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## ARTICLES

### NAÏVE CYNICISM: MAINTAINING FALSE PERCEPTIONS IN POLICY DEBATES

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*[T]hings are, for each person, the way he perceives them.*

—Plato<sup>1</sup>

*And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?*

—Matthew 7:3<sup>2</sup>

*Now, I know there are some polls out there saying this man [the President] has a 32% approval rating. But guys like us, we don't pay attention to the polls. We know that polls are just a collection of statistics that reflect what people are thinking in "reality." And reality has a well-known liberal bias.*

—Stephen Colbert<sup>3</sup>

*[T]he hallmark of the conventional wisdom is acceptability. It has the approval of those to whom it is addressed.*

—John Kenneth Galbraith<sup>4</sup>

## INTRODUCTION

Five million years after splitting with our great ape cousins, we humans ought to know ourselves fairly well. Five million years is a lot of time for observation and introspection. It is a lot of time to think about what makes us tick—what moves us to feel Y or do X; what coiled springs propel us forward; what carefully orchestrated counterweights provide the rhythm to our steady march. Yet, despite our apparent successes—our proficiency at building machines to mimic hands and map the brain, our ability to compose poetic verse exploring the human condition, and, lest we forget, our unparalleled talents at casting reality-based television programs—it turns out that we remain rather poor at constructing accurate explanations for our behavior.

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<sup>1</sup> PLATO, *THEAETETUS* 16 (John McDowell trans., Oxford Univ. Press 1973).

<sup>2</sup> *Matthew* 7:3 (King James).

<sup>3</sup> Stephen Colbert, Comedian, Remarks at the White House Correspondents Dinner (Apr. 26, 2006) (transcript available at [http://en.wikisource.org/wiki/Stephen\\_Colbert\\_White\\_House\\_Press\\_Correspondents\\_Dinner](http://en.wikisource.org/wiki/Stephen_Colbert_White_House_Press_Correspondents_Dinner)).

<sup>4</sup> JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 9 (40th Anniversary ed., Mariner Books 1998) (1958).

Perhaps, because of the remarkable advances we have made in our learning and the evident distinctions between ourselves and those farther down the evolutionary tree, we believe our causal attributions to be, more or less, spot on. We, the inhabitants of the canopy, have the elevated perspective to see things as they really are.

Confoundingly, however, we do not all see the same things. Ours is an aerie of competing perceptions and worldviews, which leads to the realization that some of us, despite feeling certain in the clarity of our vision, do not perceive matters correctly.

The fact that incompatible belief systems manage to coexist forces us to consider two difficult questions: which perceived truth, if any, is closer to *the* truth?; and, how do people persist in believing in comparative untruths?

## I. THE NAÏVE CYNICISM HYPOTHESIS

### A. *Overview of the Hypothesis*

This Article and its companion articles<sup>5</sup> adopt a *critical realist* or *situationist* perspective. Situationists presume that answers to those questions can be found in (1) the insights of social scientific disciplines—most significantly, social psychology and related fields—devoted to understanding how humans make sense of their world; and (2) the practices of institutions—particularly market practices—devoted to understanding, predicting, and influencing people’s conduct.<sup>6</sup>

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<sup>5</sup> See Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311 (2008) [hereinafter Benforado & Hanson, *The Great Attributional Divide*]; 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*]; Adam Benforado & Jon Hanson, *Backlash: The Late Twentieth-Century Attack on Situationism* (July 21, 2007) (unpublished manuscript, on file with authors) [hereinafter Benforado & Hanson, *Backlash*].

<sup>6</sup> For a more detailed description of critical realism, see 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, 149–77 (2003) [hereinafter Hanson & Yosifon, *The Situation*].

In related work in the situationist project,<sup>7</sup> many of those insights and their possible implications have already been examined.<sup>8</sup> One of the most significant among them is the “fundamental attribution error”: people ascribe the vast majority of human behavior to disposition-based choice, despite the fact that our movements are more a reflection of situation—unseen or underappreciated features in our environment and within our interiors.<sup>9</sup> Thus, when we make attributions for behavior, we typically concentrate on the least determinative factors and ignore the most decisive. We “see” disposition and miss situation.<sup>10</sup>

As dispositionists, we are more inclined than we should be to view the welfare mother as lazy and not taking responsibility for her own life and the fat man as choosing to eat too many bacon cheeseburgers and lacking “self-control.” And, too often, our attributional analysis stops there. We focus on personality flaws (often imagined) and take little notice of potent situational factors. Dumbstruck by the man’s girth, we overlook, among other things, that McDonald’s is the only restaurant within ten blocks of his home, that McDonald’s food options and prices reflect esoteric agricultural policies, that he is genetically inclined to eat all of the oversized portions of food that are put in front of him (particularly if they are dense in calories and sweet or salty

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<sup>7</sup> Supplementing the situationist law-review articles, The Project on Law and Mind Sciences at Harvard Law School maintains a blog and a website devoted to the situationist approach. See The Project on Law and Mind Sciences at Harvard Law School, <http://www.lawandmind.com> (website); The Situationist, <http://thesituationist.wordpress.com> (blog).

<sup>8</sup> See 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*]; 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*]; 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*]; Hanson & Yosifon, *The Situation*, *supra* note 6; 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*].

<sup>9</sup> See Hanson & Yosifon, *The Situational Character*, *supra* note 8, *passim*. The definitions of “disposition” and “situation” used in this Article are refinements of and, thus, sometimes differ from, the same terms as used in social psychology. See *id.* at 6–7.

<sup>10</sup> Other work in the critical realist project has shown how situationist attributions are commonly paired with dispositionist attributions to legitimate policies, customs, or outcomes that significantly advantage some groups and disadvantage others. That is, “victims” are generally dispositionalized to justify their disadvantage, while “injurer[s]” frequently attribute their own behavior to situation. See Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413 *passim* (2006) [hereinafter Hanson & Hanson, *Blame Frame*]. That “naïve situationism,” however, is not what we have in mind when we speak of situationist attributions in this Article.

tasting), and that his salary as a preschool teacher and janitor in New York City leaves him only \$15.20 and 45 minutes with which to provide dinner for his family of four.<sup>11</sup>

As detailed in *The Great Attributional Divide*, it takes opportunity and motive—which are far less common than they might seem—to discover and appreciate the influence of those, and numerous other, situational forces.<sup>12</sup> Since we are often pressed for time and generally unmotivated to appreciate vital nuance, we frequently take the potentially misleading and satisfying shortcut. We rely on our familiar, automatic, and affirming individual-choice stories.<sup>13</sup>

Dispositionism poses a major concern for anyone who is interested in legal policy because, if we are basing our laws around a mistaken view of how humans interact with their world, our prescriptions are unlikely to address the symptoms or causes of serious societal problems—much less offer a cure. Indeed, they may themselves be part of the illness. If obese children are obese, not because they are lazy or because their parents are poor guardians, but because of, say, broader economic, social, and legal forces, then a program that tells kids to get off the couch or parents to monitor their children's caloric intake is unlikely to have much beneficial impact on habits or health. If middle-class consumers are on the cusp of insolvency, not because they fritter away their paychecks on flat-screen televisions and other luxury goods, but because of an unexpected job loss or health crisis,<sup>14</sup> then tightening bankruptcy laws may do little more than enrich Bank of America.<sup>15</sup> If corporate leaders are exaggerating earnings, not because they are greedy and immoral, but because of larger market dynamics and a widely held set of legitimating beliefs, then a legal regime that comes down hard on a few “bad apples” is unlikely to get to the root of the problem. And if 100,000 New Orleans

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<sup>11</sup> See generally, Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 8.

<sup>12</sup> See *id.*; see also *infra* text accompanying notes 43–48 (describing the situational factors—in particular, occupational settings—most likely to lead to a situationist outlook).

<sup>13</sup> See Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 8.

<sup>14</sup> See ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS & FATHERS ARE GOING BROKE (WITH SURPRISING SOLUTIONS THAT WILL CHANGE OUR CHILDREN'S FUTURES)* 81 (2003).

<sup>15</sup> See 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).

residents stay put as Katrina moves in, blaming them for bad choices instead of recognizing their lack of good options will cost lives.<sup>16</sup>

While other articles in this critical realist project have focused on the role of dispositionism (i.e., our stories of thinking, preferring, willing, and choosing) in policy and policy debates, this Article and its companions examine the question of how dispositionism maintains its dominance *despite* the fact that it misses so much of what actually moves us.

A key part of the answer, in brief, is that there is a subordinate dynamic and discourse that is almost as important as dispositionism itself—what we term *naïve cynicism*: the basic subconscious mechanism by which dispositionists discredit and dismiss situationist insights and their proponents. Without it, the dominant person schema—dispositionism—would be far more vulnerable to challenge and change, and the more accurate person schema—situationism—less easily and effectively attacked. Naïve cynicism is, thus, critically important to explaining how and why certain legal policies manage to carry the day. As this Article suggests, and as will be detailed in future work, naïve cynicism plays a key role just beneath the surface of virtually every important debate.

An analogy may help clarify this project. In sports broadcasting, there are the play-by-play descriptions of the movements of the players on the field and the outcomes of their actions, and then there is the color commentary, which focuses on the strengths, weaknesses, tendencies, and backgrounds of the players, coaches, and teams. The same is true in policy discussions: there are the policies and policy arguments promulgated by various institutions or groups, and then there is everything that we think we know about those players and what is moving them.

For example, take the topic of tort law and its effects on our culture. The play-by-play should be familiar: it is the bread-and-butter focus of law review articles, legal conferences, and classroom exchanges. There are potential policy reforms (such as alterations to the liability standard, damage caps, limits on class-action options, and alternative compensation systems) and a number of policy arguments (for instance, that the threat of liability is leading

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<sup>16</sup> See Hanson & Hanson, *Blame Frame*, *supra* note 10, at 451–54.

physicians to engage in costly defensive medicine and hampering small businesses).<sup>17</sup>

At the same time, there is also another, parallel discussion—a color commentary—taking place concerning tort reform. Political pundits, editorialists, journalists, radio hosts, and even late-night comedians frequently remark upon the motives and intentions of the individuals and groups participating in the tort system and in debates about its reform.<sup>18</sup> They assert that scholars advocating tort liability are out-of-touch purveyors of the elite, or complain about the left orthodoxy of academia or the domination of the judiciary by liberal legal academics.<sup>19</sup> They point out how trial lawyers are greedily pursuing big damage awards or quick-and-easy settlements,<sup>20</sup> or how plaintiffs are irresponsible malingers willing to play the tort lottery but

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<sup>17</sup> See, e.g., George W. Bush, President of the United States, President Discusses Lawsuit Abuse at White House Economy Conference (Dec. 15, 2004) (transcript available at <http://www.whitehouse.gov/news/releases/2004/12/20041215-11.html>) (discussing how medical malpractice lawsuits have forced doctors out of practice, increased frivolous medical testing, decreased healthcare accessibility, and put the country at a global disadvantage).

<sup>18</sup> Although to a lesser degree, some judges and legal academics are also active participants in this parallel discussion. See *infra* note 19.

<sup>19</sup> According to this discussion, academia, and law schools in particular, is dangerously abstracted from mainstream thought: in the words of Judge Laurence Silberman, they are “centers of distrust for capitalism (and contempt for businessmen) as well as impatience with democratic institutions.” Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism?*, REG., Mar.–Apr. 1978, at 15, 19. Moreover, academics not only have a biased view of the world but they also try to implement skewed policies based on these mistaken perceptions. As Todd Zywicki explains, “In the modern academy, law and judicial action is viewed primarily as a vehicle for circumventing unenlightened political processes that fail to regularly accomplish the ideological goals favored by legal academics.” Todd Zywicki, *Public Choice and Tort Reform* 19 (George Mason Law & Econ. Working Paper No. 00-36, 2000), available at <http://ssrn.com/abstract=244658>. Thus, law professors strive to capture the judiciary so that they can force their agenda upon an unreceptive majority. In Lino Graglia’s estimation, the scheme is working: “The Court functions today primarily as the mirror and mouthpiece of liberal academia, especially legal academia . . .” Lino A. Graglia, *Constitutional Law: A Ruse for Government by an Intellectual Elite*, 14 GA. ST. U. L. REV. 767, 778 (1998). As Zywicki explains, summarizing the claims of other critics of academic tort reformers, “The modern tort law system is reflective of the harm that can be wreaked [by] a handful of influential academics and judges.” Zywicki, *supra*, at 20 (citing George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 461–527 (1985)).

<sup>20</sup> As the *New York Post* put it in a 1999 editorial addressing the asbestos litigation, “[B]illions are spent every year abating a non-existent threat—all because greedy tort lawyers saw an opportunity to target a product and an industry. And money that could have been spent on addressing genuine cancer risks is wasted.” Editorial, *The Great Asbestos Ripoff*, N.Y. POST, Feb. 12, 1999, at 26. In a *Wall Street Journal* editorial on the same subject, trial lawyers were compared to “parasites,” “bandits,” and the “mafia” and were accused of “wreck[ing] the U.S. legal system” and threatening “the very Constitution” for their own personal gain. Editorial, *Asbestos of All Possible Worlds?*, WALL ST. J., July 2, 1999, at A12. Indeed, it seems that plaintiffs’ attorneys are willing to do just about anything once they decide “to clean out the till,” including “bankrupt[ing an] industry based on phony medical claims.” *Id.*

unwilling to accept responsibility for their own choices.<sup>21</sup> And they lament how jurors, though often well meaning, are easily swayed by the sight of a neck brace or duped by the histrionics of smooth-talking lawyers.<sup>22</sup> When the *New York Times* publishes an article questioning the link between tort reform and liability insurance rates,<sup>23</sup> it just confirms what observers knew all along—that the print media has an engrained liberal bias.<sup>24</sup>

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<sup>21</sup> According to House Judiciary Committee Chairman F. James Sensenbrenner, Jr., this is precisely why a bill like the Personal Responsibility in Food Consumption Act—barring lawsuits against fast food corporations—is needed: lazy people are looking to pawn off their problems onto others and cash in. Carl Hulse, *Vote in House Offers a Shield in Obesity Suits*, N.Y. TIMES, Mar. 11, 2004, at A1 (“This bill says, ‘Don’t run off and file a lawsuit if you are fat’ . . . . It says, ‘Look in the mirror because you’re the one to blame.’”) (quoting Sensenbrenner). And, as the story goes, often the plaintiffs are not even sick or injured. As Joseph Perkins asks, “[W]hy have hundreds of thousands of uninjured Americans filed specious asbestos claims? Because they have been invited to do so by avaricious trial lawyers who have promise[d] them courtroom lucre.” Joseph Perkins, Op-Ed., *The Great Asbestos Deception*, S.D. UNION-TRIB., Aug. 13, 2004, at B7 (alteration in original). It is a perfect deal for someone who is lazy and willing to lie: “All a prospective plaintiff has to do to be party to a class action asbestos lawsuit is claim past or present ownership of some consumer product or another containing even trace amounts of asbestos.” *Id.*

<sup>22</sup> According to Jacob Sullum, jurors are very susceptible to emotional appeals and frequently end up awarding damages based on their “moral outrage” rather than based on what the law requires: “Jurors are often willing to help sympathetic plaintiffs by raiding deep corporate pockets,” even if that means “turning against common sense with a vengeance.” Jacob Sullum, *Whose Risk Is It, Anyway?*, N.Y. TIMES, Feb. 19, 1999, at A21.

<sup>23</sup> See, e.g., Bernard Black, Charles Silver, David Hyman & William Sage, *False Diagnosis*, N.Y. TIMES, Mar. 10, 2005, at A27 (suggesting that, for fifteen years, the tort system in Texas and other states, such as Florida and Missouri, has been remarkably stable and that the sharp spikes in insurance prices reflect forces operating outside the tort system).

<sup>24</sup> According to L. Brent Bozell III of the Media Research Center, the media has a clear “agenda against the food industry, in favor of higher taxes and greater environmental activism, and against tort reform” and as a result they are “slanting the news.” L. Brent Bozell III, Founder and President, Media Research Center, *The MRC “Tell the Truth!” 2004 Campaign Statement*, June 18, 2004, <http://www.mrc.org/campaign/04/welcome.asp>. Indeed, according to Bozell, “The national liberal ‘news’ media are participating in a campaign of partisan viciousness not seen since the days of Ronald Reagan, tossing any pretense of objectivity aside, distorting the truth, and simply refusing to report real news that doesn’t fit their political agenda.” *Id.*

Dan Gainor and Charles Simpson have suggested that that bias has been particularly egregious in the context of tort reform:

In a year where a trial lawyer first ran as a primary candidate for president and then ended up on a national ticket as a vice presidential nominee, it should be safe to assume that tort reform would be a major story. It wasn’t . . . . Why? Because the media were doing their own version of ambulance chasing, with stories skewed against industry.

Dan Gainor & Charles Simpson, *Media Malpractice: Journalists Ignoring Tort Reform to Report One-Sided Stories Against Business*, MEDIA RES. CTR., (Bus. & Media Inst., Alexandria, Va.) Feb. 28, 2005, at 21, [http://www.freemarketproject.org/specialreports/2005/media\\_malpractice/sr20050301.asp](http://www.freemarketproject.org/specialreports/2005/media_malpractice/sr20050301.asp). According to the distortion narrative, there is “a journalistic mindset that big businesses are the bad guy and anyone who sues them—lawyer, individual or nonprofit group—is seeking justice.” *Id.* The result is a clear anti-corporate position: “When reporters aren’t soliciting information from plaintiffs’ attorneys, they are relying on left-wing experts who are anti-corporate for a living.” *Id.* at 17.

Like color commentary in a sports broadcast, this discussion about the discussion is not considered very important to the game itself—and, in fact, legal scholars have paid little attention to it in most policy debates.<sup>25</sup> “That’s just spin,” we assume—the kind of political rhetoric that covers everything but determines nothing. Instead, most critical analysis goes into discussing issues like whether nonpecuniary losses increase or decrease a person’s marginal utility of money,<sup>26</sup> whether negligence or strict liability is a more efficient liability standard,<sup>27</sup> or whether markets are more reliable than tort law at deterring wrongful or inefficient conduct.<sup>28</sup>

Yet, as this Article and its companions argue, a closer look at this secondary discourse reveals that it can be—and very commonly is—far more influential than the policy discussion itself.<sup>29</sup> Color commentary indicating, say, that a scholar opposing tort reform (or worse, favoring greater industry liability) is a liberally biased anti-corporate or anti-freedom zealot not only threatens that scholar’s credibility and helps to advance the reform efforts, but it can also shape what legal scholars risk writing about, teaching, or advocating inside and outside the classroom.<sup>30</sup> Furthermore, it may mean that legal

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<sup>25</sup> Tort law actually may be a partial exception to that general claim. See, e.g., Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996) (summarizing, scrutinizing, and discrediting the “common-sense” public discourse regarding tort law).

<sup>26</sup> See, e.g., Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785 (1995) (summarizing the debate and arguing in defense of tort-awarded pain-and-suffering damages); David Rosenberg, *Deregulating Insurance Subrogation: Towards an Ex Ante Market in Tort Claims*, (Harvard Univ. John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 395, 2002), available at [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/395.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/395.pdf) (reviewing literature and analyzing “the benefits of a tort system in which commercial and governmental first-party insurers acquire complete ownership and control over the prosecution and proceeds of their insureds’ prospective tort claims,” including, importantly, their pain-and-suffering damages).

<sup>27</sup> See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: A Response to Market Manipulation*, 6 ROGER WILLIAMS U. L. REV. 259 (2000); Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993) [hereinafter Croley & Hanson, *Rescuing the Revolution*] (summarizing the debate surrounding enterprise liability and offering arguments in favor of it); James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377 (2002) (advocating for a negligence standard on the grounds that strict liability is unadjudicable, uninsurable, and inefficient).

<sup>28</sup> See Croley & Hanson, *Rescuing the Revolution*, *supra* note 27, at 713–36 (reviewing the arguments of the products liability “contractarians” who call for a greater reliance on market solutions); see also, e.g., PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1990) (calling for a more market-oriented response to product related accidents); PAUL H. RUBIN, *TORT REFORM BY CONTRACT* (1993) (same).

<sup>29</sup> See Benforado & Hanson, *Backlash*, *supra* note 5; Benforado & Hanson, *Legal Academic Backlash*, *supra* note 5.

<sup>30</sup> As this Article investigates, naïve cynicism serves a deterrence function since the risk of being associated with situationism is itself significant. Thus, the fact that there is not clear evidence of naïve cynicism on a given issue does not imply that naïve cynicism is not shaping the debate. See Benforado &

scholarship and the policy recommendations of law professors are generally undermined, particularly when they confirm the professorial stereotype. And it may force some law school faculties, in response, to alter their own compositions in order to provide greater “balance.”

In any event, this Article suggests that the discussion about the discussion of policy and policy arguments matters immensely in terms of the laws we adopt,<sup>31</sup> their effects, and the shape of our important institutions, including academia, the media, and the judiciary. This Article and its companions explore the dynamics of this second-order discussion, which has for too long directed the game from the commentator’s booth.

### B. Predictions

*The Great Attributional Divide* explored what may be *the* central rift in our policy debates: a clash between situationist and dispositionist outlooks on human behavior.<sup>32</sup> As suggested briefly earlier, dispositionists tend to believe that bad outcomes reflect bad choices and good outcomes reflect good choices, regardless of situation. Situationists, conversely, are apt to conclude that harder-to-see, less proximate, and more complex situational forces play a significant role in influencing outcomes, despite any apparent choices.<sup>33</sup>

For the dispositionist, seemingly “social” problems are, in fact, “private,” since each person (or group) has only herself (itself) to blame for suffering.<sup>34</sup> Outcomes are, with rare exceptions, freely chosen. As a result, the goal of laws and policy should be to promote good private decisions, ensure that parties have full information and bare the consequences of their choices (lest

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Hanson, Backlash, *supra* note 5. In fact, the threat of naïve cynicism may mean that certain issues that would otherwise be open to discussion are not, creating a false sense of consensus.

<sup>31</sup> Roughly, how one understands what moves individuals influences how one defines causation; how one defines causation influences one’s reactions to what occurred, where one assigns responsibility and blame, and what policy solutions one proposes and supports. In short, our theories of ourselves define our policies, which, in turn, through the situation, influence what we do and how we see ourselves. See Hanson & Yosifon, *The Situational Character*, *supra* note 8, *passim*; Hanson & Hanson, *Blame Frame*, *supra* note 10, *passim*.

<sup>32</sup> For a more detailed investigation of this divide, see Benforado & Hanson, *The Great Attributional Divide*, *supra* note 5.

<sup>33</sup> Thus, for situationists, “choice” is less the ultimate cause of people’s behavior and more the ultimate behavior caused by situation.

<sup>34</sup> Likewise, dispositionists believe that the path to success and salvation is to be found inside each of us—a manifestation of our choices.

they be tempted to enjoy the benefits but not the costs of bad selections), and then let the chips fall where they may.<sup>35</sup>

For the situationist, in contrast, seemingly “private” problems are often “social.” The connections between various institutions and structures, including our laws and policies, and particular human behavior tends to be missed, in part, because individuals attribute outcomes to interior processes that are more or less imagined. Those imagined processes largely eclipse and obscure the role of internal and external situational forces, which, in any event, are difficult to appreciate.<sup>36</sup> All of this complicates legal theory and raises the unsettling possibility that unequal outcomes reflect unequal situations and unequal justice. If problems and solutions (like categories and schemas) seem clear, absolute, commonsensical, and stable to the dispositionist, they seem fuzzy, dynamic, counterintuitive, and difficult to the situationist. Black and white to the former dissolve to shades of gray for the latter.<sup>37</sup>

These are not minor differences in perception and attribution; they suggest a major divide—one played out in various battles between conservatives and liberals, Republicans and Democrats, fundamentalists and nonfundamentalists, and other group-based dualities that form the seemingly dichotomous fronts of most policy battles.

Because of the prevalence of this rift and its importance to law and legal theory, much of *The Great Attributional Divide* was devoted to understanding what leads individuals (and sometimes groups, generations, and cultures) to tend generally toward dispositionism or situationism—and in what circumstances.<sup>38</sup> We argued that most people will be dispositionist most of the time, but that there will be some people who will be relatively situationist under certain conditions as a result of their interior and exterior situations.<sup>39</sup>

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<sup>35</sup> See Chen & Hanson, *The Illusion of Law*, *supra* note 9, at 5–23 (summarizing and providing a brief history of dominant policy scripts).

<sup>36</sup> See *supra* note 9.

<sup>37</sup> In a variety of ways, this Article simplifies a more complex story with many categories of “dispositionists” and “situationists.” For one thing, situationists often act like dispositionists and vice versa. See, e.g., Jon Hanson & Adam Benforado, Editorial, *The Conservative Hypocrisy*, *BALT. SUN*, Dec. 11, 2005, at 25A. Everyone exhibits both attributional proclivities, and this Article highlights a difference that should be seen in relative, not absolute terms. Furthermore, there are degrees of situationism. Seeing only a single, salient piece of the situation is quite common—such “naïve situationism” is not so different from basic dispositionism. Looking to multiple situational elements or dynamics is more situationist, as the term is used, and is unusual.

<sup>38</sup> See Benforado & Hanson, *The Great Attributional Divide*, *supra* note 5.

<sup>39</sup> See *id.*

Based on that analysis, we offered three tentative predictions regarding the location of the attributional gap.<sup>40</sup>

In the first prediction in *The Great Attributional Divide*, we detailed many of the interior factors that encourage people to see disposition and miss situation.<sup>41</sup> They include perceptual limitations, motives for reasons, closure, and simplicity, and motives of self-, group-, and system-affirmation.<sup>42</sup>

In building a second prediction, we looked at the exterior situations that might encourage certain individuals to become more sensitive to situation. For example, the article suggested that the dispositionist schema might be broken where individuals were (1) required to make many causal attributions of behavior; (2) presented with evidence that was not easily accommodated by the dispositionist model; (3) encouraged to interpret that evidence in unconventional ways; (4) provided with adequate time and opportunity to consider the role of situation; (5) obliged to contend with a diverse array of situations; and (6) held accountable for the accuracy of their attributions.<sup>43</sup>

The third prediction focused on how those situationism-encouraging conditions might manifest themselves across different occupational settings and suggested that academia, the press, and the judiciary are examples of institutions that have demonstrated, at least on certain occasions and in certain ways, the conditions necessary to gain situational sensitivity and promote situationist attributions.<sup>44</sup> We also discussed the potential importance of other group-identity and cultural effects in making certain individuals and groups more likely to be relative situationists.<sup>45</sup>

This Article picks up with a key question: if most people are dispositionists most of the time, but some people, at least some of the time, are in a position to make and promote situationist attributions, how do relative dispositionists maintain their outlook when confronted with relatively situationist ideas? Put differently, how and why do dispositionists—that is, most of us—continue to embrace a faulty attributional approach when some individuals and institutions are promoting a more accurate method of explaining human behavior?

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<sup>40</sup> See *id.* at 328, 338, 381–82 (offering predictions based on interior factors, exterior factors, and occupational or group settings).

<sup>41</sup> See *id.* at 321–27.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* at 328–38.

<sup>44</sup> See *id.* at 338–76.

<sup>45</sup> See *id.* at 376–81.

To answer those questions, this Article looks to social-psychological research exploring how people generally protect their schemas from ideas or alternative schemas that undermine their own. As it turns out, we humans are extremely well equipped to guard our “knowledge” and do so unwittingly or subconsciously, and often for the sake of protecting less accurate understandings.<sup>46</sup> This Article details that process, which it coins *naïve cynicism*. Adding to the three predictions from *The Great Attributional Divide*, our fourth prediction argues that the strength of the naïve cynical backlash against situationism is likely to turn largely on factors discussed in the first prediction regarding sources of dispositionism. The stronger one’s tendency to see disposition alone is, the more robust the backlash against situationist ideas, other things being equal.

The fifth prediction is focused on some of the framing techniques that are likely to be utilized by those who wish to amplify the dispositionist backlash. In a sixth prediction, this Article discusses the types of theories and evidence that one would expect to be employed to defend dispositionism and attack situationist individuals and institutions. The seventh prediction is that commercial interests—particularly large, profit-oriented corporations—have a major stake in the continued dominance of dispositionism and will, therefore, be most active in framing policy issues in ways that encourage naïve cynicism.

Other articles in this series, including *Legal Academic Backlash* and *Backlash*, will loosely test those seven predictions, as well as the more general hypothesis that naïve cynicism is playing an immense role in shaping not only the discussion about the policy discussion but also our policy and policy-making institutions themselves. Our hope is that this set of articles will help readers appreciate the importance of looking beyond the bare play-by-play analyses that dominate much legal-theoretic discourse to the color commenting that is framing—and significantly influencing—the structure and outcomes of most policy debates. Furthermore, we hope that this project provides readers with a greater understanding of the value and relevance of a situationist approach to law and legal theory.

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<sup>46</sup> For two recent, popular books written by social psychologists on this general tendency, see CAROL TAVRIS & ELLIOT ARONSON, *MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS* (2007), and MADELEINE L. VAN HECKE, *BLIND SPOTS: WHY SMART PEOPLE DO DUMB THINGS* (2007).

## II. NAÏVE REALISM<sup>47</sup>

Having explained some of the sources of the great attributional divide in the first part of this project, this Article considers the important questions regarding how that divide is maintained. More precisely, how does a dispositionist remain dispositionist when she encounters situationist claims, arguments, and evidence? How do dispositionists manage to coexist with relative situationists? How do they deal with challenges to their attributions? Those questions are particularly interesting if we are right that situationist arguments come from those individuals and institutions that have traditionally been especially credible and influential sources of “knowledge”—academics and academia, judges and the judiciary, and journalists and the press.<sup>48</sup> If those among us with the greatest commitment and ability to make accurate causal attributions are relatively situationist, how can most of us continue to believe that we are correct in our common-sense dispositionism?

To resolve those puzzles, this Article turns to the insights of social psychology and related fields which have long sought to uncover how people manage various types of interpersonal dissonance.

Renowned social psychologist Lee Ross and his collaborators have carefully studied how people understand and maintain their beliefs—or, put differently, how they perceive their perceptions. The general tendency—a process that Ross dubbed *naïve realism*—has three essential components (depicted in *Figure 1*).<sup>49</sup> First, we naïvely believe that we see the world in an objective, neutral manner.<sup>50</sup> Second, we assume that other reasonable people view the world in the same way we do—that is, accurately.<sup>51</sup> Finally, when we

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<sup>47</sup> This Part, as the citations indicate, summarizes and builds on a body of work from social psychology and social cognition that has received very little attention from legal academics. This Article relies most heavily on the recent, superb work by Emily Pronin, who is collaborating with, and building off the seminal work of, Lee Ross. The relevance of this work for legal theory and policy discourse, we hope to show, is tremendous.

<sup>48</sup> See Benforado & Hanson, *The Great Attributional Divide*, *supra* note 5, at 348–76 (suggesting that academics, judges, and journalists are subject to unique occupational influences that encourage situationism); Benforado & Hanson, *Backlash*, *supra* note 5 (offering evidence that academics, judges, and journalists do, in fact, produce relatively situationist knowledge).

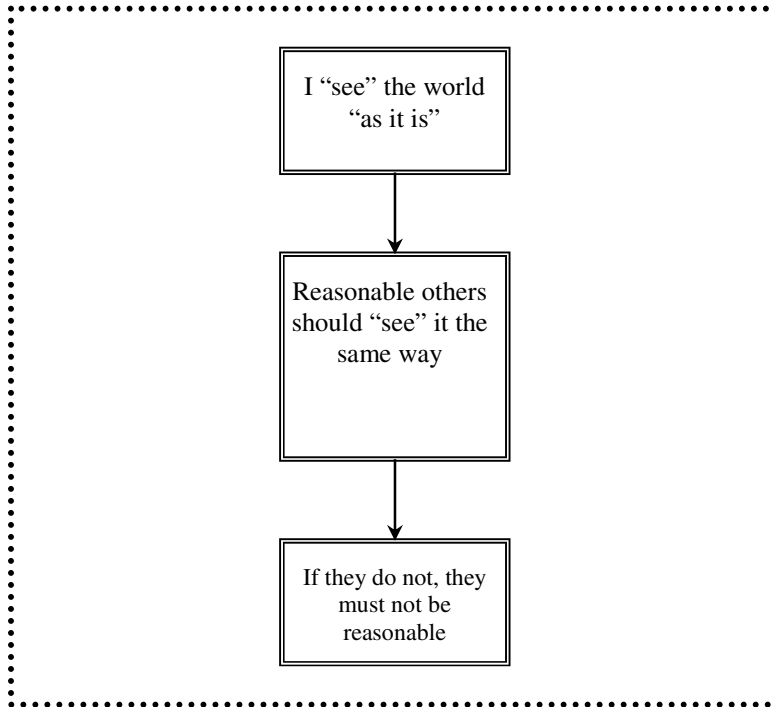
<sup>49</sup> See Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in *VALUES AND KNOWLEDGE* 103, 110 (Edward S. Reed, Elliot Turiel & Terrance Brown eds., 1996). For a recent summary of naïve realism written for a popular audience, see TAVRIS & ARONSON, *supra* note 46, at 42–43.

<sup>50</sup> See Ross & Ward, *supra* note 49.

<sup>51</sup> See *id.*

encounter individuals that see things in ways that conflict with our own views, we conclude that the difference of opinion is due to a lack of information, intelligence, or objectivity on their part.<sup>52</sup> The following sections examine those components and their interrelationships in more detail.

**Figure 1**<sup>53</sup>



<sup>52</sup> See *id.* While the concept of naïve realism has been fleshed out relatively recently by Ross and his colleagues, the idea that people naively believe that they see things “as they really are” has been around since the pioneers of the field of social psychology, Solomon Asch and Gustav Ichheiser, first began researching social cognition. As Ichheiser wrote, more than fifty years ago:

[W]e tend to resolve our perplexity arising out of the experience that other people see the world differently than we see it ourselves by declaring that those others, in consequence of some basic intellectual and moral defect, are unable to see the things “as they really are” and to react to them “in a normal way.” We thus imply, of course, that things are in fact as we see them and that our ways are the normal ways.

Gustav Ichheiser, *Misunderstandings in Human Relations: A Study in False Social Perception*, 55 AMER. J. SOC. 1, 39 (Supp. 1949).

<sup>53</sup> This figure and others in this section are adapted from similar figures in Emily Pronin, Thomas Gilovich & Lee Ross, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCH. REV. 781, 795 (2004) (adapting Fig. 6) [hereinafter Pronin, Gilovich & Ross, *Objectivity*].

A. *Component 1—“I Am Not Biased”*

1. *How We Believe We See Things Objectively*

When we look at the world, we tend to assume that we are seeing all that is truly significant in it and that what we are seeing is, in fact, pretty much the way it is. A magic show amazes us precisely because we cannot imagine that we could miss as much as we actually are missing—that we might be subject to illusion. Once the smoke dissipates and the mirrors are stored away, we tend to assume that there is a determinate, objective reality that can be observed and described neutrally and accurately and that our impressions of it are just that.<sup>54</sup>

The magic occurs within us: “The human brain knows many tricks that allow it to consider evidence, weigh facts and still reach precisely the conclusion it favors.”<sup>55</sup> Unfortunately, “people are better at playing these sorts of tricks on themselves than at catching themselves in the act.”<sup>56</sup> We are, in other words, generally oblivious to the biases, knowledge structures, motives, affective cues, and other unseen aspects of our cognitive framework and processes that distort our understandings.<sup>57</sup>

This conviction is inescapable and deep, and it governs our day-to-day functioning despite what we may know about the constructive nature of perception. Thus, even when we have learned that the colors and objects we perceive reflect the interaction between a world of molecules and energy sources and our particular human sensory processes, we continue to respond to the relevant stimuli in accord with our naïve conviction about objective reality.<sup>58</sup> In short, we enjoy the illusion of no illusions—we perceive our perceptions to be near perfect representations of the world mapped directly onto our brain.

To be sure, there are some exceptions. Occasionally, we acknowledge that our (or others’) understandings are shaped by our (or their) experiences;

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<sup>54</sup> See *id.* at 783.

<sup>55</sup> Daniel Gilbert, *I’m O.K., You’re Biased*, Op-Ed., N.Y. TIMES, Apr. 16, 2006, at 12.

<sup>56</sup> *Id.*

<sup>57</sup> See Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 794; Hanson & Yosifon, *The Situational Character*, *supra* note 8, *passim* (providing a detailed account of the contrast between the situational forces that move us and the dispositionist rationalizations we offer to explain what moves us); see also DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* 3–141 (2007) (describing and contrasting the power of emotion and the illusion of reason in politics).

<sup>58</sup> See Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 783.

however, the perceived effect of those experiences varies depending on the nature of the subject.<sup>59</sup> If we are reflecting on ourselves, then we tend to see our particular paths to the present as the roads to truth and clarity.<sup>60</sup> Conversely, if we are considering those with whom we disagree, we often view their paths as having misled them to falsehood and delusion.<sup>61</sup> Social psychologists summarize the evidence this way:

[W]e are inclined to feel that our particular vantage point (e.g., that of a devout Christian, the child of an alcoholic, a volunteer at the local battered women's shelter, or the CEO of a Fortune 500 company) has been particularly *enlightening*. By contrast, we see others' unique status or unique experiences as a source of inevitable and understandable biases that distort their objectivity and lead them to unwise or unreasonable positions on the relevant issues.<sup>62</sup>

Similarly, people treat their own introspections about the sources of their own choices and behaviors as probative, while they tend to view the reasons offered by others with suspicion.<sup>63</sup> In the words of Dan Gilbert, something that appears to be a self-serving pattern of remembering is actually the product of two innocent facts. First, because our senses point outward, we can observe other people's actions but not our own. Second, because mental life is a private affair, we can observe our own thoughts but not the thoughts of others.<sup>64</sup> Thus, from our perspective, the actions of others speak louder than their reasons, while our reasons speak louder than our actions.<sup>65</sup>

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<sup>59</sup> See Emily Pronin, Carolyn Puccio & Lee Ross, *Understanding Misunderstanding: Social Psychological Perspectives*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 647 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002) [hereinafter Pronin, Puccio & Ross, *Understanding Misunderstanding*].

<sup>60</sup> *See id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*; see also Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37, 37–38 (2006) (summarizing studies that show the way in which people attribute a range of biases to the behavior of others, even while denying or downplaying the influence of the same biases in their own actions) [hereinafter Pronin, *Perception and Misperception*].

<sup>63</sup> See Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 782; see also Pronin, *Perception and Misperception*, *supra* note 62, at 39 (“Whether assessing specific commissions of bias in the laboratory or providing more abstract assessments, people consider internal information more for the self than for others, and they consider information deriving from external sources . . . more for others than for the self.”).

<sup>64</sup> See Daniel Gilbert, Editorial, *He Who Cast the First Stone Probably Didn't*, N.Y. TIMES, July 24, 2006, at A17.

<sup>65</sup> To review the most recent research examining this bias, see Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blindspot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565 (2007). For a brief and accessible overview of that article, see Posting of Emily Pronin to The Situationist, <http://thesituationist.wordpress.com/2007/10/24/im-ok-youre-biased/> (Oct. 24, 2007, 00:01 EST).

It is not that we are completely oblivious to the possibility of flaws in our perceptions. When speaking generically, most of us are willing to admit that we are not perfect, that we make mistakes, and that we are even subject to some manipulation. We can even admit that we used to be biased—back before we gained wisdom or entered the real world or took out a mortgage. We are, after all, only human. But when we are in the moment and it comes down to a specific question or judgment in the present, our self-doubts seem to evaporate. Sure, we are generically flawed, but, at *this* moment and on *this* question, we happen to be omniscient.<sup>66</sup> We “get it.” It is as if the abstract “I” or “we” feels sufficiently distant from our identities—sufficiently “other”—to allow for the possibility of bias, while the concrete “I” or “we” is not.

## 2. *How We Do Not See Things Objectively*

Despite the illusion of personal objectivity and sovereignty, we—all of us—do, indeed, assimilate our surroundings and our interiors in a biased fashion. While other works adequately summarize that evidence,<sup>67</sup> one quick example is in order.

In a famous study, social psychologists Albert Hastorf and Hadley Cantril asked student subjects from Princeton and Dartmouth to watch a movie of a particularly rough football game between the two schools and to keep a tally of the number of “dirty” plays.<sup>68</sup> Although the students used the same rating system and viewed the same coverage, the two groups “saw” a very different contest.<sup>69</sup> Dartmouth students tended to perceive a hard fought game in which each team contributed equally to the violence, whereas the Princeton students saw the Dartmouth players as responsible for more than twice as many dirty

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<sup>66</sup> Pronin, Gilovich, and Ross summarize the tendency to defer to our own introspections this way:

[A]lthough we may well have been guilty of particular biases on some past occasions, we are innocent of bias in the specific assessment about which we have introspected. We do not claim to be immune to wishful thinking, overconfidence, defensiveness, closed mindedness, and a host of other inferential and judgmental failings; we just do not recognize that we are succumbing to them in any particular assessment we are currently making (or else, of course, we would change that assessment until we felt that it was in accord with reality).

Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 783–84.

<sup>67</sup> See Hanson & Yosifon, *supra* note 8; Chen & Hanson, *Categorically Biased*, *supra* note 8.

<sup>68</sup> Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 129–34 (1954). Princeton won the game, a very rough battle with many penalties and injuries. *Id.* A concussion and a broken nose forced Princeton’s All-American quarterback to leave the game (the last of his career) in the second quarter. *Id.* In the third quarter, Dartmouth’s quarterback was carried from the field with a broken leg. *Id.*

<sup>69</sup> *Id.*

plays as the Princeton players.<sup>70</sup> School affiliation seemed to be influencing perception in a powerful way. Hastorf and Cantril summarized the findings as follows: “[T]here is no such ‘thing’ as a ‘game’ existing ‘out there’ in its own right which people merely ‘observe.’ The ‘game’ ‘exists’ for a person and is experienced by him only in so far as certain happenings have significances in terms of his purpose.”<sup>71</sup>

A primary effect of our biased assimilation and selective perception of new information is the unwarranted *perseverance* of our beliefs.<sup>72</sup> Because we perceive ourselves to be objective, we have little reason to think critically about whether our beliefs are, in fact, correct. We maintain our beliefs and positive self-impressions by unconsciously leaving the cognitive gates wide open for new information that is (or can be construed as) consistent with our beliefs and locking them tight when information that does not square with what we “know” comes to call.<sup>73</sup> We can watch a football game, a person eating a hamburger, or a couple arguing as if these are “things” that are “out there” to be viewed in one way; and yet what we “see” is significantly

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<sup>70</sup> The study found that 86% of the Princeton students and 36% of the Dartmouth students said that Dartmouth started the trouble; and 11% of the Princeton students and 53% of the Dartmouth students said that both started it. *Id.* at 131.

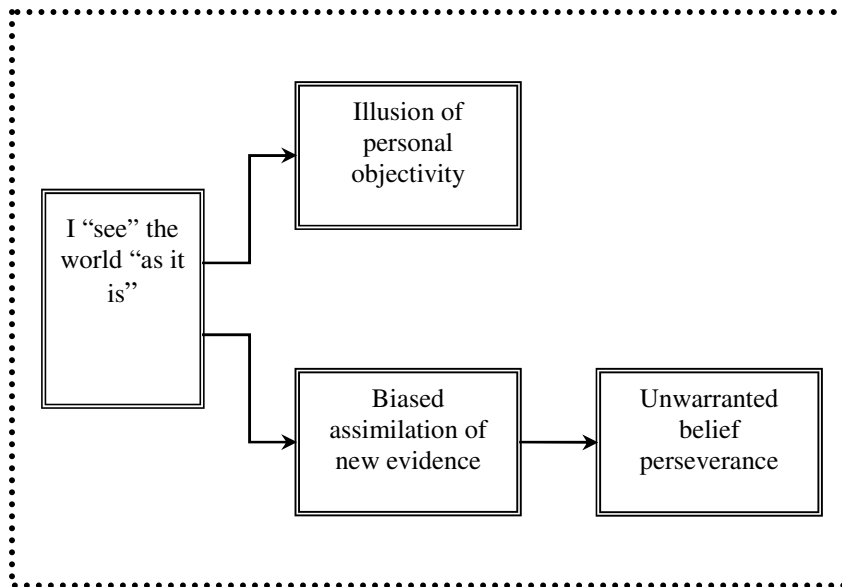
<sup>71</sup> *Id.* at 133; *see also id.* (“Out of all the occurrences going on in the environment, a person selects those that have some significance for him from his own egocentric position in the total matrix.”). For a fuller account of how knowledge structures, schemas, and categories influence what information we attend to, how we construe it, and what we remember of it, see Chen & Hanson, *Categorically Biased*, *supra* note 8.

<sup>72</sup> Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 795–96.

<sup>73</sup> Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 646–53 (1999) (summarizing studies regarding the formation and influence of personal hypotheses that indicate the strength and magnitude of personal biases); Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 796 (describing the tendency to subject information with which we disagree to much greater scrutiny than information with which we agree); *see* Hanson & Yosifon, *supra* note 8, at 50–63 (summarizing studies regarding the knowledge structures that allow for, and reinforce, stereotyping and group schemas).

determined by influences beyond our conscious purview.<sup>74</sup> In those and many other ways, our biased theories, beliefs, and expectations, tend to persevere.<sup>75</sup>

**Figure 2**<sup>76</sup>



### 3. *Why We Believe We See Things Objectively*

There are three main reasons why we fail to appreciate our own biases but are relatively quick to identify bias in others. First, our self-conception as unbiased is quite self-affirming. It feels good to believe that our lenses are

<sup>74</sup> Dan Gilbert summarizes a study by psychologists Peter Ditto and David Lopez as follows:

The . . . researchers asked subjects to evaluate a student's intelligence by examining information about him one piece at a time. The information was quite damning, and subjects were told they could stop examining it as soon as they'd reached a firm conclusion. Results showed that when subjects liked the student they were evaluating, they turned over one card after another, searching for the one piece of information that might allow them to say something nice about him. But when they disliked the student, they turned over a few cards, shrugged and called it a day.

Gilbert, *I'm O.K., You're Biased*, *supra* note 55, at 12 (summarizing Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 *J. PERSONALITY & SOC. PSYCHOL.* 568 (1992)).

<sup>75</sup> See Chen & Hanson, *Categorically Biased*, *supra* note 8, at 1195–1211 (summarizing how schemas and categorization inherently reinforce biases).

<sup>76</sup> This figure was adapted from Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 795.

untinted and our perceptions untainted. And it feels just as good to believe that those with whom we disagree cannot see past their darkly-shaded trifocals.<sup>77</sup> Put differently, perceiving ourselves as biased and others as unbiased creates a strong dissonance with our favored conceptions.<sup>78</sup> Studies have shown that people's tendency for self-enhancing beliefs persists even when the evidence suggests otherwise.<sup>79</sup> In one experiment, participants took a purported test of social intelligence.<sup>80</sup> Those who were told they performed well on the test found the test more valid than those who were told they performed poorly.<sup>81</sup> Moreover, when the experiment was explained to them, the participants were more likely to acknowledge the possibility of bias in others than in themselves.<sup>82</sup>

Second, we know that we do sometimes struggle to be objective. We remember the instances in the past when we attempted to see the issue from another side. And we do occasionally toil over our options and see some of our own choices as difficult ones. The key is that we have access to our own introspections at those moments—we have the perception that we perceive what is moving us. And experiencing that struggle and perception assures us that our own cognitive processes are fair and balanced.<sup>83</sup>

Thus, we know we see 'em clearly, and we know, through introspection, that we call 'em like we see 'em. All of that is in contrast to our sense of other people's cognitive processes, which occur outside our purview. Consequently, when we encounter individuals or groups who call 'em differently than we do, it is easy to infer that they either don't see 'em or that they don't call 'em like they see 'em.<sup>84</sup> It follows that they are ignorant, unfair, or out of balance.

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<sup>77</sup> See Hanson & Yosifon, *supra* note 8, at 109–11 (discussing the self-affirming motive and its relation to naïve realism).

<sup>78</sup> See Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 783.

<sup>79</sup> See Hanson & Kysar, *supra* note 73, at 650–53 (summarizing studies supporting this “entity effect”).

<sup>80</sup> See Pronin, *Perception and Misperception*, *supra* note 62, at 37.

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

<sup>83</sup> See Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 784 (“Most people . . . can recall instances in which they have accepted evidence that was at variance with their prior views and that they would have preferred to reject. In fact, introspection often produces the honest conviction that one acted as one did in spite of, not because of, one’s private sentiments.”); see also Pronin, *Perception and Misperception*, *supra* note 62, at 38.

<sup>84</sup> Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 784 (“[W]hen others’ judgments seem highly correlated with their preexisting beliefs, we assume that they have been guilty of assimilating the evidence at hand to those beliefs. When their judgments seem highly correlated with obvious motives, we assume that the latter have played a role in dictating the former.”).

Social psychologists call this tendency to overvalue one's own introspection and undervalue the introspection of others the "introspection illusion."<sup>85</sup> The false impression occurs when people assign undue credence to their own thoughts, feelings, or motives at the expense of other sources or types of information, such as observable behavior.<sup>86</sup> The introspection illusion allows people to plausibly overlook their own biases while plainly seeing prejudice in others, as revealed in their actions.<sup>87</sup>

Perhaps the biggest problem with introspection—and this brings us to the third main source of our inability to recognize our own perceptual biases—is that the actual origins of our behavior are generally inaccessible to introspection.<sup>88</sup> Our biases and other distorting factors tend to be extremely subtle and are present at every stage of cognitive processing, beginning with our initial intake of information.<sup>89</sup>

The effect of those "quiet," constant influences on our unseen interiors is, in some ways, tantamount to the effect of gravity on our physical selves. We are prisoners to gravity at virtually every moment, and yet, even when dropping from a tree branch, we rarely consciously perceive that immense force as a relevant part of our situation. We see a bouncing ball, which itself eclipses the ubiquitous force that eventually brings it down. Our cognitive biases can affect not only how we interpret what we see, but what we look for and attend to in any given setting.<sup>90</sup> We unthinkingly focus on those features

<sup>85</sup> Pronin, *Perception and Misperception*, *supra* note 62, at 38–39.

<sup>86</sup> *See id.*

<sup>87</sup> Pronin has provided the following summary of the research on the introspection illusion:

Studies have shown that: (i) people report that internal information is a more valuable source of information about their own bias than others' bias; (ii) people show a bias blind spot even when they have detailed access to others' introspections; and (iii) people believe that an actor's bias is more aptly defined by introspective contents when that actor is themselves rather than someone else.

*Id.* at 39.

<sup>88</sup> *See* Hanson & Yosifon, *supra* note 8, *passim* (contrasting the dispositional forces that we believe move us to the interior and situational forces that actually move us).

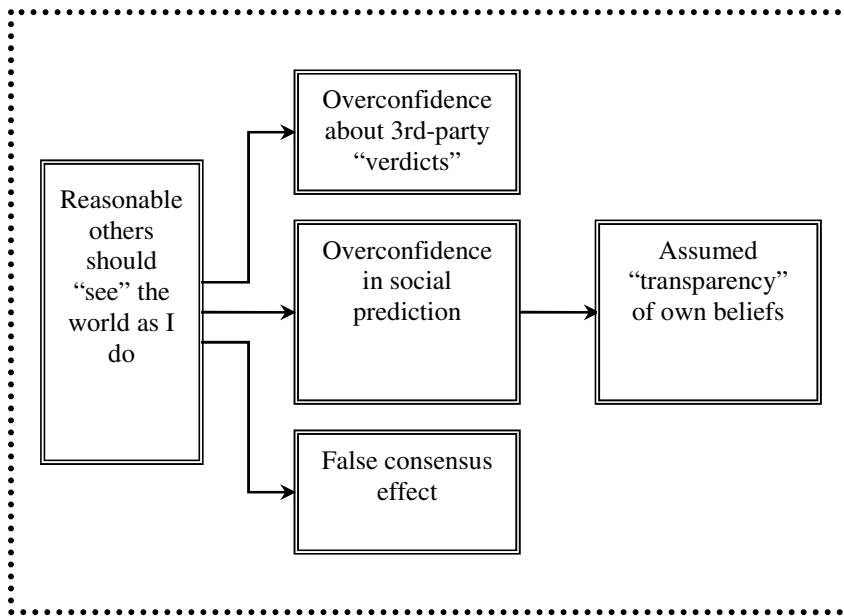
<sup>89</sup> For a detailed description of the process, see Chen & Hanson, *Categorically Biased*, *supra* note 8, at 1155–74; *see also* Gustav Ichheiser, *Misinterpretations of Personality in Everyday Life and the Psychologist's Frame of Reference*, 12 *CHARACTER & PERSONALITY* 145–46 (1943) (summarizing evidence that shows that the process at work "even on the level of immediate observation").

<sup>90</sup> *See* Chen & Hanson, *Categorically Biased*, *supra* note 8, at 1155–74 (describing how our knowledge structures influence how we process information and the biases that result); GORDON B. MOSKOWITZ, *SOCIAL COGNITION: UNDERSTANDING SELF AND OTHERS* 68 (2005) (describing how personal preferences unknowingly cause us to selectively focus our attention).

that are salient and skim or skip those that are not.<sup>91</sup> Because our motives and biases come into play so early, so often, and so automatically in our cognitive processes, there is no way for us to appreciate and account for them fully.<sup>92</sup> They remain very much beyond our awareness, leaving us to encounter the world as naïve realists.

*B. Component 2—“Everyone Who Is Reasonable Agrees With Me”*

**Figure 3**<sup>93</sup>



Given our faith that we see the world objectively, we expect that any other *reasonable* person will share our outlook—that is, our perceptions and

<sup>91</sup> In one study, David R. Roskos-Ewoldsen and Russell H. Fazio questioned a group of subjects about their interests. Later, the researchers briefly flashed a visual display with six distinct pictures on a screen in front of the subjects. The researchers found that the participants tended to focus on (and remember more readily) the objects that matched up with their interests from the first part of the study. See David R. Roskos-Ewoldsen & Russell H. Fazio, *On the Orienting Value of Attitudes: Attitude Accessibility as a Determinant of an Object's Attraction of Visual Attention*, 63 J. PERSONALITY & SOC. PSYCHOL. 198 (1992).

<sup>92</sup> See Hanson & Yosifon, *supra* note 8, *passim* (describing the nature of dispositionism as a process that necessarily results in selective reinforcement of behaviors and thoughts).

<sup>93</sup> This figure was adapted from Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 795.

opinions.<sup>94</sup> Similarly, we anticipate that any “neutral third parties” will call ‘em as we see ‘em: an objective journalist should describe a scene as we remember it; an unbiased judge should reach a decision that squares with our perceptions of justice; and a careful scholar should offer descriptions, predictions, or prescriptions that comport with our own intuitions.<sup>95</sup>

In an experiment testing those tendencies, Linda Babcock and George Loewenstein presented a detailed fact pattern of an actual tort suit involving an auto accident to a group of students.<sup>96</sup> The students had previously been divided into “plaintiffs” and “defendants” for the purpose of a negotiation exercise.<sup>97</sup> When asked to estimate the amount of monetary damages that a judge would award to the plaintiff in the case (after being told that the actual figure was between \$0 and \$100,000), the students designated as “plaintiffs” estimated an average figure that was roughly \$15,000 higher than the average amount estimated by the “defendants.”<sup>98</sup> This experiment provides a glimpse of how individuals can be unknowingly biased by situational cues, while simultaneously believing that neutral parties will see things as they do.

Related to this self-affirming belief that the judgments of disinterested third parties will align with our own is an unwarranted confidence that we can accurately predict how other people will react in a given situation by attempting to guess how we ourselves would react.<sup>99</sup> In such a setting, we take into account only those considerations that *we* find important and analyze them through our own biased lenses.<sup>100</sup> As a result, we mis-estimate more than we think we do—and continue to be surprised each time our expectations are disappointed.<sup>101</sup>

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<sup>94</sup> See Pronin, *Perception and Misperception*, *supra* note 62, at 40 (“People are naïve realists in the sense that they generally assume that they see the world as it is in ‘objective reality’. This belief begets the assumption that other objective perceivers will share one’s views about oneself and the world.”).

<sup>95</sup> See Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, J. ECON. PERSP., Winter 1997, at 109, 109–26 (detailing the self-serving bias).

<sup>96</sup> *See id.* at 112–13.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* Anecdotally, one of us has judged moot court competitions among first-year students at Harvard Law School for the last fifteen years—and, after each event, asked the moot lawyers if they tended to side more with their imagined clients or with those of their opponents. A significant majority sided with their own—even though the clients are hypothetical, case assignments are random, and the program endeavors to make the two sides as even or balanced as possible. We mention this less as proof of the larger phenomenon, and more as a suggestion for a possible empirical project for readers who might be in the market for such a topic.

<sup>99</sup> See Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 795–96.

<sup>100</sup> *Id.*

<sup>101</sup> See Hanson & Yosifon, *The Situational Character*, *supra* note 8, at 113–15.

Compelling evidence for the second component of naïve realism is also revealed in what social psychologists have named the “false consensus effect.”<sup>102</sup> People tend to assume that their beliefs and attitudes are more commonly held than they in fact are.<sup>103</sup> For instance, “people who prefer an Australian shiraz to a California merlot are likely to estimate that a higher percentage of wine lovers would likewise prefer the shiraz to the merlot than would individuals with the opposite preference.”<sup>104</sup>

In one of the better known demonstrations of this effect, a group of students were asked whether they would be willing to walk around campus wearing a large sign with “REPENT” written across it.<sup>105</sup> The experimenters next asked the students what percentage of their classmates they believed would be willing to wear the sign.<sup>106</sup> The students who refused to wear the sign guessed that 77% of their classmates would similarly refuse, whereas the students who agreed to wear the sign imagined that 64% of their classmates would be willing to wear it.<sup>107</sup> “The cause of such miscalculations in estimates of what our peers will do is supposedly that we fail to realize that our choices are subjective. Instead, we believe that we are merely responding to the objective realities of the situation.”<sup>108</sup> And, because we presume that others are reasonable like us, it follows that they will respond as we do.

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<sup>102</sup> See Lee Ross, David Greene & Pamela House, *The “False Consensus Effect”: An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279 (1977) (describing how evidence from four studies supports the “false consensus effect” of erroneously believing others commonly feel as we do); Ross & Ward, *supra* note 49, at 111–12 (describing one of the best known studies on the “false consensus effect”).

<sup>103</sup> See generally Hanson & Yosifon, *The Situational Character*, *supra* note 8, at 113–15 (describing the effect and summarizing studies demonstrating the effect).

<sup>104</sup> Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 795.

<sup>105</sup> Ross, Greene & House, *supra* note 102, at 289–97.

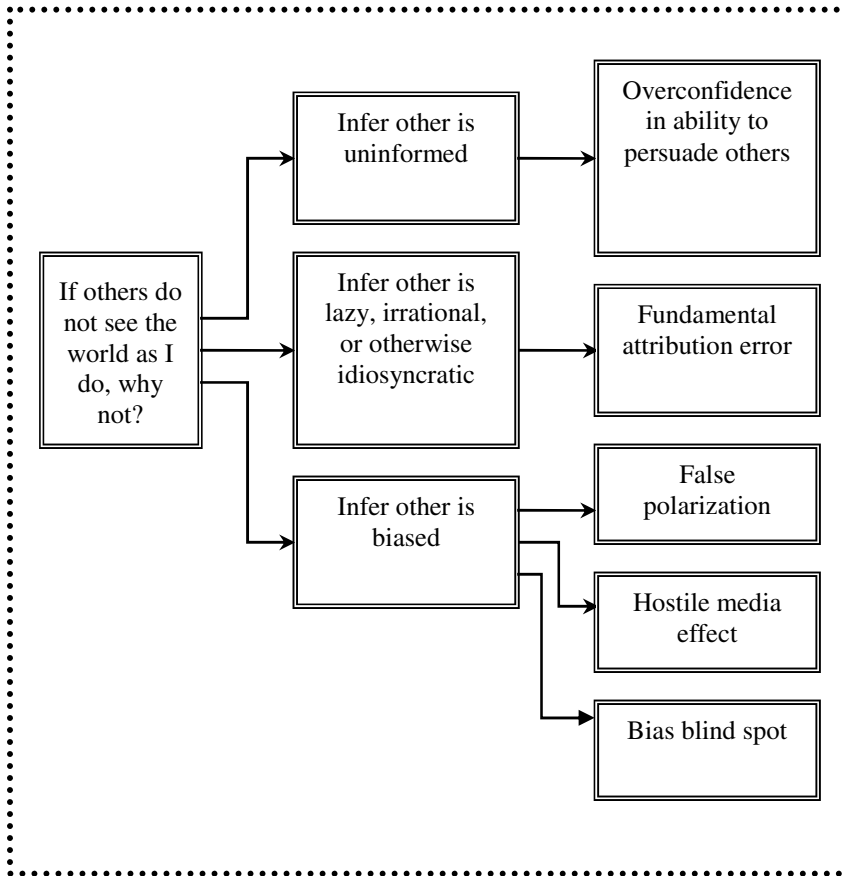
<sup>106</sup> See *id.*

<sup>107</sup> See *id.* at 292.

<sup>108</sup> MOSKOWITZ, *supra* note 90, at 45.

C. Component 3—“If You Disagree With Me, You Must Be Biased”

Figure 4<sup>109</sup>



Though we call 'em as we see 'em, and presume others who are similarly attentive will call 'em as we see 'em, we are often left disappointed. We sometimes encounter individuals or groups whose attitudes, beliefs, and ideas do not comport with our own. To be sure, we excel at avoiding such

<sup>109</sup> Adapted from Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 795.

confrontations,<sup>110</sup> but when they do occur, we are faced with an interpersonal dissonance—an experience that triggers our attributional impulse to ask “why?”<sup>111</sup> The least threatening resolution of such dissonance is to infer, as we typically do, that there is something wrong with *them*.

Assuming that we do not already perceive the individual with whom we disagree as an outgroup member, our initial attribution is generally quite charitable.<sup>112</sup> We tend to assume that the other person is simply ill-informed or has not been exposed to the evidence and arguments that we have encountered.<sup>113</sup> From that perspective, the other person is, like us, unbiased. The problem is not only understandable and forgivable, it is also easily remedied.<sup>114</sup> Once informed, our acquaintance will, of course, see things as we do. Consistent with that hopeful attributional assessment, the process of persuading the other person is presumed to be straightforward—a presumption that

leads us to be confident—indeed, *overconfident*—that rational, open-minded dialog, in which information is freely exchanged, will lead to agreement or at least to an appreciable narrowing of disagreement. This optimism is likely to be short-lived, however, especially in the social and political arena. Repeated attempts at dialog with those on the other side make it quite clear that they rarely yield to our attempts

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<sup>110</sup> See Chen & Hanson, *Categorically Biased*, *supra* note 8, at 1195–1211 (explaining the schema-protection motive where individuals are motivated to protect their own schemas).

<sup>111</sup> See Jon Hanson & Ana Reyes, *Attributional Positivism: The Naïve Psychology Behind Our Laws* (2004) (unpublished manuscript, on file with authors) (describing the widespread urge among human beings to make causal attributions and, at times, attributions of responsibility and blame).

<sup>112</sup> See Pronin, Puccio & Ross, *Understanding Misunderstanding*, *supra* note 59, at 648 (“[W]e may even be so charitable as to concede that the other party may be privy to additional facts and considerations that might actually change our own views.”).

<sup>113</sup> Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 794; see also Pronin, Puccio & Ross, *Understanding Misunderstanding*, *supra* note 59, at 648.

<sup>114</sup> This tendency is, we believe, a key source of the popular informational solutions to market problems. When confronted with seemingly bad market outcomes, market enthusiasts (who tend to be hard-core dispositionists) are quick to suggest that the solution is (and should be limited to) the provision of better information, often in the form of disclosure requirements. See Croley & Hanson, *Rescuing the Revolution*, *supra* note 27, at 713–67 (summarizing views of products liability scholars regarding the success of markets and the need for informational regulatory intervention); see also Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613 (1999) (discussing informational regulatory interventions more generally and comparing them to alternative regulatory options); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1211–27 (1999) (describing the history of securities laws as primarily one of disclosure as a regulatory method).

to enlighten them, and that they rarely present new facts and arguments that persuade us to change our minds.<sup>115</sup>

When, as is typical, our efforts to persuade those with whom we disagree fail, we are forced back to the dissonance-reduction drawing board in search of a new explanation for the disparity of opinions. To relieve the interpersonal dissonance in such cases, we often become less charitable<sup>116</sup> and draw a more negative inference about our adversaries:<sup>117</sup>

The inference may be . . . that the relevant response reveals something about the actor's personal traits or dispositions (selfishness or generosity, aggressiveness or passivity, etc.). Or, the inference may be that the response reveals something about the biased "lenses" through which the actor views the object, issue, or event in question. Such inferences of bias may be especially likely to arise in cases involving responses to social or political issues, where the opposing partisans can cite a host of possibilities ranging from self-interest and peer-group pressures to dissonance reduction and media brainwashing to explain the 'error' in their adversaries' views.<sup>118</sup>

Similarly, our tendency to see our adversaries in more negative light is heightened when the issue is particularly important to us or when our adversary is passionate and persistent.<sup>119</sup> Consequently, we not only underestimate bias in our own cognitions and behavior, we also tend to overestimate it in others—particularly in our adversaries—who we automatically assume “see the world through the distorting lenses of ideology and self-interest.”<sup>120</sup>

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<sup>115</sup> See Pronin, Puccio & Ross, *Understanding Misunderstanding*, *supra* note 59, at 648.

<sup>116</sup> *Id.*

<sup>117</sup> This is another manifestation of the fundamental attribution error—the tendency to view another person's actions as a product of his disposition (e.g., an idiosyncratic disposition) and to underestimate the role of situational influence in that person's decision-making process. See Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCHOL. 1 (1967) (describing three experiments on the theory of “correspondent inferences” and concluding that perceivers' rational-analysis lacks sufficient weight regarding the role of situational influences on others); see also Pronin, *Perception and Misperception*, *supra* note 62, at 40 (“When other people do not share one's views, one is prompted to question whether these others lack essential information and, having ruled out that possibility, one is led to conclude that these others must be biased.”).

<sup>118</sup> Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 783.

<sup>119</sup> See Pronin, Puccio & Ross, *Understanding Misunderstanding*, *supra* note 59, at 648.

<sup>120</sup> Ross & Ward, *supra* note 49, at 117; see also Emily Pronin, Daniel Y. Lin & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369 (2002) (detailing the propensity to underestimate our own biases and exaggerate biases in others). The tendency to attribute another person's non-conformance to that person's deficient disposition—as opposed to their

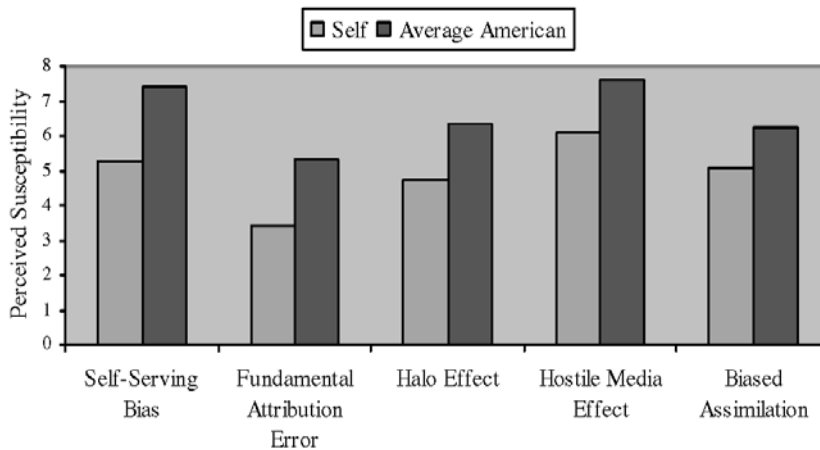
To better understand this “bias blind spot,” Emily Pronin, Daniel Lin, and Lee Ross asked Stanford students to complete surveys in which they indicated just how biased they thought they were and how biased they believed the “average American” to be.<sup>121</sup> Subjects rated themselves as being less susceptible to each listed bias in human judgment and perception than the hypothetical average American, as summarized in the chart below.<sup>122</sup>

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situation—is particularly heightened when the discrepancy involves behavior and not just articulated interpretations or viewpoints. See Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 794 (explaining that we are more likely to blame disposition when behavior is involved). The naïve realist, thus, tends to infer from the other person’s “unusual” behavior some negative character trait, preference, or prejudice. And, even where situation is part of the story—for instance, “mixing with the wrong crowd”—that situation will often be treated as the consequence of a bad choice, which itself reveals a faulty disposition.

<sup>121</sup> Pronin, Lin & Ross, *supra* note 120, at 369–71. Since we cannot observe the cognitive processes of others directly, we simply infer that other people are biased. See *id.* at 379.

<sup>122</sup> See *id.* at 372.

Figure 5<sup>123</sup>

Similar results were obtained in studies asking students to compare themselves to their college cohorts<sup>124</sup> and studies asking airport passengers to compare themselves to other passengers.<sup>125</sup>

An important effect of the so-called “bias blind spot” is the tendency on the part of individuals and groups to exaggerate the differences in opinion between themselves and others. This tendency, known as *false polarization*,<sup>126</sup> stems in

<sup>123</sup> This figure was adapted from the study by Pronin and her colleagues. *See id.* Ratings were made using a nine-point scale with one corresponding to “not at all,” five corresponding to “somewhat,” and nine corresponding to “strongly.” *Id.* at 370.

<sup>124</sup> Researchers surveyed Stanford students regarding whether they possessed three specific positive character traits and three specific negative character traits as compared to the average Stanford student. *See id.* at 371. The negative traits were snobbery, deceptiveness, and selfishness, and the positive traits were dependability, objectivity, and consideration for others. *See id.* The students in this study once again found themselves to be less likely to possess the negative traits and more likely to possess the positive ones. *See id.* at 372.

Immediately upon completion of the survey, the researchers explained that “when assessing themselves relative to other members within their group . . . 70-80% of individuals consistently rate themselves ‘better than average’ on qualities they perceive as positive, and conversely, evaluate themselves as having ‘less than average’ amounts of characteristics they believe are negative.” *Id.* at 375. The researchers then asked the subjects to reevaluate their answers in light of that phenomenon. *See id.*

When confronted with this information, only 24% of the students acknowledged that they may have fallen victim to the “better than average” bias, suggesting that even when given clear evidence of their potential lack of objectivity, individuals are loathe to see bias in themselves. *Id.*

<sup>125</sup> *See* Pronin, Lin & Ross, *supra* note 120, at 372–73.

<sup>126</sup> *See* Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 796; MOSKOWITZ, *supra* note 90, at 49–50; *see also* Robert J. Robinson, Dacher Keltner, Andrew Ward & Lee Ross, *Actual Versus Assumed Differences*

part from our own surprise (or disbelief) that others see things differently than we do. Once we perceive the other side in a particular debate to be biased (if they were not biased, they would see things as we do), we tend to exaggerate the extent of the difference of opinion.<sup>127</sup> Both sides in a particular debate tend to assume that members of the opposing group have views that are both more unified and more extreme than they actually are.<sup>128</sup>

In addition, people see the views of other members of their own group to be more extreme than what they are in reality.<sup>129</sup> In other words, people tend to view themselves as moderate members of their own group. As a result of this false polarization, groups are more likely to engage in needless conflict over perceived rather than real differences.

In one study of this effect, experimenters questioned sets of partisans about the contentious issues of racial violence, abortion, and the death penalty.<sup>130</sup> In the abortion variation, researchers presented a group of pro-life students and a group of pro-choice students with various hypothetical scenarios in which a woman had an abortion.<sup>131</sup> The researchers asked the students to rate how sympathetic they felt each case was on a scale from 1 to 100 and to estimate how sympathetic their counterparts on the other side would find the case.<sup>132</sup> The two sides did, in fact, differ in their opinions as to how sympathetic each scenario was, but only to a modest degree.<sup>133</sup> What was significant was the inability of each side to predict, with any accuracy, how the other side would respond.<sup>134</sup> The pro-choice students imagined that the pro-life students would be significantly less sympathetic than they actually were, and vice versa.<sup>135</sup>

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*in Construal: "Naïve Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 405 (1995) (finding that people have "(a) a tendency to overestimate the consistency and extremity of the other side's views and interpretations; (b) a tendency to believe that the other side will recall facts less accurately than themselves; and (c) a tendency to believe that their own beliefs *follow* from their understanding of facts and arguments whereas the other side's beliefs *dictate* their interpretation of facts and arguments").

<sup>127</sup> The contradicting perspective reveals a potential ingroup member (a reasonable person who, being reasonable, would necessarily agree with us) to be, in fact, an outgroup member and that categorical distinction contributes to an exaggeration of perceived differences. See Chen & Hanson, *Categorically Biased*, *supra* note 8, at 1160–64.

<sup>128</sup> See Robinson, Keltner, Ward & Ross, *supra* note 126, at 405.

<sup>129</sup> See *id.* at 414.

<sup>130</sup> See *id.* at 405–14.

<sup>131</sup> See *id.* at 405–06.

<sup>132</sup> See *id.* at 406.

<sup>133</sup> See *id.*

<sup>134</sup> See *id.* at 409. Both groups overestimated the degree to which the other was influenced by religious, moral, and ethical convictions. See *id.* Respondents also felt that they personally had been less swayed by

As the experiment suggests, we tend to see ourselves as “fair and balanced” and others—particularly members of outgroups—as unreasonable and partial. However, the problem of asymmetric perceptions is not directed solely at the individuals or groups who we have come to expect are on the other side of issues from us—be they Democrats, gun owners, or gay-rights advocates. Indeed, we may experience the same tendencies toward “mediators, news reporters, and other third parties whose job it is to offer neutral and unbiased views.”<sup>136</sup> After all, as Pronin, Gilovich, and Ross explain,

If one’s own views are experienced as ineluctable products of objective perception of the relevant issues or events (especially if one sees the world in “black or white”), such third parties (to the extent they claim the world to be a shade of gray) will be seen as biased in favor of the other side.<sup>137</sup>

Thus, naïve realism helps explain the common tendency to see the media and other ostensibly neutral institutions as hostile to our own views.<sup>138</sup> Inasmuch as such a third party reports information that is consistent with our existing beliefs, we see that third party as, like us, fair and balanced. To the extent that a third party reveals information or ideas that challenge our existing beliefs, however, that third party strikes us as biased.<sup>139</sup> Contradiction, which is unexpected, stands out more than affirmation, which is expected. Because a third party—like a newspaper, for example—will often impart facts and claims that both confirm and challenge the beliefs and assumptions of the different sides of a given debate, it is not surprising that each side will tend to see the

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their political orientation than had either their peers or their adversaries. *See id.* According to Robinson, Keltner, Ward, and Ross:

The data . . . made it clear that [the] participants were willing to admit that their own views on abortion had been influenced by nonfactual, nonpragmatic concerns, but they preferred to label such influences as philosophical or even religious and ethical. Only in taking into account the views of other people, especially the other side, were they inclined to cite the potentially biasing effect of political orientation.

*Id.*

<sup>135</sup> *See id.* at 406–07.

<sup>136</sup> Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 794.

<sup>137</sup> *Id.* (citing Robert P. Vallone, Lee Ross & Mark R. Lepper, *The Hostile Media Phenomenon: Biased Perception and Perceptions of Media Bias in Coverage of the Beirut Massacre*, 49 J. PERSONALITY & SOC. PSYCHOL. 577 (1985)).

<sup>138</sup> *See* Vallone, Ross & Lepper, *supra* note 137, at 581.

<sup>139</sup> In addition to feeling that the media is biased in favor of our opponents, we also assume that our opponents fail to see this bias and are, thus, more vulnerable to media manipulation than we are. *See* Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 794.

same newspaper as biased in favor of the other side or sides.<sup>140</sup> To be gray in a world of black and white or to be lukewarm in a world of hot and cold is to be one of “them,” part of the hostile “other.”

Social psychologists have found strong evidence for this *hostile media effect*. In one study, for instance, two groups of subjects—one composed of pro-Arab students and the other made up of pro-Israeli students—watched the same news coverage of a massacre of civilians in refugee camps at Sabra and Chatilla, Lebanon.<sup>141</sup> Although they had been given the same information, the pro-Arab students tended to see the coverage as providing a favorable portrayal of Israel, while the pro-Israel students tended to view the coverage as providing an unfavorable portrayal.<sup>142</sup> The study concluded that there are two mechanisms that cause individuals to see bias in the media.<sup>143</sup> First, the two sides actually were attentive to different stimuli—the subjects focused on and remembered different aspects of the news coverage. Second, even when they saw the same stimulus, each side tended to perceive it in a different way.<sup>144</sup>

Paraphrasing Hastorf and Cantril, whose famous football-game study was summarized earlier, people tend to think that “there is no such ‘thing’ as a [media message] existing ‘out there’ in its own right which people merely ‘observe.’ The [message] ‘exists’ for a person and is experienced by him only in so far as certain happenings have significances in terms of his purpose.”<sup>145</sup> In addition to seeing different things in the coverage, where the researchers controlled for the perceptions of the program’s actual content, each side still tended to view the coverage as unfairly biased in favor of the other.<sup>146</sup> The two sides, thus, had different conceptions of both what they saw and what it meant.

Those are the key elements of naïve realism—the significance of which should become more evident, presently.

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<sup>140</sup> A key contributor to this effect is the fact that many policy debates are perceived as dichotomous—for or against, us or them, conservative or liberal, black or white, and so on.

<sup>141</sup> See Vallone, Ross & Lepper, *supra* note 137, at 580.

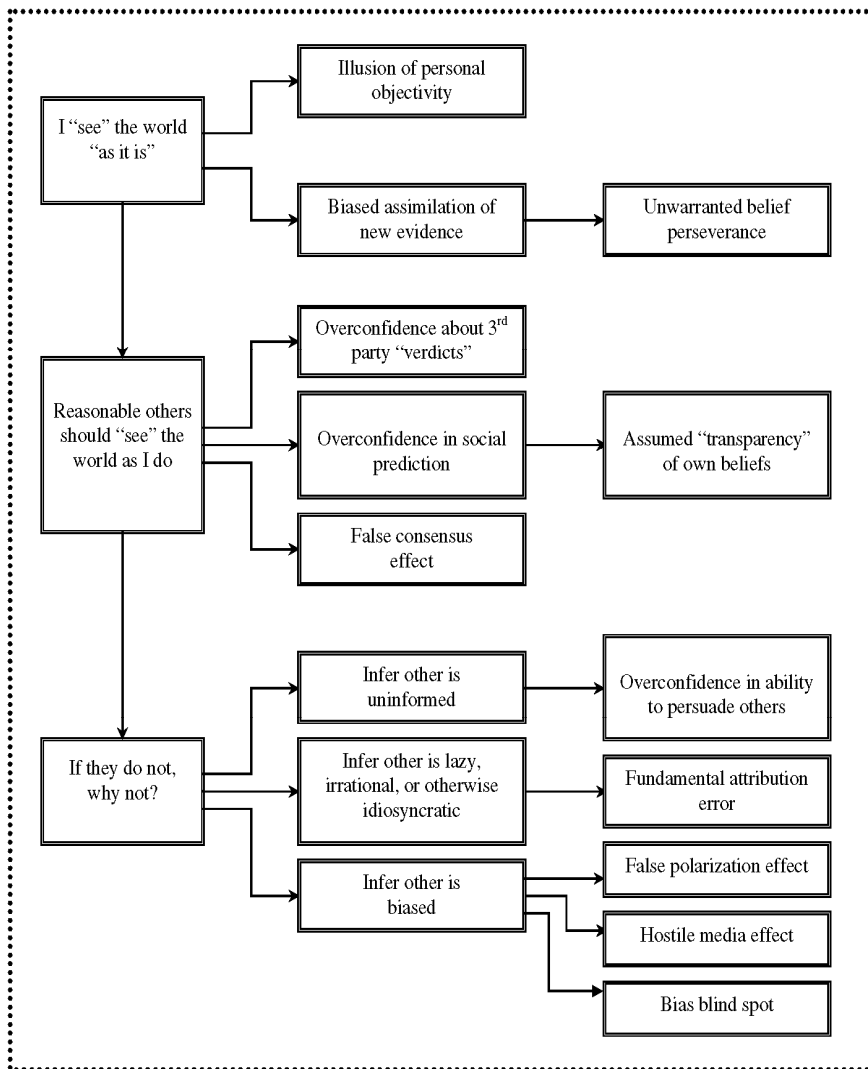
<sup>142</sup> See *id.* at 581.

<sup>143</sup> See *id.*

<sup>144</sup> See *id.* (summarizing the results of the study).

<sup>145</sup> Hastorf and Cantril, *supra* note 68, at 133; see also *id.* (“Out of all the occurrences going on in the environment, a person selects those that have some significance for him from his own egocentric position in the total matrix.”). For a fuller account of how knowledge structures, schemas, and categories influence what information we attend to, how we construe that information, and what we remember of it, see Chen & Hanson, *Categorically Biased*, *supra* note 8, at 1131–1218.

<sup>146</sup> See Vallone, Ross & Lepper, *supra* note 137, at 582.

Figure 6<sup>147</sup>

<sup>147</sup> This figure was adapted from a similar figure in Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 795.

### III. NAÏVE CYNICISM

In summary, social psychology and related fields have made two critical discoveries about the human animal that, taken together, lead to an important prediction about the nature of policy discussions.<sup>148</sup>

The first finding is that people tend wrongly to attribute human behavior to dispositionist choice and often miss the far more significant role of interior and exterior situation. That fundamental attribution error has a number of sources and varies across individuals, groups, time, and context. As a result, some individuals or groups can be relatively situationist—that is, relatively accurate in their causal attributions—in certain settings regarding particular topics. *The Great Attributional Divide* examined and offered predictions concerning some of those variables and variations.<sup>149</sup>

The second discovery, and the focus of this Article, is that individuals and groups have an elaborate and effective method of maintaining their schemas and beliefs, even when those schemas and beliefs are fundamentally unsound. Such *naïve realism*, depicted in its entirety in *Figure 6*, above, reflects the fact that the best defense is often a good offense. The most effective way to defend our own sense of things is often to attack or disarm conflicting perspectives. When we confront ideas, schemas, theories, beliefs, or attitudes that conflict with our own, we can maintain our favored views by disparaging the problematic message, discrediting the messenger, or attacking any associated institution. In particular, we may resolve the dissonance in our own favor by presuming that those with whom we disagree are uninformed or otherwise dispositionally inclined not to “get it.”

#### A. *The Basic Prediction: Naïve Cynicism*

Putting together the fundamental attribution error and naïve realism—that is, focusing on the intersection between how people make sense of their world and how they cope with those who offer conflicting conceptions of it—this Article arrives at its main hypothesis for law and policymaking: the *naïve cynicism* hypothesis.

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<sup>148</sup> The generality of this point is admittedly overstated—but we do not believe that the qualifications that could be made are terribly significant to the analysis at this stage. See Hanson & Yosifon, *The Situation*, *supra* note 6, at 250–60 (discussing cultural variations regarding dispositionism).

<sup>149</sup> See Benforado & Hanson, *The Great Attributional Divide*, *supra* note 5.

Naïve cynicism predicts that despite the fact that situationist attributions are often more accurate than their dispositionist alternatives, they nonetheless tend to be dismissed or attacked as wrong and harmful because they conflict with our underlying (and widely held) dispositionist presumptions.

The naïve cynic is also a naïve realist—one who puts great faith in the veracity of her perceptions and conceptions of how the world works. The naïve cynic, though, is a particular type of naïve realist—one who embraces and endorses *dispositionist* visions of reality, in particular, and rejects and defends those visions against *situationist* alternatives. “Cynicism” in the appellation refers to the fact that such defenses are often jadedly negative: they typically involve attacking the characters and motives of relative situationists.<sup>150</sup>

In that sense, the naïve cynic is a self-aware—even proud—critic. She speaks what she believes to be the truth, though it may require disparaging her opponents. She senses that she is delving below the surface of the complex arguments of the situationists; she “sees,” for example, the financial interest, the prejudice, or the distorting zealotry that motivates the situationist. She “sees” the bias and self-interest in those who would disagree—while maintaining an affirming view of herself as objective and other-regarding. The naïve cynic, then, is a dispositionist who cynically dispositionalizes the situationist. She protects fundamentally flawed attributions by attacking the sources of potentially more accurate attributions. The naïve cynic understands (though rarely consciously) that the best defense is a good offense.

### B. Refined Predictions

*The Great Attributional Divide* and other articles have described many of the factors that contribute to dispositionism and discourage situationism.<sup>151</sup> Based on those factors (but without reviewing them here), this section refines the above prediction regarding the role of naïve cynicism in shaping policy debates and policy.

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<sup>150</sup> To be clear, however, we believe that the same techniques are commonly used by all naïve realists—including situationists who seek to dismiss the claims of dispositionists. See *infra* note 164.

<sup>151</sup> See *supra* notes 5, 8.

### 1. *Prediction IV: Conditions Encouraging Backlash*<sup>152</sup>

Our basic hypothesis is that the maintenance of dispositionism will be aided through a dispositionist backlash against situationist attributions. Based on what has been described elsewhere about the interior sources of dispositionism, we predict that naïve cynicism will be enhanced with respect to a particular policy question when the situationist attributions:

- (1) involve settings with particularly salient actors who appear to be making particularly clear choices;<sup>153</sup>
- (2) are complex or counterintuitive;<sup>154</sup>
- (3) fail to provide clear answers or cognitive closure;<sup>155</sup>
- (4) are made by—or otherwise involve—outgroup members;<sup>156</sup>
- (5) threaten our conceptions of ourselves or the groups with which we identify;<sup>157</sup> and/or
- (6) threaten the legitimacy of larger systems (or arise during periods when the system, in general, is threatened).<sup>158</sup>

Each of those factors will likely contribute to naïve cynicism because each further engrains dispositionism, amplifying the motives behind naïve cynicism. In essence, the effect is to make us more certain of the correctness of our dispositionist conception of an issue and to make the failure of others to see things our way more suspect (because our dispositionist interpretation seems so obvious).

### 2. *Prediction V: Methods of Backlash*

While Prediction IV outlines the conditions that are particularly conducive to the generation of naïve cynicism, Prediction V focuses on how the backlash against situationism is constructed. As to a particular policy debate, we predict

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<sup>152</sup> Predictions I–III are in a companion piece, Benforado & Hanson, *The Great Attributional Divide*, *supra* note 5, at 321–82.

<sup>153</sup> *Id.* at 322–23.

<sup>154</sup> *Id.* at 323–24.

<sup>155</sup> *Id.*

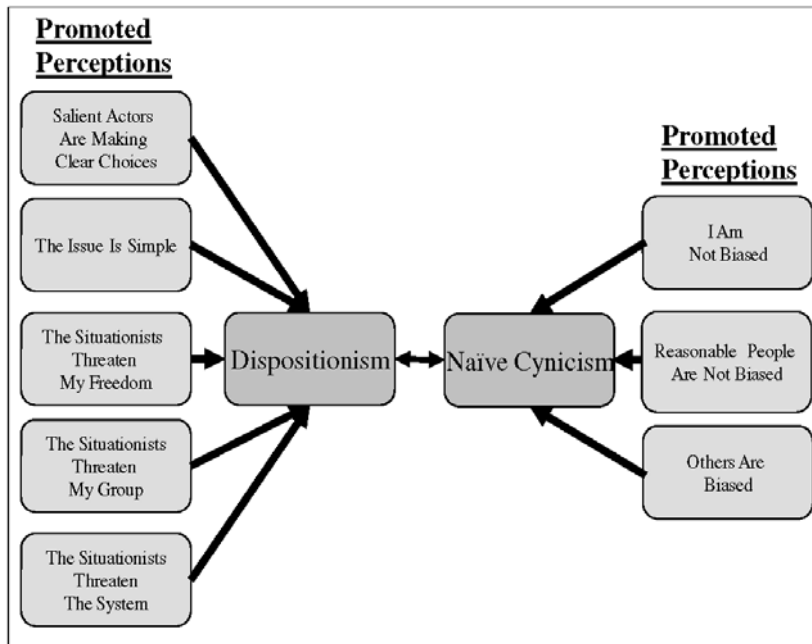
<sup>156</sup> *Id.* at 324–28. Erstwhile ingroup members will be redefined as outgroup members when they make such attributions about the group.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

that naïve cynics will, within reason, tend to frame any and all relevant issues in ways that advance dispositionist attributions (playing upon the six factors reviewed in Prediction IV) and that directly encourage naïve cynicism (enhancing the perceptions detailed in Part III). This dynamic is illustrated in *Figure 7*.

**Figure 7**<sup>159</sup>



More precisely, we predict that spokespersons for the dispositionist backlash will promote the perceptions that:

- (1) “our” way of seeing the world is correct, sensible, and common among reasonable people;
- (2) the issues are simple, clear, and obviously dispositional (in the sense that salient actors at the scene have made free choices) and clearly not complex and situational, as the situationists might claim;<sup>160</sup>

<sup>159</sup> See Pronin, Gilovich & Ross, *Objectivity*, *supra* note 53, at 795.

- (3) the situationalized subjects are actually outgroup members who
  - (a) have flawed dispositions and
  - (b) who pose a threat to “us,” (e.g., to our control, options, values, beliefs, or systems);
- (4) the situationists are outgroup members who
  - (a) are paternalistically challenging “our” ability to make good choices,<sup>161</sup>
  - (b) are ill-informed, naïve, biased, extreme, whiney, stupid, greedy, opportunistic, intermeddling, “political,” trouble-making, power-hungry, elitist, or otherwise ill-motivated, and
  - (c) pose a threat to “us”; and
- (5) the situationist ideas
  - (a) are extreme, dubious, complex, unclear, impractical, counterproductive, or radical, and
  - (b) pose a threat to “us.”

Thus, in protecting dispositionism, the backlash against situationism will often involve an affirmation of existing dispositionist notions and an attack on (1) the situationist attributions themselves; (2) the individuals, institutions, and groups from which the situationist attributions appear to emanate;<sup>162</sup> and (3) the individuals who have been situationalized.<sup>163</sup> As this suggests, perhaps the

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<sup>160</sup> There are certainly times when entities or interests will offer very complex causal attributions, particularly when doing so helps avoid profit-reducing regulations. The tobacco industry, for instance, engaged in a long-term practice of fomenting doubt and controversy regarding the risks of cigarettes and the causes of lung cancer. See Hanson & Kysar, *supra* note 27, at 1488–89. Other industries have pursued similar strategies. See, e.g., Posting of Jon Hanson to The Situationist, <http://thesituationist.wordpress.com/2007/01/23/captured-science/> (Jan. 23, 2007, 23:59 EST) (referring to efforts of the tobacco, food and beverage, pharmaceutical, and gasoline industries). Those efforts are typically combined with dispositionism in ways that serve the industry. So, for instance, the tobacco industry argued that there was no proof that cigarettes caused cancer at the same time that they argued that individual smokers freely chose to smoke and should take full responsibility for the resultant harms. See Hanson & Kysar, *supra* note 27, at 1488–89.

<sup>161</sup> On the other hand, those who assert dispositionist accounts of the world, reattributing the same behavior to personality traits and choice, will tend to be celebrated as objective, credible, commonsensical, and generally accurate in their assessments.

<sup>162</sup> Just *who* these targets of naïve cynicism are is the focus of Prediction VI.

<sup>163</sup> With regard to what causes obesity, for example, the backlash would be expected to involve an affirmation of the dispositionist belief that getting fat is the result of bad individual choices; an attack on the idea that obesity may have environmental causes; an attack on, among others, health care experts, academics, journalists, and judges who offer (or appear to be convinced by) such situationist ideas; an attack on the institutions with which such situationists are associated; and an attack on the obese themselves. For a

simplest means of fostering naïve cynical reactions to situationist ideas is to describe or frame those promoting situationist ideas as unreasonable outgroup members who are attacking “us” and the things we value.

### 3. Prediction VI: Targets of Backlash

For the reasons detailed above, individuals who are able—often through situational happenstance—to make and share situational accounts will be the target of a backlash of naïve cynicism.<sup>164</sup> When a situationist account is offered to a dispositionist, (or, as described in *The Great Attributional Divide*, when a liberal account is offered to a conservative,<sup>165</sup> or the “nurturant parent”

summary of evidence confirming those predictions, see Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 8. For similar evidence confirming similar predictions regarding victims of Hurricane Katrina, see Hanson & Hanson, *Blame Frame*, *supra* note 10, at 454–78.

<sup>164</sup> Again, the reverse will occur as well: dispositionists will tend to be written off by situationists as wrongheaded and biased. That is a general lesson of naïve realism. Again, naïve cynicism refers to the way in which dispositionists who often prefer simpler, less accurate attributions disregard the arguments of situationists who are offering more holistic and generally more accurate accounts. This is, of course, not a claim that all situationist accounts are accurate. The point is that dispositionist causal attributions are almost always significantly incomplete and often misleading—no matter how intuitive and affirming they may be. When individuals or groups make more accurate attributions, they will typically be relatively situationist and will typically be met by dispositionist doubters—naïve cynics.

<sup>165</sup> See Benforado & Hanson, *The Great Attributional Divide*, *supra* note 5, at 382–89. *The Great Attributional Divide* described how the motivations associated with the labels “conservative” and “liberal” help explain why dispositionism may be particularly strong in certain individuals. *Id.* For purposes of this Article, though, note that the way the label “liberal” is often used by conservatives to write off situationists (and their causal attributions) is a form of naïve cynicism. When a dispositionist encounters a situationist account, the reaction is to dismiss the account and its source, and an effective and commonsense way to do that is to write both off as “liberally biased.”

This is not meant to suggest that naïve cynicism is at work every time someone is called a “liberal.” After all, the label can have positive connotations in certain settings. For example: “John Edwards isn’t one of those hedging centrists; he’s a liberal.” And on the negative side, simply using it to disparage someone with whom, or something with which, one does not agree regardless of the situationist content of their message would be an instance of naïve realism, but not naïve cynicism. For a detailed account of how the term “liberal” has been transformed into an epithet, see GEOFFREY NUNBERG, TALKING RIGHT: HOW CONSERVATIVES TURNED LIBERALISM INTO A TAX-RAISING, LATTE-DRINKING, SUSHI-EATING, VOLVO-DRIVING, NEW YORK TIMES-READING, BODY-PIERCING, HOLLYWOOD-LOVING, LEFT-WING FREAK SHOW (2006).

Overall, we would predict that conservatives are more likely to demonstrate naïve cynicism than liberals because, as argued in *The Great Attributional Divide*, the conservative worldview is more reliant on a dispositionist outlook and, hence, seeing the situation is more of a threat to a conservative than a liberal. See Benforado & Hanson, *The Great Attributional Divide*, *supra* note 5, at 385–89. At the same time, naïve realism and naïve cynicism are about thresholds, not impermeable barriers, and liberals do sometimes demonstrate both proclivities.

For instance, in respect to naïve realism, a liberal may presume that a conservative politician who drafts a dispositionist, pro-industry law is simply in the pocket of that industry. The liberal, in other words,

challenges the “strict father”<sup>166</sup>), this Article predicts that the former will, in the ways described in Prediction V, be discredited.

And where such situationist conclusions tend to emanate from (or be actively promoted by) certain institutions or groups,<sup>167</sup> those institutions or groups, too, will be attacked as biased, out of touch with reality, and potential dangers to us all. That perceived bias will be increased by evidence that those groups or institutions tend to be composed primarily of individuals who are themselves relatively situationist—that is, individuals who have situationist associations and offer situationist ideas. The best evidence of “bias” at the institutional or group level, therefore, will be evidence of the *relative* situationism of the institution or group and its constituent individual members.<sup>168</sup> The sense of bias will also be increased if the institutions or

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may dispositionalize the politician and fail to consider more complex situational possibilities, including the power of legitimating dispositionist schemas.

Similarly, a liberal may read a news story about President George W. Bush that offers a situationist explanation for his actions while president—that he went to war because he was told by his top advisors that Saddam Hussein posed a grave threat to the United States and because he felt it was his religious and moral duty to free oppressed people. This simple situationist account may conflict with a dispositionist explanation—that President Bush was just being opportunistic, helping out his greedy oil buddies—and to relieve this dissonance, the liberal may write off the news story as “conservative tripe.” That the story happens to be published in the *Wall Street Journal* or the *Washington Times* is just confirmation of the fact that this is biased reporting.

<sup>166</sup> See Benforado & Hanson, *The Great Attributional Divide*, *supra* note 5, at 389–92.

<sup>167</sup> Although this Article only touches on the issue, any societal unit—big or small—may be subject to naïve cynicism where the unit is associated with situationist notions that threaten dispositionism. Thus, it is possible that naïve cynicism may be directed at a city (e.g., San Francisco), a state (e.g., Massachusetts), or even a country (e.g., France). Likewise, particular historical eras—like the 1960s—may also be attacked as biased. See Benforado & Hanson, *Backlash*, *supra* note 5.

<sup>168</sup> To avoid the difficulty of having to seriously address the claims embodied in a situationist account or trace their origins, naïve cynics will attempt to prove bias simply by assertion that the situationist ideas are contrary to common sense and popular conceptions (and, thus, lack balance) and that, again, those who offer them are biased.

The same factors will often be used to measure the neutrality of an institution: evidence that an institution is disproportionately producing ideas that go against mainstream thought will be treated as evidence of bias. See Benforado & Hanson, *Backlash* *supra* note 5 (describing the use of this sort of radical relativism).

However, it is important to note that the mode of analysis is not applied by dispositionists to all institutions. When institutions that are viewed as promoting outcomes associated with dispositionism—markets being the most prominent example—yield skewed outcomes, dispositionists often legitimate those otherwise troubling outcomes by emphasizing the reliability of the institutions and the processes associated with those institutions. Process legitimacy, thus, renders unequal outcomes just. Cf. Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANN. REV. PSYCHOL. 527, 528–29 (2001) (describing the role and significance of “procedural justice” and distinguishing it from “concerns with outcomes”). For example, when markets seem to exacerbate wealth disparities, market enthusiasts generally characterize the disparities not as a sign that markets, as institutions, are biased, but simply as the cost we pay for freedom and incentives. The wealthy are rewarded for their good choices and everyone else benefits from the inherent fairness of that

groups themselves appear to take up situationist positions in their institutional or group capacities or if situationism appears to be privileged (or rewarded) over dispositionism within the institution or group.

More generally, Prediction VI proposes that the individuals and institutions that *The Great Attributional Divide* argued are more apt than many to promote situationism—for example, judges and the judiciary, journalists and the press, and scholars and academia—are the very individuals and institutions that are more likely to be targeted for backlash.<sup>169</sup>

#### 4. *Prediction VII: Dispositionist Entrepreneurs*

As we have already detailed, dispositionism is the basic attributional schema of most people—particularly those in western cultures—and there are many reasons for individuals to maintain and promote dispositionist conceptions of human behavior. At the same time, there are some institutions and interests that have both a particularly strong stake in promoting dispositionism and a particularly great opportunity and ability to do so. As other situationist pieces have explored, the most vital of these entities are commercial interests—particularly large, profit-oriented corporations.<sup>170</sup> Therefore, the final prediction hypothesizes that those interests will be most active in framing policy issues in ways that advance—and protect—

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process or system. When, by contrast, an institution tends to promote relatively situationist ideas or ends, that tendency is itself said to evince bias and flaws in the underlying system. The incongruous result is that, while the output of an institution associated with dispositionism is beyond reproach, no matter how skewed, when an institution offers ideas that do not comport with common sense dispositionism, that institution is viewed as in need of substantial reform.

<sup>169</sup> However, insofar as those institutions carry significant credibility, instances in which they reach dispositionist conclusions will be used as compelling evidence of the correctness of dispositionism. Thus, a dispositionist conclusion coming from Yale University will be celebrated as strong proof of dispositionism's veracity, while a situationist conclusion coming from Yale University will be cast as proof of Yale's ideological bias.

<sup>170</sup> An engrained dispositionism means greater power and profits for the commercial interests. See Jon Hanson & Adam Wright, *In the Driver's Seat: Why Promoting Dispositionism is Good Business* (Sept. 27, 2006) (unpublished manuscript, on file with authors) (detailing the ways in which dispositionist attributions benefit commercial interests); Hanson & Yosifon, *The Situation*, *supra* note 6, at 202–30 (providing a summary version of same); see also Chen & Hanson, *Illusion of Law*, *supra* note 8, *passim* (describing how “shareholder primacy” as a legal norm gives corporations greater power to collaborate and cooperate in promoting pro-commercial policies and regulations); Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 8, at 1689–1711, 1723–69 (describing how and why fast-food, diet, and health industries all promote dispositionism); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1467–1500 (1999) (describing how cigarette industry manipulated the situation and consumer perceptions while promoting the idea that consumers were dispositional choosers).

dispositionism. Whenever situationist ideas threaten to take hold, large commercial interests (particularly those most threatened by situation) should be expected to have a major role in enhancing naïve cynicism.

#### IV. AN APPLICATION: THE “BAD APPLE” PRISON GUARD

In existing pieces of the critical realist project, many of the predictions outlined above have been implicitly confirmed. The reaction of the Catholic Church to Galileo and his situationist (heliocentric) view of our solar system had key components of naïve cynicism,<sup>171</sup> as did the response of dominant knowledge producers in the antebellum South to the abolitionist movement.<sup>172</sup> Within the last decade, public health experts and other commentators who have claimed that America’s obesity epidemic is attributable to situation and not disposition have experienced the backlash of naïve cynicism.<sup>173</sup> Naïve cynical dynamics are evident in most policy debates, whether they concern specific events, such as the adequacy of the government’s response to the Katrina disaster,<sup>174</sup> or more general problems, such as global climate change.<sup>175</sup>

A subsequent article, *Backlash*, will offer a more detailed and explicit test of the four predictions in this Article (as well as the three predictions in *The Great Attributional Divide*<sup>176</sup>).<sup>177</sup> It will describe how policy debates have been influenced by naïve cynicism over the last four decades.<sup>178</sup> The third article in this series, *Legal Academic Backlash*, will focus on the influence of that backlash dynamic in the specific context of legal theory.<sup>179</sup>

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<sup>171</sup> See Hanson & Yosifon, *The Situation*, *supra* note 6, at 189–91, 206–25.

<sup>172</sup> See Hanson & Yosifon, *The Situation*, *supra* note 6, at 303–27.

<sup>173</sup> See Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 8, *passim*.

<sup>174</sup> See Hanson & Hanson, *Blame Frame*, *supra* note 10, at 454–73.

<sup>175</sup> Cf., e.g., MSNBC’s Carlson: Gore Is a “Zealot,” a “Bible-Thumper,” a “Wild-Eyed Religious Nut” Whose “Religion Is the Environment,” MEDIA MATTERS AM., June 1, 2006, <http://mediamatters.org/items/200606010005> (quoting a May 31, 2006 television broadcast of MSNBC’s *The Situation*); Tucker (MSNBC television broadcast of July 6, 2007) (transcript available at <http://www.msnbc.msn.com/id/19678208/>) (“Al Gore has been looking for a world crisis his whole life that he can come through and save the world. He wants to be a super hero action figure. And he has been looking for apocalyptic movement his entire life. And so basically he makes this stuff up. There is no scientific support for most of his claims.”) (statement of Myron Ebell).

<sup>176</sup> See Benforado & Hanson, *The Great Attributional Divide*, *supra* note 5.

<sup>177</sup> See Benforado & Hanson, *Backlash*, *supra* note 5.

<sup>178</sup> See *id.*

<sup>179</sup> See Benforado & Hanson, *Legal Academic Backlash*, *supra* note 5. *Legal Academic Backlash* investigates the role of naïve cynicism in drastically curtailing the acceptance of more accurate situationist

The following section provides a sense of those applications by analyzing one recent policy debate that has drawn much attention from legal academics, politicians, commentators, and members of the public: treatment of prisoners in the war on terror.<sup>180</sup>

The controversy provides a strong case study of how the motives for naïve cynicism can be amplified. Some time is spent here analyzing the specific facts of the detainee example in order to better test the predictions elaborated in Part IV above. The task of demonstrating how the backlash against situationist accounts of events at Abu Ghraib, Guantanamo Bay, Bagram Air Base, and other detention centers is typical of many instances of opportunistic naïve cynicism must be left for future work.<sup>181</sup>

#### A. *Testing Prediction IV: Conditions Encouraging Backlash*

##### 1. *Salient Actors and Clear Choices*

In the detainee controversies of the post-9/11 world, we have two sets of particularly salient actors: prisoners and guards. And they both appear to have

attributions in defense of the dominant dispositionism of classical liberalism and, particularly, law and economics. *See id.*

<sup>180</sup> The story is an old one now and most of us have become familiar with the ugly details. Initially, however, it was all quite shocking and embarrassing for most Americans: “The nightmarish images [coming out of Abu Ghraib Prison] showed American soldiers . . . forcing Iraqis to masturbate. American soldiers sexually assaulting Iraqis with chemical light sticks. American soldiers laughing over dead Iraqis whose bodies had been abused and mutilated.” John Barry, Michael Hirsh & Michael Isikoff, *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 28.

And at Guantanamo Bay similar events appeared to be unfolding. There were numerous allegations of beatings, psychological abuse, sexual humiliation, and deprivation of basic necessities. *See, e.g.*, Tania Branigan & Vikram Dodd, *Afghanistan to Guantánamo Bay—The Story of Three British Detainees*, GUARDIAN UNLIMITED, Aug. 4, 2004, <http://www.guardian.co.uk/afghanistan/story/0,,1275579,00.html>; Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*, N.Y. TIMES, Jan. 1, 2005, at A11; Neil A. Lewis, *Canadian Was Abused at Guantánamo, Lawyers Say*, N.Y. TIMES, Feb. 10, 2005, at A12. According to a July 29, 2004 report by one FBI agent,

On a couple of occasions, I entered interview rooms [at Guantanamo] to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food or water. Most times they had urinated or defecated on themselves and had been left there for 18, 24 hours or more.

Anthony Lewis, *Guantánamo’s Long Shadow*, N.Y. TIMES, June 21, 2005, at A21.

Although the focus here is primarily on Guantanamo Bay and Abu Ghraib, it should be emphasized that these detention facilities are merely two “of a chain of shadowy detention camps that also includes . . . the military prison at Bagram Air Base in Afghanistan and other, secret locations run by the intelligence agencies. Each has produced its own stories of abuse, torture and criminal homicide.” Editorial, *Un-American by Any Name*, N.Y. TIMES, June 5, 2005, § 4, at 13.

<sup>181</sup> *See* Benforado & Hanson, *Backlash*, *supra* note 5.

made particularly clear choices: the prisoners seemingly choosing to wage war against the United States (or, at least, associate with those actively conspiring against American interests);<sup>182</sup> the guards, with control over the interior workings of the detention facilities, apparently choosing to treat the prisoners in a certain way.

Demonstrating this perception, a small number of senators initially attempted to trivialize the significance of the photos of abuse coming out of Abu Ghraib by reminding constituents that, after all, the prisoners, in a way, had it coming. Senator James Inhofe, for instance, pointed out that the victims were anything but blameless:

I'm probably not the only one up at this table that is more outraged by the outrage than we are by the treatment . . . . [They] are not there for traffic violations . . . . If they're in cell block 1A or 1B, these prisoners—they're murderers, they're terrorists, they're insurgents . . . . Many of them probably have American blood on their hands. And here we're so concerned about the treatment of those individuals.<sup>183</sup>

Moreover, after a period of denial in which the evidence of abuses continued to mount, spokespersons for our military and government began to acknowledge the mistreatment and to point to the individuals who were most obviously connected. In a report on *60 Minutes* in April 2004, Brigadier General Mark Kimmitt, then-deputy director of Coalition operations in Iraq, offered this America-affirming explanation:

The first thing I'd say is we're appalled as well. These are our fellow soldiers. These are the people we work with every day, and they represent us. They wear the same uniform as us, and they let their fellow soldiers down . . . . This is wrong. This is reprehensible. But

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<sup>182</sup> President George W. Bush described the prisoners at Guantanamo as follows: “[T]hese are people that got scooped up off a battlefield, attempting to kill U.S. troops. I want to make sure before they’re released that they don’t come back to kill again.” President George W. Bush, Press Conference (Dec. 20, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/12/20041220-3.html>. According to Vice President Dick Cheney, “The people that are there are people we picked up on a battlefield primarily in Afghanistan. They’re terrorists. They’re bomb-makers. They’re facilitators of terror. They’re members of al Qaeda and the Taliban.” Interview by Wolf Blitzer with Vice President Cheney (June 23, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/06/20050623-8.html>.

<sup>183</sup> Ed Henry, *GOP Senator Labels Abused Prisoners “Terrorists”; Other Lawmakers Disavow Comment*, CNN.COM (May 12, 2004), <http://www.cnn.com/2004/ALLPOLITICS/05/11/inhofe.abuse/> (quoting Senator James Inhofe).

this is not representative of the 150,000 soldiers that are over here . . . . Don't judge your army based on the actions of a few.<sup>184</sup>

That soon became the basic defense of U.S. policy—a position that found confirmation in the images of obvious perpetrators and victims: the smiling private giving a thumbs up while pointing at the genitals of a stripped, blindfolded detainee; the guard standing above a pile of naked bodies; the soldier holding a leash attached to the neck of a prostrate prisoner. Leading conservative commentator (and *Weekly Standard* editor) William Kristol, for instance, made several media appearances in which he insisted that the abuses were limited and simply the result of “a couple of extremely bad apples.”<sup>185</sup> According to Kristol, the abuses were to be seen less as a source of shame and more as an opportunity: “[I]f it becomes clear that this is the exception and [the troops involved] are held accountable, it could end up being an impressive demonstration to countries where torture is routine.”<sup>186</sup> Another conservative pundit, Rich Lowry, editor of the *National Review*, characterized the self-examination associated with the discoveries as an “orgy of self-flagellation about the prison abuses at Abu Ghraib” that “we insist on having” and pointed an accusatory finger, again, at the bad apples mis-implementing blameless policies: in his view, there was no reason for a “change in our interrogation tactics in the war on terror—they don't seem at fault for the perverse acts of a few MPs.”<sup>187</sup>

The rotten-fruit-good-barrel story continued to be the official line. According to White House spokesperson Trent Duffy, all the ugliness boils down to “the actions of perhaps a few bad apples.”<sup>188</sup> Army Chief of Staff General Peter Schoomaker put it similarly: “What we are dealing with are actions of a few. These are conscious issues against all that we stand for. This is not a training issue but one of loyalty and values.”<sup>189</sup> Even when President Bush acknowledged the danger that the abuse poses to the international

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<sup>184</sup> *60 Minutes II: Abuse of Iraqi POWs by GIs Probed* (CBS television broadcast Apr. 28, 2004). For a summary of the broadcast, see *Abuse of Iraqi POWs by GIs Probed*, CBSNEWS.COM, April 28, 2004, <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>.

<sup>185</sup> *Fresh Air: William Kristol Discusses the War in Iraq* (NPR radio broadcast May 18, 2004) (transcript on file with author).

<sup>186</sup> Robin Wright, *U.S. Faces Lasting Damage Abroad: Moral High Ground Lost, Experts Say*, WASH. POST, May 7, 2004, at A26.

<sup>187</sup> Rich Lowry, *The Other Prison Outrage: On the Home Front*, NAT'L REV. ONLINE, May 14, 2004, <http://article.nationalreview.com/?q=ZjlkY2QyNWQ4OTE2M2YzNmMmQxYWU1Nzk1YWZmZThjZWE=>.

<sup>188</sup> Rowan Scarborough, *Gitmo Called Death Camp*, WASH. TIMES, June 16, 2005, at A13.

<sup>189</sup> Liza Porteus, *Rumsfeld Apologizes for Iraqi Prisoner Abuse*, FOXNEWS.COM, May 7, 2004, <http://www.foxnews.com/story/0,2933,119257,00.html>.

reputation of the United States,<sup>190</sup> he made sure to emphasize to “the people of the Middle East that the practices that took place in that prison are abhorrent and they don’t represent America.”<sup>191</sup> As he hammered home, those practices, instead, “represent the actions of a few people.”<sup>192</sup>

Ultimately, the disposition-based account is not simply that a few individuals at the scene did, obviously, have bad natures, but that no one in a position of authority revealed a similarly suspect disposition.<sup>193</sup> As Department of Defense spokesman Larry DiRita insisted, “no responsible official of the Department of Defense approved any program that could conceivably have been intended to result in such abuses.”<sup>194</sup> Absent evidence of such corrupted disposition, those in authority are presumed innocent while those close to the misdeeds are presumed malignant and guilty.

## 2. *Complex and Counterintuitive Situationist Explanations*

If the dispositionist account of detainee abuse offered by DiRita, Inhofe, Kristol, and countless others is relatively straightforward and commonsensical, the situationist explanations are comparatively complex and counterintuitive.

Part of the reason for this is that the situational forces that can lead to such abuse are, by definition, generally unseen and all of the nightmarish behavior documented at Abu Ghraib and Guantanamo can be situationally created or encouraged without anyone specifically intending it or knowing of it. In fact, the elements that ultimately result in a particular instance of degrading treatment are often distant in time and space from the actual act. In addition, they sometimes involve agents that have faded from the limelight.

One of the more recent investigations into the Abu Ghraib scandal, the Schlesinger report,<sup>195</sup> represents a good example of how the complexity and

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<sup>190</sup> See, e.g., President George W. Bush, Press Conference (Dec. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/12/20041220-3.html> (“Look, we are a nation of laws and, to the extent that people say, well, America is no longer a nation of laws—that does hurt our reputation.”).

<sup>191</sup> Interview by Al-Arabiya Television with President George W. Bush, in Washington, D.C. (May 5, 2004), available at <http://www.whitehouse.gov/news/releases/2004/05/20040505-2.html>.

<sup>192</sup> *Id.*

<sup>193</sup> Cf. Hanson & Hanson, *Blame Frame*, *supra* note 10, at 477 (describing how the absence of an intent to harm is used as a defense in other contexts).

<sup>194</sup> Barry, Hirsh & Isikoff, *supra* note 180.

<sup>195</sup> FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 5 (2004), available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> [hereinafter SCHLESINGER REPORT]. The report is named after James Schlesinger, the former Secretary of Defense, who headed the investigation.

subtlety of situational forces make the attribution of responsibility—however indisputable it might be—similarly subtle and complex.<sup>196</sup> Like many commentators, the authors of the report ultimately refused to attribute responsibility to Bush Administration officials: after all, none had issued explicit instructions for the soldiers to engage in the specific acts of abuse seen at Abu Ghraib.<sup>197</sup> Nonetheless, the report rendered a striking case history that implicated the Administration at many turns, beginning with President Bush’s pronouncement that the military was no longer bound by the Geneva Convention in its treatment of members of al Qaeda or the Taliban.<sup>198</sup> Building upon that fundamental reorientation of military policy away from the constraints of law, the report suggested, then-Secretary of Defense Donald Rumsfeld vigorously expanded the list of permissible interrogation techniques (drawing the immediate objection of the military),<sup>199</sup> and Lieutenant General Ricardo S. Sánchez repeatedly endorsed policies that went further than the Geneva Conventions allowed.<sup>200</sup>

Although all of these highly aggressive policies were ultimately cut back on paper to conform with international law, they nevertheless combined to create a confusing policy landscape for the soldier on the ground,<sup>201</sup> who had

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<sup>196</sup> The Schlesinger Report actually highlighted the relevance of social psychology:

The potential for abusive treatment of detainees during the Global War on Terrorism was entirely predictable based on a fundamental understanding of the principle of social psychology principles [sic] coupled with an awareness of numerous known environmental risk factors . . . .

. . . .

. . . Findings from the field of social psychology suggest that the conditions of war and the dynamics of detainee operations carry inherent risks for human mistreatment, and therefore must be approached with great caution and careful planning and training.

*Id.* The report even referenced the famous Stanford Prison Experiment, discussed later in this subsection, which, it explained, “provides a cautionary tale for all military detention operations.” *Id.*; see *infra* text accompanying notes 212–20 (describing the Stanford Prison Experiment).

<sup>197</sup> See SCHLESINGER REPORT, *supra* note 195, at 5 (“No approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities.”).

<sup>198</sup> See *id.* at 34. According to the President’s memorandum, the Geneva Conventions gave absolutely no protection to al Qaeda, while the Taliban was excepted from the protections normally accorded prisoners of war because of their status as unlawful combatants. See *id.* Furthermore, the Administration asserted, it lies within the President’s power to authorize torture, should he see fit. See *id.*

<sup>199</sup> See *id.* at 35 (explaining that the Secretary of Defense approved several categories of interrogation techniques but then rescinded authorization for some of those techniques after concern by the Navy General Counsel).

<sup>200</sup> See *id.* at 37–38.

<sup>201</sup> For example, even if soldiers heard and accepted President Bush’s hortatory statement that prisoners should be treated “humanely,” one wonders about the edifying effect of such a directive on a person trying to

to absorb and sort out a series of rapidly changing, inconsistent, and legalistic policies that varied depending upon whether he or she was in Iraq, Cuba, or Afghanistan.<sup>202</sup> The regular movement of soldiers from one of these locations to another additionally ensured that only a soldier who was a regular and scrupulous student of these policies could keep aware of the particular obligations incumbent upon her in some particular place and time.<sup>203</sup>

As a result, soldiers who were otherwise being encouraged to do whatever they could to extract information from their prisoners interpreted ambiguous and inconsistent policies to allow for increasingly brutal interrogation techniques.<sup>204</sup> Although unwilling to conclude that responsibility reached the echelons occupied by President Bush and Secretary Rumsfeld, the authors of the Schlesinger Report could not deny this causal relationship between multiple, ambiguous policies and abusive interrogation: “The existence of confusing and inconsistent interrogation technique policies contributed to the belief that additional interrogation techniques were condoned.”<sup>205</sup> Nor could the report deny that the Bush Administration had set the tone with its aggressive, results-oriented approach: “It is clear that pressure for additional intelligence and the more aggressive methods sanctioned by the Secretary of Defense memorandum resulted in stronger interrogation techniques. They did contribute to a belief that stronger interrogation methods were needed and appropriate in their treatment of detainees.”<sup>206</sup>

In the end, however, the Schlesinger Report took advantage of the complexity of the situation to avoid pinpointing parties’ specific contributions to the debacle: “[T]he abuses were not just the failure of some individuals to follow known standards, and they are more than the failure of a few leaders to enforce proper discipline. There is both institutional and personal

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determine—as Lieutenant General Mark Schmidt and Brigadier General John Furlow struggled to do in an investigative report into allegations of detainee abuse—when “abusive” and “degrading” prisoner handling rises to the level of “inhumane.” See LIEUTENANT GENERAL MARK SCHMIDT & BRIGADIER GENERAL JOHN FURLOW, INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY 1 (2005), available at [http://www.humanrightsfirst.org/us\\_law/detainees/schmidt-army-reg-150605.pdf](http://www.humanrightsfirst.org/us_law/detainees/schmidt-army-reg-150605.pdf) [hereinafter SCHMIDT REPORT].

<sup>202</sup> See SCHLESINGER REPORT, *supra* note 195, at 37–38.

<sup>203</sup> See *id.* at 37–38 (describing the transfer of tactics from Guantanamo and Afghanistan to Iraq and the application of methods designed for Al Qaeda or Taliban detainees, who were not entitled to Geneva protections, to Iraqi detainees, who deserved the protections, and noting that “[t]his clearly led to confusion on what practices were acceptable”).

<sup>204</sup> See SCHLESINGER REPORT, *supra* note 195, at 37–38.

<sup>205</sup> *Id.* at 10.

<sup>206</sup> *Id.* at 36.

responsibility at higher levels.”<sup>207</sup> In light of the Report’s many damning intermediate conclusions, this vague conclusion seems puzzling. Only the complexity of the situational explanation as a whole allows such a statement to avoid the appearance of a blatant evasion. In this sense, the Schlesinger Report complements more recent statements by certain Republican members of Congress, who have come to conclude that the White House in some way contributed to the Abu Ghraib scandal, despite being unable to articulate the precise causal chain.<sup>208</sup>

A more complete situationist explanation would extend far beyond the administration’s policies, however decisive they might have been.<sup>209</sup> The scope and complexity of situationist explanations are theoretically limitless, though it suffices here to mention some of the most powerful factors at work. For instance, some believe it would help to understand the pre-military situations of military recruits, how enlistment shortfalls can emerge in response to market conditions or cultural events, and how shortfalls can result in lowered entry standards with respect to education level, mental health, and criminal record.<sup>210</sup> To truly appreciate the unfolding drama from a situationist

<sup>207</sup> *Id.* at 5.

<sup>208</sup> Republican Senator Lindsey Graham of South Carolina has demanded an “appropriate response” from “those people who tried to cut the corners too close [at] the Justice Department and the White House [and] set in motion some legal reasoning that literally got our people in trouble.” Jackson Diehl, *Refusing to Whitewash Abu Ghraib*, WASH. POST, Sept. 13, 2004, at A21 (alterations in original); *see also id.* (describing similar remarks by Maryland Republican Representative Roscoe Bartlett). For an illuminating review of numerous military investigations of Abu Ghraib, as well as a report conducted by Human Rights Watch, *see PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 382–415 (2007).

<sup>209</sup> Consider the way Philip Zimbardo, co-creator of the landmark Stanford Prison Experiment, described later in this subsection, came to understand his own responsibility for what transpired in that experiment gone awry:

In addition, I later realized that it was I, along with my research team, who was responsible for the System that made that situation work so effectively and so destructively. We failed to provide adequate top-down constraints to prevent prisoner abuse, and we set an agenda and procedures that encouraged a process of dehumanization and deindividuation that stimulated guards to act in creatively evil ways. Further, we could harness the System’s power to terminate the experiment when it began to spin out of control and when a whistle-blower forced recognition of my personal responsibility for the abuses.

ZIMBARDO, *supra* note 208, at 329. Zimbardo attributes similar culpability to President Bush and the rest of the administration for the Abu Ghraib abuses: “The seeds for the flowers of evil that blossomed in that dark dungeon of Abu Ghraib were planted by the Bush administration in its triangular framing of national security threats, citizen fear and vulnerability, and interrogation/torture to win the war on terror.” *Id.* 432.

<sup>210</sup> As Eric Schmitt recently reported, “the Army is having to turn to more high school dropouts and lower-achieving applicants to fill its ranks, accepting hundreds of recruits in recent months who would have been rejected a year ago, according to Army statistics.” Eric Schmitt, *Army Recruiting More High School Dropouts to Meet Goals*, N.Y. TIMES, June 11, 2005, at A11. After interviewing Army recruiters in ten states,

perspective, others find it crucial to understand how the actual detention facilities are set up, how guards are trained, and how conditions are monitored.<sup>211</sup>

Those factors and dynamics still only scratch the surface of situational considerations, however. To pierce that surface, one must be committed and resolute in seeking an answer, for the social-psychological research that describes the fundamental prisoner-guard dynamic is not only hard to grasp, it is downright unpleasant to consider. As Philip G. Zimbardo famously documented in the Stanford experiment—much to his own surprise—simply assigning some college-student subjects the role and clothing of guards and some the role and clothing of prisoners and putting them in a prison-like environment can result in the same sort of mindsets, pressures, and abuses witnessed at Abu Ghraib and Guantanamo Bay.<sup>212</sup> In just six days, young men randomly chosen as “guards” developed physical and psychological tactics to “deal” with the randomly chosen “prisoners”: making toilet use a “privilege”,<sup>213</sup> forcing prisoners to clean out the toilet bowl with their bare hands; forcing prisoners to do repetitive, exhausting physical activities; and putting troublesome prisoners in “the hole” (a small closet) for extended periods of time.<sup>214</sup>

In a recent book, Zimbardo discusses elements of the Stanford Prison Experiment that parallel the abuses at Abu Ghraib to a shocking degree and

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reporter Damien Cave found evidence of widespread bending and breaking of enlistment rules as a result of a reduced applicant pool, including “concealing mental-health histories and police records” and providing “falsified documents [and] wallet-size cheat sheets [to applicants] . . . before the military’s aptitude test.” Damien Cave, *Army Recruiters Say They Feel Pressure to Bend Rules*, N.Y. TIMES, May 3, 2005, at A23.

In terms of the connection to actual abuse at Abu Ghraib, some have suggested that learning disabilities and mental health problems among guards may have led to some of the worst behavior. See David S. Cloud, *Starkly Contrasting Portraits of G.I. Iraqi Abuse Retrial*, N.Y. TIMES, Sept. 22, 2005, at A14 (reporting that a lawyer for Private First Class Lyndie R. England, an Army reservist accused of abuse of detainees, stated at her court martial that England suffered from learning disabilities and depression and had “an overly compliant personality [that] left her open to the suggestion of others”).

<sup>211</sup> Similarly, it would be useful to understand the particular dynamics at work with respect to social exchanges between the guards. See Cloud, *supra* note 210 (explaining that England’s boyfriend at the time was Private Charles Graner, another one of the accused). For an interpretation of the connection between the sexualized nature of the abuses and the social relationships of the guards, see ZIMBARDO, *supra* note 208, at 354–62.

<sup>212</sup> Craig Haney, Curtis Banks & Philip Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 INT’L J. CRIMINOLOGY & PENOLOGY 69–97 (1973); Craig Haney, Curtis Banks & Philip Zimbardo, *A Study of Prisoners and Guards in a Simulated Prison*, 9 NAVAL RES. REVIEWS 1, 1–17 (1973).

<sup>213</sup> Philip Zimbardo, *You Can’t Be a Sweet Cucumber in a Vinegar Barrel: A Talk with Philip Zimbardo*, EDGE, Jan. 19, 2005, [http://www.edge.org/3rd\\_culture/zimbardo05/zimbardo05\\_index.html](http://www.edge.org/3rd_culture/zimbardo05/zimbardo05_index.html).

<sup>214</sup> ZIMBARDO, *supra* note 208, at 51, 59–60.

offers compelling evidence that, more than bad dispositions, situational forces were largely behind the appalling treatment. Common to both were the “deindividuation” or dehumanization “created by anonymity of person and anonymity of place” and the “boredom” of long night shifts that motivated both sets of guards “to take actions that might bring some excitement, some controlled sensation.”<sup>215</sup> Zimbardo continues:

All this was aggravated, of course, by the lack of mission-specific training for a difficult and complex job and the lack of oversight by a supervisory staff, which rendered accountability unnecessary. In both prisons the system’s operatives gave permission for the guards to maintain total power over the prisoners. In addition, the guards feared that the prisoners would escape or riot, as did our Stanford guards, although of course with less deadly consequences. Obviously, Abu Ghraib Prison was a far more lethal environment than our relatively benign prison at Stanford. However, as the experiment showed, the abusiveness of guards and their aggression toward the prisoners escalated nightly, culminating in a series of sexual, homophobic acts imposed upon the prisoners. The same was true, in even more perverse and extreme ways, on Tier 1A. Moreover, in both cases, the worse abuses occurred during the night shift, when the guards felt that the authorities noticed them least.<sup>216</sup>

Corresponding situations yielded corresponding results, namely that individuals without prior indications of “bad dispositions” committed unquestionably bad acts.<sup>217</sup> The guards who were initially “good apples” were “soured over time by powerful situational forces.”<sup>218</sup>

Zimbardo, who served as an expert acting on behalf of one of the infamous Abu Ghraib night-shift guards, had this to say after spending a day with the defendant and his wife:

[I]t became apparent that [the guard] was also totally abused by the situation that the military had thrust upon him. [Imagine] the cumulative stress of working 12 hour night shifts, 7 days a week, with not a day off for 40 days! Also regularly missing breakfast and lunch because he slept through them having finished his tour of duty at 4 AM and sleeping in a small cell in another part of the prison that he rarely left. When he complained about children [being] mixed

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<sup>215</sup> *Id.* at 352.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 329–30.

<sup>218</sup> *Id.* at 329.

with adult inmates or [the] mentally ill or those with contagious TB among the prisoners, he was reprimanded, but rewarded for helping to get confessions by softening up the inmates. Not once was there any official supervision on his night shift that he could rely on. There were insufficient guards, 8 for 1000 inmates and none had been adequately trained for this tough job. His psychological testing and my interview revealed a young man who had not a single symptom of pathology that he brought into that prison; the situation was the pathological ingredient that infected his reason and judgment. Indeed, in many ways, this soldier is an American icon[—a] good husband, father, worker, patriotic, religious, with many friends and a long history of having lived a most normal, moral small town life.

The question is whether what we learned about the psychological mechanisms that transformed our good volunteers into these creatively evil guards can be used to understand the transformation of good American Army reservists into the people we see in these trophy photos in Abu Ghraib. And my answer is, yes, there are very direct parallels.<sup>219</sup>

According to Zimbardo “[y]ou could put virtually anybody” in that situation “and you’re going to get this kind of evil behavior.”<sup>220</sup>

### 3. *Situationist Explanations Fail to Offer Clear Answers or Cognitive Closure*

Although such situationist insights may go a long way in accurately capturing the causal forces in play, a situationist explanation remains cognitively unsatisfying by not providing simple answers and cognitive closure. Typically, there is no single source of the problem and, thus, no quick and easy “fix.” At Abu Ghraib, there were numerous individuals, including “doctors, nurses, and technicians,” who witnessed the guards’ behavior and offered no objection.<sup>221</sup> And there were many individuals in the chain of

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<sup>219</sup> Zimbardo, *Sweet Cucumber*, *supra* note 213; *see also* ZIMBARDO, *supra* note 208, at 345–51, 356 (providing a more detailed account).

<sup>220</sup> Zimbardo, *Sweet Cucumber*, *supra* note 213.

<sup>221</sup> *Id.* For a consideration of how these witnesses may have contributed to the abuses, *see* ZIMBARDO, *supra* note 208, at 396 (“that is significant to me is the number of people who knew of the abuses, witnessed them, even participated in them in various ways and did nothing to prevent, stop, or report them. They provided “social proof” to the MPs that it was acceptable to continue doing whatever they wanted to do. Their smiling, silent faces provided social support from the surrounding network of the general interrogation team that gave thumbs up to abuses that should have received reprimands. Once again, we see the evil of inaction facilitating the evil of action.”).

command who could have anticipated, learned about, or taken steps to deter such activities but who did not. With countless factors operating in concert, any potential solution seems to require many different kinds of changes, none of which offer the cognitive appeal of blaming the guards or the prisoners. With the dispositionist account, by contrast, the problem can be solved—and the ugly matter put out of our minds—by simply identifying, trying, and sentencing the guilty parties.<sup>222</sup>

#### 4. *Outgroup Members Implicated in Situationist Explanations*

The situationist attributions concerning abuse by guards in America's war on terror involve powerful outgroup members. Indeed, the prisoners at Abu Ghraib and Guantanamo have been detained purportedly because they are a threat to us—a good number of them, we presume, are affiliated with al Qaeda. As Rumsfeld has explained:

[T]his is not an army fighting an army under the laws of war. This is a world that's confronted by terrorist networks that . . . don't wear uniforms, and they don't carry their weapons publicly, and they kill innocent men, women and children. And their goal is to terrorize people and to alter free people's behavior.

And the idea that we need to treat them as though they're stealing hubcaps off the streets of our cities and then have a jury trial and then send them to jail for a month is certainly not going to work. The people down in Guantanamo Bay are people that have been deeply involved in killing Americans and in threatening to kill people, and they're bad people.<sup>223</sup>

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<sup>222</sup> Military trials, in particular, aid in directing attention away from unpleasant and complex realities. Unlike the civilian criminal justice system,

the military has no central prosecutor's office, meaning courts-martial are brought on a case-by-case basis with no ability to follow investigations across cases. Military prosecutors can't do what their civilian counterparts are famous for: slowly building a large case by trying to flip the low-level perpetrators and nab the big fish.

Eric Umansky, *Failures of Imagination*, COLUM. JOURNALISM REV. 16–26, 25 (Nov./Dec. 2006). Also, the drama entailed in trials often eclipses other sources of information. Thus, “the various torture memos were covered on all three networks on only one day . . . . By contrast, the trial of Lynndie England . . . was a regular staple on network and cable news programs.” *Id.*

<sup>223</sup> Radio Interview with former Secretary Rumsfeld on the Monica Crowley Show (July 8, 2006), <http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=43> (quoting Secretary Rumsfeld).

Rush Limbaugh gave voice to the same presumption in his description of the detention facility at Guantanamo, which he calls “Club G’itmo.”<sup>224</sup> According to Limbaugh, the detention facility is a “tropical paradise down there where Muslim extremists and terrorist wannabes can get together for rest and relaxation.”<sup>225</sup> It is difficult to muster much sympathy for individuals characterized in this way.

Accordingly, Bill O’Reilly had this response to an editorial in the *Los Angeles Times* that suggested that the detention center be shut down and the detainees be given legal representation:

I want everybody in the country to read this editorial, ‘cause it just—I mean, you’ll be sitting there pounding the table like I did. How can they—how can they think this way? How can anyone think this way? You know, “Shutting down Guantánamo and giving suspected terrorists legal protections would help restore our reputation abroad.” No, it wouldn’t. I mean that’s like saying, well, if we’re nicer to the people who want to KILL US, then the other people who want to KILL US will like us more. Does that make any sense to you? Do you think Osama [bin Laden] is gonna be more favorably disposed to the U.S. if we give the Guantánamo people lawyers?

I mean, but this is what they’re saying. It is just—you just sit there, you go, “They’ll never get it until they grab Michael Kinsley out of his little house and they cut his head off.” And maybe when the blade sinks in, he’ll go, “Perhaps O’Reilly was right.”<sup>226</sup>

Perhaps. In any event, if the guards—who were living in stress-filled proximity to those prisoners—had a mindset anything like O’Reilly’s (and many probably did),<sup>227</sup> that would help to explain why the prisoners were not treated any “nicer” than they were. The more threatening and the less “human” the inmates were perceived to be, the more readily their mistreatment could be tolerated or even encouraged.

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<sup>224</sup> Limbaugh Touted “Club G’itmo, the Muslim Resort,” June 17, 2005, <http://mediamatters.org/items/200506170004> (quoting a June 14, 2005 radio broadcast of *The Rush Limbaugh Show*).

<sup>225</sup> *Id.* In addition, Limbaugh was selling “Club G’itmo” t-shirts printed with slogans like, “Your Tropical Retreat from the Stress of Jihad.” *Id.*

<sup>226</sup> *Murder on Their Minds: Robertson Not Alone Among Conservative Media Figures*, MEDIA MATTERS AM., Aug. 23, 2005 (quoting May 17, 2005 television broadcast of *The O’Reilly Factor*).

<sup>227</sup> See, e.g., ZIMBARDO, *supra* note 208, at 350–55 (discussing the fear and other situational stressors that guards were experiencing and how those factors encouraged the dehumanization of prisoners, which, in turn, contributed to an atmosphere in which mistreatment was more likely to occur).

5. *Situationist Explanations Threaten Conceptions of Ourselves and Our Ingroups*

Situationist attributions of prisoner mistreatment are also generally disfavored because they stand as a threat to our positive conceptions of ourselves and the groups with which we identify; they suggest that we may, in some sense, be culpable for abuse. As Zimbardo explains, “We want to believe we are good, we are different, we are better, or we are superior.”<sup>228</sup> We want to believe that we chose lawmakers who make superlative decisions. A dispositionist conception of sound, well-reasoned policies implemented incorrectly by a few sadist prison guards against individuals who, in any case, deserved to be mistreated helps us maintain our reassuring sense that “we are good.”

Senator Richard Durbin, a Democrat from Illinois, rendered the dissonance between our ideals and our actions acute when he called upon his colleagues and President Bush to consider how the world was perceiving evidence of prisoner mistreatment at Guantanamo Bay.<sup>229</sup> By drawing attention to the horrific behavior, Durbin became the threat—a challenge to our own affirming self-perceptions. And that is true even though Durbin’s remarks were purportedly motivated by a desire to lessen the threat of terrorism. His point was that, instead of effectively eliminating “bad apples”—the terrorists bent on our demise—the harsh treatment of prisoners was, in effect, poisoning the orchard and increasing the danger posed to our own soldiers and National Security:

When you read some of the graphic descriptions of what has occurred here—I almost hesitate to put them in the RECORD, and yet they have to be added to this debate. Let me read to you what one FBI agent saw. And I quote from his report:

On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food or water. Most times they urinated or defecated on themselves, and had been left there for 18–24 hours or more. On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold . . . . On another occasion, the [air conditioner] had been turned off, making the temperature in the unventilated room well over

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<sup>228</sup> Zimbardo, *Sweet Cucumber*, *supra* note 213.

<sup>229</sup> See 151 CONG. REC. S6593 (daily ed. June 14, 2005) (statement of Sen. Durbin).

100 degrees. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his hair out throughout the night. On another occasion, not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.

If I read this to you and did not tell you that it was an FBI agent describing what Americans had done to prisoners in their control, you would most certainly believe this must have been done by Nazis, Soviets in their gulags, or some mad regime—Pol Pot or others—that had no concern for human beings. Sadly, that is not the case. This was the action of Americans in the treatment of their prisoners.

. . . .

It is not too late. I hope we will learn from history. I hope we will change course.

Such a change of course would dramatically improve our image and it would make us safer. I hope this administration will choose that course.<sup>230</sup>

Thus, Durbin's remarks called upon leaders to examine the situation of our prisoners and to consider how U.S. policy may be contributing to the hatred that others have felt toward us—how, in other words, terrorism may be based on more than just the evil disposition of our enemies.<sup>231</sup> Durbin also suggested that the abuses represented more than simply the bad dispositions of individual prison guards.<sup>232</sup> In effect, he was pointing the finger at *us*.

With Durbin's call to attention standing as a serious threat to our positive self- and group-conceptions, the nuances of his situationist message were soon lost in the backlash. The chorus of responses was clear: the Hitler analogy is shamefully inappropriate in any context other than a horrific, dictator-driven genocide, and any abuse of detainees was the result of some rogue guards, nothing more. White House spokesman Trent Duffy called the remarks "reprehensible" and "a disservice to any man and woman serving in the U.S. military who's putting their life on the line each day."<sup>233</sup> He went on to

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<sup>230</sup> *Id.*

<sup>231</sup> *See id.* ("We're basically condemning these guys to a long-term imprisonment. If they weren't terrorists before, they certainly could be now.") (quoting a military officer).

<sup>232</sup> *See id.*

<sup>233</sup> Scarborough, *supra* note 188, at A13.

criticize Durbin for “trying to paint all military with a broad brush because of the actions of perhaps a few bad apples, who are being punished severely.”<sup>234</sup>

While widely shared, what Duffy’s response missed was that the Nazi comparison is often made with success even to rather mundane behavior; in fact, the key to the vitriolic response to Durbin’s remarks lies in the ingroup-outgroup dynamic. The Hitler analogy is unoffending when it casts *us* in the role of the innocent victims and *them* as vilified perpetrators—say, “islamo-fascist”<sup>235</sup> terrorists dedicated to our destruction, Big Brother bureaucrats, greed-driven tort lawyers, or know-it-all academics. No one objected when market enthusiasts (including Nobel Laureates Fredrick von Hayek and Milton Friedman) likened regulators to totalitarians.<sup>236</sup> Nor was there much outrage expressed when former Texas Republican Senator Phil Gramm compared a Democratic tax proposal to Nazi legislation<sup>237</sup> or when Republican Senator James M. Inhofe of Oklahoma suggested that the Kyoto Protocol would “deal a powerful blow on the whole [of] humanity” tantamount to that of Nazism and Communism.<sup>238</sup> Durbin’s remarks elicited such a powerful backlash in part because he made the mistake of comparing *us* to Nazis and suggesting that *we* were committing atrocities against a human *them* and, also, because he was attributing the injustice to larger policies and not just a small number of “bad apples.”

#### 6. *Situationist Explanations Threaten the Legitimacy of Larger Systems*

Durbin’s relatively situationist take also implicitly suggested that our entire system might lack legitimacy—that, despite our rhetoric to the contrary, we might not be a nation that respects personal freedoms and treats everyone humanely. Our protections of the rights of individuals might not, in fact, be stalwart and enduring. Safeguards against torture and secret imprisonment

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<sup>234</sup> *Id.*

<sup>235</sup> See President George W. Bush, President Discusses War on Terror at National Endowment for Democracy (October 6, 2005) (transcript available at <http://www.whitehouse.gov/news/releases/2005/10/20051006-3.html>) (“Some call this evil Islamic radicalism; others, militant Jihadism; still others, Islamofascism. Whatever it’s called, this . . . form of radicalism exploits Islam to serve a violent, political vision: the establishment, by terrorism and subversion and insurgency, of a totalitarian empire that denies all political and religious freedom.”).

<sup>236</sup> See, e.g., text accompanying note 165; FRIEDRICH VON HAYEK, ROAD TO SERFDOM (1944).

<sup>237</sup> See 148 CONG. REC. S8258 (daily ed. Sept. 5, 2002) (statement of Sen. Gramm) (“Now, forgive me, but that is right out of Nazi Germany. I don’t understand . . . why all of a sudden we are passing laws that sound as if they are right out of Nazi Germany.”).

<sup>238</sup> See 150 CONG. REC. 11297 (daily ed. Oct. 11, 2004) (statement of Sen. Inhofe) (quoting with approval Russia’s former Presidential Economic Advisor, Andrei Illarionov).

might be only as strong as the current government thinks they should be. The “rule of law” might just be the “rule of short-sighted expediency.” Through their actions, a few men on four planes might actually crumble the framework of liberty erected over centuries. These are all deeply unsettling notions, and our negative response is less to the inapt analogy Durbin chose than it is to the disconcerting suggestion, carried in his words, that we—our country and our troops—may be comparable to “some mad regime.”

Moreover, the fact that Durbin’s remarks were made during a period when many Americans perceived themselves to be generally under threat from outsiders means that the environment was especially ripe for naïve cynicism.<sup>239</sup>

### *B. Testing Prediction V: Methods of Encouraging Backlash*

Having laid out the conditions that encouraged naïve cynicism with respect to the detainee abuse scandals, we turn now to the ways in which spokespersons for the backlash actually framed the issue. To make the task manageable, this section focuses on the response to Durbin’s Nazi analogy.

#### *1. Reinforcing the “Correctness” of Our Intuitions*

First, the agents of naïve cynicism ratcheted up the threat posed by Durbin’s remarks to reassure members of the public that his claims were outlandish and that our dispositionist intuitions about abuses at Guantanamo were correct, sensible, and widely-shared. They did so, in part, by changing the frame of analysis and shifting the analogy. A comment about how one policy resembled a Nazi practice was treated as a claim that our entire regime and its effects are in every way equivalent to those of Hitler’s Germany.<sup>240</sup> When Americans might have felt ashamed for policies and practices violating

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<sup>239</sup> Cf. George A. Bonanno & John T. Jost, *Conservative Shift Among High-Exposure Survivors of the September 11th Terrorist Attacks*, 28 BASIC & APPLIED SOC. PSYCHOL. 311, 311–23 (2006) (describing the “system threat” effects of 9/11).

<sup>240</sup> Newt Gingrich reframed it this way:

Nine million innocent human beings were murdered in Hitler’s death camps, nearly three million perished in the gulags under Stalin, and more than one and a half millions were slaughtered in the killing fields of Cambodia at the hand of Pol Pot. And while not a single terrorist has died in detention at Guantanamo, Senator Durbin sees fit to liken our American service men and women to the terrifying murderers of three despotic regimes.

Letter from Newt Gingrich, Former Speaker of the U.S. House of Representatives, to Members of the U.S. Senate (June 18, 2005), available at <http://www.cnsnews.com/news/viewstory.asp?Page=%5CPolitics%5Carchive%5C200506%5CPOL20050620a.html>.

codes of ethics and international laws—not to mention our own sense of ourselves—the subject was altered through a comparison of our entire system to the worst of the Nazi machine. And by that standard, no doubt about it, America came off looking pretty righteous. As Rush Limbaugh summed up, “The Nazis were literally brutal. We have nothing in common with them.”<sup>241</sup> In the words of the *Sioux City Journal*, “We cannot conceive of there ever being a time when anyone in or near our government or our military should be compared, even remotely, to Hitler, Stalin or Pol Pot. Those hideous historical figures should be considered out of bounds in discussions about the actions of this nation.”<sup>242</sup>

## 2. *Portraying the Issues as Simple, Clear, and Obviously Dispositional*

Second, the spokespersons for the backlash emphasized that the issue of prisoner treatment was simple, dispositional, and, thus, completely non-threatening to our sense of ourselves. In their estimation, the analogy was so inapt that a person really did not need to be familiar with any of the details of Durbin’s remarks to know that he was wrong. Hence, then-Secretary of Defense Donald Rumsfeld’s spokesman Larry Di Rita reacted as follows: “I didn’t hear what [Durbin] said, but any such comparison would obviously be outrageous and not remotely connected with reality.”<sup>243</sup>

More generally, Rumsfeld warned of those dangerous individuals, like Durbin, who attempt to draw us into “moral or intellectual confusion about who and what is right or wrong” when the issues are, in fact, so simple and clear.<sup>244</sup> In Rumsfeld’s words, although

in every army, there are occasional bad actors, the ones who dominate the headlines today, who don’t live up to the standards of the oath and of our country . . . . They are a very, very small percentage of the literally hundreds of thousands of honorable men and women . . . serving our country.<sup>245</sup>

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<sup>241</sup> *Democrat Senator: U.S. Troops ‘Nazis’; Dick Durbin Sparks National Fury After Likening Treatment of Terror Detainees to KGB, Pol Pot*, June 15, 2005, WORLDNETDAILY, [http://www.wnd.com/news/article.asp?ARTICLE\\_ID=44804](http://www.wnd.com/news/article.asp?ARTICLE_ID=44804) (quoting Rush Limbaugh).

<sup>242</sup> *An Apology from Durbin*, SIOUX CITY J., June 23, 2005.

<sup>243</sup> Scarborough, *supra* note 188, at A13.

<sup>244</sup> Former U.S. Sec’y of Def. Donald Rumsfeld, Address at the Eighty-Eighth Annual American Legion National Convention (Aug. 29, 2006), <http://www.defenselink.mil/Speeches/Speech.aspx?SpeechID=1033>.

<sup>245</sup> *Id.*

Just as we knew all along, “America is not what’s wrong with the world.”<sup>246</sup>

Meanwhile, Rumsfeld himself benefited from the protection afforded by the structural limitations of conventional media, which appeared unable to analyze sufficiently the role he played. As Joanne Mariner, head of Human Rights Watch’s counterterrorism program explained at the time, “You don’t see headlines in the *New York Times* that Rumsfeld approved techniques that others are now facing courts-martial for . . . . It doesn’t lend itself to daily coverage. What you need is more analytic capacity to add things up. It requires larger context.”<sup>247</sup> By contrast, Durbin’s own culpability does not require any analysis and is as immediate as the jolt of indignation that his words produce in our gut.

### 3. *Attacking the Situationalized Subjects*

Third, the naïve cynics emphasized the flawed dispositions of the individual actors at the scene in a way that eclipsed any other more context-dependent causes and effects. The guards involved were “bad apples” who were already “being punished severely.”<sup>248</sup> And, lest we forget, the detainees were rotten to the core as well<sup>249</sup>—in Rush Limbaugh’s phrasing, “terrorists who want[] to blow up Americans that we’re trying to get information from.”<sup>250</sup>

More generally, after academics, lawyers, and others presented evidence suggesting that the Guantanamo prisoners might not be outgroup members after all, the Defense Department put into motion “a major public relations response” to make sure that Americans continued to view detainees as

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<sup>246</sup> *Id.*

<sup>247</sup> Umansky, *supra* note 222, at 26. In line with Mariner’s predictions, there has been little fallout from congressional testimony that Rumsfeld was kept abreast and approved of abusive interrogation techniques at Guantanamo, such as soldiers keeping a detainee near-freezing and leading him around naked on a leash. *See id.* at 24–25.

In addition, some readers may find it interesting that the Fox News Network, following the prison abuse scandals and Katrina, added a transitional promotion that roughly echoed Rumsfeld’s remarks. Specifically, it read, amid images and music, “America has Problems. The Problem is not America.” A copy of this transitional promotion is available on YouTube. *See America Has Problems but America is Not the Problem*, YOUTUBE, Feb. 15, 2007, <http://www.youtube.com/watch?v=6XBWFbiqUIA> (video clip of a Fox News television broadcast).

<sup>248</sup> Scarborough, *supra* note 188, at A13.

<sup>249</sup> *See supra* text accompanying note 188.

<sup>250</sup> *The Rush Limbaugh Show* (Premier Radio Networks radio broadcast June 15, 2005) (transcript available at <http://www.freerepublic.com/focus/f-news/1424122/posts>).

dangerous killers.<sup>251</sup> For instance, one study by Professor Mark Denbeaux, Joshua Denbeaux, and a number of students from Seton Hall University School of Law found that the military had only identified eight percent of the detainees as al Qaeda fighters and, for forty-five percent of the detainees, had not determined that they had committed any hostile acts against American interests.<sup>252</sup> In a responding report, written at the request of the Pentagon, Joseph Felter and Jarret Brachman of the Combating Terrorism Center at the United States Military Academy at West Point attacked the Seton Hall group for reaching spurious conclusions and misreading the data.<sup>253</sup> More importantly, however, they reemphasized that the detainees were anything but innocent: seventy-three percent were a “demonstrated threat” to America and its coalition allies—that is, enemies who had “participated, prepared to participate or intended to participate in, direct hostilities against” us.<sup>254</sup>

#### 4. *Attacking the Situationists and Their Situationist Ideas*

Fourth, agents of the backlash suggested that Durbin’s view was biased by his own selfish and peculiar motives—that this “slander” was part of an “agenda of demonizing the war effort” and was nothing more than an opportunistic “political” move to unfairly attack the Bush Administration.<sup>255</sup>

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<sup>251</sup> William Glaberson, *Pentagon Study Sees Threat in Guantanamo Detainees*, N.Y. TIMES, July 26, 2007, at A16.

<sup>252</sup> See Mark Denbeaux & Joshua W. Denbeaux, Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data 2 (Seton Hall Public Law Research Paper No. 46, 2006), available at <http://papers.ssm.com/abstract=885659>. In April 2007, Professor Denbeaux testified before the Senate that “[t]he reality is that a very large fraction of the detainees seem to be at most a ragtag collection of ‘support’ personnel for low-level foot soldiers.” Glaberson, *supra* note 251, at A16 (quoting Professor Denbeaux).

<sup>253</sup> See JOSEPH FELTER & JARRET BRACHMAN, COMBATING TERRORISM CTR. AT WEST POINT, AN ASSESSMENT OF 516 COMBATANT STATUS REVIEW TRIBUNAL (CSRT) UNCLASSIFIED SUMMARIES (2007) [hereinafter CTC REPORT]; JOSEPH FELTER & JARRET BRACHMAN, COMBATING TERRORISM CTR. AT WEST POINT, A RESPONSE TO THE SETON HALL STUDY: ASSESSMENT OF 516 COMBATANT STATUS REVIEW TRIBUNAL (CSRT) UNCLASSIFIED SUMMARIES (2007) [hereinafter A RESPONSE]. Felter acknowledged that the military made clear that it wanted to contest the Seton Hall group’s work: “They had been getting a lot of inquiries related to this previous study . . . . They had a lot of concerns with the conclusions, but they did not have another study.” Glaberson, *supra* note 252, at A16.

<sup>254</sup> Felter & Brachman, CTC REPORT, *supra* note 253, at 4.

<sup>255</sup> Hugh Hewitt, *Breaking the Durbin Code*, DAILY STANDARD, June 20, 2005, <http://www.weeklystandard.com/Content/Public/Articles/000/000/005/752ovekh.asp>. As Hugh Hewitt articulated, “Durbin’s remarks . . . represent an escalation in the political rhetoric of the left, which is designed to undermine the public’s confidence in the military, the administration, and the war.” *Id.* Rather than “segregate the criminal conduct by a handful of out-of-control G.I.’s not acting under orders—and already prosecuted and punished—from the authorized conduct at Gitmo and elsewhere,” Durbin took “a single report

Worse still, the pundits of naïve cynicism pointed out, Durbin and his critical account posed a dangerous threat to us and our system. After questioning American policy, Durbin was regularly accused of emboldening our enemy and criticizing our soldiers.<sup>256</sup> His extreme ideas were not only wrong, but also strongly counterproductive and harmful.<sup>257</sup> As Bill O'Reilly argued, Durbin's comments went beyond "dissenting from a war" to "trying to undermine a war."<sup>258</sup> After all, Al Jazeera, "[t]hat anti-American network[,] couldn't get enough of Dick Durbin. For days his opinion echoed through the Arab world, inflaming even more hatred toward the USA."<sup>259</sup>

America's problem was not the prison abuses, but rather those who would capitalize on the abuses for personal gain. Thus, the messenger, not the message, became the primary threat. Or, as Zimbardo has expressed it, "the whistle blower" became "the culprit."<sup>260</sup> As a result, the discussion could move from one of national policy to one of indignant commiseration and mutual reassurances.

### C. Testing Prediction VI: Targets of Backlash

As was emphasized above and as Senator Durbin's experience suggests, anyone who asserts a situationist account is at risk of experiencing a backlash of naïve cynicism. And, when that person makes such a situationist claim, the result is often that the institution (or institutions) of which he is a member—in this case, the Democratic Party—is also attacked as biased and out of touch with reality. According to Rush Limbaugh, for instance, Durbin's comments were just part of a bigger problem within the Democrats: "This is what you get when you have a political party that's so obsessed with hatred for the sitting

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from an FBI investigator, inflate[d] its allegations to Abu Ghraib-level criminal conduct, and attribute[d] it to every detention facility used in the war on terror." *Id.*

<sup>256</sup> See, e.g., Bill O'Reilly, *The Limits of Dissent*, BILLOREILLY.COM, June 23, 2007, <http://www.billoreilly.com/column?pid=18939> (arguing that Durbin's comments "echoed through the Arab world, inflaming even more hatred toward the USA").

<sup>257</sup> See *id.*

<sup>258</sup> *Id.* Newt Gingrich parroted the sentiment: "This moral equivalence isn't just utterly false; it endangers the lives of our young men and women in the military because it arms every radical Islamist with the official-record words of a Senate leader to justify their war of terror against civilized people everywhere." Letter from Newt Gingrich, *supra* note 240.

<sup>259</sup> O'Reilly, *supra* note 256.

<sup>260</sup> Zimbardo, *Sweet Cucumber*, *supra* note 213. Similarly, when news was leaked about the CIA's network of secret prisons in Europe, Senator Bill Frist immediately redirected attention from the alarming news to the source of the news, declaring himself more interested in discovering and punishing the leaker than in finding out what goes on at the camps. See Umansky, *supra* note 222, at 30.

president that [they will] do anything they can to beat him, that they'll do anything to get their power back."<sup>261</sup> Mark Steyn echoed that theme, explaining that Durbin's "inflammatory libel against his country's military . . . [had] no value whatsoever except to America's enemies," and that the statements reflected the fact that "senior Democrats . . . are so over-invested in their hatred of a passing administration that they've signed on to the nuttiest slurs of the lunatic fringe."<sup>262</sup>

In general, however, politicians—needing to steer clear of controversy to win elections—usually avoid putting forward challenging situationist ideas.<sup>263</sup> Instead, situationism tends to emerge from members of the sorts of occupational settings described above—academia, the press, and the judiciary, among others.<sup>264</sup> Consequently, it is those institutions, and the situationist spokespersons who inhabit them, that tend to be subject to the greatest backlash. The detainee abuse issue is no exception.<sup>265</sup>

Academics and journalists who offered situationist analyses of scandals at Abu Ghraib and Guantanamo have been repeatedly assailed for their "lack of objectivity."<sup>266</sup> And, their evident bias on this issue has been treated as just another example of how academia and the media have a clearly skewed agenda.<sup>267</sup>

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<sup>261</sup> *The Rush Limbaugh Show*, *supra* note 250.

<sup>262</sup> Mark Steyn, Editorial, *Durbin Slanders His Own Country*, CHI. SUN-TIMES, June 19, 2005, at 45A.

<sup>263</sup> See Jill Zuckman, *Anatomy of a Political Firestorm*, CHI. TRIB., June 23, 2005, § 1, at 24. It is a dangerous game and politicians today often rely on carefully screening new stances before venturing unfamiliar notions. According to Jim Jordan, an election strategist, "Relatively few remarks go totally unnoticed, especially, of course, from the floor of the Senate . . . [a]nd things that might have gone unremarked or uncontested years ago are now fair game." *Id.*

<sup>264</sup> See *supra* text accompanying note 19.

<sup>265</sup> However, even people whom one would assume would be immune to accusations of bias—such as Colin Powell, a member of the Bush administration *and* a military veteran—were subjected to naïve cynical attacks. When Powell expressed concern about the lack of legal protections for al Qaeda and Taliban suspects, administration sources repudiated his views as the product of "bowing to pressure from the political left." Umansky, *supra* note 222, at 23.

<sup>266</sup> See *infra* text accompanying notes 267–68.

<sup>267</sup> Donald Rumsfeld, for example, has spoken of "a war that is to a great extent fought in the media on a global stage" and has lamented "that in some quarters [particularly journalistic quarters] there's more of a focus on dividing our country than acting with unity against the gathering threats."

It's a strange time:

- When a database search of America's leading newspapers turns up literally 10 times as many mentions of one of the soldiers who has been punished for misconduct—10 times more—than the mentions of Sergeant First Class Paul Ray Smith, the first recipient of the Medal of Honor in the Global War on Terror;

When Seymour Hersh, a Pulitzer Prize-winning journalist for the *New Yorker*, wrote a series of articles examining the war in Iraq—and particularly the Abu Ghraib prison scandal—with an eye on the situational forces at work,<sup>268</sup> he opened himself up to sharp, naïve-cynical attacks. Responding to one of the pieces that analyzed a secret Pentagon program designed to interrogate leaders of the terrorist insurgency in Iraq, Department of Defense Spokesperson Lawrence Di Rita called Hersh’s “assertions on activities at Abu Ghraib, and the abuse of Iraqi detainees . . . outlandish, conspiratorial, and filled with error and anonymous conjecture.”<sup>269</sup> Hence, Hersh’s relatively situationist view was not only radical, but also dangerous. As Richard N. Perle, the chairman of the Defense Policy Board, which advises the Pentagon, remarked in an interview, “Sy Hersh is the closest thing American journalism has to a terrorist, frankly . . . he’s widely irresponsible.”<sup>270</sup> Lowell Ponte went one step further, suggesting that it was not just a matter of negligence or recklessness, but also that Hersh was actively trying to bring our country down: “The passion that drives Hersh has often manifested as obsessive hatred

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- Or when a senior editor at *Newsweek* disparagingly refers to the brave volunteers in our armed forces—the Army, the Navy, the Air Force, the Marines, the Coast Guard—as a “mercenary army”;
  - When the former head of CNN accuses the American military of deliberately targeting journalists; and the once CNN Baghdad bureau chief finally admits that as bureau chief in Baghdad, he concealed reports of Saddam Hussein’s crimes when he was in charge there so that CNN could keep on reporting selective news;
  - And it’s a time when Amnesty International refers to the military facility at Guantanamo Bay—which holds terrorists who have vowed to kill Americans and which is arguably the best run and most scrutinized detention facility in the history of warfare—as “the gulag of our times.” It’s inexcusable.

Former U.S. Sec’y of Def. Donald Rumsfeld, *supra* note, 244.

<sup>268</sup> In the articles, Hersh avoided the simple “bad apple” explanation for detainee abuse and focused on broader institutional and structural issues. See SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 46 (2004) (“The roots of the Abu Ghraib scandal lie not in the criminal inclinations of a few Army reservists, but in the reliance of George Bush and Donald Rumsfeld on secret operations and the use of coercion—and eye-for-an-eye retribution—in fighting terrorism . . .”).

<sup>269</sup> Press Release, Lawrence Di Rita, Spokesperson for Dep’t of Def., Statement from Department of Defense (May 15, 2004), <http://www.defenselink.mil/releases/2004/nr20040515-0793.html> (“This story seems to reflect the fevered insights of those with little, if any, connection to the activities in the Department of Defense. With these false claims, the [m]agazine and the reporter have made themselves part of the story.”).

<sup>270</sup> *CNN Late Edition with Wolf Blitzer: Showdown Iraq* (CNN television broadcast, Mar. 9, 2003) (transcript available at <http://cgi.cnn.com/TRANSCRIPTS/0303/09/le.00.html>). Blitzer had asked Perle about an article in which Hersh suggested that Perle’s staunch advocacy for the war in Iraq might be tied to the benefits that his venture-capital company, Trireme Partners L.P., stood to gain as a result. *Id.*

for American leaders, the projection of American power, and the Central Intelligence Agency (CIA).”<sup>271</sup>

Moreover, as other naïve cynics pointed out, Hersh’s situational account did not make sense; it was confusing and lacking support in reality. In Di Rita’s words, Hersh “threw a lot of crap against the wall and he expects someone to peel off what’s real. It’s a tapestry of nonsense. To some degree he became the story.”<sup>272</sup> And that, some argued, was exactly what Hersh wanted in the first place—his real motivation was his insatiable hunger for publicity. Ponte, for example, wrote about how Hersh achieved fame during the Vietnam War for his similarly anti-American account of the My Lai Massacre, and still craves the attention:

[His Vietnam] story, with its vivid portrayal of alleged American atrocities, was perfect for the propaganda purposes of the anti-war Left. The liberal media echoed and amplified Hersh’s report into front page news—and in the process turned him overnight into a journalist superstar . . . .

Such fame is an intoxicating drug. When your story sits atop the world news wires, the telephone rings constantly—are you available to appear tomorrow on the Today Show? On CBS News? To give a speech Saturday for \$25,000? It was a magical moment in Hersh’s life that he has tried again and again to recapture with shocking stories—but never quite succeeded.<sup>273</sup>

Thus, in an ironic twist, naïve cynics attempted to minimize Hersh’s situationist account by making him the story—and suggesting that that is what he wanted in the first place.

Although attacking Hersh’s motivation and integrity proved to be the primary form of backlash, agents of naïve cynicism also attempted to discredit the institutions with which Hersh was associated. Spokespersons suggested that “[t]he re-emergence of Hersh as a media darling [was] itself evidence of

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<sup>271</sup> Lowell Ponte, *A Ghost in the Iraqi Prison*, FRONTPAGEMAGAZINE.COM, May 14, 2004, <http://www.frontpagemagazine.com/Articles/Read.aspx?GUID={269A2193-CD23-41A4-9229-986672D24AA2}>.

<sup>272</sup> Howard Kurtz, *Seymour Hersh, at the Front Lines on War Scandals*, WASH. POST, May 19, 2004, at C9. Perle also emphasized the befuddling nature of Hersh’s account, as well as its clear agenda: “If you read the article, it’s first of all, impossible to find any consistent theme in it . . . he sets out to do damage and he will do it by whatever innuendo, whatever distortion he can . . . .” *CNN Late Edition with Wolf Blitzer*, *supra* note 270.

<sup>273</sup> Ponte, *supra* note 271.

liberal media bias.”<sup>274</sup> The fact that the media treated the “liberal *New Yorker* writer . . . like an unbiased, authoritative journalist,” when he appeared on several television programs to discuss his work, reconfirmed the view that the entire media aligns itself dangerously to the left.<sup>275</sup>

Supplementing attempts at individual vilification and institutional association, the naïve cynical response to situational accounts of detainee abuse also entailed direct generalized attacks on the media as an institution. As Jeff Jacoby wrote in the *Boston Globe*:

I’m sickened . . . by the relish with which this scandal is being exploited by those who think that the defeat of the Bush administration is an end that justifies just about any means. I’m sickened by the recklessness of the media, which relentlessly flogged the graphic images from Abu Ghraib, giving them an in-your-face prominence that couldn’t help but exaggerate their impact. And I’m sickened by the thought of how much damage this feeding frenzy may have done to the war effort.<sup>276</sup>

The agenda of “the media elite” was once again all too evident: “[F]or weeks now, a goodly swath of the chattering class has been treating the war as little more than a rhetorical backdrop against which to score political points or increase market share.”<sup>277</sup> CBS, the *New Yorker*, the *Washington Post*, and the *New York Times* were offering analyses that challenged the dispositionist message coming out of the White House concerning detainees, not because they were pursuing the truth, but to advance their liberal program. Answering the question of just how dangerous the media had become, Di Rita stated in a letter to the editor of the *Washington Post* that “[t]he Post’s continued editorializing on narrow definitions of international laws and whether our soldiers understand them puts *The Post* in the same company as those involved

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<sup>274</sup> Cliff Kincaid, *The Other Seymour Hersh*, ACCURACY IN MEDIA, May 27, 2004, [http://www.aim.org/media\\_monitor/A1570\\_0\\_2\\_0\\_C/](http://www.aim.org/media_monitor/A1570_0_2_0_C/); see also *id.* (“The media like the Iraq stories because they make a Republican president look bad . . . . One can’t blame him for basking in the publicity. But the publicity should be understood as political in nature. The media are out to get another Republican.”).

<sup>275</sup> Brent Baker, *CyberAlert*, *Now that He’s Attacking Bush, Reporters Have Respect for Hersh*, MEDIA RES. CTR., May 19, 2004, <http://www.mediaresearch.org/cyberalerts/2004/cyb20040519.asp#2>.

<sup>276</sup> Jeff Jacoby, *The Images We See—And Those We Don’t*, BOS. GLOBE, May 13, 2004, at A15. Just as was the case in the attacks on Hersh, the more general attacks on the media as an institution have focused on the danger posed by the ideas—ideas that “enrage our enemies and get more Americans killed.” *Id.* Jacoby actually went as far as to suggest that the journalists who drew attention to the atrocities at Abu Ghraib were culpable in the beheading of an American civilian contractor: “Nick Berg lost his life because the Abu Ghraib pictures were turned into a worldwide media event. Yes, those who did so were sheltered by the First Amendment. That makes what they did not better but worse.” *Id.*

<sup>277</sup> Jacoby, *supra* note 276.

in this despicable behavior in terms of apparent disregard for basic human dignity.”<sup>278</sup> According to Di Rita, the media’s transgression was so egregious because the issue was so clearly about the bad disposition of individual actors, and nothing more:

The Post’s focus on the possible uncertainty of the international legal status of the detainees held by the United States as the reason for the shocking abuse shown in the photos from Abu Ghraib detention facility is misplaced and wrongheaded . . . . The behavior shown in the photos is depraved and sadistic. It violates the most basic teachings of human behavior that people learn before kindergarten . . . .<sup>279</sup>

In offering a relatively situationist account of why guards had abused enemy prisoners—focusing on “the soldiers’ level of training or their understanding of international treaties” instead of the “depraved and sadistic” natures of the individuals involved—members of the media had themselves become equivalent to torturers.<sup>280</sup>

Naive cynics have also attacked members of the judiciary when they have taken actions threatening the dispositionist account of the detainee issue. For instance, when U.S. District Judge Alvin K. Hellerstein ordered the military to prepare additional photos of alleged abuse of detainees at Abu Ghraib,<sup>281</sup> Bill O’Reilly looked back with sharp naïve cynicism:

Everybody knows those pictures incite violence against Americans. So why should more of them be fed to the press? We already know what happened at Abu Ghraib, and people are going to prison because of it. Clearly, more pictures of Abu Ghraib help the terrorists, as do Geneva Convention protections and civilian lawyers. So there is no question the ACLU and the judges who side with them are terror allies.<sup>282</sup>

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<sup>278</sup> Lawrence Di Rita, Letter to the Editor, *In the Company of Those Involved*, WASH. POST, May 15, 2004, at A22.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* Note that such analogies do not draw much attention when policy critics are painted as terrorists; see also *supra* text accompanying notes 244–46 (describing a very different dynamic when such analogies are directed at “us”).

<sup>281</sup> See *ACLU v. Dep’t of Def.*, 389 F. Supp. 2d 547, 568 (S.D.N.Y. 2005); see also Alan Wirzbicki, *More Abu Ghraib Images Ordered: Hide Detainee IDs, Judge Tells Army*, BOS. GLOBE, June 4, 2005, at A2 (summarizing the episode).

<sup>282</sup> O’Reilly: “*ACLU and the Judges Who Side with Them Are Terror Allies*,” MEDIA MATTERS AM., July 26, 2005, <http://mediamatters.org/items/200507260002> (quoting a July 25, 2005 television broadcast of *The O’Reilly Factor*).

Once again, the backlash suggested that the issue was a simple matter of “bad apples” and, moreover, because the “bad apples” had already been “sentenced to . . . prison, demoted and dishonorably discharged from the Army, the matter was closed and settled.”<sup>283</sup> In addition, those resisting the dispositionist account were major dangers to us and our system: the judges were not only biased—“activist[s], often working for progressive causes,”<sup>284</sup>—but also literally the allies of terrorists.<sup>285</sup> O’Reilly hammered on the same themes when he asked former Speaker of the House Newt Gingrich if he agreed that the ACLU was “grossly irresponsible” for “going out of its way to help Al Qaeda” and, more generally, “aiding and abetting the enemy.”<sup>286</sup> Gingrich fully concurred, asserting that “the ACLU has been taken over by a group of people whose vision of America is so weird and so contrary to the overwhelming values of over 95 percent of the American people.”<sup>287</sup> According to Gingrich,

[I]t’s almost as though they were into destruction for its own sake and weakening and undermining America for its own sake . . . . I do think there’s a point to which it’s legitimate to say that the ACLU is a consistently destructive organization that is opposed to and undermines the values of most Americans, and takes positions that are consistently weakening the security of the United States.<sup>288</sup>

The megaphones of naïve cynicism similarly discredited legal academics and other lawyers who stood up for the rights of the dispositionalized outgroup or attacked the legitimacy of the government’s approach. On Federal Radio News, Charles D. Stimson, then-Assistant Secretary of Defense for Detainee Affairs, provided a list of firms providing free representation to Guantanamo

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<sup>283</sup> Wirzbicki, *supra* note 281.

<sup>284</sup> Bill O’Reilly, *Another Dangerous Ruling by an Activist Judge*, FOXNEWS.COM, Nov. 10, 2004, <http://www.foxnews.com/story/0,2933,138132,00.html> (characterizing as dangerous U.S. District Court Judge James Robertson).

<sup>285</sup> U.S. District Judge James Robertson ruled that the Bush Administration could not deny Geneva Convention protections to Salim Ahmed Hamdan because they had neglected to “convene a competent tribunal” to determine if Hamdan was entitled to be considered a POW. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 162 (D.C. Cir. 2004). O’Reilly characterized the opinion as “[a]nother ruling by an activist judge that puts us all in danger.” *O’Reilly Falsely Claimed “Activist Judge” Granted Geneva Protections to Guantánamo Detainees*, MEDIA MATTERS AM., Nov. 10, 2004, <http://mediamatters.org/items/200411100005> (quoting a Nov. 8, 2004 television broadcast of *The O’Reilly Factor*); *see also id.* (“[Judge Robertson] wants all terrorists to be POWs.”).

<sup>286</sup> *O’Reilly Said ACLU “Certainly is Aiding and Abetting the Enemy”; Gingrich Joined in Smearing Group*, MEDIA MATTERS AM., Dec. 12, 2005, [http://mediamatters.org/items/200512120001?f=i\\_related](http://mediamatters.org/items/200512120001?f=i_related) (quoting a Dec. 8, 2005 television broadcast of *The O’Reilly Factor*).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

prisoners and suggested that corporations consider a boycott to make the firms “choose between representing terrorists or representing reputable firms.”<sup>289</sup> Though the lawyers involved in representing the detainees do the work *pro bono*, Stimson argued that some were “receiving monies from who knows where”—implying that funding was coming from terrorist-affiliated groups.<sup>290</sup>

As suggested above, even societies or entire nations may face naïve cynicism to the extent that they are seen to be associated with situationist ideas. By criticizing the dispositionist account offered by the Bush Administration about abuse at Guantanamo and Abu Ghraib, a number of European nations faced attacks on their objectivity and integrity. As Ralph Peters wrote in the *New York Post*:

The demands [by a number of European countries] to shut down our Guantanamo lock-up for terrorists have nothing to do with human rights. They’re about punishing America for our power and success.

From our ailing domestic left to overseas America haters, no one really cares about the fate of Mustapha the Murderer or Ahmed the Assassin. The lies told about Gitmo are meant to undercut U.S. foreign policy and embarrass America.

The Gitmo controversy is about many things, from jealousy of the United States and outrage that we refuse to fail, to residual anger that we won the Cold War and exploded the left’s great fantasy of a dictatorship of the intellectuals.

. . . .

You can’t negotiate with terrorists. And you cannot reason with ideologues—whether they’re Islamist fanatics or pathetic old lefties fishing for a cause to give meaning to squandered lives. Terrorists, French and German neo-Stalinists, and our own democracy-hating intelligentsia aren’t interested in facts. It’s all about the comfort of *belief*.<sup>291</sup>

Peters, thus, attacked European countries as being biased and having flawed dispositions—“a global intelligentsia outraged that all their theories came to nothing . . . who need to blame the United States for their personal inadequacies.”<sup>292</sup> What is, perhaps, most revealing in the example is how all

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<sup>289</sup> John Heilprin, *Views on Detainee Representation Draw Fire*, WASH. POST, Jan. 14, 2007, at A5.

<sup>290</sup> *Id.*

<sup>291</sup> Ralph Peters, *Gitmo Cocktail*, N.Y. POST, June 16, 2005, at 31.

<sup>292</sup> Peters, *supra* note 291.

parties who see things differently than “we” do—American intellectuals, French people, Islamic terrorists, Communists—are lumped together as equivalent: equally deluding and threatening to our way of life.<sup>293</sup>

#### *D. Testing Prediction VII: Dispositionist Entrepreneurs*

Although the critical realist project has focused on corporations as the most important kind of dispositionist entrepreneurs, any entity that has a strong stake in discouraging situationism and the opportunity and ability to do so will likely look to frame issues to encourage a backlash of naïve cynicism. A government administration can certainly fit the bill. In the case of the Bush Administration, there is a strong incentive to keep the prisoners and any guards who “get caught” looking like bad apples. The situationist account implicates the whole administration, our institutions, and ourselves. Not only does it suggest that our strategy for ending terrorism by capturing or killing individual terrorists may backfire, but it gives credence to claims that we are a land of hypocrites. If we cannot even ensure civil liberties in our own country, our capacity to bring “freedom” to Iraq is seriously called into question.

Moreover, with the dispositionist account, the problem of detainee abuse can be “solved” relatively easily with a few quick trials and stern sentences for the salient culprits.<sup>294</sup> The situationist account, on the other hand, mandates costly and time-consuming systemic changes. And a solid argument can be made that real change, with respect to detainee treatment, is not the goal of the administration at all. The dispositionist account is useful precisely because it allows the government to continue its Zimbardo-esque experiment and reap the rewards, whatever they might be, while buffering itself against direct political fallout when evidence of atrocity occasionally crops up.<sup>295</sup>

Finally, the dispositionist account of detainee abuse fits into the overall dispositionist platform of recent administrations, which emphasizes personal choice and responsibility and justifies reduced regulation of industry and reduced social services.<sup>296</sup>

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<sup>293</sup> See *supra* text accompanying note 291.

<sup>294</sup> See Eric Schmitt, *Iraq Abuse Trial Is Again Limited to Lower Ranks*, N.Y. TIMES, Mar. 23, 2006, at A1, A22 (identifying servicepersons convicted of committing detainee abuse and documenting a perceived focus on low-level actors).

<sup>295</sup> See *supra* text accompanying notes 207–08.

<sup>296</sup> See Chen & Hanson, *Illusion of Law*, *supra* note 8, at 5–33.

Through backlash against those associated with a relatively situationist account of detainee abuse, the Bush Administration and its backers—including many of the people quoted in the previous sections—are able to potentially discredit the individuals, institutions, and societies that pose a threat to their dispositionist worldview and their actual power. And the work is done without ever having to address or respond to the merits of the relatively situationist arguments. The message is lost in the attack on the messenger.

As an added benefit, such attacks are mutually reinforcing across policy debates. The effect of “proving” Senator Durbin’s and associated Democrats’ biases on the specific issue of detainee treatment is to call into question the “objectivity” of their positions on social security, tax relief, drilling in the Arctic, and countless other concerns. Showing liberal prejudices in certain prominent judges or press outlets further weakens the credibility of some of the institutions and individuals most likely to take a situationist view. Similarly, to enhance the public’s perception that the Germans or French are “jealous” of our success, weak-willed, or liberally biased when it comes to prisoner treatment at Guantanamo undermines their domestic relevance when it comes to criticizing the war in Iraq and even our use of the death penalty.

#### *E. Final Thoughts on the Detainee Debate*

Following the revelations of troubling events at Abu Ghraib and Guantanamo, the legal academic world produced—as it often does in the wake of controversy—a number of studies and articles.<sup>297</sup> Scholars wrote papers carefully assessing the security benefits of different detainee policies, analyses of the human costs of coercive interrogation, and articles dedicated to understanding the national and international obligations of the United States toward those suspected of terrorism.<sup>298</sup> Generally thoughtful and well supported, the scholarship, for all of its benefits, has been—and continues to

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<sup>297</sup> See, e.g., John Sifton, *United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, 43 HARV. J. ON LEGIS. 487, 487 (2006) (suggesting that the failure to hold detainee abusers at Abu Ghraib accountable is attributable “to inherent flaws in military and federal criminal law”); Diane Marie Amann, *Application of the Constitution to Guantanamo Bay*, 153 U. PA. L. REV. 2085, 2087 (2005) (arguing that “[p]ervasive failure to comprehend potentially applicable laws enabled the Executive to maintain its zones of detention” and led to abuses at Abu Ghraib); Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L.J. 1255, 1257 (2006) (suggesting that future abuses would be better prevented through “the reinforcement and enhancement of the courts and . . . other arguably undemocratic institutions [like the media], than through congressional or other ‘hardcore’ democratic checks on power”).

<sup>298</sup> See *supra* note 297.

be—hampered by its failure to address the true driving forces behind our approach to detainee abuse.

Despite the emphasis within the legal academy on weighing arguments and carefully parsing statutes, it is the naïve cynicism dynamic, as much as anything else, that shapes legal policy. As the preceding pages have suggested, the outcome of the debate turns on Bill O'Reilly's or Donald Rumsfeld's rhetoric—and the resultant consequences—much more than it turns on the merits of a particular approach in the battle of ideas. When Rumsfeld implies that members of the media and academics who have challenged the Bush Administration's approaches to detainees are just like those who appeased Hitler or calls upon Americans "to speak out against . . . [the] myths and distortions that are being told about our troops and about our country [by the] . . . 'Blame America First'" crowd, he wields the cudgel of naïve cynicism.<sup>299</sup> It is a swift and powerful instrument. The situationist work of journalists and scholars may present a more accurate vision of the actual state of things, but it stands little chance (at least in the short run) against such an effective weapon.

#### CONCLUSION

In the end, two of this Article's claims seem particularly likely to rankle some readers and are worth addressing in these final remarks. One is the assertion, largely undefended here, that a necessary condition for achieving a more accurate understanding of human behavior is a situationist perspective—that situationism is the path to attributional accuracy. For readers skeptical of such a claim, we offer three quick responses. First, it can be viewed as a simplifying assumption, much like those employed as a matter of course in economics—that should not eclipse the remainder of the analysis. Second, in other work, we and our coauthors defend that assumption at considerable length and consider it to be quite realistic.<sup>300</sup> Finally, even if that assumption is incorrect, this Article's predictions may still turn out to be true as a positive matter when we review the evidence in *Academic Backlash* and in *Backlash*; the only difference would concern their normative implications.

The other assumption that may bother some readers—and well it should—is that a simplifying dichotomy exists between dispositionists and situationists.

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<sup>299</sup> Former U.S. Sec'y of Def. Donald Rumsfeld, *supra* note 244.

<sup>300</sup> *See supra* note 297.

There really is no such thing as a pure dispositionist or a pure situationist. We are all both. Our attributional tendencies—as well as the extent to which we seek to protect our attributional outlooks through naïve realism and naïve cynicism—vary for individuals and groups in response to interior and exterior situational influences.<sup>301</sup> By utilizing these categories, however, a goal of this series of articles is to elucidate some very important patterns and sources of intergroup conflict that are otherwise difficult to see.

Without our realizing it, attributional schemas are having a huge influence on many of our most pressing policy debates. Naïve realism and naïve cynicism are, to a significant extent, *the* dynamics that determine which policy carries the day. And what is particularly troubling is that they are being energetically framed and promoted by certain individuals and groups with the incentive and ability to do so. The result is that attributional schemas that social science appears to have quite clearly discredited are able to dominate the policy landscape. Our laws and legal theories—far from being determined in a meritocratic battle based upon accuracy and effectiveness—have been shaped, and continue to be shaped, by largely unsupported intuitions and outward claims of ignorance, misinformation, bias, irrationality, and disloyalty.

This Article, due to space constraints, provided only a tiny sample of the naïve cynicism dynamic in action.<sup>302</sup> We save the bulk of that work for other articles in this series, including *Academic Backlash*<sup>303</sup> and *Backlash*,<sup>304</sup> which offer a more general test of all of the predictions outlined in the first two articles.

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<sup>301</sup> Indeed, we may exhibit dispositionism in respect to one policy topic and situationism in respect to another—often revealing the powerful role of implicit motives and attitudes. See generally Hanson & Benforado, *Conservative Hypocrisy*, *supra* note 37, at A25; Hanson & Hanson, *Blame Frame*, *supra* note 10, at 455–56.

<sup>302</sup> But see notes 171–75 and accompanying text (referencing existing work that provides implicit evidence of naïve cynicism).

<sup>303</sup> See *supra* note 179 (providing brief summary).

<sup>304</sup> *Backlash* begins by examining evidence that the significant changes taking place during the 1960s and early 1970s represented a distinct moment of burgeoning situational sensitivity. See Benforado & Hanson, *Backlash*, *supra* note 5. Special attention is given to the important societal shifts that allowed situationism to gain on dispositionism more generally during those decades, and the article explores the interior motivations and exterior incentives and opportunities that allowed certain individuals—most notably academics, journalists, and judges—to see the power of situation and share situationist insights with large audiences.

Turning to a subsequent moment, from the late 1970s through the end of the twentieth century, *Backlash* describes how many of the ideas that flowed from the situationist moment of the 1960s and early 1970s were criticized and dismissed in a dispositionist backlash. In addition, the article offers evidence of how individuals and institutions most closely associated with those situationist ideas also met with strong naïve cynicism.

Ultimately, the primary goal of all of the pieces in this project is to demonstrate that policy debates and policy itself reflect, not so much logic or experience, but features of, and dynamics within, our unexamined situations.<sup>305</sup> Law and legal theory reflect those situational influences while contributing to the affirming illusion that we are who we like to believe we are.

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<sup>305</sup> Cf. WESTEN, *supra* note 57, at xv (“*The political brain is an emotional brain*. It is not a dispassionate calculating machine, objectively searching for the right facts, figures, and policies to make a reasoned decision.”).