watchdog” Reports Dominate 2004 duPont-Columbia University Awards*, COLUM. NEWS: THE PUB. AFFAIRS AND RECORD HOME PAGE, Dec. 8, 2003, <http://www.columbia.edu/cu/news/03/12/duPont.html>.

¹³⁷ For a more complete discussion of the situationism-enhancing situations of judges, see Hanson & Benforado, *The Drifters*, *supra* note 133, at 26 (focusing particularly on the Supreme Court and suggesting that having to deal with the most significant, contentious cases; enjoying tremendous resources; and being exposed to a variety of perspectives enhance situationism among members of the Court).

(1) *Role Schemas*

Social psychologists have long understood that role schemas—the norms, customs, and responsibilities that we associate with various jobs and functions—powerfully influence the people who take on particular roles.¹³⁸ To the extent that there has been a commitment to a situationist-promoting code of conduct within the judiciary, academia, and the press, situationism has been relatively encouraged.

Both implicit and explicit forces play a part in shaping the role schema for academics. For example, the commonly held—but rarely written down—expectation for academics is that a successful thesis is one that anticipates and meets counterarguments and that stands up to the challenge of conflicting or anomalous evidence.¹³⁹ Meeting these expectations forces a professor to confront the power of situation, and overlooking them can be costly: an individual who forgoes the process of testing a theory against conflicting ideas and evidence is likely to be seen as lacking in rigor and can be more easily

¹³⁸ See Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1137.

¹³⁹ See, e.g., ROWENA MURRAY, *WRITING FOR ACADEMIC JOURNALS* 134–35 (2005) (stating that academic authors should anticipate and address possible refutations of their conclusions); EUGENE VOLOKH, *ACADEMIC LEGAL WRITING* 40 (2d ed. 2005) (noting that a successful law review article must confront counterarguments).

attacked.¹⁴⁰ At the same time, academics also face more explicit directives in the form of university codes of conduct for professors.¹⁴¹

Journalists, too, operate within a set of professional expectations that appear to push them in a situationist direction. To conform to the understood code of behavior, journalists must thoroughly research issues, press on the accuracy of their sources, find corroborating accounts, stay objective, and present the whole picture by seeking out the perspectives of all interested parties.¹⁴² All of these professional approaches aid in breaking away from

¹⁴⁰ See Ralph H. Johnson, *Critical Reasoning and Informal Logic*, in CRITICAL REASONING IN CONTEMPORARY CULTURE 69, 76 (Richard A. Talaska ed., 1992) (noting that a critical thinker must “know[] what objections are likely to be raised to a position and know[] how to examine positions by probing their assumptions and consequences” and be “willing to revise his position in light of the reasoning of others and of contrary evidence”); Robert J. Silverman, *The Impact of Electronic Publishing on the Academic Community*, in SCHOLARLY PUBLISHING 55, 61–62 (Robin P. Peek & Gregory B. Newby eds., 1996) (observing that in today’s electronic journal environment “[o]ne simply will not survive by doing, or knowing how to do, research only in a certain way when it is likely that one will be confronted publicly with suggested alternative ways of performing the inquiry, or elements of it”). Peer review and the tenure system heighten the need for academics to test their theories against conflicting ideas and evidence. It is widely believed that, before attaining tenure, an academic should submit her ideas and findings to peer review of one type or another so that scholars with opposing ideas or evidence may scrutinize and respond to them. See JEFFREY A. CANTOR, A GUIDE TO ACADEMIC WRITING 9 (1993) (explaining that publication in a refereed journal is a primary consideration for tenure and promotion committees); LINDA R. TIMM, PEER REVIEW IN PROMOTION AND TENURE DECISIONS IN HIGHER EDUCATION 11 (1994) (describing how senior faculty members use the peer review process to solicit comments about a candidate for tenure from other scholars in the candidate’s field). Peer review, it should be noted, may encourage situationism, too, inasmuch as the “peers” are themselves relative situationists (as many academics will tend to be). In *Backlash*, this phenomenon is taken up in more detail. See Benforado & Hanson, *Backlash*, *supra* note 17.

¹⁴¹ Although these directives are often fairly vague, they do tend to reference a strong commitment to seeking out and uncovering the truth, which may frequently encourage scholars to engage in situationist approaches:

Professors, guided by deep convictions of the worth and dignity of the advancement of knowledge, recognize the special responsibilities placed upon them. Their primary responsibilities to their subjects are to seek and to state the truth as they see it. To this end they devote their energies to developing and improving their scholarly competence. They accept the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. They practice intellectual honesty. Although they may follow subsidiary interests, these interests must never seriously hamper or compromise their freedom of inquiry.

Amer. Ass’n of Univ. Professors, Statement on Professional Ethics, AAUP Policy (10th ed. 1987), available at <http://www.aaup.org/NR/rdonlyres/3B3F65BF-AA8F-4EC2-90C2-DA83380C8CB4/0/StatementonProfessionalEthics.pdf>.

¹⁴² According to the Society of Professional Journalists Code of Ethics, among other things, journalists should:

Test the accuracy of information from all sources and exercise care to avoid inadvertent error. Diligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing.

dispositionism, but perhaps the most important aspect of the conception of the journalist, in this regard, is the idea that, in the words of Steven A. Smith, “there are no sacred cows, that we’ll go where the news takes us.”¹⁴³ As critical realist scholarship has shown, in America, dispositionism is as sacred as they come. Overall, part of the story of encouraging situationism within the

Identify sources whenever feasible. The public is entitled to as much information as possible on sources’ reliability.

Always question sources’ motives before promising anonymity.

Make certain that headlines, news teases and promotional material, photos, video, audio, graphics, sound bites and quotations do not misrepresent. They should not oversimplify or highlight incidents out of context.

....

Tell the story of the diversity and magnitude of the human experience boldly, even when it is unpopular to do so.

Examine their own cultural values and avoid imposing those values on others.

Avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status.

Support the open exchange of views, even views they find repugnant.

Give voice to the voiceless; official and unofficial sources of information can be equally valid.

....

Show compassion for those who may be affected adversely by news coverage.

....

Recognize that gathering and reporting information may cause harm or discomfort.

....

Clarify and explain news coverage and invite dialogue with the public over journalistic conduct.

Soc’y of Prof’l Journalists, Code of Ethics (Sept. 1996), <http://www.spj.org/pdf/ethicscode.pdf>.

Similarly, *The New York Times’* Guidelines on Integrity detail the paper’s strong commitment to ensuring that all parties on an issue are given a chance to present their side of the story:

Few writers need to be reminded that we seek and publish a response from anyone criticized in our pages. But when the criticism is serious, we have a special obligation to describe the scope of the accusation and let the subject respond in detail. No subject should be taken by surprise when the paper appears, or feel that there was no chance to respond.

N.Y. Times Co., Guidelines on Integrity, http://nytco.com/company/business_units/integrity.html (last visited Oct. 1, 2007) [hereinafter N.Y. Times Co., Guidelines on Integrity]. In the newspaper’s handbook on ethical journalism, *The New York Times* also urges reporters to constantly be on guard for the danger of growing too close to one perspective: “Scrupulous practice requires that periodically we step back and take a hard look at whether we have drifted too close to sources we deal with regularly. The acid test of freedom from favoritism is the ability to maintain good working relationships with all parties to a dispute.” *The New York Times*, Ethical Journalism: A Handbook of Values and Practices for the News and Editorial Departments, Sept. 2004, http://www.nytimes.com/pdf/nytco/Ethical_Journalism_0904.pdf, at 9. *The Washington Post* offers a similar directive: “The newspaper shall not be the ally of any special interest, but shall be fair and free and wholesome in its outlook on public affairs and public men.” Wash. Post, Eugene Meyer’s Principles for the Washington Post, http://www.washpost.com/gen_info/principles/index.shtml (last visited Oct. 1, 2007).

¹⁴³ Steven A. Smith, *Newsroom Values Drive Coverage Decisions*, SPOKESMAN-REVIEW, July 10, 2005, at B7.

press is about ideal types that journalists are encouraged to strive for,¹⁴⁴ but it is also about the threat of punishment for failing to conform to proper behavior.¹⁴⁵

There are similar specific expectations and responsibilities that go along with being a judge.¹⁴⁶ As Judge Guido Calabresi has explained, “I am extraordinarily role-conscious What is appropriate for me as a judge, what is appropriate for me as a scholar, what is appropriate as a dean, and what is appropriate if I did more op-ed writing . . . are completely different things.”¹⁴⁷ To ensure his own legitimacy and that of the judiciary, a judge must be objective, fair, and reasoned in his opinions.¹⁴⁸ As emphasized earlier,

¹⁴⁴ The role schema for members of the press is defined largely by journalistic exemplars. The heroes of journalism are symbols of independence, watchfulness, integrity, and courage who are not afraid to go to jail or bear the scorn of a society or government unwilling to face the realities they report. See Anderson, *supra* note 130, at 475–76. These hero journalists embody values that encourage situationism. Indeed, to realize that situation is more determinative than disposition, one must be watchful and dedicated to seeking the truth. Moreover, it takes courage to assert situationist truths in the face of widely shared, commonsense, system-affirming notions to the contrary.

¹⁴⁵ Journalists who fail to live up to the understood code of conduct are frequently ostracized by those within the profession. As David A. Anderson explains,

Network executives were vilified when they secretly agreed to insert government-approved anti-drug messages into entertainment programming in exchange for reduction of their quota of public-service announcements. The *Los Angeles Times* earned a place in journalistic infamy by selling its independence to an advertiser. Janet Cooke became an object lesson for a generation of journalists by making up a story about an eight-year-old drug addict.

Anderson, *supra* note 130, at 476–77 (citations omitted).

¹⁴⁶ In his study of why federal courts are better at protecting constitutional rights, Burt Neuborne asserts that

an elite tradition animates the federal judiciary, instilling elan and a sense of mission in federal judges and exerting, as Judge Friendly has noted, a palpable influence on the quality of the judicial product. As heirs of a tradition of constitutional enforcement, federal judges feel subtle, yet nonetheless real pressures to uphold that tradition.

Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1124 (1977) (citation omitted). For a criticism of Neuborne’s arguments, see MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS 37–42 (1999).

¹⁴⁷ See Hanson & Benforado, *The Drifters*, *supra* note 133, at 24.

¹⁴⁸ In the words of the American Bar Association,

Judges are like umpires in baseball or referees in football or basketball. Their role is to see that the rules of court procedures are followed by both sides. Like the ump, they call ‘em as they see ‘em, according to the facts and law—without regard to which side is popular (no home field advantage), without regard to who is “favored,” without regard for what the spectators want, and without regard to whether the judge agrees with the law.

Am. Bar Ass’n Div. of Pub. Educ., Courts and Legal Procedure: The Role of Judges, http://www.abanet.org/publiced/courts/judge_role.html (last visited Oct. 18, 2007). Chief Justice John Roberts used the same

working to achieve balance and manage restraint puts individuals in a much better position to appreciate the power of situation. Moreover, judges are expected to reach the “right” decision, even if it is unpopular, which can potentially be important in encouraging an individual to move beyond widely held dispositionist notions.¹⁴⁹ In addition, to convince fellow judges and write a persuasive opinion, members of the judiciary must anticipate prominent counterarguments and consider both the short- and long-term effects of their decisions. Embodying those implicit expectations, the Code of Conduct for United States Judges encourages judges to constantly question their objectivity and consider their biases.¹⁵⁰ Among other things, a judge is expected to “uphold the integrity and independence of the judiciary” (Canon 1),¹⁵¹ “avoid impropriety and the appearance of impropriety in all activities” (Canon 2),¹⁵²

metaphor during his nomination hearing before the Senate Judiciary Committee: “Judges are like umpires. Umpires don’t make the rules, they apply them They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.” *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

¹⁴⁹ Of course, the desire for legitimacy will often discourage situationist attributions. In fact, to the extent that judges are supposed to make accurate attributions and to the extent that common-sense attributions are dispositionist, the legitimacy motive can also limit a judge’s ability to consider situational forces that are otherwise ignored by most people in society. To assign responsibility in ways that conflict with common sense undermines *perceptions* of accuracy and, in turn, legitimacy, even where such assignments are accurate.

¹⁵⁰ See CODE OF CONDUCT FOR U.S. JUDGES (2000), available at <http://www.uscourts.gov/guide/vol2/ch1.html>; see also ABA MODEL CODE OF JUDICIAL CONDUCT (2004), available at <http://www.abanet.org/cpr/mcjc/toc.html> (“The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges.”).

¹⁵¹ CODE OF CONDUCT FOR U.S. JUDGES, Canon 1. As the Commentary to Canon 1 explains, “Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor.” *Id.* Canon 1 cmt.

¹⁵² *Id.* Canon 2. “Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny.” *Id.* Canon 2(A) cmt. The Code tries to get judges to think not only about more explicit biases—for example, by requiring a judge to disqualify himself if he realizes that he has “a personal bias or prejudice concerning a party”—but also the less salient ones—for example, by barring a judge from being a member of an “organization that practices invidious discrimination . . . on the basis of race, religion, sex, or national origin” and even having a “meeting at a club the judge knows practices invidious discrimination.” *Id.* Canon 3(C)(1)(a); *id.* Canon 2(C) cmt. In this respect, the Code suggests that situation matters more than disposition—both in terms of outside perception and in shaping individual judges’ outlooks.

What makes the Code particularly important in encouraging situationism is that it covers such a wide swath of behavior: “A judge must . . . accept restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge.” *Id.* Canon 2(A). However, although a judge is expected to “regulate extra-judicial activities to minimize the risk of conflict with judicial duties” and “refrain from political activity,” the purpose of the Code is not to place the judge at a remove from the world—in a place where she would lose touch with the situations of real people: “Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become

and “perform the duties of the office impartially and diligently” (Canon 3).¹⁵³ Struggling to meet those requirements, a judge will often confront evidence of, and arguments about, situational elements in a way that is shared by few other professions.

(2) *Institutional Mechanisms and Procedures*

Outside of role schemas, established institutional procedures can also encourage situationism. Although judges are themselves charged with the responsibility of carefully limiting and weighing the evidence, they also have readily available tools or processes to help them do that. Evidentiary rules that screen out material that is too biasing, a legal system that requires the adversarial presentation of facts, and numerous other mechanisms can help judges and juries see some situational forces that would otherwise be missed.¹⁵⁴ Legal outcomes that seem absurd to members of the general population—despite being based on accurate attributions—sometimes emerge in courtrooms because of the operation of those structures.¹⁵⁵ It is not just that

isolated from the society in which the judge lives.” *Id.* Canons 5, 7, & 5(A) cmt. As a whole, the Code seems designed to encourage judges to hear many voices, stories, and perspectives to gain a more complete appreciation of the full situation: “A judge should accord to every person who is legally interested in a proceeding, or the person’s lawyer, full right to be heard according to law” *Id.* Canon 3(A)(4). At the same time, the idea is to avoid hearing too much of any one voice:

[E]xcept as authorized by law, [a judge is to] neither initiate nor consider ex parte communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. A judge may, however, obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

Id.

¹⁵³ *Id.* Canon 3. More specifically, “[a] judge should be faithful to and maintain professional competence in the law, and should not be swayed by partisan interests, public clamor, or fear of criticism.” *Id.* Canon 3(A)(1).

¹⁵⁴ For a discussion of how the adversarial system and the “case and controversy” requirement of Article III make federal courts better situations for challenging common sense dispositionist notions than state courts and civil law courts, where these structural features are often absent, see Hanson & Benforado, *The Drifters*, *supra* note 133, at 25.

As argued elsewhere, other structural elements of our judicial system may also have an important effect on promoting situationism. See Benforado & Hanson, *Costs of Dispositionism*, *supra* note 3, at 38 n.51 (“Where a district court has granted a defendant’s motion for summary judgment [a circuit court judge] would, other things equal, tend to be more situationally sensitive given their charge of determining the existence of any genuine issues of material fact. Put differently, such cases require judges to search for facts that might preclude summary judgment, an inquiry that itself is likely to promote situationism.”).

¹⁵⁵ For example, the notion that a woman might successfully sue McDonald’s for burns from spilled coffee seems absurd to many people, yet a judge and jury, after being forced to consider all of the evidence—

such information is hard for us to see; we also avoid it because it is difficult to accommodate within dispositionist schemas. Thus, part of the story is that judges are encouraged to cognize some of the little, but important, details of other people's lives that most of us ignore—and it is those details that often challenge dispositionism.¹⁵⁶ Another part of the story, however, is that judges are also encouraged to see beyond potentially biasing details to larger system-level considerations.¹⁵⁷

Similarly, when academics employ the techniques of social science, they increase the chance that they will discover situational forces and see past dispositionist preconceptions and presumptions.¹⁵⁸ The scientific method is designed (though imperfectly) to reduce the power of personal and institutional biases when a hypothesis or theory is tested.¹⁵⁹ On a general level, it requires

including the fact that McDonald's had been selling coffee at temperatures that they knew caused third-degree burns and had injured hundreds of people—awarded compensatory and punitive damages in just such a case. See *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 2004); see also Public Citizen, Congress Watch: Legal Myths (Nov. 30, 1999), <http://www.citizen.org/congress/civjus/archive/tort/myths/articles.cfm?ID=785> (citations omitted).

¹⁵⁶ In the words of Judge Richard Posner:

[T]he experience of being a judge is bound to moderate one's views. When you are dealing with large doctrinal policy issues in a rather abstract way, it's very easy to allow your general outlook on things to carry you to foreordained conclusions. But when you are actually forced to consider both sides of the case, often you realize there is more to be said on the other side of the case than you might have thought. So a lot of statutes that I would have ridiculed as preposterous interventionism in the economy, when looked at up close in the context of the specific case, make more sense. I have learned there is more to be said for some of these interventionist laws than I had initially thought.

Steve Kurtz, *Sex, Economics, and Other Legal Matters*, REASON, Apr. 2001, 36, 39–40, available at <http://reason.com/0104/int.sk.sex.shtml> (quoting Judge Posner).

¹⁵⁷ In suggesting that federal courts more vigorously protect constitutional rights than state courts, Britt Neuborne has argued that one of the key factors is that federal judges are “insulated from the more cynicism-breeding dimensions of constitutional law . . . [and the] distasteful and troubling fact patterns.” Neuborne, *supra* note 146, at 1125. As he explains,

The [F]ourth [A]mendment's exclusionary rule, for example, will command greater allegiance from a judge who has not been repeatedly exposed to the reality of the social harms inflicted by some felons whom the rule requires to be freed Distance from the pressures and emotions generated by the application of constitutional doctrine is conducive to a generous reading and vigorous enforcement of constitutional rights.

Id.

For a criticism of Neuborne's arguments, see SOLIMINE & WALKER, *supra* note 132, at 37–42.

¹⁵⁸ Indeed, the approaches of social science have provided the means to discover much of what we mean by “situation.” See Hanson & Yosifon, *The Situational Character*, *supra* note 3, *passim*.

¹⁵⁹ See Frank Wolfs, Univ. of Rochester Dep't of Physics & Astronomy, Introduction to the Scientific Method, http://teacher.nslr.rochester.edu/PHY_LABS/AppendixE/AppendixE.html (last visited Feb. 11, 2008). As Professor Wolfs explains,

scientists to (1) carefully observe and describe a phenomenon or phenomena; (2) construct a hypothesis that offers an explanation for the phenomenon or phenomena;¹⁶⁰ (3) predict future phenomena using the hypothesis; and (4) test the hypothesis experimentally to assess the accuracy of the prediction.¹⁶¹ Thus, through the scientific method, ideas about how the world functions emerge over time based on concrete evidence from tests rather than on beliefs and intuitions.¹⁶²

Dispositionism does less well when it must contend with careful observation and be tested against hard facts. Hence, professors who employ the scientific method are (situationally) in a better position to overcome the fundamental attribution error and realize the importance of situational factors relative to dispositional ones than members of the general population. Moreover, uncovering the centrality of situationism may promote the development and adoption of other, more specific, methodologies that force academics to look at questions from a different perspective and, as such, further bolster situationism. A good example is the basic approach of feminism, which—in acknowledging that our situations affect our perspectives—encourages individuals to work to see the world from a woman's perspective.¹⁶³ Similarly, fields such as social psychology and

Recognizing that personal and cultural beliefs influence both our perceptions and our interpretations of natural phenomena, we aim through the use of standard procedures and criteria to minimize those influences when developing a theory. As a famous scientist once said, "Smart people (like smart lawyers) can come up with very good explanations for mistaken points of view."

Id. This ability makes the scientific method a vital tool in formulating accurate theories.

¹⁶⁰ See JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 3 (1989) ("To explain an event is to give an account of why it happened. Usually, and always ultimately, this takes the form of citing an earlier event as the cause of the event we want to explain, together with some account of the causal mechanism connecting the two events.") (footnote omitted).

¹⁶¹ See Wolfs, *supra* note 159.

¹⁶² Indeed, a theory that cannot be tested is not a scientific theory. *Id.*

¹⁶³ As Patricia Cain explains,

Feminist legal scholarship seeks to analyze the law's effect on women as a class [T]he analysis is formed by a distinctly feminist point of view, a point of view that is shaped by an understanding of women's life experiences. This understanding can come either from living life as a woman and developing critical consciousness about that experience or from listening carefully to the stories of female experience that come from others [L]egal scholarship is not feminist unless it is grounded in women's experience.

Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 20 (1991).

Many Critical Race Theorists embrace a similar situation-acknowledging and situationism-enhancing methodology:

cognitive neuroscience have developed many innovative techniques for discovering why we humans behave as we do.

Journalists, too, often face an elaborate editorial process that itself can promote accuracy,¹⁶⁴ multiple perspectives, and, at times, situationism.¹⁶⁵

(3) *Institutional Culture*

In addition to behavioral norms and institutional structures, the existing composition of an institution is also likely to have an effect on the extent to which individuals develop situationist ideas.¹⁶⁶ For instance, an institution that

Critical Race Theory (CRT) is a collection of critical stances against the existing legal order from a race-based point of view CRT attempts to analyze law and legal traditions through the history, contemporary experiences, and racial sensibilities of racial minorities in this country Because the existing legal order, including traditional legal analysis, has a built-in bias in favor of whites, CRT consciously looks at the law from the perspective of nonwhites.

Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 85, 96 (1994) (citations omitted).

¹⁶⁴ For further discussion of the role of accuracy motives, see *infra* text accompanying notes 192–201.

¹⁶⁵ Stephen Baker, an editor at *Business Week*, recently described his magazine's editorial process—intended to maintain the periodical's "standards of editorial accuracy, fairness and quality"—this way:

We're proud here of the work we do as a team to lift the level of each story. But what a slog Consider the path of a story as it winds its way through our system.

I looked at a draft of the story over the weekend, suggested changes, and spent nine hours editing it yesterday. (Usually two people share this job, but this week we're short-handed.) Then I sent it to the copy desk. There, people who are new to the story read it to see if it makes sense, if the thinking is logical, the context clear, the grammar and spelling ok, the names and titles correct. Meantime, some facts, such as names and Web addresses, are checked by a researcher. The copy desk sends the story, with questions, back to the writer and me. At the same time, the top editors of the magazine have a chance to read the story and suggest changes of their own. Potentially contentious or delicate stories are often sent upstairs to a McGraw-Hill lawyer, who might suggest further adjustments.

Today we work answering the questions, clearing up doubts, filling in holes, and cutting the story to fit on the page.

Then, wouldn't you know, the story goes back to the desk. They edit again—mostly proofreading, making sure questions have been answered, and writing display language this time around—and put it on a literal sheet of paper. Then that paper is circulated back to us. We read it and make fixes, and then carry it to the close desk, where editors make the final changes and push the button to send it to the printing press.

Posting of Stephen Baker to Blogspotting, http://www.businessweek.com/the_thread/blogspotting/archives/2005/07/editorial_stand.html (July 19, 2005). To be sure, there is nothing in that process that ensures that situationist considerations will be taken seriously. Our point is simply that an intensive, sustained, accuracy-oriented editorial process creates an opportunity for such considerations to be incorporated.

¹⁶⁶ See *infra* notes 316–22 and accompanying text (describing the work of social dominance theorists on the general tendency for people and institutional environments to be matched).

is perceived as relatively situationist may attract more situationists or may tend to select more situationists as employees or members.¹⁶⁷ Similarly, an institution that has comparatively more situationists may influence individuals' actual attributions once there.¹⁶⁸

Thus, the entry requirements of academia, the press, and the judiciary may screen at the outset for a certain type of individual who is more situationally sensitive (the type described in Prediction I) or who wants to work in a setting where a relatively situationist approach is encouraged or shared by others. It is possible that the purportedly elite intellects sought after by universities, top media outlets, and the judiciary have a heightened tendency or ability to order and understand the complexity inherent in a situationist account.¹⁶⁹ Further, having gone through the lengthy education necessary to gain a place in academia, on the bench, or, in many cases, at a top newspaper, individuals may be culturally stimulated to be more situationally sensitive.¹⁷⁰ Indeed, being taught to be a journalist, an anthropologist, or a legal scholar by other situationally sensitive individuals likely does produce students (and later professors, journalists, and judges) who are more situationally sensitive and who enjoy and feel comfortable being in an environment where situationism is more common. In addition, it is possible that academia, the press, and the judiciary disproportionately reward or promote existing members who are situationist, encourage those who are comparatively dispositionist to leave, or otherwise socialize individuals to become more situationist.¹⁷¹

Of course, all of this presumes that such positions are relatively situationist to begin with. If those institutions are occupied by, or such careers tend to be associated with, individuals with relatively dispositionist mindsets, they will tend to attract, and be perpetually occupied by, other dispositionists.

¹⁶⁷ See *infra* notes 317–18 and accompanying text (describing the processes of self-selection and institutional selection).

¹⁶⁸ See *supra* notes 89–91 and accompanying text.

¹⁶⁹ Other scholars have made similar arguments. For example, in explaining federal judges' unique abilities to protect constitutional rights, Burt Neuborne has pointed to, among other things, the "relative capacities of the judges themselves" to appreciate nuanced and complex arguments, both as they relate to inherent ability (federal judgeships attract stronger candidates) and better resources (including better judicial clerks and generally more limited caseloads at the federal level). See Neuborne, *supra* note 146, at 1121–23.

¹⁷⁰ See *infra* text accompanying note 235 (suggesting how education may be related to situationism).

¹⁷¹ See *infra* notes 319–21 and accompanying text (describing the processes of institutional socialization, differential success, and differential attrition).

(c) *Factor III: Time and Resources*

Institutions that foster situationism will tend to provide the time, freedom, and resources for individuals to explore the answers to difficult attributional questions. On all those variables, academia, the press, and the judiciary often have a leg up—though, again, there is tremendous variation.¹⁷² Many academic institutions provide professors opportunities and incentives—research grants, research leaves, sabbaticals, gifted students, vast libraries, and research tools—with which to develop new ideas, test new theories, and make their findings known through publication. Academics have, in that sense, “a room of their own,” in which to examine and challenge common sense. In addition, academics are rarely, if ever, required to write or think on any specific topic; within broad boundaries they can explore unexpected, untrammelled intellectual pathways that, at the outset, show little promise for sure and immediate payoff.¹⁷³

Some journalists, too, are given the freedom—in terms of time and resources—to overcome dispositionist notions. To the extent that they are provided with the temporal flexibility and money to uncover all the sides of a story, to travel to the actual scene of events and interview actual

¹⁷² This is not to say that journalists, judges, and academics do not face considerable situational time and resource constraints that limit situationism. Like individuals in most occupations, they must contend with deadlines and the pressure to produce: academics, for instance, have to teach classes, grade exams, supervise papers, hold office hours, attend faculty meetings, fulfill administrative commitments, and produce scholarship; journalists have to, among other things, develop story ideas, conduct interviews, research stories, and meet frequent deadlines; and judges have to hold hearings, manage clerks, rule on motions, write opinions, and so on.

¹⁷³ Ronald D. Simpson has noted that one of the fundamental differences “between corporate America and higher education is the emphasis on efficiency versus effectiveness”:

For most businesses and corporations, quarterly or at least annual earnings, serve as an important endpoint. For institutions of higher education, graduation—or the end of a specific degree program—is viewed not as an ending, but as a beginning. It is impossible to assess the value of a college education at the end of a four or five year period. That investment may not produce dividends immediately, but over the next twenty or thirty years magnificent things can happen that could never have been predicted or even dreamed of earlier. So, while efficiency is an American value not to be scoffed at, in the long run it is not as important to academicians and scholars as the concept of effectiveness. Sometimes the incubation period required for outcomes of the highest quality take additional time.

Ronald D. Simpson, *How Higher Education Differs from Corporate America*, 26 INNOVATIVE HIGHER EDUC. 231, 232–33 (2002).

Although Simpson’s focus is particularly on the shaping of quality students, the same analysis is likely to apply to the production of scholarly works as well: “outcomes of the highest quality”—that is, works reflecting situationist insights—are far more likely within an institutional setting not obsessed with efficiency.

participants,¹⁷⁴ and to follow the story wherever it leads, they have an opportunity to discover the role of situational influences.¹⁷⁵

Judges are also often provided space in which to do their work. Although they are sometimes criticized for being slow to reach opinions,¹⁷⁶ they are generally encouraged to trade swiftness for accuracy. Moreover, as discussed briefly above, there are structures within the judiciary—from the adversarial system, to law clerks, to amicus briefs—that help provide judges with causal information at a relatively low cost, increasing their ability to encounter and understand situationist insights.¹⁷⁷

(d) *Factor IV: Diversity of Encounters*

Situationism has a better chance of emerging within institutions where individuals are likely to hear many different perspectives on the same situation and see people in a range of different settings.¹⁷⁸ Such opportunities allow people the chance to see “others respond to issues and events differently from the way they themselves are responding . . . [and] it is this very discrepancy in response—especially when it violates one’s expectation that reasonable people

¹⁷⁴ As *The New York Times* provides in its guidelines for reporters, rather than attribute facts to others, “[o]ur preference, when time and distance permit, is to do our own reporting and verify another organization’s story.” N.Y. Times Co., *Guidelines for Integrity*, *supra* note 142.

¹⁷⁵ Although, as a result of improvements in transportation and technology, journalists now have greater ability to perform investigative reporting on a global scale, the increasing commercialization of journalism has meant new time and resource pressures, which decrease the opportunity for situationist insight. The race to break a story before other news networks can result in simplistic, causal explanations that can “lack perspective, and even turn out to be wrong”:

Print reporters have the luxury of longer deadlines than television reporters have, but even they get things wrong. When they do, they point out that journalism is but the first draft of history. Television takes its cameras live to the scene of the story, and the camera theoretically does not lie. But the camera often captures only a narrow slice of reality.

John Hughes, *New Media Technology Increases Pressure to Get the Story Right*, CHRISTIAN SCI. MONITOR, May 3, 1996, at 19.

Recent controversies suggest that the problem of time pressure is, indeed, having real effects. For example, when CBS was found to have committed “more than a dozen serious violations of basic reporting and vetting standards” in airing a story about President Bush’s military service, the main cause appears to have been “the desire to ‘crash’ the story—to rush it to air to beat perceived competition.” Betsy Ashton, *The CBS Debacle*, QUILL, Supp. Oct.–Nov. 2005, at 34, 38.

¹⁷⁶ See, e.g., Benjamin Weiser, *Judge’s Decisions Draw Notice, for Being Conspicuously Late*, N.Y. TIMES, Dec. 6, 2004, at A1.

¹⁷⁷ See *supra* text accompanying notes 154–57.

¹⁷⁸ See *supra* text accompanying notes 169–70.

will respond similarly—that motivates much of the attributional work people do.”¹⁷⁹

An academic who studies human behavior—whether as a historian, an anthropologist, a sociologist, or a professor of architecture—will have the opportunity to test the dispositionist model in ways that members of the general public often cannot. Instead of (or more likely, in addition to) trying out their attributional theories on coworkers in the lunchroom, academics are given the chance to study humans in a wide range of situations—over time, in different parts of the world, in office building and huts, and in youth and old age.

Similarly, for many journalists, part of the job is to go out into the public, meet people in different settings and geographic locations, and try to understand their perspectives and their lives. British print journalist Sean McCauley, when asked in an interview about the most interesting part of his job, answered: “[G]etting the chance to peer into strange worlds, other lives. You get to interview people you’d never normally m[e]et, never mind invite round for a cup of tea.”¹⁸⁰ One of the founding principles of *The Washington Post* is that “[t]he newspaper shall tell ALL the truth so far as it can learn it, concerning the important affairs of America and the world.”¹⁸¹ Often, to make it in journalism, members of the profession must uncover stories that have not been told and find fresh viewpoints.¹⁸² Like academics, journalists are, thus,

¹⁷⁹ 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, 783 (2004) (citing T.A. Pyszczynsk & J. Greenberg, *Role of Disconfirmed Expectancies in the Instigation of Attributional Processing*, 40 J. PERSONALITY & SOC. PSYCHOL. 31, 31–38 (1981)); see also P.T.P. Wong & B. Weiner, *When People Ask “Why” Questions, and the Heuristics of Attributional Search*, 40 J. PERSONALITY & SOC. PSYCHOL. 650, 650–63 (1981).

¹⁸⁰ The News: The Process Behind the Presentation, Newspaper: Interview with Sean Macaulay, <http://library.thinkquest.org/18764/print/interview.html> (last visited Oct. 1, 2007).

¹⁸¹ The Washington Post, *supra* note 142. Smaller papers see their role similarly. As Steven A. Smith wrote, describing the values of the *Spokesman-Review*, a newspaper in Spokane, Washington,

We reflect the life of our community every day in all of its wholeness and complexity. By this we mean that all our citizens should be able to see themselves—their hopes, dreams, aspirations, successes and tragedies—reflected respectfully and authentically in our pages. There are segments or our community that some citizens wish we would ignore. Doing so would violate this value.

Smith, *supra* note 143 (“We give voice to the voiceless and defend the defenseless. In our society, what other institutions are able to step in to represent the interests of the disenfranchised?”).

¹⁸² As Ashley Kelly puts it, “Journalism is about . . . giving a voice to the voiceless.” Kelly, *supra* note 136.

given a greater opportunity to see that people's behavior varies according to situation.

Judges, too, have some opportunity to test whether the dispositionist model actually works. The adversarial system, for instance, gives the judge at least two different perspectives on the same incident, and the debate is typically an "attributional" one regarding who or what caused a particular harm or cost and who should be blamed or held responsible.¹⁸³ Moreover, as part of the process, each side cites a set of analogous factual settings and judicial rulings in support of its position. Over the course of a judge's tenure, she also encounters, in her own caseload, many other parties who bring their perspectives (and background situations) to a series of similar incidents. In this manner, a judge is given a chance to see how individuals with very different backgrounds and characteristics (that is, who appear to have very different "dispositions") may take similar actions when confronting similar situations. Conversely, by dint of having to decide many different kinds of cases, a judge is able to see how demographically similar individuals act across a range of situations.

(e) Factor V: Pressures for Accuracy and Accountability

Occupational institutions, like academia, the press, and the judiciary, that are, relatively speaking, committed to being accurate and that have adopted particular structural features to *promote* accuracy and accountability are more likely to allow individuals to break the dispositionist schema. The key structures take the form of both internal checks on work product and bulwarks against accuracy-distorting external influences.

There are several important features of the judiciary that, operating together, encourage judges to be accurate and hold them accountable for inaccuracy. The first is the hierarchical setup of our courts.¹⁸⁴ In the federal system (and in many state courts), a lower-court judge knows that his analysis is subject to scrutiny by a three-judge panel of intermediate appellate judges.¹⁸⁵

¹⁸³ See NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS passim* (2000); Jon Hanson & Ana Reyes, *Attributional Positivism, the Naïve Psychology Behind Our Laws* (Apr. 2, 2006) (unpublished manuscript, on file with authors).

¹⁸⁴ See, e.g., 28 U.S.C. §§ 1-482 (2006) (organization of federal courts).

¹⁸⁵ See *About the Three-Judge Panel*, Indiana Court of Appeals, <http://www.in.gov/judiciary/appeals/3judge-panel.html> (last visited Oct. 1, 2007) ("The three-judge panel system has been traditional in this country for intermediate appellate courts . . . and is consistent with the standard adopted by the American Bar Association. The underlying rationale for panels of three is that cases should be resolved by a collective judicial judgment so that appeals are more than substituting the decision of a single appellate judge for that of a single trial judge Although there are some variations from three judge panels in [some state] courts

Each circuit court judge knows that his analysis of a legal issue will be reviewed by the other panel members for accuracy.¹⁸⁶ Moreover, before opinions are published, it is common practice for them to be circulated to the entire court for comments,¹⁸⁷ and the case is always subject to being reheard by the entire court en banc.¹⁸⁸ Finally, even the decision of an en banc circuit court is subject to Supreme Court review.¹⁸⁹ These layers of oversight—and the stigma of being reversed¹⁹⁰—likely encourage judges to be more attentive to the accuracy of their work.

A second feature encouraging accuracy and accountability is the ability of a disappointed party to appeal.¹⁹¹ Judges know that their determinations and analyses may be carefully reviewed by losing parties for any potential errors that might subject a decision to reversal. Few occupational settings provide a mechanism for review by individuals with such a strong incentive to uncover inaccuracy.

Another feature of the juridical situation encouraging accuracy and accountability is the system of publishing opinions. As opposed to some court systems, where judges do not tend to record their reasoning,¹⁹² in the United States, opinions are regularly written down and usually made available for

it is the structure for most intermediate appellate courts including the United States Circuit Courts of Appeal.”); 28 U.S.C. § 46 (2006).

¹⁸⁶ See, e.g., HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, XII(c) (2007), available at [http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+RPP+-+Handbook+2006+Rev+2007/\\$FILE/Handbook2006%20Revised%20March%202007.pdf](http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+RPP+-+Handbook+2006+Rev+2007/$FILE/Handbook2006%20Revised%20March%202007.pdf) (“If the case is to be decided with an opinion or memorandum, the author circulates a draft to the other members of the panel. The other judges are free to suggest changes in the proposed text, or they may draft and circulate concurring or dissenting opinions. These may lead to further changes in the majority opinion.”).

¹⁸⁷ See *id.* (“Final drafts of all opinions to be published . . . are circulated to all active judges on the Court.”).

¹⁸⁸ See 28 U.S.C. § 46(c); FED. R. APP. P. 35.

¹⁸⁹ See 28 U.S.C. § 1254.

¹⁹⁰ See Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 111 (1989) (discussing the stigma of reversal).

¹⁹¹ See, e.g., 28 U.S.C. § 1291 (providing the right to appeal final decisions of U.S. District Courts).

¹⁹² See, e.g., Lindsay Wilson, Note, *Investors Beware: The WTO Will Not Cure All Ills with China*, 2003 COLUM. BUS. L. REV. 1007, 1013 (“[In China,] [c]ourt opinions are brief and usually do not explain the reasoning behind the ruling. An opinion may or may not make reference to statutory authority, and no dissenting opinions are allowed. To add to the uncertainty, Chinese legal doctrine rejects the idea of precedent. Only selected opinions of the Supreme People’s Court are published, and rather than being printed in some sort of reporter, decisions are circulated internally among court personnel.”) (citations omitted).

public perusal.¹⁹³ Just as judges know that parties may scrutinize their work for inaccuracies, which they will bring to the attention of reviewing courts, they also know that judges on appellate courts will review their work and point out any errors in their opinions. Furthermore, the ability of circuit court judges, and Supreme Court Justices, to publish dissents and concurrences makes failing to correct an inaccuracy identified by a fellow judge or justice all the more costly or embarrassing.¹⁹⁴ Perhaps more importantly, even after a case has run its course through the judicial gambit, through our system of precedent, a judge's work will continue to be reconsidered and its reasoning and assumptions challenged in new and different factual settings.¹⁹⁵ Moreover, the work will occasionally give rise to scrutiny in the political branches of government, in affected regulatory and private spheres, or in the legal-academic arena. Thus, whereas for most members of the general public attributional inaccuracies in the workplace do not draw much attention, for a judge they can be scrutinized, criticized, and reversed in the short- and long-term.

The press is also subject to several accountability features that promote accuracy. As already noted, print journalists face a hierarchical structure of review composed of fact checkers and editors.¹⁹⁶ In addition, their work—including any errors it may contain—is published, making inaccuracies more likely to be discovered and more costly, since it reaches a broader audience and is, to some extent, permanently recorded (that is, it cannot be recast or revised). On the whole, inaccuracy is viewed as reputationally damaging to newspapers and other sources of media¹⁹⁷ and is treated harshly when discovered.¹⁹⁸ One of “the four major provisions of the Society of Professional Journalists” Code of Ethics is “Be Accountable”:

¹⁹³ See, e.g., D.C. CIR. R. 36(a)(1) (“It is the policy of this court to publish opinions and explanatory memoranda that have general public interest.”).

¹⁹⁴ Cf. Macey, *supra* note 190, at 111 (discussing reasons why individual judges tend to follow precedent including the fact that “reversals by higher courts are embarrassing”).

¹⁹⁵ Cf. FED. R. APP. P. 32.1 (preventing courts from prohibiting or restricting citations to federal judicial opinions and other written dispositions, issued on or after January 1, 2007, that have been designated as “unpublished,” “non-precedential,” or the like).

¹⁹⁶ See *supra* note 164 and accompanying text.

¹⁹⁷ Accuracy is, according to the guiding principles of *The Washington Post*, the paper's most important responsibility: “The first mission of a newspaper is to tell the truth as nearly as the truth can be ascertained.” Wash. Post, *supra* note 142.

¹⁹⁸ As *The New York Times*' Guidelines on Integrity provides:

At a time of growing and even justified public suspicion about the impartiality, accuracy and integrity of some journalists and some journalism, it is imperative that The Times and its staff

Journalists are accountable to their readers, listeners, viewers and each other.

Journalists should:

- Clarify and explain news coverage and invite dialogue with the public over journalistic conduct.
- Encourage the public to voice grievances against the news media.
- Admit mistakes and correct them promptly.
- Expose unethical practices of journalists and the news media.¹⁹⁹
- Abide by the same high standards to which they hold others.¹⁹⁹

Most newspapers and magazines have particular sections where they make public notice of any errors in previous editions.²⁰⁰ They also provide a public forum, in letters-to-the-editor sections, for those who wish to challenge the accuracy of previously published stories.²⁰¹

Academics face similar structures that hold them somewhat accountable for the accuracy of their work. As with judges who must consider that their analyses will be reviewed by others, academics can face layers of scrutiny when it comes to publishing their work in academic journals or as books.²⁰² Even before publication, academics often receive feedback on the accuracy of their work when they circulate drafts or attend conferences and workshops or submit their work for publication.²⁰³ As suggested above, this type of

maintain the highest possible standards to insure that we do nothing that might erode readers' faith and confidence in our news columns

No one needs to be reminded that falsifying any part of a news report cannot be tolerated and will result automatically in disciplinary action up to and including termination.

N.Y. Times Co., Guidelines on Integrity, *supra* note 142.

¹⁹⁹ Society of Professional Journalists, *supra* note 142.

²⁰⁰ See, e.g., *Corrections: For the Record*, N.Y. TIMES, June 26, 2007, at A2. As explained in *The New York Times'* Guidelines on Integrity,

Because our voice is loud and far-reaching, *The Times* recognizes an ethical responsibility to correct all its factual errors, large and small. The paper regrets every error, but it applauds the integrity of a writer who volunteers a correction of his or her own published story. Whatever the origin, though, any complaint should be relayed to a responsible supervising editor and investigated quickly. If a correction is warranted, fairness demands that it be published immediately. In case of reasonable doubt or disagreement about the facts, we can acknowledge that a statement was "imprecise" or "incomplete" even if we are not sure it was wrong.

N.Y. Times, Guidelines on Integrity, *supra* note 142.

²⁰¹ See, e.g., *The Mail*, NEW YORKER, Mar. 19, 2007, at 24.

²⁰² The editing process can be quite similar to that for journalists. See *supra* note 165.

²⁰³ Law school faculty members receive commentary on their ideas and emerging scholarship at a variety of forums from informal brown bag lunches to presentations at large conferences. See, e.g., Virginia Law, Faculty Workshops (2007), <http://www.law.virginia.edu/html/faculty/workshops.htm> (listing weekly faculty workshops at the University of Virginia School of Law).

feedback is generally rare in most occupations. After publication, the accuracy of their work is, particularly if it is influential, repeatedly reconsidered as other academics press to challenge, replicate, or expand it. Those making inaccurate or debatable attributions of causation, responsibility, or blame can expect to be challenged and risk being discredited.

Our point is by no means that the process by which ideas are brokered in academia is foolproof. No doubt, there are many inaccuracies, and those inaccuracies can actually become accepted truths. Our claim is simply that inaccurate dispositionist attributions will often stand a better chance of being tested, challenged, and qualified or rejected (in favor of relatively situationist attributions) in well-functioning academic settings than they will in most workaday situations.

In addition, some of the more important situationism-enhancing structures are those that ensure the independence of the institution and its constituent members and serve, consequently, as a buffer against the many dispositionalizing forces in society. Academia, the press, and the judiciary have long enjoyed special protections because of the work that they do—informing us about ourselves and our world—and it has been understood that, without those protections, they (and more importantly, *we*) are vulnerable to popular, but ultimately inaccurate, sentiment. In the words of James Madison, “Learned Institutions ought to be favorite objects with every free people. They throw that light over the public mind which is the best security against crafty and dangerous encroachments on the public liberty.”²⁰⁴ That light, we would argue, is the light that permits the growth of, among other things, situationism.

The Founders established the federal judiciary as a counter-majoritarian institution for the very purpose of avoiding widely shared but incorrect and harmful impulses.²⁰⁵ Specific provisions in Article III were adopted to insulate

²⁰⁴ Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON (1819–1836), at 105 (Gaillard Hunt ed., 1910). It should be noted that the academy and the press were very different in Madison’s time than they are today. See *infra* note 210.

²⁰⁵ Justice O’Connor emphasized the point in responding to those who would cut back the autonomy of the judiciary:

A key concept of the rule of law is the notion of an independent judiciary. That’s what our country as a policy has been supporting and trying to do . . . well-trained responsible people who are able to be that independent entity of government . . . brings balance . . . to what otherwise would get out of kilter by majority decision making.

Hanson & Benforado, *The Drifters*, *supra* note 133, at 28 (quoting Justice O’Conner).

the federal judiciary from interference and domination.²⁰⁶ Under the Constitution, federal judges have life tenure “during good Behavior,” and their salary is “not [to] be diminished during their Continuance in Office.”²⁰⁷ Moreover, rules like the prohibition on advisory opinions further buffer the federal judiciary from control by the popular branches of government.²⁰⁸ Although judges must worry about public perceptions and not deviate too drastically from “common sense,” those protections allow them some security against the consequences of ruling in ways that go against widely held notions or that upset the dispositionist status quo.²⁰⁹

²⁰⁶ Indeed, in the Declaration of Independence, one of the listed grievances was that the King had forced judges to be “dependent upon his will alone for the tenure of their offices and payment of their salaries.” THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

²⁰⁷ U.S. CONST. art. III, § 1. At the Constitutional Convention, these provisions appear to have been widely supported and drew little controversy. When it was suggested, for example, that judges ought to be potentially removable “by the Executive on the application by the Senate and House of Representatives” only Connecticut supported the motion. See MAX FARRAND, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 428–29 (1911); CHARLES WARREN, THE MAKING OF THE CONSTITUTION 428–29 (1911). Judges also enjoy absolute immunity from lawsuits, and one of the major justifications is that “it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.” *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871).

²⁰⁸ We have explored this point in other work:

[I]n the words of Chief Justice Earl Warren, the prohibition on advisory opinions insures that “a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.” The prohibition similarly protects the independence of the federal judiciary from control by other branches of government, which, as in some Continental systems, may frame legal questions to suit their own needs and agendas.

Hanson & Benforado, *The Drifters*, *supra* note 133, at 25 (citing *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)).

²⁰⁹ State courts and foreign courts often do not have the same rigorous protections. See *id.* Indeed, state court judges are often accountable electorally; there is some electoral review of state court judges in thirty-eight states. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1589–90 (1990). In addition, a number of state courts, including those in Colorado, Florida, Maine, Michigan, and Massachusetts, are authorized, like many European courts, to issue advisory opinions in certain instances at the request of state officials. This comparative lack of independence may place state and some foreign judges in a weaker position than U.S. federal judges when it comes to breaking away from the dispositionist schema.

The press has also long enjoyed special protections and freedoms.²¹⁰ As with an independent judiciary, the Founders seemed to share a concern that a free press was essential to a democratic government²¹¹—although today the Free Press Clause appears to serve only a minor function in the protections the press enjoys.²¹² Moreover, internal structures—like the traditional wall between those making editorial decisions and those conducting business

²¹⁰ As James Madison explained,

Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press.

Address of the General Assembly to the People of the Commonwealth of Virginia, in 6 THE WRITINGS OF JAMES MADISON (1790–1802), at 336 (Gaillard Hunt ed., 1906). Modern legal minds have voiced similar conclusions. Although Justice Potter Stewart’s particular conception of the Free Press Clause has not carried the day, his understanding of the press’s fundamental role as a “Fourth Estate”—a powerful force checking government excess— seems to have wide support. See Justice Potter Stewart, “Or of the Press,” Address at Yale Univ. (Nov. 2, 1974), in 26 HASTINGS L.J. 631, 634 (1975). As Stewart explained, historically, “[t]he free press meant organized, expert scrutiny of government. The press was a conspiracy of the intellect, with the courage of numbers.” *Id.* Thus, protecting its “institutional autonomy” was of central importance, explaining why “[t]he publishing business is . . . the only organized private business that is given explicit constitutional protection.” *Id.* at 633 (“In contrast [to the Speech Clause, which protects individuals], the Free Press Clause extends protection to an institution.”).

²¹¹ We are not suggesting that the Founding Fathers set about to protect the exact institutions that we have today. For instance, it seems fairly clear that the Founders, in adopting the Free Press Clause, were primarily concerned with the actual ability of people to “print” their views. See JEFFREY A. SMITH, PRINTERS AND PRESS FREEDOM *passim* (1988). It was not until the latter half of the nineteenth century that newspapers developed into anything like what we have today, and not until the twentieth century that “journalism” really took off. See MICHAEL EMERY & EDWIN EMERY, THE PRESS AND AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA 118–20, 574–79 (6th ed. 1988). Still, we tend to agree with scholars like David A. Anderson, who suggest that, just because “journalism as we know it cannot have been what the Framers had in mind when they used the term ‘press[.]’ [t]his is not necessarily a fatal objection to defining [and protecting the] press today in terms of journalism.” See Anderson, *supra* note 130, at 447 (suggesting a functional analysis).

²¹² David Anderson, for instance, suggests that

[m]ost of the freedoms the press receives from the First Amendment are no different from the freedoms everyone enjoys under the Speech Clause. The press is protected from most government censorship, libel judgments, and prior restraints not because it is the press but because the Speech Clause protects all of us from those threats.

Anderson, *supra* note 130, at 430. Anderson, however, points to the many non-Constitutional sources of press freedoms created through “statute, regulation, rule, or policy,” including, “[t]he press pass, the press gallery, the press room, the press office, the press secretary (or public-information officer), the press bus or plane, and the press pool.” *Id.* As he elaborates, “The press gets preferential access to legislative chambers, executive news conferences, trials, war zones, disaster scenes, prisons, and executions[.] . . . [s]tate and local statutes protect the press from otherwise legal police searches[.] . . . [and m]ore than half of the states have ‘shield laws’ creating ‘reporters’ privileges.’” *Id.* at 432; see also *id.* at 528 (describing numerous other “nonconstitutional sources” of privileges that the law gives to the press, including “tax exemptions, postal subsidies, free use of broadcast spectrum, and exemptions from antitrust laws”).

operations within newspapers²¹³—have had an important impact on buffering the press from outside dispositionalizing influences.²¹⁴ Some newspapers, such as *The Washington Post*, have explicitly set out directives that prioritize the paper’s duties “to its readers and to the public at large” over “the private interests of its owners”: “In the pursuit of truth, the newspaper shall be prepared to make sacrifices of its material fortunes, if such a course be necessary for the public good.”²¹⁵ Such structures acknowledge the fact that independent judgment is endangered both when individuals can be threatened or fired—or in the case of government coercion, jailed²¹⁶—for pointing out

²¹³ Robert McCormick, the publisher of the *Chicago Tribune* in the first half of the twentieth century, for example, had those on the business side of operations use completely separate elevators from those exercising editorial judgment. See BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM* 64–65 (2001).

A similarly independence-enhancing mechanism within journalism seems to be the internal system of self-reward. See Anderson, *supra* note 130, at 475 (“[J]ournalism is staffed largely by people who have rejected economic reward as their principal motivation. The rewards they seek come from their peers and their superiors, not the audience or the market This largely noneconomic reward structure may or may not produce better journalists or better journalistic decisions, of course, but it does tend to insulate journalists from audience pressures.”).

²¹⁴ Independence seems to be central to the idea of the press. In their wide-sweeping study of the profession of journalism, for example, Bill Kovach and Tom Rosenstiel recently identified nine principles essential to journalism, many of which go to this issue of buffering:

1. Journalism’s first obligation is to the truth.
2. Its first loyalty is to citizens.
3. Its essence is a discipline of verification.
4. Its practitioners must maintain an independence from those they cover.
5. It must serve as an independent monitor of power.
6. It must provide a forum for public criticism and compromise.
7. It must strive to make the significant interesting and relevant.
8. It must keep the news comprehensive and proportional.
9. Its practitioners must be allowed to exercise their personal conscience.

See KOVACH & ROSENSTIEL, *supra* note 213, at 5–6.

²¹⁵ Wash. Post, *supra* note 142

²¹⁶ It seems likely that the recent media attention focused on the cases of Judith Miller of *The New York Times* and Matthew Cooper of *Time* magazine—reporters subpoenaed to testify about sources who disclosed the identity of CIA operative Valerie Plame—would make journalists less likely to become situationist. Those reporters faced jail time for refusing to testify, and the Supreme Court declined to hear their cases, thereby leaving in place a lower court judge’s order against them. *Miller v. United States*, 545 U.S. 1150 (2005) (denying certiorari); *Cooper v. United States*, 545 U.S. 1150 (2005) (same); see also Adam Liptak, *Court Declines to Rule on Case of Reporters’ Refusal to Testify*, N.Y. TIMES, June 28, 2005, at A1. As a result, other journalists may now have less of an incentive and ability to dig below the dispositionist surface of a controversial story. High-level government officials, for example, who before might have been willing to leak politically-sensitive—but revealing—information, may now keep silent, knowing that journalists can less easily protect the anonymity of their sources. See *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 991–92 (D.C. Cir. 2005) (Tatel, C.J., concurring) (explaining that potential chilling effect); Nancy V. Mate, Comment, *Piercing The Shield: Reporter Privilege in Minnesota Following State v. Turner*, 82 MINN. L. REV.

unsettling truths and when they can be subtly influenced by commercial, ideological, or technological forces operating either within the institution or in broader society.²¹⁷

It is not only that journalists enjoy legal protections and structural advantages that allow them to search out and publish non-affirming truths; it is also that over many years an invisible, if flimsy, buffer against public opinion has developed around their work. At least as compared to other sources, we tend to be more tolerant of the press giving us information that we do not want to hear, that upsets us, or that makes us look bad.²¹⁸ In part because of its historical significance, the press can get away with a little more truth-telling than can other institutions in our society.²¹⁹ According to Randall Bezanson,

1563, 1584–87 (1998) (same); Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 228 (2005) (same).

²¹⁷ As we touched on briefly above, the press has experienced serious changes in recent years. See Anderson, *supra* note 130, at 429 (pointing to the economic, technological, and ideological forces that are working to shift the institution of the press); see also RANDALL P. BEZANSON, TAXES ON KNOWLEDGE IN AMERICA 2–3 (1994) (suggesting that advances in “technology will force us to reexamine many of the most basic assumptions we hold about the role and, indeed, the *meaning* of the press”). Such shifts may have just as much impact on the independence—and consequently, situationism-promoting potential—of the institution as, for example, a court limiting the ability of a journalist to protect his or her source during a government investigation. As Randall P. Bezanson argues, “newspapers are no longer unified institutions performing with ruthless independence and competitiveness the three functions of acquiring, selecting, and distributing information.” *Id.* at 202. With the growth of online formats, for instance, it may be far more difficult to differentiate business and editorial decisionmaking (and, thus, protect journalists from commercial pressures). See Anderson, *supra* note 130, at 468–70. Moreover, there appears to be a strong decline in independent ownership of journalistic enterprises. See *id.* at 455–57 (media conglomerates frequently own both media and non-media interests, and report on entities that they own a stake in). To the extent that those shifts result in members of the media being less protected from arriving at unsettling situationist truths—that are not in the best interests of the conglomerate—situationism is likely to be relatively disadvantaged.

²¹⁸ Bill Moyers describes the role of a journalist in terms of “help[ing] to keep the record straight”:

I confess to thinking of journalism as the social equivalent to a medical diagnosis. My doctor owes me candor; I pay him for it. Candor could save my life.

I like to think journalists are paid for candor, too; society needs to know what could kill us, whether it's too many lies or too much pollution. Napoleon left instructions that he was not to be awakened if the news from the front were good; with good news, he told his secretary, there is no hurry. But if the news were bad, he said, “Rouse me instantly, for then there is not a moment to be lost.” Think of journalism as a kind of early warning system—iceberg spotting in the choppy waters of democracy.

Bill Moyers, *On the Role of a Journalist in a Democracy*, NOW, May 25, 2003, <http://www.alternet.org/story/16002/>.

²¹⁹ As David A. Anderson explains,

At present, audiences give the media a great deal of discretion in deciding what information they will provide. Journalism as we know it exposes us to a great deal of material we don't want, or at least didn't know in advance that we wanted These stories may or may not remain

the central attribute of the press relates to the ability of journalists to employ editorial judgment, which, ideally, is geared toward “what people need to know, not simply what people want to know.”²²⁰ To the extent that the public allows journalists to adhere to this role, situationism is more likely to flourish.

Like members of the press and the judiciary, academics belong to an institution that has a history of searching for the truth. Their relative independence and credibility as knowledge producers has helped to deflect some potentially damaging (and situationism-discouraging) criticism. Academics usually also enjoy a set of rights commonly grouped under the heading “academic freedom,” which include rights to “free inquiry, and exchange of ideas”; “the right to present controversial material relevant to a course of instruction”; “participation in the governance of the University”; and “the right to be judged by one’s colleagues, in accordance with fair procedures, in matters of promotion, tenure, and discipline, solely on the basis of the faculty member’s professional qualifications and professional conduct.”²²¹ These rights, like the tenure system itself, are highly imperfect. However, they provide some protection to academics from being fired for introducing potentially unpopular and counterintuitive ideas, such as situationism, into public discourse.²²²

“unwanted;” curiosity or skillful journalism may convert the uninterested viewer into an interested one. In any event, the nature of the medium (and the nature of all mass media) exposes viewers to material they would not have seen had the initial selection been left to them.

Anderson, *supra* note 130, at 472.

²²⁰ Randall P. Bezanson, *The Atomization of the Newspaper: Technology, Economics and the Coming Transformation of Editorial Judgments About News*, 3 COMM. L. & POL’Y 175, 175 (1998). In other work, Bezanson defines “editorial judgment” as the “independent choice of information and opinion of current value, directed to public need, and borne of non-self-interested purposes.” Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 856 (1999). According to Bezanson,

Journalism’s task . . . is to establish mechanisms for separating the writer and editor from the audience and its surrogate, the advertiser, lest editorial judgment be eroded from the bottom up—from the reader, the niche market and ultimately from the capacity of technology to place increasing content control in the hands of the audience.

Bezanson, *The Atomization of the Newspaper*, *supra*, at 220.

²²¹ OFFICE OF THE PRESIDENT, UNIV. OF CAL., ACADEMIC PERSONNEL MANUAL 3–4 (2002), available at <http://www.ucop.edu/acadadv/acadpers/apm/section1.pdf>.

²²² In *Barnes v. Washington State Community College*, the Washington Supreme Court wrote that, according to the American Association of University Professors (AAUP)—“[t]he most authoritative source regarding the meaning and purpose of tenure”—“the purpose of tenure is to protect the faculty member in the classroom and in scholarly research.” 529 P.2d 1102, 1104 (Wash. 1975). As the court went on to suggest,

In spite of the features of academia, the judiciary, and the press that encourage accuracy and accountability, there are, nonetheless, important dispositionist pressures emanating mostly from outside of those institutions that help to explain why some dispositionists manage to thrive as academics, judges, and journalists. As we suggested above, dispositionism is valuable to some of the most powerful and wealthy entities in the world—particularly large commercial interests—and they look to promote it wherever they can.²²³ Within academia, for instance, they create journals to publish dispositionist ideas, fund centers at universities to employ dispositionists, and directly subsidize dispositionist scholarship—for instance, by allocating grants for neo-classical economics but not, say, sociology.²²⁴ With respect to the judiciary, they create organizations to promote clerkship and judgeship candidates that subscribe to dispositionism, develop think tanks and dispositionist entrepreneurs to better funnel dispositionist ideas into the courts and legislatures, and even work to undermine the credibility of any institutions that promote situationism.²²⁵ These practices have been highlighted in other critical realist articles²²⁶ and are the primary focus of work now in progress, including *Backlash*.²²⁷

Overall, the more that institutions—academia, the press, and the judiciary—remain independent sources of knowledge production, girded against the distorting effects of dispositionist funding and the criticisms of a

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to those purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

Tenure is a means to certain ends; specifically: (1) Freedom of teaching and research and of extramural activities, and (2) A sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

Id. (quoting CLARK BYSE & LOUIS JOUGHIN, *TENURE IN AMERICAN HIGHER EDUCATION: PLANS, PRACTICES, AND THE LAW* 172–73 (1959)).

²²³ See *supra* notes 58–62 and accompanying text.

²²⁴ See Hanson et al., *Deep Capture*, *supra* note 59.

²²⁵ See Benforado & Hanson, *Drifters*, *supra* note 133, at 28.

²²⁶ See Hanson & Yosifon, *The Situation*, *supra* note 3, at 260–84; Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 3, at 1727–69.

²²⁷ See Benforado & Hanson, *Backlash*, *supra* note 17; see also Hanson et al., *Deep Capture*, *supra* note 59, *passim*.

dispositionist public, the more likely that situationism is to thrive within their walls. On the other hand, the more dependent upon, or vulnerable to, dispositionist forces those institutions are, the more likely they are to reinforce dispositionist attributions and steer clear of situationist insights and conclusions.²²⁸

(f) *Another Consideration: Incentive and Ability to Reach a Wider Audience*

Unlike members of the general community, academics, journalists, and judges also have the means to communicate their attributional conclusions to an audience and therefore to influence that audience's attributions. Academics and journalists (and some jurists) write in popular and academic periodicals, post on blogs, publish books, and appear on television and radio programs.²²⁹ In addition, academics give lectures and sometimes consult with politicians or give their testimony to lawmakers. Judges publish opinions, which are sometimes reported on by the media; discussed by politicians; and interpreted by academics, other judges, lawyers, and members of the broader public.

Importantly, all three types of professionals also enjoy the credibility of the institutions to which they belong—whether it is *The New York Times*, Emory University School of Law, or the Second Circuit Court of Appeals.²³⁰ Their viewpoints simply cannot be as easily ignored as those of the assistant manager of the Sears Auto Supplies Department.²³¹ Of course, given the strong

²²⁸ See Hanson et al., *Deep Capture*, *supra* note 59.

²²⁹ With respect to print media alone, academics' and journalists' abilities to reach an audience is considerable. Research conducted in 2004 estimated that there were nearly 43,500 actively publishing "academic/scholarly" journals. Carol Tenopir, *Online Scholarly Journals: How Many?*, LIBRARYJOURNAL.COM, Feb. 1, 2004, <http://www.libraryjournal.com/article/CA374956.html>. Similarly, in the United States in 2003, there were 1,456 daily papers, Editor & Publisher, CIRCULATION OF U.S. DAILY NEWSPAPERS BY POPULATION GROUPS, available at <http://www.editorandpublisher.com/eandp/images/pdf/US%20Daily%20Circ.%20by%20Pop.pdf> (last visited Feb. 8, 2006), and 7,387 weekly community newspapers, Editor & Publisher, CIRCULATION OF U.S. COMMUNITY WEEKLY NEWSPAPERS BY DAY OF PUBLICATION, at <http://www.editorandpublisher.com/eandp/images/pdf/US%20Weekly%20Circ.%20by%20Day.pdf> (last visited Feb. 8, 2006). More importantly, those papers appear to reach a large number of people in the country. A 2005 report, suggested that "nearly 116 million adults in the top 50 markets, or 77% of the total, read a newspaper at some point during the average week." David Lieberman, *Study Shows Newspapers Reach Many*, USA TODAY, Oct. 3, 2005, at 2B.

²³⁰ Once again, part of the reason for that credibility is that those are institutions in which people are more or less charged with pursuing the truth. See KOVACH & ROSENSTIEL, *supra* note 213, at 5–6.

²³¹ Part of the institutional story is also that academics, journalists, and judges are likely to be amongst a sympathetic, collegial community that can help them develop and improve their (situationist) ideas.

dispositionism present in society as a whole, the more a journalist, academic, or judge is able to reach a broader audience (beyond his fellow judges, academics, and journalists) with his situationist ideas, the more we should expect him to experience resistance to his work.²³² And this may have the effect of actually discouraging further situationism.²³³ Thus, greater exposure holds the promise of increased communication of situationism, at the same time that it involves a risk of spawning a backlash that may undercut the public credibility of any one situationist and ultimately deter the development, promotion, and adoption of new situationist ideas generally.

b. Other, General Attributional Influences

Beyond occupation, there are numerous additional demographic characteristics that play a role in determining an individual's attributional proclivities based on the five schema-breaking factors outlined above.²³⁴ Although an analysis of other potentially important variables, such as wealth, age, education, and when and where a person happens to live, is beyond the scope of this Article,²³⁵ the following subsection will provide a sense of the

Knowledge is passed down in terms of both methods that promote situationism, *see supra* Part II.A.2.b, and actual substantive situationist discoveries. Furthermore, experience with those discoveries and methods may make other academics more welcoming to new situationist evidence.

²³² See Benforado & Hanson, *Naïve Cynicism*, *supra* note 12, *passim*.

²³³ See Benforado & Hanson, *Backlash*, *supra* note 17, *passim*.

²³⁴ See *supra* text accompanying notes 65–94.

²³⁵ In part, we also forgo the analysis because of the difficulty of stating with any certainty the directional effects of certain demographic characteristics. Many of the demographic characteristics we might investigate involve divergent impulses (e.g., being young can allow one to be more situationist at the same time that it may leave one more vulnerable to dispositionist framing). In addition, a number of potential identifiers may only be meaningful when considered with other characteristics; having continued one's studies to the graduate level instead of stopping at high school does not make a person automatically more of a situationist. However, we would expect young, Hispanic law professors, as a group, to be more situationist than white sixty-year-old oyster shuckers, even if we cannot be sure that a particular NYU professor will be any less dispositionist than a particular Apalachicola oysterman.

Similar difficulties confront political scientists attempting to pin down the ideological consequences or correlations of demographic variables. Erin O'Donnell recently summarized the state of the literature this way:

Decades of research have generated many theories about how life circumstances influence political ideology. There are the issues of income (the higher your income, the more conservative you're likely to be); education (an advanced degree makes a person at least a little liberal); region (residents of Utah are generally more conservative than residents of Massachusetts); race (minorities generally are more likely to lean left); and religion (regular churchgoers are more likely to lean right). Yet the variables interact in complex ways, and scholars do not agree about which demographic factors matter most. It is difficult to predict with

breadth of situational stimuli involved in shaping dispositionism and situationism by offering a loose overview of two general areas of influence: group-identity effects and cultural effects.

i. Group-Identity Effects

There are a number of potential group-based effects²³⁶ that shed light on why certain people in certain situations end up being in a position to see more of the situation than others. James Kluegel and Eliot Smith's important work on how Americans make sense of inequality provides a ready means of introducing these influences, and we turn to that scholarship now.²³⁷

Kluegel and Smith argue that there exists in America a "dominant ideology" that helps individuals accept existing inequalities.²³⁸ That ideology approximates what we mean by dispositionism and "involves three beliefs: First, that opportunity for economic advancement is widespread in America today; second, that individuals are personally responsible for their positions; and third, that the overall system of inequality is, therefore, equitable and fair."²³⁹ Other scholars have come to very similar conclusions.²⁴⁰ As Kluegel

certainty how a person with a Ph.D. who earns \$100,000 a year and lives in Pennsylvania will vote on Election Day.

Erin O'Donnell, *Twigs Bent Left or Right: Understanding How Liberals and Conservatives Differ, from Conception On*, HARV. MAG., Jan.-Feb. 2006, at 34, 37.

²³⁶ Many group-based dynamics are beyond the scope of this Article. For instance, the ultimate attribution error, discussed above, reflects one way in which attributions differ for in-groups and out-groups. See *supra* notes 43–47 and accompanying text. For a useful overview of some of the dynamics behind group identity, perceptions, and behavior, see Stephen Worchel, *Come One, Come All: Toward Understanding the Process of Collective Behavior*, in THE SAGE HANDBOOK OF SOCIAL PSYCHOLOGY 477 (Michael A Hogg & Joel Cooper eds., 2003). This section focuses only on evidence regarding the way certain salient identity groups may be more or less dispositionist or situationist.

²³⁷ See JAMES R. KLUEGAL & ELIOT R. SMITH, BELIEFS ABOUT INEQUALITY: AMERICANS' VIEWS OF WHAT IS AND WHAT OUGHT TO BE 62–73 (1986).

²³⁸ *Id.*

²³⁹ *Id.* at 23. That basic legitimating ideology is by no means the only belief system, but it may well be the dominant one. See generally Chen & Hanson, *Illusion of Law*, *supra* note 3, at 3–33 (summarizing the emergence of the dispositionist free-market ideology); Hanson & Hanson, *Blame Frame*, *supra* note 3 (describing how dispositionist attributional schemas have been used to justify inequalities and oppression throughout American history); John T. Jost & Orsolya Hunyady, *Antecedents and Consequences of System-Justifying Ideologies*, 14 CURRENT DIRECTIONS IN PSYCHOL. SCI. 260 (2005) [hereinafter Jost & Hunyady, *Antecedents and Consequences*] (summarizing many of the most influential legitimating ideologies and some of their interior situational sources); Kevin B. Smith & Lorene H. Stone, *Rags, Riches, and Boostraps: Beliefs About the Causes of Wealth and Poverty*, 30 SOC. Q. 93 (1989) (examining the relative strength of four "metatheories" about socioeconomic inequalities and finding that "individualism"—briefly, "the age-old notion that individuals are ultimately responsible for their status in systems of social inequality"—was the dominant metatheory for explaining poverty in their sample); NAT'L OPINION RES. CTR., GENERAL SOCIAL

and Smith illustrate, however, some *groups* embrace that ideology more completely and wholeheartedly than others—though it is not the case that any group is homogenous in its attributions.²⁴¹

For instance, with regard to various outcomes or distributions, certain groups are, on average, more likely than others to perceive “structural” (or, as we might put it, situationist) causes and less likely to perceive “individual” (or dispositionist) causes.²⁴² Hence, particular demographic groups differ as to their tendency to doubt or reject the dominant ideology. Kluegel and Smith summarized some of the group-based variations regarding attributions of wealth this way:

Structural causes for wealth are more often cited by females, the young, nonwhites, those with lower incomes, . . . and Northeasterners Those for whom wealth is unlikely personally seem to see the wealthy in negative terms and see wealth itself as the result of structural factors . . . rather than individual efforts and abilities.

Individual causes of wealth portray the wealthy in a more positive light. Males, the old, whites, those with high incomes, and Westerners are more inclined to see individual causes of wealth. Catholics, Protestants, and Jews are all higher on this variable than adherents of other religions or no religion [T]his regression looks like the reverse of that for structural causes of wealth: The

SURVEY (1993) (finding, in a survey asking Americans whether various factors were very important, important, somewhat important, or not at all important for how somebody's life turns out, that 93% of respondents stated that will power and hard work were either very important (57%) or important (36%); by contrast, 23% and 28% of respondents, respectively, believed that God was a very important or important factor; 3% and 28% thought that about genes; 13% and 37% about societal effects giving certain individuals a head start and holding others back; and 3% and 16% about chance).

²⁴⁰ Brenda Major has shown, for instance, that individuals deal with disparities across groups with several “legitimizing myths,” which “tend to legitimate the status quo.” Brenda Major, *From Social Inequality to Personal Entitlement*, 26 *ADV. EXP. SOC. PSYCHOL.* 293, 309 (1994); see also *supra* text accompanying notes 48–51 (discussing the system-affirmation motive). Major also argues that people make sense of intergroup inequalities through different causal attributions for success and failure. Major, *supra*. The legitimizing myths include locating causation in people, not in systems, embodied by an exaggerated sense of control over one's own life and a presumption that people, one way or another, end up getting what they deserve. *Id.*

²⁴¹ For instance, according to Kluegel and Smith, “Lower status people . . . less often endorse the dominant-ideology belief that opportunity is prevalent, are less optimistic about their contemporary and future chance for economic advancement, and tend to see themselves as victims of barriers to opportunity more often than higher status people.” KLUEGAL & SMITH *supra* note 237, at 72. In addition, Kluegel and Smith found that, of group-based categories, “sex and race” were “the strongest bases for potential group differences in beliefs about opportunity,” with “blacks and women . . . express[ing] on the average a less favorable assessment of aspects of opportunity than . . . white men.” *Id.*

²⁴² *Id.* at 90–91.

advantaged see wealth as achievable by individual talents and efforts and thus as potentially attainable by themselves.²⁴³

Those findings, though only suggestive, are consistent with older (less thorough) studies on attributions of poverty²⁴⁴ as well as some of the more recent social psychological research regarding the types of group-based variations that may exist for many sorts of causal attributions.²⁴⁵

Kluegel and Smith's extensive examination of how Americans make sense of inequalities has been bolstered by a recent, ambitious study involving over forty researchers from fifteen U.S. colleges and universities: *The Multi-City*

²⁴³ *Id.*

²⁴⁴ One such study was by Joseph Feagin, who was one of the first social psychologists to explore how Americans explained poverty. See Joseph Feagin, *Poverty: We Still Believe that God Helps Those Who Help Themselves*, 6 PSYCHOL. TODAY 101–29 (1972). Feagin developed a typology of eleven causes, which he then grouped into three broad categories: “individualistic” explanations, which focus on the dispositions or characters of the impoverished (e.g., “lazy”); “structural” explanations, which attribute poverty to external situational factors (e.g., absence of job opportunities); and “fatalistic” explanations, which attribute poverty to a different sort of external situational force—fate or chance. Feagin discovered that most Americans attribute poverty to individualistic causes. More specifically, over one thousand survey respondents ranked eleven possible causes of poverty as either “very important,” “somewhat important,” or “not important.” Of those, only three of the causes (all individualistic) were rated as very important by a majority of the respondents: “lack of thrift and proper money management”; “lack of effort”; and “lack of ability.” The potential causes that were considered least important were “being taken advantage by rich people” and “just bad luck.” Generally, structural factors were most likely to be viewed as “not important.” *Id.*

Feagin also found, however, significant attributional variability across demographic groups. For instance, “individualistic” attributions were endorsed disproportionately by White Protestants and Catholics. The results also indicated that disadvantaged groups were more prone to accept structural or fatalistic attributions. *Id.*

²⁴⁵ See, e.g., NISBETT, *supra* note 56, *passim* (exploring, delineating, and explaining attributional differences across “Eastern” and “Western” cultures); LAURA UBA, ASIAN AMERICANS: PERSONALITY PATTERNS, IDENTITY, AND MENTAL HEALTH *passim* (1994) (across racial and ethnic groups); Yiwei Chen & Fredda Blanchard-Fields, *Age Differences in Stages of Attributional Processing*, 12 PSYCHOL. & AGING 694, 700 (1997) (across age groups); Katherine Follett & Thomas Hess, *Aging, Cognitive Complexity, and the Fundamental Attribution Error*, 57B J. GERONTOLOGY 312, *passim* (2002) (same); James M. Jones, *Racism in Black and White: A Bicultural Model of Reaction and Evolution*, in ELIMINATING RACISM: PROFILES IN CONTROVERSY 117, *passim* (Phyllis A. Katz & Dalmas A. Taylor eds., 1988) (across racial and ethnic groups); Hazel Markus & D. Oyserman, *Gender and Thought: The Role of the Self-Concept*, in GENDER AND THOUGHT 100, *passim* (M. Crawford & M. Gentry eds., 1989) (across gender).

Groups based on age, gender, educational levels, status, race, religion, culture, social environment, income, and so on are all likely to influence the extent to which different individuals will deviate from general dispositionist attributions or be relatively open to others who are promoting a situationist perspective. The differences across groups are, we suspect, partially a reflection of different situational influences. Applying the five schema-breaking factors outlined in Part II.B.1.c may go some distance toward explaining disparate tendencies, just as it did with respect to occupation. As indicated above, however, the complexity of interacting situational forces renders simplistic group-based predictions all but impossible. See *supra* note 235.

Study of Urban Inequality. A 2001 volume summarizing many of the results of that project is consistent with the contours of Kluegel and Smith's findings.²⁴⁶ With respect to racial inequalities, for instance, the researchers found that many people make sense of inequalities through dispositionalizing stereotypes—positive and negative—and that, moreover, those stereotypes are part of the situation that gives rise to the inequalities. As explained in the volume's introduction, “positive and negative stereotypes are influenced by who's on top and who's at the bottom of the earnings structure, even as they play a role in shaping, justifying, and perpetuating that status quo.”²⁴⁷

That tendency to rely on such group-dispositionist rationalizations, however, varied across groups. For instance, a person's education level “usually influence[d] the degree of negative stereotyping, with the better educated expressing less negative views.”²⁴⁸ Moreover, other variables, such as age, gender, and political ideology, also seem to have “shaped the degree of negative stereotyping.”²⁴⁹

ii. *Cultural Effects*

A burgeoning cultural-psychology literature²⁵⁰ shows how Western cultures tend to be more dispositionist than Eastern cultures.²⁵¹ Similarly, though Western nations, particularly the U.S., have long been relatively dispositionist (individualistic, “me-first,” and so on), the strength of dispositionism in the U.S. has varied over time.²⁵² Since the 1960s, for instance, the country has undergone a notable shift in the dispositionist direction. The reasons for that

²⁴⁶ See URBAN INEQUALITY: EVIDENCE FROM FOUR CITIES (Alice O'Connor, Chris Tilly & Lawrence Bobo eds., 2001).

²⁴⁷ *Id.* at 20.

²⁴⁸ *Id.* at 130–31.

²⁴⁹ *Id.* at 131. Similar results can be found in Lawrence Bobo and his co-authors' related work, which examines the differences between whites and blacks in their interpretations of inequality in, and their preferences for punishment through, the criminal justice system. See Lawrence D. Bobo & Devon Johnson, *A Taste for Punishment: Black and White American's Views on the Death Penalty and the War on Drugs*, 1 DU BOIS REV. 151 (2004); Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RES. 445 (2005).

²⁵⁰ Richard A. Shweder, *Cultural Psychology—What is It?*, in CULTURAL PSYCHOLOGY: ESSAYS ON COMPARATIVE HUMAN DEVELOPMENT 1 (James W. Stigler, Richard A. Shweder & Gilbert Herdt eds., 1990) (“A discipline is emerging called ‘cultural psychology’ . . . and its time may have arrived.”).

²⁵¹ See *supra* notes 56 & 245; see also Hanson & Yosifon, *The Situation*, *supra* note 3, at 250–59 (reviewing literature on western conception of the “self”).

²⁵² See Hanson, *Backlash*, *supra* note 17, *passim*; see also Chen & Hanson, *Illusion of Law*, *supra* note 3, at 3–33 (describing the emergence of neo-conservative, dispositionist schemas associated with today's dominant policymaking scripts).

trend are many, and too complex to do justice to here, but the point is that the dominant or widespread schemas tend, other things equal, to be self-perpetuating.²⁵³ After all, “culture” itself can be thought of as the

set of ideas that coordinate the actions and construct the meanings of a group of people. More often than not, these ideas are implicit and automatic, guiding our practices, structuring our institutions, and generally infusing the everyday business of our lives. As people engage with a culture’s practices, artifacts, and institutions, their thoughts, feelings, and behaviors come to reflect the culture’s values and beliefs.²⁵⁴

Because attributional schemas are cultural, they will tend to reproduce themselves, implicitly and automatically. And, as cultures shift—owing to evolving situational forces (whether through war, natural disaster, intergroup competition, scientific and technological developments, political crises, or the work of attributional entrepreneurs)—attributional schemas and presumptions are likely to change as well.

c. Prediction III

The preceding pages have identified a number of demographic variables that allow for lesser or greater situational sensitivity, with special emphasis on occupation. The basic claim has been that certain demographic identities are more likely than others to encourage individuals to develop and refine situationist sensitivity and, in turn, to challenge publicly our dominant dispositionist presumptions.²⁵⁵ That brings us to the third major prediction.

²⁵³ Again, applying the five schema-breaking factors from Part II.B.1.c is likely to be revealing. Indeed, we hope future work will consider how large-scale societal forces may encourage situationism by creating new situations that (1) require individuals to make many causal attributions regarding human behavior; (2) present individuals with evidence that is not easily accommodated by the dispositionist model, and allow or promote unconventional interpretations of that evidence; (3) provide adequate time and opportunity to consider the role of situation; (4) promote diverse and wide-ranging interactions; and (5) encourage and hold individuals accountable for accuracy.

²⁵⁴ Alana Conner Snibbe, *Cultural Psychology: Study in More than the Exotic Other*, 16 AM. PSYCHOL. SOC’Y OBSERVER, Dec. 2003, available at <http://www.psychologicalscience.org/observer/getArticle.cfm?id=1444>; see also Justin D. Levinson & Kaiping Peng, *Different Torts for Different Cohorts: A Cultural Psychological Critique of Tort Law’s Actual Cause and Foreseeability Inquiries*, 13 S. CAL. INTERDISC. L.J. 195, 202–03 (2004) (defining culture as “community-specific concepts of what is true, good, beautiful, and efficient that are socially inherited (made manifest in the language, laws, and customary practices of the members of a certain group) and serve to mark a distinction between different ways of life”).

²⁵⁵ We do not mean to suggest that certain occupations or certain groups are homogeneous in their attributions. As emphasized above, the currents behind dispositionism are deep and wide. Our focus has been

Within any society, the catalysts behind trends toward situationism will be those individuals (and associated institutions) with the interior motivations (see Prediction I)²⁵⁶ and exterior incentives and opportunities (see Prediction II)²⁵⁷ to appreciate the power of situation and the ability to communicate with or affect the mass populace. In America, those relative situationists will tend to have occupations and work for institutions that create opportunities for, or encourage, the making and promoting of situationist attributions. Academia, the press, and the judiciary are examples of institutions that have demonstrated, at least on certain occasions and in certain ways, just such situationism-bolstering characteristics.²⁵⁸

A person's other affiliations and identity groups, as well as larger cultural and historical forces, may also influence whether an individual will develop situational sensitivity.

C. Attributional Tendencies Underlying the Liberal-Conservative Duality

1. Using Labels: Liberal and Conservative

Given the variability of dispositionism and our great reliance on schemas, it is unsurprising that we humans commonly employ labels to categorize relatively situationist and relatively dispositionist individuals, approaches, institutions, movements, and societies. The most significant (and, for many, chronically activated) of those schemas is the liberal-conservative bipolarity, which Americans routinely employ to explain, predict, and understand a range of subjects—from our policies to our history and from ourselves to others.²⁵⁹

on identifying the circumstances in which individuals might be given the opportunity to swim against the dispositionist tide successfully and to credibly persuade others to do the same.

²⁵⁶ See *supra* Part II.A.1.f.

²⁵⁷ See *supra* Part II.B.1.c.

²⁵⁸ As already indicated, that list is meant to be suggestive and illustrative, but not exhaustive. Among other possible occupations, we suspect that that of administrative regulator might also push toward relatively situationist attributions. Cf. STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT, *passim* (2007) (detailing, in different terms, the situational forces or regulatory processes that lead regulators toward situationism).

²⁵⁹ Self-description based on the bipolarity is incredibly powerful, for example, in predicting how an individual will vote. See John T. Jost, *The End of the End of Ideology*, 61 AM. PSYCHOL. 651, 658–59 (2006) [hereinafter Jost, *End of Ideology*]. A survey of the voting behavior of 7,500 respondents in presidential elections between 1972 and 2004 found that “[a]pproximately 80% of respondents who described themselves as ‘liberal’ or ‘extremely liberal’ reported voting for Democratic candidates, and 80% of respondents who described themselves as ‘conservative’ or ‘extremely conservative’ voted for Republican candidates.” *Id.* at 659.

This section argues that a major part of what it means to call a person “liberal” is to designate that individual as relatively sensitive to situation. And, conversely, the label “conservative” is often meant to designate a person as relatively dispositionist.²⁶⁰ Although the correspondence between attributional tendencies and these labels is not widely perceived (owing largely to the fact that people generally fail to cognize attributional styles as such), it is nonetheless quite strong. Social psychologists have shown that political worldviews do correlate with attributional styles. Gail Zucker and Bernard Weiner, for instance, have found that “[c]onservatives generally rate individualistic [or dispositionist] causes as being more important than do liberals who, in turn, rate societal and fatalistic [two types of external situationist] causes as being more important than do conservatives.”²⁶¹

As Susan Fiske explains, summarizing the relevant literature, conservatives tend to believe that

people are poor because they are lazy, do not improve themselves, cannot manage money, and abuse drugs or alcohol. Less conservative beliefs correlate with situational attributions: perceiving societal causes, feeling pity, and intending to help. In this view, people are poor because of prejudice and discrimination, inadequate

²⁶⁰ Again, the point is not to suggest that people neatly fall into one of two categories. *See supra* note 10. Our point is that those referred to as “liberals” tend to be *relatively* situationist, but are often still rather strong dispositionists. Thus, it is about a spectrum based on recognition of the power of situation, openness to ambiguity, and a host of other factors. *See* EQUAL TIME FOR FREETHOUGHT, THE SCIENCE OF CONSERVATISM PART I—GEORGE RAKOFF/JOHN JOST (Nov. 13, 2005), *available at* http://web.archive.org/web/20060615205539/http://njhn.org/etff_archives.html [hereinafter EQUAL TIME FOR FREETHOUGHT, CONSERVATISM PART I] (Jost explaining that “people who can be classified as either liberals or conservatives share some things in common but have a great deal that is different” and that “[i]t is useful to think about it as a continuum where you can have extreme exemplars at either end of the continuum”). Moreover, we should reiterate that being a situationist is only a necessary condition, not a sufficient one, for accurate attributions. Liberals, in as much as they have come closer to meeting that condition and are looking for hard-to-see and less-affirming role of situation, stand a better chance, other things equal, of more closely approaching the truth in explaining behavior. *See supra* note 10.

²⁶¹ Gail Sahar Zucker & Bernard Weiner, *Conservatism and Perceptions of Poverty: An Attributional Analysis*, 23 J. APPLIED SOC. PSYCHOL. 925, 940 (1993). Similarly, Sarah Williams conducted studies examining attributions of causation and blame regarding a welfare recipient and a theft victim. Her studies demonstrate

that reactions to victims are an integral part of ideological orientation. The extent of responsibility attribution, [victim] derogation, and affective responses to the victim were all predicted on the basis of the observers’ political attitudes. Conservatives are more willing than liberals to derogate and blame victims. Similarly, conservatives are less likely than liberals to express feelings of sympathy and more likely to express disgust.

Sarah Williams, *Left-Right Ideological Differences in Blaming Victims*, 5 POL. PSYCHOL. 573, 580 (1984).

education, exploitation by the rich, and low wages. The conservative dispositional attributions imply that poor people have a controllable predisposition to stay poor.²⁶²

Relatedly, conservatives tend to be less sympathetic to and less willing to help individuals harmed by everything from natural disasters to low income, in part, because they tend to attribute the suffering to the victims' faulty dispositions.²⁶³

Social psychologists have begun to explore the unseen (or, as we would cast them, interior situational) forces that motivate individuals to tend toward liberalism or conservatism.²⁶⁴ As would be expected, those forces share much with the five interior sources of dispositionism—(1) perceptual limitations (salience); (2) the motives for reasons, closure, and simplicity; (3) the self-affirming motive; (4) the group-affirming motive; and (5) the system-affirming motive—outlined in Part II.A above.²⁶⁵

²⁶² FISKE, *supra* note 39, at 98.

²⁶³ See Hanson & Hanson, *Blame Frame*, *supra* note 3, at 454–78 (examining conservative reaction to Katrina victims); Linda J. Skitka, *Ideological and Attributional Boundaries on Public Compassion: Reactions to Individuals and Communities Affected by Natural Disaster*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 793 *passim* (1999); Linda J. Skitka & Philip E. Tetlock, *Providing Public Assistance: Cognitive and Motivational Processes Underlying Liberal and Conservative Policy Processes*, 65 J. PERSONALITY & SOC. PSYCHOL. 1205 *passim* (1993); see also *supra* text accompanying notes 237–44 (summarizing Feagin's work on causal attributions for poverty and Kluegel and Smith's evidence regarding relatively dispositionist and relatively situationist explanations for income inequality); EQUAL TIME FOR FREETHOUGHT, CONSERVATISM PART I, *supra* note 260 (Jost explaining that one of the two core and stable features of conservative ideology is "an acceptance of social differentiation or inequality and this corresponds more directly to economic forms of conservatism, including forms of support for laissez faire capitalism"); Jost, *End of Ideology*, *supra* note 259, at 661 (explaining that conservatives are also more "likely to hold prejudicial attitudes—at a conscious or unconscious level—toward racial minorities, homosexuals, women, and members of other disadvantaged groups").

²⁶⁴ As John Jost has detailed, following World War II, a general consensus existed among many sociologists and political scientists that ideological distinctions did not have social and psychological significance. Jost, *End of Ideology*, *supra* note 259, at 651–52. Jost argues that recent work by social and personality psychologists casts serious doubt on the end-of-ideology thesis and suggests "that there are indeed meaningful political and psychological differences that covary with ideological self-placement." *Id.* at 651.

²⁶⁵ See *supra* text accompanying notes 23–51. Because this research has not previously been discussed in the law review literature, the following subsections will be slightly more detailed than the previous ones. It is also important to note that, although it is implicit in much of the work we describe, the research below does not make the precise causal link to dispositionism and situationism that we assert.

2. *Interior Sources: Liberal and Conservative*

a. *Motivated Social Cognition*

John Jost, Jack Glaser, Arie Kruglanski, and Frank Sulloway recently reviewed nearly fifty years of studies analyzing psychological differences associated with left- and right-wing thinking.²⁶⁶ In particular, they examined the motives correlated with the expression and adoption of political conservatism.²⁶⁷

In their meta-analysis, motives are grouped into several broad headings, including *epistemic* motives, that “govern the ways in which people seek to acquire beliefs . . . that help to navigate social and physical worlds that are threateningly ambiguous, complex, novel, and chaotic”²⁶⁸—and *ideological* motives—which underlie beliefs about the self, group, and the social and political systems that “help to reduce uncertainty and mitigate feelings of threat and worthlessness.”²⁶⁹ Both types of motives are related to an individual’s response to uncertainty or dangers posed to the system.²⁷⁰ According to Jost and his colleagues, when people are exposed to a heightened level of uncertainty or threat, they experience an increased need to reduce the feeling of threat and exhibit traits and attitudes typically associated with political conservatism.²⁷¹

The social-cognitive motives that Jost and his collaborators have identified overlap elegantly with the interior sources of dispositionism we outlined in Part II, suggesting a powerful connection between political conservatism and

²⁶⁶ John T. Jost, Jack Glaser, Arie W. Kruglanski & Frank J. Sulloway, *Political Conservatism as Motivated Social Cognition*, 129 PSYCHOL. BULL. 339 (2003) [hereinafter Jost, Glaser, Kruglanski & Sulloway, *Conservatism*]. Jost and his colleagues analyzed eighty-eight samples, involving 22,818 participants, studied between 1958 and 2002. *Id.* at 352. These samples were amassed from books, articles, and conferences, and included coverage of twelve countries. *Id.*

This work is part of what Jost explains to be an “emerging psychological paradigm” that offers “the possibility of explaining ideological differences between right and left in terms of underlying psychological needs for stability versus change, order versus complexity, familiarity versus novelty, conformity versus creativity, and loyalty versus rebellion.” Jost, *End of Ideology*, *supra* note 259, at 662.

²⁶⁷ Jost, Glaser, Kruglanski & Sulloway, *Conservatism*, *supra* note 266, at 351.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 368.

²⁷⁰ *Id.*

²⁷¹ See Jost & Hunyady, *Antecedents and Consequences*, *supra* note 239, at 261–62; see also John T. Jost, Gráinne Fitzsimmons & Aaron C. Kay, *The Ideological Animal: A System Justification View*, in HANDBOOK OF EXPERIMENTAL EXISTENTIAL PSYCHOLOGY 263, 275–77 (Jeff Greenberg et al. eds., 2004) [hereinafter Jost, Fitzsimmons & Kay, *Ideological Animal*].

dispositionism. Earlier sections explained that the desires for closure, structure, and simplicity are forces that drive people to prefer simple theories over complex ones and to avoid information that undermines initial beliefs.²⁷² This description aligns with the three epistemic motives that have been shown to correlate with political conservatism: “intolerance of ambiguity,” “uncertainty avoidance,” and “need for order, structure, and closure.”²⁷³

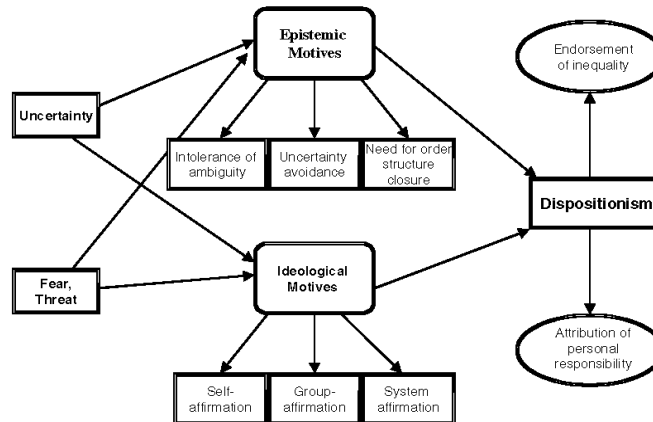
There is also a striking similarity between the needs for self-, group-, and system-affirmation—which we identified as forces that lead people to maintain a dispositionist outlook even in the face of contrary evidence²⁷⁴—and Jost’s account of the “ideological” motives of “group-based dominance” and “system justification.”²⁷⁵ As depicted in Figure 1 below, our desire to view ourselves as independent, autonomous entities; our in-groups (and their members) as superior to out-groups (and their members); and our world, as fundamentally rational and just, have all tended to encourage and maintain dispositionism. In Jost’s framework, those motivations also lead to avoidance of change and endorsement of the status quo, impulses that are emblematic of political conservatism.

²⁷² See *supra* text accompanying notes 23–51. For an interesting audio discussion on the ways in which one’s desire for certainty, simplicity, and closure point to the link between political conservatism and religious fundamentalism, see EQUAL TIME FOR FREETHOUGHT, THE SCIENCE OF CONSERVATISM PART II (Nov. 20, 2005), available at http://web.archive.org/web/20060615205539/http://njhn.org/etff_archives.html [hereinafter EQUAL TIME FOR FREETHOUGHT, CONSERVATISM PART II].

²⁷³ Jost, Glaser, Kruglanski & Sulloway, *Conservatism*, *supra* note 266, at 368; see also Jost, *End of Ideology*, *supra* note 259, at 662 (stating that, in addition, there is “a clear tendency for conservatives to score . . . lower in openness to experience and integrative complexity than moderates and liberals”). As Jost and his colleagues are quick to caution, “This does not mean that liberals crave uncertainty and risk, but they do seem to be less troubled by them and less preoccupied with their management in comparison with conservatives.” John T. Jost, Jack Glaser, Arie W. Kruglanski & Frank J. Sulloway, *Exceptions that Prove the Rule—Using a Theory of Motivated Social Cognition to Account for Ideological Incongruities and Political Anomalies: Reply to Greenberg and Jonas*, 129 PSYCHOL. BULL. 383, 383 (2003). Jost and his colleagues’ findings are supported by other studies that “demonstrate that in a variety of perceptual and aesthetic domains, conservatism is associated with preferences for relatively simple, unambiguous, and familiar stimuli, whether they are paintings, poems, or songs.” Jost, *End of Ideology*, *supra* note 259, at 662.

²⁷⁴ See *supra* text accompanying notes 35–51.

²⁷⁵ Jost, *End of Ideology*, *supra* note 259, at 662.

Figure 1²⁷⁶

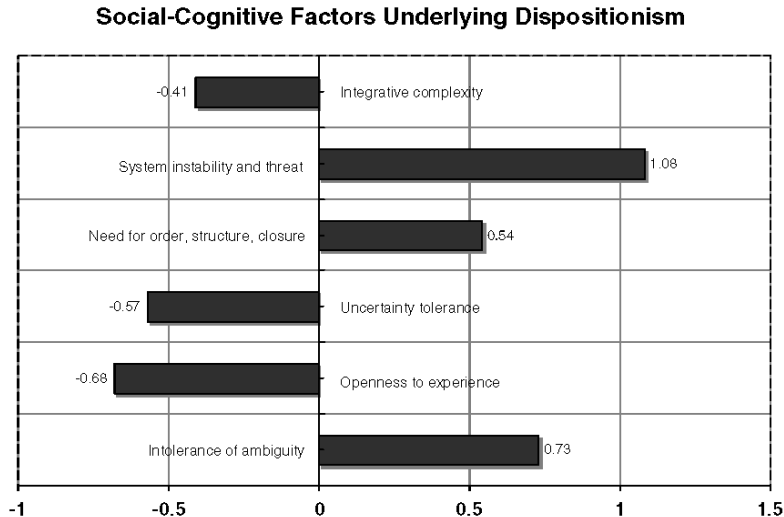
In other work, Jost and his colleagues discuss numerous variables pertaining to “epistemic and existential functioning” that are significantly correlated with right-wing conservatism,²⁷⁷ as measured by Cohen’s d ’s.²⁷⁸ As summarized in *Figure 2*, six of the variables closely relate to our earlier analysis of the external factors and internal motivations underlying dispositionism: integrative complexity (-0.41), system instability and threat (1.08), intolerance of ambiguity (0.73), openness to experience (-0.68),²⁷⁹ tolerance for uncertainty (-0.57), and need for order, structure, and closure (0.54).

²⁷⁶ Jost, Glaser, Kruglanski & Sulloway, *Conservatism*, *supra* note 266, at 368.

²⁷⁷ See Jost, Fitzsimmons & Kay, *Ideological Animal*, *supra* note 271, at 270.

²⁷⁸ Cohen’s d is a descriptive measurement of effect sizes, often used in meta-analysis like the one that Jost and his coauthors performed in *Conservatism as Motivated Social Cognition*. See Jost, Glaser, Kruglanski & Sulloway, *Conservatism*, *supra* note 266, *passim*. The d measures the difference between the means of the experimental group and the control group given the presence of variables. See JACOB COHEN, *STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES* 20–27 (2d ed. 1988). Cohen, who invented this form of analysis, defined effect size as “small, $d=.2$,” “medium, $d=.5$,” and “large, $d=.8$.” See *id.*

²⁷⁹ A negative d value indicates that the *lack* of the social-cognitive factor is correlated with conservatism.

Figure 2

Jost is careful to note that the causal relationship between the social-cognitive motives and conservative ideology is still unclear and requires further research.²⁸⁰ Nonetheless, he argues that his team “identified plausible interpretations of these data” with a social-cognitive theory of conservatism.²⁸¹ For our purposes, even if epistemic and ideological motives do not “cause” political conservatism, but are merely correlated with it, there is still a striking

²⁸⁰ Neurocognitive research may eventually shed some light on this difficult causation question, as illustrated by a recent experiment by David Amodio and his collaborators, including Jost. David M. Amodio, John T. Jost, Sarah L. Master & Cindy M. Yee, *Neurocognitive Correlates of Liberalism and Conservatism*, 10 NATURE NEUROSCIENCE 1246 (2007). The experiment, though small in scale, revealed that during a simple task, the brain activity related to processing conflicts was markedly different for liberals and conservatives. *Id.* at 1247. Subjects completed a survey (modeled on one earlier developed by Jost) evaluating their political attitudes. *Id.* Subjects then completed a simple Go/No-Go task on a computer. *Id.* The frequency of the Go stimulus that appeared on the computer screen created a habitual response in the subject. *Id.* When subjects were presented with a No-Go stimulus they were supposed to withhold a response. *Id.* at 1246–47. In the latter cases, the brain activity of the subjects, recorded for each stimulus, showed that conflict-related neural activity was significantly higher in liberal subjects. *Id.* at 1247. Liberal subjects also showed greater accuracy in withholding responses when appropriate. *Id.* Overall, the experiment suggests, but only vaguely, that liberals and conservatives have different cognitive styles when faced with a conflicting or ambiguous situation. *Id.* Liberals are more likely to adjust their response to the conflict whereas conservatives are more likely to maintain a fixed response. *Id.*

²⁸¹ Jost, Glaser, Kruglanski & Sulloway, *Conservatism*, *supra* note 266, at 368.

connection between conservatism and dispositionism. Indeed, one very recent study²⁸² found that “regional” interior dispositions may help explain the political division between “red” and “blue” states:

Consistent with results at the individual level of analysis . . . , openness to new experiences was the strongest [of five] regional personality predictor[s] of the percentage of the statewide vote cast for Democratic versus Republican candidates in the three most recent presidential elections That is, states with higher mean-level openness scores were significantly more likely to have cast votes for Clinton, Gore, and Kerry in these elections and significantly less likely to have cast votes for Dole or Bush. Remarkably, state-level openness remained a significant predictor even after we adjusted for demographic and other political variables, including population density, percentage of minority population, average income, voter turnout, and percentage of the vote cast for the same-party candidate in the previous election.²⁸³

Simply stated, many of the motives exhibited by conservatives are the very same ones that we have argued would lead people to embrace dispositionism. Therefore, it should not be surprising that people who are conservative tend to be relatively dispositionist in orientation, and vice versa.

b. Cognitive Linguistics and Conceptual Metaphors

George Lakoff, a cognitive linguist,²⁸⁴ has conducted similar research on the conservative-liberal divide.²⁸⁵ Lakoff’s explanation for why liberal and

²⁸² Peter J. Rentfrow, John T. Jost, Samuel D. Gosling & Jeff Potter, *Regional Differences in Personality Predict Voting Patterns in U.S. Presidential Elections, 1996–2004* (unpublished manuscript, on file with authors).

²⁸³ Jost, *End of Ideology*, *supra* note 259, at 665–66; *see also* EQUAL TIME FOR FREETHOUGHT, CONSERVATISM PART II, *supra* note 272 (discussing that study).

²⁸⁴ The field of Cognitive Linguistics emerged from research focused on exploring the “the relation of language and mind” without attempting “to explain linguistic patterns by means of appeals to structural properties internal to and specific to language”:

Rather than attempting to segregate syntax from the rest of language in a ‘syntactic component’ governed by a set of principles and elements specific to that component, the line of research followed instead was to examine the relation of language structure to things outside language: cognitive principles and mechanisms not specific to language, including principles of human categorization; pragmatic and interactional principles; and functional principles in general, such as iconicity and economy.

Suzanne Kemmer, *About Cognitive Linguistics: Historical Background*, INTERNATIONAL COGNITIVE LINGUISTICS ASS’N, July 28, 2007, <http://www.cognitivelinguistics.org/cl.shtml> (July 28, 2007).

conservatives adopt the distinct, identifiable positions that they do lies in each side's conception of "morality," by which Lakoff means "a fundamental human concern with what is best for us and how we ought to live."²⁸⁶ At the heart of both liberal and conservative moral conceptual systems is a cognitive model of the family, and a set of related conceptual metaphors that make particular political positions appear moral or immoral.²⁸⁷ The liberal worldview is centered on a "nurturant parent" model that assumes "that the world is basically good and can be made better and that one must work toward that."²⁸⁸ As Lakoff explains, "[n]urturing involves empathy, and the responsibility to take care of oneself and others for whom we are responsible."²⁸⁹

The conservative worldview, conversely, is based on a "strict father" model, which assumes that the world is dangerous and difficult, and that children are born bad and must be made good.²⁹⁰ Thus, the strict-father is the moral authority who prevails in competitive struggles (allowing him to support and defend the family), tells his wife what to do, and teaches his kids right

²⁸⁵ We benefited immensely from the superb summary of Lakoff's extensive work by Jith Meganathan. See Jith Meganathan, *Judges as Political Actors: Cognitive Linguistic Evidence* (unpublished manuscript, on file with authors).

²⁸⁶ GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 290 (2d ed. 2003).

²⁸⁷ As Lakoff writes,

The link between family-based morality and politics comes from one of the most common ways we have of conceptualizing what a nation is, namely, as a family. It is the common, unconscious, and automatic metaphor of the Nation-as-Family that produces contemporary conservatism from Strict Father morality and contemporary liberalism from Nurturant Parent morality.

GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* 13 (2d ed. 2002) [hereinafter LAKOFF, *MORAL POLITICS*].

²⁸⁸ George Lakoff as quoted in Bonnie Azab Powell, *Framing the Issues: UC Berkeley Professor George Lakoff Tells How Conservatives Use Language to Dominate Politics*, U.C. BERKELEY NEWS, Oct. 27, 2003, http://www.berkeley.edu/news/media/releases/2003/10/27_lakoff.shtml.

²⁸⁹ According to Lakoff, specific policies naturally flow from the nurturant parent model

such as governmental protection in [the] form of a social safety net and government regulation, universal education (to ensure competence, fairness), civil liberties and equal treatment (fairness and freedom), accountability (derived from trust), public service (from responsibility), open government (from open communication), and the promotion of an economy that benefits all and functions to promote these values, which are traditional progressive values in American politics.

Id.

²⁹⁰ Jost has noted the rough consistencies between his theories and Lakoff's "strict father" model: "I do think it's interesting that [Lakoff's] metaphor frame of the strict-father role does seem to combine both elements of traditionalism and inequality within the family, a hierarchical structure within the family setting." EQUAL TIME FOR FREETHOUGHT, *CONSERVATISM PART I*, *supra* note 260.

from wrong.²⁹¹ The only way to do that is through discipline. Once grown, the self-reliant, disciplined children are free to make their choices and will do so competently. Those children who remain dependent—who were spoiled, overly willful, or recalcitrant—should be forced to undergo further discipline or be cut free, with no support, to face the harsh realities of the outside world.²⁹²

Framed in our terms, the “strict father” and his offspring are classic dispositionists.²⁹³ Moral strength, the conceptual metaphor with the highest priority in the strict-father model, is a dispositionist metaphor—one based on the idea of personal responsibility for action.²⁹⁴ Actions reflect choices, choices reflect disposition, and that is pretty much it. Since the central question with human behavior is whether a person is morally strong or morally weak, situational factors are necessarily ignored.

The “nurturant parent,” on the other hand, is far more situationally sensitive—indeed, the concept of nurturance itself evokes the idea of careful attention to situation. The nurturant parent is the empathetic parent. And, according to Lakoff, the conception of morality as empathy translates to the “capacity to project your consciousness into other people so that you can feel what they feel.”²⁹⁵ This capacity is, in many ways, what it means to be

²⁹¹ *Id.*

²⁹² *See id.* The strict-parent model mandates that government social programs be eliminated because they “‘spoil’ people by giving them things they haven’t earned and keeping them dependent. The government is there only to protect the nation, maintain order, administer justice (punishment), and to provide for the promotion and orderly conduct of business.” *Id.*

²⁹³ Lakoff illustrates the connection between discipline within the strict-father model and the common dispositionist presumption that outcomes reflect a person’s character:

Suppose that you are not prosperous, that means you aren’t disciplined enough and if you’re not disciplined enough to be prosperous then you’re not disciplined enough to be moral and follow the rules. And, therefore, you deserve your poverty because you are immoral. Therefore, any sort of social program should be eliminated on the grounds that it gives people things they haven’t earned, taking away their discipline. If it takes away their discipline, it takes away their capacity for morality and therefore they are immoral. What that does is induces a hierarchy of quality of people. That is the moral people are the prosperous people and you can tell from their power and prosperity that they are the disciplined people. The undisciplined people don’t deserve anything and they are less worthy people. And the result is there is a notion of inequality and rank on this higher part of the hierarchy has to be earned. That is part of conservative thought—both in terms of economics and in terms of how morality works.

EQUAL TIME FOR FREETHOUGHT, CONSERVATISM PART I, *supra* note 260.

²⁹⁴ As Lakoff states, under the strict-father model, “[i]f you know how a person has acted, you know what his character is. If you know what a person’s character is, you know how he will act.” LAKOFF, MORAL POLITICS, *supra* note 287, at 89.

²⁹⁵ *Id.* at 114.

“situationally sensitive”—to be able to see the world from many perspectives.²⁹⁶

c. Deeper Interior Sources: Genes

In search of the origins of political attitudes and ideologies, researchers have recently begun to investigate what might lie behind the attributional proclivities that Jost, Lakoff, and others have described. A recent longitudinal study by Jack and Jeanne H. Block suggests that there may be important personality differences—largely aligning with the adult personality differences identified by Jost—observable in early childhood, before the onset of political awareness, between those who demonstrate a liberal versus a conservative worldview later in life.²⁹⁷

And although the work is in its infancy, recent research suggests that political attitudes may have a significant genetic component.²⁹⁸ Survey data of

²⁹⁶ See *supra* notes 26, 43–47 and accompanying text (discussing actor-observer bias and other attributional biases).

²⁹⁷ See Jack Block & Jeanne H. Block, *Nursery School Personality and Political Orientation Two Decades Later*, 40 J. RES. PERSONALITY 734 (2006). Young children, who in adulthood came to identify themselves as conservative, were viewed by their nursery school teachers as uncomfortable with uncertainty, rigid, fearful, inhibited, easily offended and quick to feel victimized, and over-controlled. *Id.* at 740–41. As the authors readily concede, “The study is too limited by itself to admit of extensive efforts at rationalization of the dynamics between personality and political persuasion[;]” the findings, however, do suggest the potential operation of personality predispositions “[d]ynamically interplaying with . . . experiential factors such as parenting chronicities and the larger cultural surround” in forming later ideological identity. *Id.* at 747.

²⁹⁸ See John R. Alford, Carolyn L. Funk & John R. Hibbing, *Are Political Orientations Genetically Transmitted?*, 99 AM. POL. SCI. REV. 153, 163 (2005) [hereinafter Alford, Funk & Hibbing, *Political Orientations*] (finding that “true explanations of the source of political attitudes and behaviors will be found when we combine our currently detailed understanding of environmental forces with a recognition that genetic variables subtly but importantly condition human responses to environmental stimuli”); see also John R. Alford & John R. Hibbing, *Could Political Attitudes Be Shaped by Evolution Working Through Genes?*, TIDSSKRIFTET POLITIK, Aug. 2006, <http://www.polisci.umn.edu/cspp/Tidsskriftet%20Politik%20July%20Alford%20Hibbing.doc> (debunking certain myths that have created skepticism regarding the potential evolutionary or genetic origins of political orientations, reviewing evidence of that connection, and considering some of the mechanisms that might offer a causal explanation for the links between genes on the one hand and political attitudes and behavior on the other); Thomas J. Bouchard Jr., Nancy L. Segal, Auke Tellegen, Matt McGue, Margaret Keyes & Robert F. Krueger, *Evidence for the Construct Validity and Heritability of the Wilson-Patterson Conservatism Scale: A Reared-Apart Twins Study of Social Attitudes*, 34 PERSONALITY & INDIVIDUAL DIFFERENCES 959, 959–69 (2003) (summarizing their study of the social and political attitudes of twins reared apart); Thomas J. Bouchard, Jr., Nancy L. Segal, Auke Tellegen, Matt McGue, Margaret Keyes & Robert F. Krueger, *Genetic Influences on Social Attitudes: Another Challenge to Psychologists from Behavior Genetics*, in BEHAVIOR GENETIC PRINCIPLES: PERSPECTIVES IN DEVELOPMENT, PERSONALITY AND PSYCHOPATHOLOGY 89, 89–104 (Lisabeth Fisher DiLalla ed., 2004) (same); Lindon J. Eaves, Andrew C. Heath, Nicholas G. Martin, Michael C. Neale, Joanne M. Meyer, Judy L. Silberg, Linda A. Corey, Kimberley Truett & Ellen Walters, *Biological and Cultural Inheritance of Stature and Attitudes*, in PERSONALITY AND

more than 8,000 twins has shown that “[f]or the overall index of political conservatism, genetics accounts for approximately half of the variance in ideology, while shared environment including parental influence accounts for only 11%.”²⁹⁹ More importantly for our purposes, this analysis suggests that since the transmission of genetic material likely “affects clusters of political attitudes, we are likely to observe broad but distinct political phenotypes.”³⁰⁰ The two attitudes that they highlight share an uncanny resemblance to the dispositionist and situationist categories we have explored in this Article:

One is characterized by a relatively strong suspicion of out-groups (e.g., immigrants), a yearning for in-group unity and strong leadership, especially if there is an out-group threat (“Do not question the President while we are at war with terrorists”), a desire for clear, unbending moral and behavioral codes (strict constructionists), a fondness for swift and severe punishment for violations of this code (the death penalty), a fondness for systematization (procedural due process), a willingness to tolerate inequality (opposition to redistributive policies), and an inherently pessimistic view of human nature (life is “nasty, brutish, and short”).

The other phenotype is characterized by relatively tolerant attitudes toward out-groups, a desire to take a more context-dependent rather than rule-based approach to proper behavior (substantive due process), an inherently optimistic view of human nature (people should be given the benefit of the doubt), a distaste for preset punishments (mitigating circumstances), a preference for group togetherness but not necessarily unity (“We can all get along even though we are quite different”), suspicion of hierarchy, certainty, and strong leadership (flip-flopping is not a character flaw), an aversion to inequality (e.g., support for a graduated income tax),

PSYCHOPATHOLOGY 269 (C. Robert Cloninger ed., 1999) (summarizing some of the findings, and responding to some of the criticisms, of behavioral genetics); Abraham Tesser, *The Importance of Heritability in Psychological Research: The Case of Attitudes*, 100 PSYCHOL. REV. 129, 129–42 (1993) (arguing that heritability should play a bigger role in general psychological theories).

²⁹⁹ Alford, Funk & Hibbing, *Political Orientations*, *supra* note 298, at 164. This is not to suggest either that there is a single “ideology gene” or that environment is not important. As Alford, Funk, and Hibbing point out,

An individual with a contextualist genotype who has been repeatedly victimized by out-group members, or who has simply spent a great deal of time listening to persuasive absolutists, may adopt attitudes that run against type. Thus, even if a political system started with two pure genotypes, it would soon display a fascinating array of expressed orientations and beliefs, intensity levels, and degrees of involvement even as the system would continue to revolve around the central division between absolutists and contextualists.

Id. at 165.

³⁰⁰ *Id.* at 164.

and greater general empathic tendencies (rehabilitate, don't punish).³⁰¹

Those findings are roughly consistent with: (1) the interior factors highlighted at the beginning of this Article as having a strong effect on dispositionism (including the desire for simplicity and closure and group- and system-affirming motives); (2) Jost's research on the underlying proclivities of conservatives (including tolerance of inequality, dogmatism and intolerance of ambiguity, uncertainty avoidance, personal needs for order, structure, and closure, and a strong sense of system threat); and (3) Lakoff's work on conceptual metaphors (with the first phenotype appearing to share much with the strict father, particularly the fondness for hard discipline and the pessimistic view of human nature, and the second phenotype appearing to share much with the nurturant parent, particularly the "general empathic tendencies" and hopeful outlook on human nature).

3. *Exterior Sources: Liberal and Conservative*

Once again, suggesting that there is an important genetic component to the origin of political attitudes does not mean that exterior situation is not very important. As Alford, Funk, and Hibbing assert, "The issue is not nature versus nurture but the manner in which nature interacts with nurture."³⁰² Just as with the tendencies associated with dispositionism, the psychological dimensions that Jost and his colleagues describe (as well as the two underlying motivations relating to fear and uncertainty) vary according to situation.³⁰³ As they explain,

Our findings highlight the importance of situations and historical factors that can produce political shifts by affecting psychological

³⁰¹ *Id.* at 164–65. The researchers note that although these two phenotypes would be called conservative and liberal based on "[c]ommon political usage," they chose the labels "absolutist" and "contextualist" because they want to emphasize that these two phenotypes go beyond capturing political ideology "to the very orientation of people to society, leadership, knowledge, group life, and the human condition." *Id.* at 165.

³⁰² *Id.* at 154–55 (citing MATT RIDLEY, *NATURE VIA NURTURE: GENES, EXPERIENCE, AND WHAT MAKES US HUMAN* (2003); GEORGE E. MARCUS, W. RUSSELL NEUMAN & MICHAEL MACKUEEN, *AFFECTIVE INTELLIGENCE AND POLITICAL JUDGMENT* (2000)); *see also* EQUAL TIME FOR FREETHOUGHT, *CONSERVATISM PART II*, *supra* note 272 (Jost cautioning that it probably does not make sense to assume that there is a gene for political orientation per se that switches left to right and arguing that it is more likely that there are general psychological predispositions, including orientations towards uncertainty and threats, including perhaps orientations with regard to empathy and responses towards others, and that those predispositions have a heritable component that ultimately lead to an increased likelihood of an individual gravitating towards a political orientation).

³⁰³ Jost, Glaser, Kruglanski & Sulloway, *Conservatism*, *supra* note 266, at 369.

needs pertaining to uncertainty and threat. The need to achieve closure and to resolve ambiguity, for example, are heightened under conditions of destabilizing uncertainty (for example, with the outbreak of terrorism, economic turmoil or political instability). Thus our research is best understood as addressing the cognitive and motivational bases of conservatism (and liberalism) rather than the personalities of conservatives (and liberals).³⁰⁴

Similarly, Lakoff has emphasized that an individual's adoption of either the strict or nurturant parent model is quite situationally dependent. People not only know and understand both models, but are also capable of inhabiting different models under different circumstances:

You are brought up in a society where you actually have both models—that is, you cannot live in American society without at least knowing about both cases. You can be as nurturant and progressive as you want in every part of your life, but if you walk into an Arnold Schwarzenegger movie and you understand it, there is no question you have a strict father model at least passively. And the same thing is true for conservatives. They cannot live in this culture without knowing there is a nurturant model out there And then there are lots of people who have both models active in different parts of their lives. I have lots of colleagues who are nurturant at home and in their liberal politics but then are strict fathers in the classroom.³⁰⁵

In other words, despite the likelihood that only one model will be activated at a time, competing conceptions of the family can simultaneously reside in our minds, and the question of which one is activated in which situation is itself situationally dependent.³⁰⁶ According to Lakoff, conditions of fear—as

³⁰⁴ Arie W. Kruglanski & John T. Jost, *Political Opinion, Not Pathology*, WASH. POST, Aug. 28, 2003, at A27. In Jost's words,

[P]erceptions of system instability and system threat as well as death anxiety lead to an increased, at least temporary, shift in preferences for conservative over liberal ideologies. I think it is no coincidence that the terrorist attacks of 9/11 evoked both system threat and death anxiety and that they do appear to have precipitated a general conservative shift in the United States and elsewhere. Situations of high uncertainty and high threat give conservatives an advantage because these situations make people more prepared to accept unambiguous, black and white, good/evil kinds of messages and it also makes people more likely to admire decisive, autocratic, and aggressive leaders.

EQUAL TIME FOR FREETHOUGHT, CONSERVATISM PART I, *supra* note 260.

³⁰⁵ EQUAL TIME FOR FREETHOUGHT, CONSERVATISM PART I, *supra* note 260

³⁰⁶ See generally Chen & Hanson, *Categorically Biased*, *supra* note 3 (describing the process by which inconsistent schemas are maintained).

following 9/11—evoke the strict-father model, just as conditions encouraging empathy—as in the wake of Hurricane Katrina—evoke the nurturant parent.³⁰⁷

It should be unsurprising then that issues, arguments, individuals, and institutions can be framed to play upon the underlying dimensions of conservatism, just as was demonstrated with the underlying dimensions of dispositionism. If part of the reason that people adopt a conservative outlook is that “it serves to reduce fear, anxiety, and uncertainty; to avoid change, disruption, and ambiguity; and to explain, order, and justify inequality among groups and individuals,”³⁰⁸ it follows that increasing the perception of a serious threat to the system or emphasizing that an out-group is trying to change the status quo to their advantage will push people more firmly in that direction and, hence, further engrain dispositionist tendencies.³⁰⁹ A number of studies of shifting ideological attitudes following 9/11 support that prediction.³¹⁰ In one study of World Trade Center survivors, for instance, subjects were asked eighteen months after the attacks about how their ideological views had shifted, if at all. Thirty-eight percent of the sample said they had become more conservative, while only thirteen percent reported having grown more liberal. The trend toward conservatism existed throughout the sample (though to varying degrees), regardless of the ideological starting points of the subjects.³¹¹

There may also be a sort of confirmation bias associated with ideological presumptions. Once one identifies with a certain ideology, the associated belief system itself can situationally encourage a person to be more situationist or more dispositionist.³¹² The conservative ideology does not put an individual

³⁰⁷ EQUAL TIME FOR FREETHOUGHT, CONSERVATISM PART I, *supra* note 260. Lakoff suggests that those people who fall, politically, somewhere in the middle of liberals and conservatives—those who have both models in different parts of their lives—were using their liberal model to empathize with the victims of Hurricane Katrina. *Id.*

³⁰⁸ Jost, Glaser, Kruglanski & Sulloway, *Conservatism*, *supra* note 266, at 340.

³⁰⁹ As Jost and his colleagues point out, “When confronted with thoughts of their own mortality . . . , people appear to behave more conservatively by shunning and even punishing outsiders and those who threaten the status of cherished worldviews.” *Id.* at 349; *see id.* (“Under conditions of heightened mortality salience, defense and justification of the worldview should be intensified, thereby decreasing tolerance of opposing views and social, cultural, and political alternatives”); *see also* Jost, *End of Ideology*, *supra* note 259, at 663 (“Since the publication of our [2003] meta-analysis, several additional studies have demonstrated that reminders of death and terrorism increase the attractiveness of conservative leaders and opinions.”).

³¹⁰ For a review, *see* Jost, *End of Ideology*, *supra* note 259, at 663.

³¹¹ George A. Bonanno & John T. Jost, *Conservative Shift Among High-Exposure Survivors of the September 11th Terrorist Attacks*, 28 BASIC & APPLIED SOC. PSYCHOL. 311 (2006).

³¹² For an overview of how person schemas (in this case, those associated with an ideology) become part of the schema-affirming situation, *see* Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1195–1211 (describing some of the ways schemas are generally protected, despite evidence to the contrary); Hanson &

in a position to be situationally sensitive. If you believe that individuals are rational actors in a free market making decisions, good or bad, that they should be accountable for, and those decisions, or their consequences, should not be remedied through government action, you are probably not going to spend very much time trying to learn about how Joe Penniless became poor. And you are even less likely to read magazines in which such a story is given. On the other hand, if you are liberal, and your worldview suggests that where you end up in life has very little to do with fairness or justice, you may be naturally inclined (or at least less adamantly disinclined) to read said magazine. And certainly, if you are considering what social program is needed to remedy Penniless's troubles, you will have to learn about his situation (and in doing so, will learn even more about the power of situation, in general). The point is that, if this process is correct, situationism and dispositionism, once established, may be somewhat self-reinforcing within an individual.

Furthermore, once a person is self-identified as a "conservative," she will tend to associate with other in-group members and disassociate with out-group liberals (and vice versa); she will tend to watch the same television programs and read the same editorials as in-group members, and she will join the same conservative institutions.³¹³ Recent research indicates another reason why liberals and conservatives may not mix very easily. In a series of studies, a group of social psychologists have obtained what they describe as "consistent and converging evidence that personality differences between liberals and conservatives are . . . robust, replicable, and behaviorally significant."³¹⁴ Specifically, they found that, generally speaking, liberals "appear to be more open, tolerant, creative, curious, expressive, enthusiastic, and drawn to novelty and diversity, in comparison with conservatives, who appear[] to be more conventional, orderly, organized, neat, clean, withdrawn, reserved, rigid, and relatively intolerant."³¹⁵ Given those differences, liberals and conservatives would seem destined to clash, at least mildly, in their tastes and proclivities, whatever their differences on "the issues." If the liberal seeks novelty while

Yosifon, *The Situation*, *supra* note 3, at 165–66 (highlighting some of the ways in which dispositionism can succeed as a predictive model even among situational characters); and Swann, *supra* note 66, *passim* (describing some of the ways that individuals maintain favored self-conceptions).

³¹³ A well-publicized example of this tendency might be Vice President Cheney's request that his hotel-room television sets be pre-tuned to Fox News. See *Web Site Details Cheney's Hotel Comforts: 68 Degrees, Diet Sprite*, CNN.COM, Mar. 24 2006, <http://www.cnn.com/2006/POLITICS/03/23/cheney.hotel/>.

³¹⁴ Dana R. Carney, John T. Jost, Samuel D. Gosling, Kate Niederhoffer & Jeff Potter, *Personality Profiles, Interaction Styles, and the Things They Leave Behind* 29 (unpublished manuscript, on file with authors).

³¹⁵ *Id.* at 30.

the conservative prefers familiarity, and if the liberal craves diversity while the conservative is relatively intolerant of difference, then each would seem to have some reason to avoid the other.

Indeed, this tendency seems to be reflected and encouraged by the institutions in which we work. Several decades of research confirms the somewhat intuitive conclusion that people tend to be “psychologically matched to different occupational settings.”³¹⁶ Over the last decade, that research has been supplemented by empirical work of social dominance theorists, who predicted that the general tendency for people and institutional environments to be matched is broad enough to include sociopolitical attitudes. “In the same way that people who place a premium on moneymaking tend to work in environments that do the same,” people with certain sociopolitical preferences should tend to inhabit institutions that advance those preferences.³¹⁷ Through empirical testing, social dominance theorists have confirmed that there is, indeed, such a correlation (at least with respect to people’s intergroup attitudes and the institution’s posture toward existing inequalities). They have further learned that the correspondence is at least partially the consequence of five overlapping processes: *self-selection* (“the process by which people select their environments”³¹⁸); *institutional selection* (the process by which institutions select their members³¹⁹); *institutional socialization* (“the process by which people’s values and attitudes are shaped by forces like institutional rules, institutional incentives, and peer pressures, differential rewards, and differential attrition”³²⁰); *differential success* (the tendency of institutions to reward individuals who are a good sociopolitical fit³²¹); and *differential attrition* (the tendency of individuals who are not a good sociopolitical fit with an institution to quit³²²). Growing evidence indicates that those processes, operating together, promote ideological congruence between people and their

³¹⁶ Hillary Haley & Jim Sidanius, *Person-Organization Congruence and the Maintenance of Group-Based Social Hierarchy: A Social Dominance Perspective*, 8 GROUP PROCESSES & INTERGROUP RELATIONS 187, 188 (2005); see also Felicia Pratto, Jim Sidanius, Lisa M. Stallworth & Bertram F. Malle, *Social Dominance Orientation: A Personality Variable Predicting Social and Political Attitudes*, 67 J. PERSONALITY & SOC. PSYCHOL. 741, 758 (1994) (describing the ideological interaction between, and mutually reinforcing effects of, individuals and the institutions to which they belong).

³¹⁷ Haley & Sidanius, *supra* note 316, at 188.

³¹⁸ *Id.* at 192.

³¹⁹ See *id.* at 193.

³²⁰ *Id.* at 194.

³²¹ See *id.* at 196.

³²² See *id.* at 198.

institutions,³²³ thus increasing the distance between people with differing ideological inclinations.

In addition, as we will detail in *Naïve Cynicism*, individuals commonly rely on a self-reinforcing process, which social psychologists call “naïve realism,” for discrediting the arguments with which, and the individuals with whom, they disagree.³²⁴ In those ways and others, ideology often becomes its own self-fulfilling situation.³²⁵

4. *Some Situationist Exceptions to the Dispositionist Rule*

As mentioned above, the strength of dispositionism varies across situations, so we should expect that situationist utterances will sometimes emerge from an otherwise dispositionist mouth. And, thus, we should sometimes hear conservatives making situationist attributions, claiming that situation has a significant impact on individuals, and arguing that we need to adjust policy to influence the situation. We would predict that this would happen—consistent with the larger explanation of the forces behind humans’ general dispositionism³²⁶—particularly when situation is salient, when individuals are motivated to see it, and when issues are framed in situational terms. In addition, however, we would also predict that such attributions would be only one or two steps removed from pure dispositionism.

In fact, the selective use of situation can be employed to serve dispositionist ends.³²⁷ For instance, by suggesting that people are susceptible

³²³ See *id. passim*.

³²⁴ See Benforado & Hanson, *Naïve Cynicism*, *supra* note 12, at 513–33.

³²⁵ For overview of such groupist tendencies, see Chen & Hanson, *Categorically Biased*, *supra* note 3, at 1160–63; and Hanson & Yosifon, *The Situational Character*, *supra* note 3, at 54–62; 100–01; 111–15; see also Dominic Abrams & Michael A. Hogg, *Collective Identity: Group Membership and Self-Conception*, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: GROUP PROCESSES (Michael A. Hogg & Scott Tindale eds., 2002); William B. Swann, Jr., Conor Seyle, Angel Gómez, & Francico Morales, *Identity Fusion* (2005) (unpublished manuscript, on file with authors) (exploring some of the ways that people’s personal and social self-conceptions overlap and how, in some cases, the former is subordinate to the latter and the extraordinary group-based behavior that results).

³²⁶ See *supra* Part II.A.

³²⁷ Cf. Hanson & Hanson, *Blame Frame*, *supra* note 3, *passim*. Dispositionist and narrow- (or naïve-) situationist attributions are often employed to justify oppression with the following basic argument:

“We,” who should be advantaged, are acting, if at all, through good intentions, exemplary dispositions, and in accordance with situational forces larger than us. “They,” because of their aberrant dispositions interacting with or resulting from those same forces, should suffer or be further disadvantaged or separated from us and should not receive our assistance.

Id. at 426 (footnote omitted).

to suggestion and control by “evil doers”—a threat, among other things, to our personal freedoms, our groups, and our system—a speaker can play upon fears that are directly tied to increased dispositionism in individuals.³²⁸ Similarly, when social conservatives articulate their concerns about “individualism” harmfully undermining our important customs, institutions, and beliefs, they are making a relatively situationist argument. Specifically, they are underscoring the role that the situation (in the form of traditions and cultural norms) play in shaping people and behavior and they are raising doubts about the assumption that laws and policies should disregard that role in the name of encouraging unbridled individualism. Our problem with those arguments is not that they are situationist,³²⁹ but (1) that those who make them do not take situation seriously enough (generally embracing a highly simplistic and affirming situational narrative and ignoring situational forces in other contexts³³⁰); and (2) that they tend to reflect and encourage dispositionism by suggesting that existing arrangements are under threat and must be protected.³³¹

In many cases, situationist attributions are only situationist on the surface; engrained dispositionist notions hide in their cores. Dispositionism can form the buried heart of a situationist argument in a numbers of ways. First, as we detail in *Backlash*, many scripts imagine that behind the situational factors are individuals or a group with a particular intent to manipulate others.³³² In the case of tort law, for instance, one common script is that our “culture of victimhood” has been deliberately propagated by money-hungry lawyers and know-it-all nanny regulators who want to advance their own careers or are

³²⁸ See *supra* Part II.A.1.c.–II.A.1.e. and notes 307–10 and accompanying text. Of course, the fact that individuals are susceptible to their situations only feels like a threat when it seems to endanger something we hold dear. Conversely, when it aligns with our desires or when the right forces or people are controlling the variables it does not worry us. Consequently, according to conventional conservative schemas, when the relevant situational forces are the church, God, traditional family values, or markets, the results are viewed positively. However, when the situational forces are government regulators, trial lawyers, or university professors, then the outcomes are quite suspect, and the situation itself is generally viewed as in need of fixing.

³²⁹ In fact, we are somewhat persuaded by the implicit argument (loosely translated into our terminology) of some scholars that liberals have failed to understand the situational nature of conservative morality and have unfairly dispositionalized conservatives. See Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals May Not Recognize*, 20 SOC. JUSTICE RES. 98 *passim* (2007).

³³⁰ See *supra* text accompanying notes 261–63; Hanson & Hanson, *Blame Frame*, *supra* note 3, at 426–27, 454–55 (defining and discussing “naïve situationism”); *cf. supra* notes 43–47 and accompanying text (describing some contexts where individuals are selectively situationist).

³³¹ See *supra* Part II.A.1.c and notes 304–07 and accompanying text.

³³² See Benforado & Hanson, *Backlash*, *supra* note 17.

simply driven by a desire to “master” others. In the case of political correctness, another well-worn script suggests that professors at elite academic institutions are casting spells on impressionable students in an effort to forward their own agendas. Second, dispositionism can also underlie situationist arguments when it comes to the “victims” of situation: it is often assumed that those individuals do not deserve pity (or assistance) because it was their flawed or weak dispositions that made them susceptible to situational influences in the first place. Such people make bad choices and, except in extreme cases, should be held responsible for them, even where situation yields some acknowledged influence. Finally, just as situationism is often limited in terms of depth, it is also limited in terms of breadth—frequently, individuals are situationist only with respect to one or two situational forces.

There is also a different kind of exception to our general claim that liberals are relatively situationist and conservatives are relatively dispositionist: the example of the “knee-jerk liberal” or the contemplative conservative. We all know people of different political stripes who vary significantly in terms of, say, how dogmatic or simplistic their attributional stories tend to be.

Despite the existence of those exceptions, the evidence to date indicates that they are only that. In a review of the relevant research on ideology, John Jost concluded, “There is now sufficient evidence to conclude . . . that conservatives are, on average, more rigid and closed-minded than liberals.”³³³ In addition to his research, described above,³³⁴ Jost summarized other studies showing that:

- “in a variety of perceptual and aesthetic domains, conservatism is associated with preferences for relatively simple, unambiguous, and familiar stimuli, whether they are paintings, poems, or songs;”³³⁵
- “[c]onservatives are, on average, more likely than liberals to perceive the world as a dangerous place”³³⁶ and “to fear crime, terrorism, and death;”³³⁷

³³³ Jost, *End of Ideology*, *supra* note 259, at 661.

³³⁴ See *supra* notes 266–77, 304 & 308–11 and accompanying text.

³³⁵ See Jost, *End of Ideology*, *supra* note 259, at 662 (referring to GLENN D. WILSON, *THE PSYCHOLOGY OF CONSERVATISM* (1973)).

³³⁶ *Id.* (citing Robert Altemeyer, *The Other “Authoritarian Personality,”* 30 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 47, 47–91 (1998); John Duckitt, *A Dual-Process Cognitive-Motivational Theory of Ideology and Prejudice*, 33 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 41, 41–113 (2001)).

³³⁷ *Id.* (citing Jost, Glaser, Kruglanski & Sulloway, *Conservatism*, *supra* note 266; WILSON, *supra* note 344).

- “[t]hey are also more likely to make purely internal attributions for the causes of others’ behaviors,”³³⁸ and “to engage in moral condemnation of others, especially in sexual domains;”³³⁹ and
- “conservatives tend to hold more prejudicial attitudes than liberals toward members of deviant or stigmatized groups, at least in part because of chronically elevated levels of threat and rigidity.”³⁴⁰

Jost’s references to these studies indicate that, at least at this point, the weight of the evidence supports the “rigidity-of-the-right hypothesis and contradicts persistent claims that liberals and conservatives are *equally* rigid and dogmatic.”³⁴¹

³³⁸ *Id.* (referencing Linda J. Skitka, Elizabeth Mullen, Thomas Griffin, Susan Hutchinson & Brian Chamberlin, *Dispositions, Ideological Scripts, or Motivated Correction? Understanding Ideological Differences in Attributions for Social Problems*, 83 J. PERSONALITY & SOC. PSYCHOL. 470, 470–87 (2002)).

³³⁹ *Id.* (citing Jonathan Haidt & Matthew A. Hersh, *Sexual Morality: The Cultures and Emotions of Conservatives and Liberals*, 31 J. APPLIED SOC. PSYCHOL. 191 (2001)).

³⁴⁰ *Id.* (citing as examples ROBERT ALTEMEYER, *ENEMIES OF FREEDOM: UNDERSTANDING RIGHT-WING AUTHORITARIANISM* (1st ed. 1988); Altemeyer, *supra* note 336; William A. Cunningham, John B. Nezlek & Mahzarin R. Banaji, *Implicit and Explicit Ethnocentrism: Revisiting the Ideologies of Prejudice*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1332 (2004); Duckitt, *supra* note 336; Jim Sidanius, Felicia Pratto & Lawrence Bobo, *Racism, Conservatism, Affirmative Action, and Intellectual Sophistication: A Matter of Principled Conservatism or Group Dominance?*, 70 J. PERSONALITY & SOC. PSYCHOL. 476 (1996); Bernard Whitley, Jr., *Right-Wing Authoritarianism, Social Dominance Orientation, and Prejudice*, 77 J. PERSONALITY & SOC. PSYCHOL. 126 (1999)).

³⁴¹ *Id.* (citing Jeff Greenberg & Eva Jonas, *Psychological Motives and Political Orientation—the Left, the Right, and the Rigid: Comment on Jost et al.*, 129 PSYCHOL. BULL. 376 (2003)).

CONCLUSION

For a great part of the beggery that is among the poore, can bee imputed to nothing so much, as to idlenesse, and to the negligence of parents, which do not bring vp their children, either in good learning, honest labour, or some commendable occupation or trade, whereby when they come to age, they might get their liuing.

—Bishop James Jewel³⁴²

Laziness travels so slowly, that poverty soon overtakes him.

—Benjamin Franklin³⁴³

Poverty is the worst form of violence.

—Mohandas Karamchand Gandhi³⁴⁴

[T]he prevalent fear of poverty among the educated classes is the worst moral disease from which our civilization suffers.

—William James³⁴⁵

This Article has advanced five main arguments. First, stretching across and defining most policy debates, there is a gaping divide arising from two fundamentally different ways of explaining behavior and events. That is, beneath the surface of most law-related discussions, there are two conflicting and competing attributional presumptions: dispositionism and situationism. Second, for a variety of reasons that we explored, dispositionism is the default attributional outlook for most Americans, despite the fact that situationism is the more accurate presumption. Third, although dispositionism is generally dominant, there are a number of factors or conditions that can encourage individuals or groups to adopt a relatively situationist perspective. Fourth, those conditions vary depending upon certain recognizable demographic and societal circumstances. There are, for instance, certain occupations, identities,

³⁴² Bishop James Jewel, *An Homilie Against Idlenesse*, in THE BOOK OF HOMILIES (Ian Lancashire ed., Renaissance Electronic Texts 1.2 1994), available at <http://www.library.utoronto.ca/utel/ret/homilies/bk2hom19.html>.

³⁴³ BENJAMIN FRANKLIN, *The Way to Wealth*, in POOR RICHARD IMPROVED (1758), reprinted in BENJAMIN FRANKLIN, AUTOBIOGRAPHY, POOR RICHARD, AND LATER WRITINGS, 556 (J.A. Leo Lemay ed., Library of America 1997) (1987).

³⁴⁴ Evvie Becker-Lausen & Annette U. Rickel, *Chi-Squares Versus Green Eye Shades: Psychology and the Press*, 25 J. COMMUNITY PSYCHOL. 111, 114 (1997) (citing Mohandas Karamchand Gandhi).

³⁴⁵ WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCES: A STUDY IN HUMAN NATURE 369 (Dover 2002) (1902).

or cultural or environmental forces that can encourage one attributional tendency or another. Fifth and finally, the familiar liberal-conservative divide that is so prominent in policy discourse is loosely the same as (and largely explained by) the less-familiar situationist-dispositionist divide that we have identified.

Taken together, these arguments shed new light on concepts and categories that have been largely ignored in legal-academic research but that have been extremely important in the real world of policy attitudes and policymaking. Almost every major policy debate today is defined and animated by the great attributional divide. Even a policy concern as broad as “poverty”—which, in Katrina’s wake, was, at least briefly, placed back at the center of the policymaking map³⁴⁶—has long reflected this attributional rivalry.

On one hand, there is the dominant, dispositionist view articulated by Bishop Jewel and Benjamin Franklin.³⁴⁷ As their quotations indicate, there is nothing new about dispositionalizing poverty,³⁴⁸ although modern commentators often employ similar reasoning. Comedian Bill Cosby, for example, echoed Bishop Jewel’s arguments in a speech at a 2004 NAACP ceremony in which he lambasted poor African Americans for not taking responsibility for their lives and for being bad parents.³⁴⁹ Similarly, journalist Michelle Singletary solicited comments from the public about the causes of poverty and recorded nearly identical sentiments:

- “We would live in a much better world if people pulled themselves up by their own bootstraps instead of waiting for a handout.”
- “Bottom line, most people are poor because they choose to be poor. They choose to buy a new car instead of buying a used car and investing the difference. They choose to buy new clothes instead of shopping at thrift stores (as I do) and investing the difference.”

³⁴⁶ See ALAN BERUBE & BRUCE KATZ, BROOKINGS INST., *KATRINA’S WINDOW: CONFRONTING CONCENTRATED POVERTY ACROSS AMERICA* (2005), http://www.brookings.edu/metro/pubs/20051012_concentratedpoverty.pdf.

³⁴⁷ See *supra* quotations accompanying notes 342–43.

³⁴⁸ See Hanson & Hanson, *Blame Frame*, *supra* note 3, *passim*. Similar arguments can be found in Proverbs 10:4 (“A slack hand causes poverty, but the hand of the diligent makes rich.”) and 13:4 (“The soul of the sluggard craves and gets nothing, while the soul of the diligent is richly supplied.”). *Proverbs* 10:4, 13:4.

³⁴⁹ Bill Cosby, Address at the NAACP’s Gala to Commemorate the 50th Anniversary of *Brown v. Board of Education* (May 17, 2004), available at http://www.americanrhetoric.com/speeches/billcosbypoundcakes_speech.htm.

- “Many poor, of all colors, are where they are because they are foolish with their money, integrity and philosophy.”³⁵⁰

On the other hand, there is the harder-to-grasp situational account—which sees poverty more as a cause than as a symptom of individual “choice.” By stating that poverty is a form of “violence,” for example, Ghandi was flipping the attributional default and urging people to look at poverty as a situational cause. That was also President Johnson’s message in 1965 in his famous “We Shall Overcome Speech”:

This great, rich, restless country can offer opportunity and education and hope to all: black and white, North and South, sharecropper and city dweller. These are the enemies: poverty, ignorance, disease. They are our enemies, not our fellow man, not our neighbor. And these enemies too, poverty, disease, and ignorance, we shall overcome.³⁵¹

Shortly after Katrina’s devastation, even President Bush embraced, if only temporarily,³⁵² a similarly situationist perspective regarding the disturbing images and unheeded cries for help that, for a time, dominated the airwaves. From the French Quarter, he lamented the “deep, persistent poverty” that “all of us saw on television.”³⁵³ According to President Bush, “[t]hat poverty has roots in a history of racial discrimination, which cut off generations from the opportunity of America.”³⁵⁴ Viewed from a situationist vantage point, the impoverished seem to be victims, as opposed to causes, of their plight, which is perhaps why President Bush stated that “[w]e have a duty to confront this poverty with bold action.”³⁵⁵

³⁵⁰ Michelle Singletary, *Do We Appreciate the Plight of the Poor*, BLACK AMERICA WEB, Dec. 29, 2005, <http://www.blackamericaweb.com/site.aspx/finance/sing122905>. The reactions of conservatives to many of the images of suffering following Katrina echoed the same dispositionist themes. See Hanson & Hanson, *Blame Frame*, *supra* note 3, at 462–78.

³⁵¹ Special Message to the Congress: The American Promise, 1 PUB. PAPERS 284 (Mar. 15, 1965).

³⁵² See Michael A. Fletcher, *Bush’s Poverty Talk Is Now All but Silent: Aiding Poor Was Brief Priority After Katrina*, WASH. POST, July 20, 2006, at A04.

³⁵³ Press Release, President George W. Bush, President Discusses Hurricane Relief in Address to the Nation (Sept. 15, 2005), available at <http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html> [hereinafter Press Release, Bush, Hurricane Relief].

³⁵⁴ *Id.*

³⁵⁵ *Id.* For a more detailed discussion of the role of dispositionist and situationist attributions in the wake of Katrina and an explanation for why President Bush was especially situationist at that moment, see Hanson & Hanson, *Blame Frame*, *supra* note 3, at 454–78. By most accounts, the commitment that President Bush expressed in that speech, and which many other leaders (Democrats and Republicans alike) echoed at the time, was significantly qualified, if not abandoned, shortly thereafter. See, e.g., *id.*; Associated Press, *A Year After Katrina, Bush Administration Fulfills Few Promises*, USA TODAY, Aug. 20, 2006, <http://www.usatoday.com/>

Attributions matter. Do the have-nots bring poverty upon themselves because of their lazy dispositions and bad choices, or is poverty a violent situational force that harms its victims and encourages rationalizations among the haves? How one answers those attributional questions has major implications when it comes to what, if anything, we should do about poverty and the impoverished. Attributional presumptions and policy solutions are, thus, tightly connected.

Given that attributional presumptions are themselves the product of situational forces, and given that the dominant attributional presumption is badly flawed (and yet heavily promoted by powerful interests), this link is troubling.

If dispositionism, however common-sensical, affirming, and promoted, is wrong, then, to paraphrase President Bush, we have a duty to confront this error with bold action.³⁵⁶ One critical, normative implication of the positive contributions of this Article—in particular, the identification of the key situational elements that provide certain individuals, institutions, and societies with a greater opportunity for developing accurate attributions—is that policymakers should look to the sources identified here as likely to produce the most accurate (situationist) attributions, even though those sources are likely to produce information and ideas that do not align with powerful dispositionist notions shared by most knowledge producers in society and the general public. This work of changing the sources of the attributional framework used by policymakers may be the single most important step in developing effective policies in the law and beyond. The costs of inaction are huge: policy that is the product of psychological biases can have devastating real-world consequences. Nobel laureate Daniel Kahneman and Jonathan Renshon recently surveyed forty years of research on decision-making biases (a number of which were discussed earlier in this Article as engraining dispositionism)

news/washington/2006-08-19-analysis-katrina_x.htm. As the *New Republic* editors summarized a year after Katrina,

[W]hat was billed as a revived war on poverty has barely amounted to a skirmish. There have been no new anti-poverty initiatives, let alone a beefing up of the old ones. As a result, the number of Americans living below the poverty line increased last year as it has for every year of the Bush presidency.

Lost City, NEW REPUBLIC, Aug. 14 & 21, 2006, at 7.

³⁵⁶ See Press Release, Bush, Hurricane Relief, *supra* note 353 (“We have a duty to confront this poverty with bold action.”).

and found that all of the biases favored hawks during times of tension and conflict, with staggering results:

These psychological impulses . . . incline national leaders to exaggerate the evil intentions of adversaries, to misjudge how adversaries perceive them, to be overly sanguine when hostilities start, and overly reluctant to make necessary concession in negotiations. In short, these biases have the effect of making wars more likely to begin and more difficult to end.³⁵⁷

Just as we have emphasized that dispositionism is not without certain benefits in certain situations,³⁵⁸ Kahneman and Renshon caution that none of their analysis implies that there are no advantages to a hawkish bias.³⁵⁹ However, they stress that the biases that they have highlighted “operate over and beyond such rules of prudence and are not the product of thoughtful consideration. [Their] conclusion is not that hawkish advisors are necessarily wrong, only that they are likely to be more persuasive than they deserve to be.”³⁶⁰ Adapting Kahneman and Renshon to the particular context of this Article, our conclusion is that dispositionist advisors will generally offer less accurate counsel than situationist advisers, and that they are likely to be more persuasive than they deserve to be. Hence, getting decisionmakers to rely more heavily on situationist advisors should be a major priority of those within and outside legal academia.

Another implication of this Article is that we have a continuing duty to protect and strengthen the existing structures that encourage certain individuals, institutions, and societies to develop situationist attributions. As we have suggested, some facets of academia, the press, and the judiciary are designed to provide a buffer against dispositionalizing forces and an opportunity to discover and promote situationist insights. Of course, the continued existence of those elements is in no way assured and the vulnerability of those institutions as fertile grounds for situationism is well-referenced in recent history, a topic that we take up in other work, including *Legal Academic Backlash*.³⁶¹ To the extent that the press, academia, and the judiciary fail to withstand inroads by the dispositionism dominant in American

³⁵⁷ Daniel Kahneman & Jonathan Renshon, *Why Hawks Win*, FOREIGN POL’Y, Jan.–Feb. 2007, available at http://www.foreignpolicy.com/story/cms.php?story_id=3660.

³⁵⁸ See *supra* text accompanying note 10.

³⁵⁹ Kahneman & Renshon, *supra* note 357, at 36.

³⁶⁰ *Id.*

³⁶¹ See Benforado & Hanson, *Legal Academic Backlash*, *supra* note 15.

society as a whole, we can expect significant societal costs as more and more vital decisions for the future of our country are made based on incorrect attributions of causation, responsibility, and blame.

A final normative implication of this Article is that we cannot afford to rely solely on the situationism-encouraging entities identified in the previous pages, but also must adopt additional measures that enhance situationism more broadly. Before we can effectively do that, however, we must better understand how dispositionism maintains its commanding position in the face of more accurate attributions—in other words, how we consistently manage to disregard or dismiss attributional errors even when they are brought to our attention. That is the topic of the next article in this series, *Naïve Cynicism*.³⁶²

³⁶² See Benforado & Hanson, *Naïve Cynicism*, *supra* note 12.